SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

September 11, 1981

TO: Judge O'Connor

FM: John Roberts John Roberts

Attached are a revision of your draft response to Senator Moynihan and a draft reply to Senator Helms' latest letter. We are working on and can prepare a more elaborate response to Senator Helms, if desired. In light of the fact that the question Senator Helms raises has been raised and put to rest during the hearings, however, a brief response along the lines of the attached draft may be the better part of valor.

Attachments

O'Connor file

The Honorable Daniel Patrick Moynihan
United States Senate
Washington, D. C. 20510

Dear Senator Moynihan:

Thank you very much for your letter of September 10, 1981. In your letter you enclosed a copy of an article from the February, 1971, issue of Phoenix Magazine. The article states in one sentence that I "was almost alone in opposing publicly state aid to private schools -- she is a trustee of Phoenix Country Day. 'Clearly unconstitutional,' she said."

After reviewing the article, I cannot recall specifically my discussion with the author concerning state aid to private schools. There was, of course, discussion in the Arizona Legislature during that period about the possibility of state aid to private and parochial schools. The Supreme Court's views on such aid were at the time, and indeed still are, evolving. In Everson v. Board of Education, 330 U.S. 1 (1947), the Court upheld aid in the form of bus transportation, and in Board of Education v. Allen, 392 U.S. 236 (1968), it upheld aid in the form of loaned textbooks. The very year that the article to which you refer appeared, however, the Court struck down the laws of two states providing teachers' salaries to private schools, Lemon v. Kurtzman, 403 U.S. 602 (1971), issuing no fewer than four separate opinions. The uncertain state of the law at the time of the Phoenix Magazine article, soon evidenced by the Lemon decision, caused me to believe it would be difficult to draft a legislative proposal for Arizona for state aid to private and parochial schools which would withstand the Court's scrutiny. Two years later the Court was still sharply divided in Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), which struck down New York's statutory aid plan.

Any statement I may have made in 1971 should not, of course, be considered a conclusion on any specific legal question. Any analysis I may have made of the situation in 1971 was not the type of thorough and focused analysis which I would make as a member of the United States Supreme Court with the benefit of briefs and oral argument in a specific

case, as well as the full record in the case. I would certainly consider any specific case which might come before the Court on its own facts and without, I assure you, any predetermined conclusion.

I might add as a final note that I myself am a product of private schools, and my children have all attended a parochial school. I have been a trustee of two private schools. The problems of financing such schools and the importance of maintaining them are well known and personally familiar to me.

Again, I appreciate your courtesy in writing.

Sincerely,

Sandra D. O'Connor

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United States Senate
Washington, D. C. 20510

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Honorable Jesse A. Helms
United States Senate
Washington, D.C. 20510

Dear Senator Helms:

Thank you for your letter of September 4, 1981. In that letter you reiterate your inquiry concerning my views on the correctness of Roe v. Wade, both as an interpretation of the Constitution and as an exercise of judicial authority. I declined in my letter of August 28, 1981, to state my views on the correctness of Roe v. Wade, noting that were I to do so I might be disqualified in subsequent cases raising related issues.

In your most recent letter you state that you believe it is appropriate for me to respond to your questions concerning Roe v. Wade because they concern a past decision rather than a pending case. You indicate that even if it is inappropriate for me to state whether Roe v. Wade was a correct interpretation of the Constitution, you believe it would not be inappropriate for me to state whether it was a proper exercise of judicial authority.

With all respect I must adhere to the views expressed in my previous response. As I stated in that letter, a prospective Supreme Court Justice should not make public statements on issues which might later come before the Supreme Court. The citations from earlier confirmation hearings which I included in my earlier letter, illustrate that prior Supreme Court nominees have likewise declined to comment on past Supreme Court decisions, as well as pending cases. Cases involving the issues raised by Roe v. Wade, and interpreting that decision, continue to come before the Court. The question of whether Roe v. Wade should be overruled may also arise. Were I to comment on the correctness of that decision I might be disqualified from sitting in those cases.

Nor do I see any inconsistency between my responding to your question concerning stare decisis and my refusal to state whether Roe v. Wade was a proper exercise of judicial authority. This question is not severable from the question of the correctness of Roe v. Wade. If Roe v. Wade was not a proper exercise of judicial authority, it was not correctly decided. While I am happy to respond to questions concerning my general judicial philosophy, as illustrated by my response to your question concerning stare decisis, the question whether a particular case

was a proper exercise of judicial authority would require me to state whether or not I believe the case was correctly reasoned in accordance with the dictates of the Constitution. As I have explained, I must refrain from doing this.

Sincerely,

Sandra D. O'Connor

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United States Senate
Washington, D.C. 20510

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Sincerely,

Sandra D. O'Connor

O'Connor file

STATEMENT OF SANDRA DAY O'CONNOR

SEPTEMBER 9, 1981

Mr. Chairman and Members of the Committee

I would like to begin my brief opening remarks by expressing my gratitude to the President for nominating me to be an associate justice of the United States Supreme Court, and my appreciation and thanks to the members of this committee and its distinquished chairman for your courtesy and for the privilege of meeting with you.

As the first woman to be nominated as a Supreme Court Justice, I am particularly honored, but I happily share the honor with millions of American women of yesterday and today whose abilities and conduct have given me this opportunity for service. As a citizen, as a lawyer and as a judge I have, from afar, always regarded the Court with the reverence and the respect to which it is so clearly entitled because of the function it serves. It is the institution which is charged with the final responsibility of ensuring that basic constitutional doctrines will be continually honored and enforced. It is the body to which all Americans look for the ultimate protection of their rights. It is to the United States Supreme Court that we all turn when we seek that which we want most from our government: equal justice under the law.

If confirmed by the Senate, I will apply all my abilities to ensure that our government is preserved and that justice under our Constitution and the laws of this land will always be the foundation of that government.

I want to make only one substantive statement to you at this time. My experience as a state court judge and as a state legislator has given me a greater appreciation of the important role the states play in our federal system, and also a greater appreciation of the separate and distinct roles of the three branches of government at both the state and federal levels. Those experiences have strengthened my view that the proper role of the judiciary is one of interpreting and applying the law, not making it.

If confirmed, I face an awesome responsibility ahead. So, too, does this Committee face a heavy responsibility with respect to my nomination. I hope to be as helpful to you as possible in responding to your questions on my background, beliefs and views. There is, however, a limitation on my responses which I am compelled to recognize. I do not believe that, as a nominee, I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future court action might make it necessary to disqualify myself on the matter. This would result in my inability to do that which would be my sworn duty, namely, to decide cases that come before the Court. Finally, neither you nor I know today

the precise way in which any issue will present itself in the future or what the facts or arguments may be at that time or how the statute being interpreted may read. Until those crucial factors become known, I suggest none of us really know how we would resolve any issue. At the very least, we would reserve judgment until that time.

On a personal note, if the Chairman will permit it, I would now like to say something to you about my family and to introduce them to you. By way of preamble, I would note that some of the media have reported, correctly, I might add, that I have performed some marriage ceremonies in my capacity as a judge. I would like to read to you an extract from a part of the form of marriage ceremony I prepared. "Marriage is far more than an exchange of vows. It is the foundation of the family, mankind's basic unit of society, the hope of the world and the strength of our country. It is the relationship between ourselves and the generations to follow."

That statement represents not only advice I give to the couples who have stood before me, but my view of all families and the importance of families in our lives and in our country.

My nomination to the Supreme Court has brought my own very close family even closer together.

(Introductions to follow)

Finally, I want to thank you, Mr Chairman and Members of the Committee, for allowing me this time.

I would now be happy to respond to your questions.

September 8, 1981

file

JUDGE SANDRA O'CONNOR -- Update

1) Hearings: Hearings on her nomination before the Senate Judiciary Committee will begin Wednesday morning at 10:00 a.m. They will continue on Thursday with anticipated conclusion on Friday.

2) Prior to start of the hearings, she will meet at 9:00 a.m. with Senator Thurmond in his office.

3) Following introductions by members of the Arizona Congressional delegation, Governor Babbitt and the Attorney General, she will open the hearings with a prepared statement of 5-7 minutes. This will be followed by three rounds of questions, 10 minutes each, by Committee members.

4) The hearings are scheduled for Wednesday, Thursday and Friday. Thus far, 26 groups or individuals have signed up to testify for/against the nomination. A list of these can be obtained from the Committee press officer, Bill Kenyon, 224-5225.

5) She will be accompanied to the hearings by her husband, John, and sons, Scott (23), Brian (21) and Jay (19). Requests for interviews for the period between conclusion of the hearings and the swearing-in should be made through Pete Roussel.

6) She has no meetings scheduled this week with the President.

7) Outlook: Very positive. We anticipate confirmation with minimal opposition. No Senator has yet expressed opposition.

8) Not for Announcement: The swearing-in is tentatively set for Friday, September 25, at the Supreme Court. It is anticipated the President would attend but this should not be announced yet -- nor this date.

THE SUN, Sunday, September 6, 1981

'Symbols' believed at stake

New Right keeping O'Connor under fire

By Lyle Denniston
Washington Bureau of The Sun

Washington—In an old-fashioned way, the radio announcement begins: "Should a gentleman ask a lady an embarrassing question?"

But that is as far as chivalry goes.

The announcer goes on immediately to suggest that members of the Senate ask Sandra Day O'Connor some very tough questions, about abortion and teenage sex.

That 60-second message is being broadcast in several states this weekend, and will be heard even more widely before Wednesday, the day the Senate Judiciary Committee starts questioning Judge O'Connor, the first woman ever to be nominated to the Supreme Court.

Richard A. Viguerie, leader of the New Right coalition that is fighting Judge O'Connor's nomination, is the man behind the radio spot. One of the purposes, he says, is to make sure that the Senate—and especially the White House—realizes that the New Right has not given up.

Against strong indications that the Arizona judge will win Senate approval as a justice without any notable difficulty, her challengers say they are persisting.

"We are not discouraged because of anticipated losing the vote," Mr. Viguerie said. "We're not under illusions about our chances of winning, but the only time you lose is when you fail to fight."

Inside the Senate hearing room, "the right kind of questions are going to be asked," if Mr. Viguerie's grass-roots radio campaign gets the results it seeks.

Outside the Dirksen Senate Office Building, Nellie Gray, who leads each January's "March for Life" to protest the Supreme Court's 1973 decision on abortions, will be leading anti-O'Connor rallies.

The Senate is the immediate target of those efforts, but it is not the most important one. Mr. Viguerie and his coalition followers want President Reagan to notice that New Right conservatives are still unhappy about the choice of Mrs. O'Connor.

"For the first time," Mr. Viguerie says, "a president is receiving significant pressure from the right. We're going to keep it up, on this issue and others."

Without pressure from what he calls "the Reagan coalition," the coalition leader fears that the president may forget who his truest political friends are.

"We want to show Republicans how very important it is to work with that coalition," he says. "We're going to allow Reagan to stay right where he'd like to be."

The "message" Mr. Viguerie wants most to be heard in the White House is that the New Right positions Mr. Reagan embraced in the 1980 campaign are not to be forgotten in 1981.

The nomination of Judge O'Connor, as the coalition sees it, is the president's "first broken promise." Mr. Viguerie's magazine, *Conservative Digest*, uses that phrase with a cover picture of Judge O'Connor. The cover also shows the 1980 Republican platform—which included a promise to pick federal judges who oppose abortions—with the word "VOID" stamped on it. The New Right believes Judge O'Connor has actively promoted abortion rights.

"We just don't know which straw will break the back of the coalition," Mr. Viguerie comments. "Will it be this one, or the next one?"

If the pressure is kept up against Judge O'Connor, he suggests, "you're going to see a different kind of judge" named to future vacancies on the Supreme Court and lower federal courts.

At the White House, aides are aware of the coalition's aims, realizing, they say, that the anti-O'Connor effort is more a symbol than a threat to her nomination.

One presidential lobbyist working to keep Judge O'Connor's path smooth remarked: "They [the New Right] feel they must make a point for the future: to be consulted about their issues."

That aide, who asked not to be identified, indicated, though, that the White House does not view the opposition as only part of a larger strategy. Her position on abortion, which at this point remains somewhat clouded, makes some of the opposition genuine, the lobbyist conceded.

"Individual people in the [New Right] movement are adamantly opposed to her because of her position on some issues," the aide commented.

For that reason, the nominee will go to hearings ready to give a full explanation of her positions, according to the presidential aide. "She's her own best witness, and she hasn't been a witness yet."

One of the points the New Right has been making against her, in Mr. Viguerie's magazine, on the radio spots and elsewhere, is that she has not answered questions about what she really thinks and has done on abortion.

That undoubtedly will be the dominant issue at this week's hearings, according to the coalition leader. Other points that will be pressed, he said, are her views on tax credits for private school tuition and tax-exempt status for private Christian schools that are racially segregated.

In past hearings on Supreme Court nominees, future justices have begged off answering questions that seemed designed to test how they would vote on legal or constitutional issues.

Anticipating that Judge O'Connor might do that, aides to some senators are preparing to circulate a memo arguing that the nominee has an obligation to answer all questions bearing on judicial philosophy, and should go unquestioned only on a narrow range of matters directly before the court.

Most of the questions that her challengers want answered have to do with her voting record as a member of the Arizona state Senate. According to the White House aide, Judge O'Connor is prepared to give a very full account of "why she voted as she did, at the time that she did."

There is nothing in that record, the aide contended, that will be a source of serious difficulty for the nominee.

Last week, Judge O'Connor seemed to have removed the chance that her financial status would cause problems as it has for some court nominees. She and her husband disclosed their investments and assets, and none appeared controversial.

Her challengers, even while conceding that there may not be a single vote cast against her in the final Senate tally, do insist that it is premature to say there will be no problems at all for her.

An aide to Senator John P. East (R, N.C.), one of the Senate's strongest foes of abortion, said: "It is hard to say what might come up at the hearings." He did not say he knew of any specific problem, however.

The hearings are scheduled to continue through Friday. Judge O'Connor herself is expected to be on the witness stand at least one day and perhaps two.

AP

Attorney General William French Smith and Supreme Court Justice-designate Sandra Day O'Connor leave the Justice Department Friday.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

O'Connor file

To Kennit

September 4, 1981

TO: Senate Committee on the Judiciary
Hon. Strom Thurmond, Chairman
Hon. Joseph Biden, Ranking Minority Member

FROM: American Law Division

SUBJECT: Supplement to Briefing Book on Judge Sandra D. O'Connor

Per the request of counsel and our submission dated August 17, 1981, this memorandum transmits a supplement to the Briefing Book on the Nomination of Sandra Day O'Connor to be an Associate Justice of the Supreme Court of the United States. This supplement contains five additional opinions by Judge O'Connor, obtained from her chambers, and additional news articles on the nominee. The supplement includes material which has come to our attention through September 3, 1981. We have not been successful at obtaining a copy of the Senate Journals for the Arizona Legislature for 1974. We are continuing our efforts in this area.

If we can be of further service, please feel free to call on us.

Leland E. Beck

Leland E. Beck
Legislative Attorney

SUPPLEMENT TABLE OF CONTENTS

SUPPLEMENT INDEX TO LEGAL SUBJECTS

SUPPLEMENT INDEX TO GENERAL SUBJECTS

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED JUN 4 1981

GLEN D. CLARK, CLERK
By _____

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CLINT MILLER,

Plaintiff-Appellant,

v.

ARNAL CORPORATION, dba The Arizona Snow Bowl,

Defendant-Appellee.

1 CA-CIV 4796

DEPARTMENT C

O P I N I O N

An Appeal from the Superior Court of Maricopa County

Cause No. C-305007

The Honorable Robert J. Corcoran, Judge

AFFIRMED

Gust, Rosenfeld, Divelbess & Henderson
By: James F. Henderson
Dean G. Kallenbach
Attorneys for Appellant
Phoenix

O'Connor, Cavanagh, Anderson, Westover,
Killingsworth & Beshears
By: Richard McC. Shannon
Attorneys for Appellee
Phoenix

O'C O N N O R, Presiding Judge

This is an appeal from a denial of a motion for new trial following a jury verdict against the appellant and in favor of appellee in an action alleging that the appellee willfully, negligently, and unreasonably terminated a rescue effort to assist the appellant. The appeal raises the issue of whether certain jury instructions were properly refused by the trial court. We find no error and affirm the orders of the trial court.

The appellant, Clint Miller, and five companions hiked on Humphrey's Peak in the mountains near Flagstaff, Arizona, in December, 1972. The group assembled for the hike in the parking lot of the Snow Bowl ski area and camped out overnight nearby on December 30, 1972. The next morning, they began their hike and set up camp for the night of December 31 in a ravine at an elevation of approximately 11,200 to 11,500 feet. During the night a severe storm developed, with high winds, blowing snow and extremely low temperatures. Much of the group's shelter and equipment was lost or destroyed in the storm. The following morning, four members of the group, including Douglas Rickard, decided to descend the mountain and to return to the Snow Bowl and try to obtain assistance for Mr. Miller and another companion, Allison Clay. Mr. Miller had suffered from exposure and frostbite during the preceding night and he did not want to attempt to walk down the mountain. Ms. Clay decided to remain with Mr. Miller.

The four who left the campsite arrived at the Snow Bowl Lodge at approximately 1:45 P.M. on January 1, 1973. They contacted Danny Rich, the assistant director of the ski patrol, and told him of the predicament of Mr. Miller and Ms. Clay. Rich was a member of the ski patrol and an employee of the Snow Bowl, which was owned and operated

by appellee, Arnal Corporation. Rich asked several other ski patrolmen whether they wanted to volunteer for the rescue attempt and told them to begin gathering their equipment and warm clothing. He also telephoned the Coconino County Sheriff's office to obtain assistance from their search and rescue unit. Rickard told Rich that the appellant and Ms. Clay were camped somewhere near the top of the chair lift, indicating what he believed to be the general area on a map Rich showed him. In fact, the appellant's location was a substantial distance farther around the mountain. Rich planned to use the ski chair lift to ascend the mountain, and then traverse on skis over to the stranded hikers. However, another storm was developing and the wind was blowing so hard that the chair lift had been shut off. Rich asked his supervisor, Dave Kuntzleman, the appellee corporation's mountain manager, to start the ski lift for the rescue party to ascend. Kuntzleman refused on the ground that it was too dangerous in the existing high winds and he thought the chair lift cable might derail, and also because he wanted the ski patrol to remain on duty to protect skiers on Snow Bowl property. In making his decision, Kuntzleman testified that he was aware the hikers could suffer serious harm or death if they were forced to spend another night on the mountain. An argument ensued between Rich and Kuntzleman, but Kuntzleman refused to start the lift.

The Coconino County Sheriff's search and rescue party did not arrive at the Snow Bowl until approximately 5:30 P.M. Efforts were made to reach the two stranded hikers but the rescuers did not reach them until early morning on January 2. The storm during the night of January 1 was more severe than on the previous night. On arrival, the rescuers found appellant, Miller, in serious condition with hypothermia

and frostbite; Ms. Clay had frozen to death. As a result of his exposure, Mr. Miller lost all ten toes, other portions of both feet, and all the fingers of his right hand.

Appellant's first contention is that the trial court erred in failing to submit his requested instruction 14 to the jury. It reads as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if the harm is suffered because of the other's reliance upon the undertaking.

The requested instruction is taken directly from Restatement (Second) of Torts § 323 dealing with negligent performance of an undertaking to render services.[1/] Appellant contends that he was put in a worse position by appellee's termination of a rescue attempt by its own ski patrol and the jury should have been allowed to compensate him for his loss of the chance of being rescued by the ski patrol.

1/ Restatement (Second) of Torts § 323, at 135, reads as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (1) his failure to exercise such care increases the risk of such harm, or
>
> (2) the harm is suffered because of the other's reliance upon the undertaking.

Appellant concedes that the law presently imposes no liability upon those who stand idly by and fail to rescue a stranger who is in danger. See, e.g., Union Pacific Ry. Co. v. Cappier, 66 Kan. 649, 72 P.281 (1903); Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A.809 (1897); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959). See also Annot., 33 A.L.R.3d 301 (1970); M. Shapo, The Duty to Act (1977); G. Gordon, Moral Challenge to the Legal Doctrine of Rescue, 14 Cleveland-Marshall L.Rev. 334 (1965); Note, The Failure to Rescue: A Comparative Study, 52 Columbia L.Rev. 631 (1952); Note, The Duty to Rescue, 47 Ind. L.J. 321 (1972); Comment, The Duty to Rescue, 28 U. of Pitts. L.Rev. 61 (1966).

W. Prosser, Handbook of the Law of Torts § 56 at 341-42 (4th ed. 1971) explains the general rule as follows:

> Thus far the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one, has limited any tendency to depart from the rule to cases where some special relation between the parties has afforded a justification for the creation of a duty, without any question of setting up a rule of universal application. Thus a carrier has been required to take reasonable affirmative steps to aid a passenger in peril, and an innkeeper to aid his guest. Maritime law has long recognized the duty of a ship to save its seaman who has fallen overboard; and there is now quite a general tendency to extend the same duty to any employer when his employee is injured or endangered in the course of his employment. There is now respectable authority imposing the same duty upon a shopkeeper to his business visitor, upon a host to his social guest, upon a jailer to his prisoner, and upon a school

> to its pupil. There are undoubtedly other relations calling for the same conclusion. (footnotes omitted)2/

As noted by appellant, some states have created statutory duties to render assistance in certain circumstances. See, e.g., A.R.S. § 28-663 (duty of a motorist involved in an accident to render aid to persons injured in the accident). The Arizona Legislature has also limited the liability of persons who render "emergency care" gratuitously and in good faith to circumstances of gross rather than ordinary negligence, whether liability is alleged to exist as a result of an act or a failure to act. A.R.S. § 32-1471.3/ The purpose of

---

2/ For an example of another situation creating a duty to aid, see Maldonado v. Southern Pacific Transportation Co., 2 CA-CIV 3837 (filed April 2, 1981), holding that the complaint stated a cause of action for breach of a duty to render reasonable aid under Restatement (Second) of Torts § 322, where the plaintiff was allegedly injured by an instrumentality under the defendant's control. However, the court affirmed the dismissal of a claim for interference with third party rescuers, holding that the complaint alleged at most an attempt to prevent the rendering of aid.

The instant case is clearly distinguishable as to the duty to aid because appellant was injured by the weather, not by any instrumentality under appellee's control. Appellant's claim for interference with a rescuer is discussed infra.

3/ A.R.S. § 32-1471 was amended in 1978, after the decision in Barnum v. Rural Fire Protection Co., 24 Ariz.App. 233, 537 P.2d 618 (1975). The amendment changed an initial list of doctors and nurses to read "Any health care provider," but did not otherwise alter the wording of the statute from that considered by the Barnum court. The section now provides:

> Any health care provider licensed or certified to practice as such in this state or elsewhere, or a licensed ambulance attendant, driver or pilot as defined in § 41-1831, or any other person who renders emergency care at a public gathering or at the scene of an emergency occurrence gratuitously and in good faith shall not be liable for any civil or other damages as the result of any act or omission by such person rendering the emergency care, or as the result of any act or failure to act to provide or arrange for further medical treatment or care for the injured persons, unless such person, while rendering such emergency care, is guilty of gross negligence.

A.R.S. § 32-1471 has been described as follows:

> The apparent purpose of this statute is to relieve the burden of liability on individuals who choose to or not to render aid to others in emergency situations. . . . An individual may in good faith help another in a crisis with untoward results for which he should not be penalized or the same person may not help, perhaps knowing that he lacks the necessary expertise to be of aid.

Guerrero v. Copper Queen Hospital, 112 Ariz. 104, 106, 537 P.2d 1329, 1331 (1975).

The applicability of this statute to a case such as this has not been decided by the Arizona courts, although the language has been described in one case as "notably broad." See Barnum v. Rural Fire Protection Co., 24 Ariz.App. 233, 237 n.1, 537 P.2d 618, 622 n.1 (1975). However, the Barnum opinion cites with approval Restatement (Second) of Torts § 323. It holds that reliance is a necessary element for recovery against a volunteer, and that the element of reliance "bespeaks a voluntary choice of conduct by the person harmed. It infers that the person exercising it can decide between available alternatives." Id. at 237, 537 P.2d at 622.

Comment (a) to § 323 reads in part as follows:

> This Section applies to any undertaking to render services to another which the defendant should recognize as necessary for the protection of the other's person or things. It applies whether the harm to the other or his things results from the defendant's negligent conduct in the manner of his performance of the undertaking, or from his failure to exercise reasonable care to complete it or to protect the other when he discontinues it. It applies both to undertakings for a consideration, and to those which are gratuitious.

Comment (c) to § 323 deals with termination of services once begun, and it reads:

> The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him. His motives in discontinuing the services are immaterial. It is not necessary for him to justify his failure to continue the services by proving a privilege to do so, based upon his private concerns which would suffer from the continuance of the service. He may without liability discontinue the services through mere caprice, or because of personal dislike or enmity toward the other.
>
> Where, however, the actor's assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated. [emphasis added]

The trial court instructed the jury concerning the abandonment or termination of rescue services in its instruction number 1, which incorporates much of the language of comment (c) quoted

above.[4/]

We believe the trial court properly refused to give appellant's requested instruction 14 for several reasons. Appellant did not claim that his injuries were caused by the negligent performance by appellee of any duty owed to appellant, but rather claimed that his injuries were exacerbated by a termination of the initial plans and arrangements being made by the ski patrol to attempt his rescue. The Restatement (Second) of Torts § 323 explanation in comment (c) concerning termination or abandonment of rescue efforts was in fact incorporated into the court's instruction 1, which correctly and adequately covered the alleged wrong, namely, an unreasonable termination of rescue services. Moreover, we believe that any instruc-

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4/ Court's instruction number 1 reads:

> If the defendant gratuitously started to aid the plaintiff, this does not necessarily require it to continue its services.
>
> Defendant is not required to continue the services indefinitely, or even until it has done everything in its power to aid and protect the plaintiff.
>
> The defendant could abandon its efforts at any time, unless, by giving the aid, it put the plaintiff in a worse position than he was in before the defendant attempted to aid him.
>
> Its motives in discontinuing the services are immaterial. It is not necessary for the defendant to justify its failure to continue the services. If, however, the defendant's assistance put the plaintiff in a worse position than he was in before, either because the actual danger of harm to the plaintiff has been increased by the partial performance, or because the plaintiff or those acting on his behalf, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance, the defendant is not free to discontinue its services where a reasonable man would not do so.
>
> The defendant would then be required to exercise reasonable care to terminate its services in such a manner that there is no unreasonable risk of harm to the plaintiff, or to continue them until they can be so terminated.

on concerning negligent performance of an undertaking to render services under these circumstances would have to be limited to acts or omissions amounting to gross negligence as required by A.R.S. § 32-1471. Appellant's requested instruction was based on a standard of ordinary negligence alone.

In determining whether an instruction is justified, we must consider the evidence in the strongest possible manner in support of the theory of the party asking for the instruction. Evans v. Pickett, 102 Ariz. 393, 430 P.2d 413 (1967). Even viewed in this light, there is no evidence that appellant relied on any rescue undertaking by appellee in the sense that he chose rescue by the ski patrol over any other available alternative. Appellant's companions did not rely on appellee by choosing not to pursue other possible avenues of rescue on his behalf. Appellee's employee Rich telephoned the county search and rescue unit almost immediately after appellant's companions arrived at the lodge. The county unit then began organizing equipment and personnel for its rescue attempt. The evidence shows that the county's rescue efforts were not delayed, discouraged, or prevented by any act of appellee's. It is error to instruct in relation to a matter not supported by the evidence. De Elena v. Southern Pacific Co., 121 Ariz. 563, 592 P.2d 759 (1979). Thus, the trial court properly refused to give appellant's requested instruction 14.

Appellant next contends that the trial court erred in refusing to give his requested instructions 2 and 9. They read as follows:

> 2. Defendant is liable if you find that it unreasonably terminated a rescue attempt once it had begun.
>
> 9. The defendant is liable if it began to assist plaintiff, knowing its services were necessary to prevent serious harm to him, and then unreasonably abandoned the effort.

It is not error for the trial court to refuse to give a requested instruction where the subject of the requested instruction was adequately covered by other instructions which were given. Tucson Utility Supplies, Inc. v. Gallagher, 102 Ariz. 499, 433 P.2d 629 (1967). Appellant's requested instructions 2 and 9 were clearly

covered by court's instruction 1, which defined the circumstances in which a rescue effort may be abandoned in accordance with the comment (c) to § 323. In a caveat to § 323, the Restatement notes at 135-36:

> The Institute expresses no opinion as to whether:
>
> * * *
>
> (2) there may not be other situations in which one may be liable where he has entered upon performance, and cannot withdraw from his undertaking without leaving an unreasonable risk of serious harm to the other.

In comment (e) to § 323 at 139, the caveat is clarified as follows:

> The Caveat also leaves open the question whether there may not be cases in which one who has entered on performance of his undertaking, and cannot withdraw from it without leaving an unreasonable risk of serious harm to another, may be subject to liability even though his conduct has induced no reliance and he has in no way increased the risk. Clear authority is lacking, but it is possible that a court may hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and left him to drown, is liable even though there were no other possible sources of aid, and the situation is made no worse than it was.

Appellant urges us to implement comment (e) to § 323 of the Restatement by holding it to be the law in this jurisdiction that a rescue effort, once begun in any manner and in any degree whatsoever, may not thereafter be abandoned or terminated if it would leave the other person with an unreasonable risk of serious harm, even though there has been no reliance on the rescue effort and the extent of the risk has not been increased. We decline to so hold. The trial

court properly refused to give appellant's requested instructions 2 and 9.

Next appellant argues that the trial court erred in refusing to give his requested instructions 5 and 8. His requested instruction 5 read as follows:

> If you find that defendant prevented or interfered with the rescue of plaintiff, defendant is liable for any harm plaintiff suffered as a result of that prevention or interference.

His requested instruction 8 read:

> If defendant intentionally or negligently interfered with the Ski Patrol's efforts to rescue plaintiff, it is liable for any harm suffered by plaintiff as a result of such interference.

Appellant's instructions 5 and 8 were based on §§ 326 and 327, Restatement (Second) of Torts, which state that one is liable for physical harm resulting from the intentional or negligent prevention of the giving of aid to another by a third person.[5/]

5/ § 326, Restatement (Second) of Torts provides at 145-46:

> One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.

§ 327, Restatement (Second) of Torts provides at 146:

> One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.

Appellant's instruction 5 inadequately states the law concerning prevention of aid. It is phrased in terms of absolute liability, without indicating that the prevention or interference must be done intentionally or negligently. An instruction which misstates the law is properly rejected. Travelers Indemnity Co. v. Hudson, 15 Ariz.App. 371, 488 P.2d 1008 (1971). The trial court properly refused to give appellant's instruction 5.

Appellant's instruction 8 refers to an intentional or negligent interference with a rescue effort. He contends that, as far as this issue is concerned, appellant is in fact two parties although it "prefers to see itself as one entity." In the Restatement terms, Kuntzleman is seen as the one who wrongfully prevented the "third person," the ski patrol, from continuing the rescue attempt. Appellant would hold appellee liable for Kuntzleman's act by respondeat superior. While appellant concedes that Kuntzleman and the ski patrol members were all employees of Arnal Corporation and that Kuntzleman had the authority to direct the ski patrol's activities, he contends that Kuntzleman nevertheless had no right to interfere with or prevent the proposed rescue operation by the ski patrol.

On the other hand, appellee argues that because Kuntzleman and the ski patrol members were all employees of the corporation, there were only two parties involved, the corporation and the appellant. The corporation could not be said to have "interfered with itself." The corporation did not interfere with an attempt; rather, it chose not to make an attempt. We agree. The Restatement sections upon which appellant relies require three parties: an imperilled plaintiff, a rescuer, and one who prevents or interferes with the rescuer.

A corporation is an impersonal entity which can act only through its officers and agents. O'Malley Investment and Realty Co. v. Trimble, 5 Ariz.App. 10, 422 P.2d 740, supplemented, 5 Ariz.App. 434, 427 P.2d 926 (1967). The acts of a corporation's agents are the acts of the corporation. Tobman v. Cottage Woodcraft Shop, 194 F.Supp. 83 (S.D. Cal. 1961). The concept of a corporation as a separate entity is a legal fact, not a fiction. Modern Pioneers Ins. Co. v. Nandin, 103 Ariz. 125, 437 P.2d 658 (1968). In this case one group of corporate employees, the ski patrol, decided to attempt a rescue. A higher-ranking corporate employee, Kuntzleman, told the patrol members that they could not undertake the rescue as they had planned. The effect was that the corporation as an entity decided, through the interactions of its employees, not to begin a rescue. The corporation cannot be held liable for interfering with a rescue attempt, because it chose not to make any attempt. As discussed above, there is no duty to rescue an endangered stranger. Thus there is no basis upon which to hold appellee liable for interfering with or preventing a rescue attempt.

We also note that, while appellant contends that Kuntzleman and the ski patrol are two distinct parties for purposes of this argument, and although his complaint was originally filed against both the corporation and several individual corporate officers and employees including Kuntzleman, the trial court gave appellant's requested jury instruction 4 which stated in part: "The defendant in this action is Arnal Corporation." Appellant appealed only from the judgment in favor of Arnal Corporation, which is the sole appellee now before us. We believe the trial court correctly concluded that the appellee corporation could not be said to have prevented or

interfered with itself in giving or refusing aid to appellant.

Finally, appellant contends the trial court erred in refusing his requested instructions on punitive damages.[6/] The jury was properly instructed by the trial court on the elements of a wrongful termination of rescue aid. The jury found in favor of the defendant corporation and against the plaintiff on the underlying claim and it awarded no actual damages to the plaintiff. Therefore, the error of the trial court, if any, in refusing to instruct the jury on punitive damages was harmless, because a plaintiff may not recover punitive damages unless the trier of fact first determines that he is entitled to actual damages. Hurvitz v. Coburn, 117 Ariz. 300, 572 P.2d 128 (App. 1977).

The orders of the trial court are affirmed.

SANDRA D. O'CONNOR, Presiding Judge
Department C

CONCURRING:

LAURANCE T. WREN, Judge

DONALD F. FROEB, Judge

6/ Appellant's requested instruction 15 read as follows:

> If you find that the defendant did an act or failed to do an act which was its duty to do, knowing or having reason to know of facts from which it could reasonably conclude that its conduct created an unreasonable risk of harm to the plaintiff and involved a high degree of probability that substantial harm would result, the defendant is liable for punitive damages.

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WESTERN CASUALTY & SURETY COMPANY, a Kansas corporation, Plaintiff-Appellee, v. INTERNATIONAL SPAS OF ARIZONA, INC., an Arizona corporation, Defendant-Appellant.	1 CA-CIV 4862 DEPARTMENT B O P I N I O N

An Appeal from the Superior Court of Maricopa County

Cause No. C-369161

The Honorable Frederic W. Heineman, Judge
The Honorable Stephen H. Scott, Judge

REVERSED AND REMANDED

Jones, Teilborg, Sanders, Haga & Parks
By: David S. Shughart, II
Frank A. Parks
Attorneys for Plaintiff-Appellee Phoenix

Fogel and Lamber
By: Dennis M. Lamber
Attorneys for Defendant-Appellant Phoenix

O'C O N N O R, Judge

This is an appeal from the granting of a summary judgment in favor of appellee, the plaintiff in the trial court, and from the denial of appellant's motion for new trial. The sole issue is whether the appellee, Western Casualty & Surety Company (Western), has a duty to defend appellant, International Spas of Arizona (International Spas), pursuant to a general liability insurance policy issued by Western, in a lawsuit filed against International Spas by a lessee, Neil David McLaughlin (McLaughlin). We hold there is a duty to defend the lawsuit and reverse the summary judgment.

McLaughlin's complaint against International Spas alleges four claims arising out of a termination by International Spas of a lease to McLaughlin of a portion of its premises for operation of a beverage service by McLaughlin in the spas. The first count of the complaint is for the breach of the lease; the second is for conversion of personal property belonging to McLaughlin; the third is for conspiracy to interfere with business and contractual relations; and the fourth is for imposition of a constructive trust. International Spas requested Western to defend it under its general liability insurance policy. Western filed an answer on behalf of International Spas, but filed a separate declaratory judgment action against International Spas seeking a declaration that there was no coverage in its insurance policy for the matters alleged in McLaughlin's complaint.

Cross motions for summary judgment were filed in the declaratory judgment action. Western's motion for summary judgment was granted, and the court determined that no policy coverage existed. International Spas' motion for new trial was denied, and this appeal followed.

The general liability insurance policy contains a personal injury liability insurance endorsement which provides in part that:

> 1. COVERAGE AGREEMENT
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (herein called "personal injury") sustained by any person or organization and arising out of one or more of the following offenses committed in the conduct of the named insured's business:
>
> * * *
>
> C. wrongful entry or eviction, or other invasion of the right of private occupancy; . . .
>
> Exclusions
>
> This insurance does not apply:
>
> (a) to liability assumed by the insured under any contract or agreement; . . .
>
> * * *

Appellee contends that the personal injury endorsement of the policy was intended to protect the insured from alleged wrongful actions toward its customers, such as the wrongful eviction by International Spas of a patron. Appellee originally also contended that coverage was precluded by another policy provision excluding personal injuries sustained by employees. Appellee now concedes, however, that McLaughlin was not an employee of appellant and that the exclusion is inapplicable.

Appellant, on the other hand, contends that McLaughlin's complaint seeks recovery of damages for personal injury sustained by him arising out of his wrongful eviction by the insured, International Spas,

for conversion of some of his property in the course of his eviction, and for interference with his business when International Spas allegedly "unlawfully and wrongfully caused [McLaughlin] to be excluded from all of his business premises."

The trial court in granting Western's motion for summary judgment stated in its minute order that:

> It is further noted that unless the personal injury was committed in the conduct of the Spas' business there is no coverage, and if the personal injury was sustained as a result of an offense indirectly related to the employment of such person there is no coverage.
>
> In short, if the juice bar is an essential part of the conduct of the Spas' business, personal injury to McLaughlin is excluded. If the juice bar is not a part of the Spas' business the alleged breach of McLaughlin's lease did not occur as part of the conduct of the business and is, therefore, not covered.

Clearly, the trial court was in error in concluding that the events alleged in McLaughlin's complaint did not occur in the conduct of the insured's business. International Spas admittedly conducted business by providing opportunities for recreation and exercise by its patrons, and by making it possible for its patrons to purchase beverages on the premises by virtue of the lease agreement with McLaughlin. Appellee has conceded in oral argument that McLaughlin was not appellant's employee. Moreover, there is nothing in the language of the policy which limits the liability to customers or patrons of the insured, as argued by Western. The endorsement refers to injury "sustained by any person or organization." Nor is this a case in which the liability of the insured is alleged to have been assumed by

International Spas by any contract or agreement. Rather, the McLaughlin complaint seeks damages in two of the counts for alleged intentional torts committed during the course of an alleged wrongful eviction. Clauses excluding liability for assumed liability under a contract are explained in 44 Am.Jur.2d Insurance § 1410 at 258 (1969) as follows:

> Where the insured specifically assumed liability under a contract with a third party, such an exclusion provision is operative - in the sense that it relieves the insurer of liability otherwise existing under the policy - only in situations where the insured would not be liable to a third party except for the fact that he assumed liability under an express agreement with such party. In other words, the contractual liability clause relieves the insurer of liability where the insured's liability would not exist except for the express contract.
>
> * * *
>
> Where the insured failed to enter into a contractual agreement whereby he expressly assumed any liability, the exclusion clause will not relieve the insurer from liability under the policy even though the insured's liability may arise out of a contract entered into with a third party, since a contractual liability exclusion clause refers to a specific contractual assumption of liability by the insured as exemplified by an indemnity agreement. [footnotes omitted]

While the McLaughlin complaint does not allege a separate count for "wrongful entry or eviction," it nevertheless seeks recovery for two personal injury torts, conversion and interference with business relations, based on allegations of "wrongful exclusion" from the premises. The alleged actions of International Spas were taken during the course of its conduct of its business of operating the spas. As

stated in Kepner v. Western Fire Insurance Co., 109 Ariz. 329, 331, 509 P.2d 222, 224 (1973):

> If the complaint in the action brought against the insured upon its face alleges facts which come within the coverage of the liability policy, the insurer is obligated to assume the defense of the action, but if the alleged facts fail to bring the case within the policy coverage, the insurer is free of such obligation.
>
> * * *
>
> [T]he complaint serves a notice function and is framed before discovery proceedings crystalize the facts of the case. The trial focuses on the facts as they exist under the theory of recovery in the complaint. Accordingly, the duty to defend should focus on the facts rather than upon the allegations of the complaint which may or may not control the ultimate determination of liability.
>
> * * *
>
> The allegations in a pleading are not, in all circumstances and situations, the decisive factor in determining whether there exists a duty on the part of the insurance company to defend. This is especially true when the duty to defend depends upon a factual issue which will not be resolved by the trial of the third party's suit against the insured, the duty to defend may depend upon the actual facts and not upon the allegations in the pleading.

On the state of the record before the trial court, the McLaughlin complaint stated in the second and third counts sufficient facts to possibly bring the complaint within the coverage pro-

vided in the insured's personal injury endorsement. We believe that, reading the endorsement and the insurance policy as a whole, the intention of the parties to provide a defense for the insured for the allegations of the second and third counts is clear.

The question then arises whether Western is obligated to defend the insured as to all the allegations of the complaint, not merely those which appear to be within the policy's coverage. The personal injury liability insurance endorsement section of the policy contains a provision creating a duty to defend suits against the insured which reads in part as follows:

> [T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury even if any of the allegations of the suit are groundless, false or fraudulent. . . .

While the Arizona courts have not addressed this issue directly, the apparent majority rule is that if any claim alleged in the complaint is within the policy's coverage, the insurer has a duty to defend the entire suit, because it is impossible to determine the basis upon which the plaintiff will recover (if any) until the action is completed. St. Paul Fire & Marine Ins. Co. v. Sears, Roebuck & Co., 603 F.2d 780 (9th Circ. 1979); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531 (8th Cir. 1970); C. Raymond Davis & Sons, Inc. v. Liberty Mut. Ins. Co., 467 F. Supp. 17 (D.C. Pa. 1979); Steyer v. Westvaco Corp., 450 F. Supp. 384 (D.C. Md. 1978). See also Appleman, Insurance Law and Practice (Berdal ed.), § 4684.01 at 102-07 (1979); Comment, The Insurer's Duty to Defend Under a Liability Insurance Policy, 114 U. of Pa. L.Rev. 734 (1966); Annot., 41 A.L.R.2d 434

(1955). In addition, we believe that the policy language quoted above clearly creates a duty to defend the entire suit, even though some of the allegations in the complaint are groundless as far as the insurer is concerned. We express no opinion, however, as to the insurer's duty to continue the defense if the litigation should reach a point at which it is impossible for McLaughlin to recover on any claim covered by the policy.

The summary judgment in favor of Western is reversed and the matter is remanded to the trial court for trial or for further proceedings consistent with this decision.

SANDRA D. O'CONNOR, Judge

CONCURRING:

WILLIAM E. EUBANK
Acting Presiding Judge
Department B

JOE W. CONTRERAS, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GERALDINE HUNTER,

Petitioner-Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

FOOD GIANT ARDEN MAYFAIR, INC.,

Respondent-Employer,

FREMONT INDEMNITY COMPANY,

Respondent-Carrier.

1 CA-IC 2347

DEPARTMENT C

O P I N I O N

Special Action - Industrial Commission

ICA Claim No. 527-52-1429

Carrier No. 001432-300

Administrative Law Judge Jerry C. Schmidt

AWARD SET ASIDE

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O'C O N N O R, Presiding Judge

This special action is from a determination by the Industrial Commission closing petitioner's industrial claim with a finding of no permanent disability. Specifically, the issue is whether an industrially caused condition known as "meat wrapper's asthma," which prevents petitioner from continuing her employment as a meat wrapper, constitutes a permanent impairment within the meaning of the workmen's compensation statutes. We find that the evidence does not support the administrative determination of no permanent impairment and, therefore, set the award aside.

Petitioner, Geraldine Hunter, worked as a meat wrapper for approximately nine years when she developed a bronchial hypersensitivity known as meat wrapper's asthma. She filed a workmen's compensation claim for benefits. Her claim was accepted by the carrier and she was eventually discharged by her treating physician. The carrier issued a notice of claim status closing the claim. Petitioner requested a hearing alleging that she had sustained permanent physical impairment. After a hearing, the administrative law judge entered an award finding petitioner's condition to be stationary with no permanent impairment and no disability. After the award was affirmed on administrative review, petitioner brought the case to this court by special action.

On review, petitioner contends that, although her lung condition is not ratable under the American Medical Association guides to rating impairments (AMA guides), the medical testimony shows that her industrial injury renders her unable to return to her former employment. Therefore, she asserts she has sustained a permanent functional impairment and is entitled to proceed to a loss of earning capacity determination.

The basic compensation statute, A.R.S. § 23-1044, provides in part as follows:

> (C) . . . [W]here the injury causes permanent partial disability for work, the employee shall receive during such disability compensation. . . but the payment shall not continue after the disability ends. . . .
>
> * * *
>
> (G) The commission may adopt. . . reasonable and proper rules to carry out the provisions of this section.

The Industrial Commission has promulgated a rule, A.C.R.R. R4-13-113, which provides in part as follows:

> * * *
>
> D. If upon discharge from treatment the physician finds that the employee has sustained an impairment of function as the result of the injury, he shall so state in his report. Any rating of the percentage of functional impairment shall be in accordance with the standards for the evaluation of permanent impairment as published by the American Medical Association in "Guides to the Evaluation of Permanent Impairment". It shall include a clinical report in sufficient detail to support the percentage ratings assigned.

The Arizona Supreme Court upheld the adoption of the rule quoted above in Smith v. Industrial Commission, 113 Ariz. 304, 552 P.2d 1198 (1976), and also adopted the definitions of "permanent impairment" and "permanent disability" found in the AMA guides:

> (1) Permanent Impairment. This is a purely medical condition. Permanent impairment is any anatomic or functional

> abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the physician considers stable or non-progressive at the time evaluation is made. It is always a basic consideration in the evaluation of permanent disability.
>
> (2) Permanent Disability. This is not a purely medical condition. A patient is "permanently disabled" or "under a permanent disability" when his actual or presumed ability to engage in gainful activity is reduced or absent because of "impairment" which, in turn, may or may not be combined with other factors. . . .

Id. at 305-06 n.1, 552 P.2d 1198 at 1199-2000 n.1.

These definitions make it clear that the determination of whether an injured worker has sustained a "permanent disability," i.e., a loss of earning capacity, is a two-step process. Only after a permanent physical or functional impairment has been found does the question of loss of earning capacity arise.[1/] "Determination of permanent impairment is a medical question while evaluation of a permanent disability is a law question." Alsbrooks v. Industrial Commission, 118 Ariz. 480, 482, 578 P.2d 159, 161 (1978). Therefore, the question to be resolved in this case is not the legal question whether petitioner has sustained a loss of earning capacity, but the

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1/ See, e.g., Sims v. Industrial Commission, 10 Ariz.App. 574, 460 P.2d 1103 (1969), supplemental opinion, 11 Ariz.App. 385, 464 P.2d 972 (1970) (finding claimant's condition stationary with permanent impairment but without disability because he had found re-employment at wages substantially higher than his pre-injury salary, and holding that the Commission must determine that claimant has suffered impairment or loss of function for work before reaching question of loss of earning capacity.)

medical question whether petitioner has shown a permanent functional impairment causally related to her employment. If petitioner shows such an impairment, she would be entitled to proceed to a loss of earning capacity determination.

We first consider the effect of a statement made by Irvin Belzer, M.D., that petitioner had suffered "no permanent reaction to her previous employment." A thorough reading of Dr. Belzer's testimony reveals that this statement was not based upon his specific medical findings pertaining to petitioner, but upon his personal view that medical science has not yet determined the long-term effects of meat wrapper's asthma. He stated:

> . . . I am not aware of any long term studies that have shown that that kind of exposure of itself continued over a long period of time leads to a permanently disabling situation. There are statements of literature that would imply that.

Medical opinions not based on medical findings should not form the basis of an award. Royal Globe Insurance Co. v. Industrial Commission, 20 Ariz.App. 432, 513 P.2d 970 (1973). Thus Dr. Belzer's opinion regarding the incomplete state of medical knowledge about meat wrapper's asthma in general does not preclude a finding that petitioner has sustained a permanent functional impairment, where testimony specifically pertaining to petitioner so indicates.

The uncontroverted testimony of both medical witnesses, Dr. Belzer and Dr. Engelsberg, M.D., was that petitioner had developed a bronchial hypersensitivity known as meat wrapper's asthma and caused by her industrial exposure to fumes from polyvinyl chloride, which is

contained in the material used to wrap meat for sale in markets.[2/] Further, both doctors agreed that petitioner's industrially caused physical condition permanently precludes her from functioning in any employment which would expose her to polyvinyl chloride or other lung irritants. The industrial commission may not arbitrarily disregard the only reasonable inference which can be drawn from uncontradicted testimony. Ratley v. Industrial Commission, 74 Ariz. 347, 248 P.2d 997 (1952). We find that the only reasonable inference here is that petitioner has a permanent industrially caused functional impairment.

Neither doctor was able to rate petitioner's condition under the AMA guides.[3/] However, the AMA guides apply only to the extent

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2/ For another case discussing meat wrapper's asthma in greater detail, see Matter of Compensation of Bracke, ____ Or.App. ____, 626 P.2d 918 (1981).

3/ The AMA guides relating to pulmonary function state:

> There are many tests of pulmonary function which have value and interest as guides to therapy and prognosis. For the great majority of patients, however, most of these are neither practical nor necessary for the assignment to a particular class of impairment. Judicious interpretation of the results of tests of ventilatory function combined with the clinical impression gained from weighing all the information gathered should permit the physician to place the patient in the proper class of impairment.
>
> A classification based on clinical and laboratory observations is provided in the text. Each class has both subjective and objective findings and percentage values for impairment of the whole man. Since there is a wide variation in the results of tests of ventilatory function among normal individuals, no percentage of impairment of the whole man is said to exist until the functional impairment has progressed to such a state as to meet the criteria set forth in Class 2.

American Medical Association, Guides to the Evaluation of Permanent Impairment, p. 67 (1971).

that they cover the specific impairment and the percentage thereof. Smith v. Industrial Commission, 113 Ariz. 304, 552 P.2d 1198 (1976); Adams v. Industrial Commission, 113 Ariz. 294, 552 P.2d 764 (1976). Since both doctors testified that petitioner's industrially-caused hypersensitivity permanently precludes her from returning to work as a meat wrapper, we find that petitioner has met her burden of proving a permanent functional impairment causally related to her employment. Accordingly, she is entitled to proceed to a hearing to determine whether her impairment has caused a loss of earning capacity.[4/] Hughes Aircraft v. Industrial Commission, (1 CA-IC 2411, filed April 16, 1981).

The court's opinion in Alvarado v. Industrial Commission, 115 Ariz. 113, 563 P.2d 912 (App. 1977) does not require a contrary result. The Alvarado opinion did not directly address the question of whether an industrially caused permanent functional impairment due to a hypersensitivity could constitute an unscheduled injury entitling the claimant to a loss of earning capacity determination pursuant to A.R.S. § 23-1047. The court in Alvarado merely analyzed the application of the Langbell[5/] doctrine to a case of contact dermatitis when the employee was reemployed full time without disability. In the instant case petitioner was still unemployed at the time of the hearing, although she had attempted to find other employment.

4/ At any loss of earning capacity hearing, petitioner must prove a loss of earning power generally. It is not sufficient to prove an inability to perform the particular work petitioner was doing at the time she developed her meat wrapper's asthma. See Alsbrooks v. Industrial Commission, 118 Ariz. 480, 578 P.2d 159 (1978); Savich v. Industrial Commission, 39 Ariz. 266, 5 P.2d 779 (1931).

5/ Langbell v. Industrial Commission, 111 Ariz. 328, 529 P.2d 227 (1974) held that a scheduled injury must be converted to unscheduled if there existed a substantial risk of serious reinjury if the workman were reemployed. See also Espey v. Industrial Commission, 121 Ariz. 289, 589 P.2d 1321 (App. 1978).

(footnote 5 continued on page 8)

Because the uncontroverted medical testimony in this case is that petitioner's industrially-caused condition has permanently restricted her functional ability to return to work as a meat wrapper, the award finding no permanent impairment was in error. Our disposition of the matter makes it unnecessary to reach the other arguments raised by petitioner, including those regarding the fairness of the proceedings.

The award is set aside.

SANDRA D. O'CONNOR, Presiding Judge
Department C

CONCURRING:

LAURANCE T. WREN, Judge

DONALD F. FROEB, Judge

5/ (Continued from page 7)

A.R.S. § 23-1044(H) was amended by Laws 1980, Ch. 246, § 33. It legislatively overrules Langbell, at least insofar as converting an otherwise scheduled disability into an unscheduled one is concerned. A.R.S. § 23-1044(H), as amended, provides:

> Any single injury or disability listed in subsection B of this section which is not converted into an injury or disability compensated under subsection C of this section by operation of this section shall be treated as scheduled under subsection B of this section regardless of its actual effect on the injured employee's earning capacity.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MIKE FRANCO,

Petitioner,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,

Respondent,

FOOD GIANT SUPER MARKET #2,

Respondent-Employer,

WESTERN FIRE INSURANCE COMPANY,

Respondent-Carrier.

1 CA-IC 2372

DEPARTMENT C

O P I N I O N

Special Action - Industrial Commission

ICA Claim No. 9/8-47-00

Carrier No. FC268058

Administrative Law Judge John B. Chickering

AWARD SET ASIDE

Frank W. Frey
Attorney for Petitioner — Tucson

Calvin H. Harris, Chief Counsel
The Industrial Commission of Arizona
Attorney for Respondent — Phoenix

O'Connor, Cavanagh, Anderson, Westover,
Killingsworth & Beshears
By: Donald L. Cross
Larry L. Smith
Attorneys for Respondent-Employer and
Respondent-Carrier — Phoenix

O'C O N N O R, Presiding Judge

The issue raised in this Industrial Commission special action is whether a voluntary retirement of an injured workmen's compensation claimant is grounds for a readjustment of his loss of earning capacity benefits. We hold that it is not, and set aside the award.

The petitioner, Mike Franco, suffered a back injury in 1969 when he was unloading produce at work. At the time of his injury, Mr. Franco was earning $620.24 per month. In 1971, the Industrial Commission determined that the claimant had an unscheduled permanent partial disability representing a 15% general physical functional impairment. Inasmuch as Mr. Franco had returned to his former employment, it was determined that he had no loss of earning capacity. However, in 1972 he found it necessary to change his employment due to his impairment. He accepted employment as a building custodian at a lower wage. His petition for rearrangement of his compensation benefits was granted and he was found to have a 47.2% loss of earning capacity. He was awarded $161.01 per month as workmen's compensation benefits.

In 1978, Mr. Franco's employer notified him that he would reach the mandatory retirement age of 65 on July 27, 1978, and that he would be retired on August 1 unless he applied for and received an extension from the Board of Education. Mr. Franco did not apply for an extension. He testified that he would have retired anyway because: "I couldn't work any more, my work was getting too heavy for me. I was having problems." In the meantime the federal law changed, increasing the mandatory retirement age to 70; however, Mr. Franco was unaware of the change in the law until after his retirement on July 31, 1978. Mr. Franco now receives social security benefits and a $78.04 per month pension from the Sunnyside School District.

The carrier in this case petitioned for a rearrangement or readjustment of benefits based on an allegation that Mr. Franco's earning capacity had increased since the award as provided in A.R.S. § 23-1044(F)(3). The carrier's petition was filed in April, 1979, before Mr. Franco's retirement. The Industrial Commission denied the petition, and the carrier filed a request for hearing. The hearing was held in November, 1979, after Mr. Franco had retired. Following the hearing, the carrier argued alternatively that the employee's earning capacity had increased before his retirement based on various step increases in pay over the years, or that benefits should be denied because the employee had retired voluntarily, thereby creating a changed economic status of his own making. The carrier relied upon Bryant v. Industrial Commission, 21 Ariz.App. 356, 519 P.2d 209 (1974); Hobbs v. Industrial Commission, 20 Ariz.App. 437, 513 P.2d 975 (1973); and Whitlock v. Industrial Commission, 19 Ariz.App. 326, 507 P.2d 128 (1973), for the proposition that a workmen's compensation claimant is not entitled to loss of earning capacity benefits if he voluntarily removes himself from the labor market. The administrative law judge based his findings and award on the cases cited and determined that the carrier had met its burden of proof, and that the employee was entitled to no loss of earning capacity benefits because he had voluntarily removed himself from the labor market by retiring at age 65.

We must view the evidence in the light most favorable to sustaining the findings and award of the Industrial Commission and will not set aside the award if it is based upon any reasonable interpretation of the evidence. Bergstresser v. Industrial Commission, 118 Ariz. 155, 575 P.2d 354 (App. 1978). However, regardless of whether the respondent employee retired voluntarily or involuntarily, the

award must be set aside because the hearing judge readjusted the employee's loss of earning capacity benefits on a ground not authorized by statute. A.R.S. § 23-1044(F) provides that an award of compensation benefits can be changed in the following circumstances:

> 1. Upon a showing of a change in the physical condition of the workman subsequent to such findings and award arising out of the injury resulting in the reduction or increase of his earning capacity.
>
> 2. Upon a showing of a reduction in the earning capacity of the workman arising out of such injury where there is no change in his physical condition, subsequent to the findings and award.
>
> 3. Upon a showing that his earning capacity has increased subsequent to such findings and award.

We believe the carrier and the hearing judge have failed to consider the statutory scheme in Arizona for rearrangement and readjustment of benefits. Under the workmen's compensation act as it is now written, compensation for an unscheduled permanent partial or total disability continues unless or until the disability ends. A.R.S. §§ 23-1044(C); 23-1045(A)(1). The determination of disability is a determination of the injured worker's ability to be employed, and requires an evaluation of the worker's medical permanent impairment as well as the worker's age, sex, education, and employment restrictions and opportunities. Smith v. Industrial Commission, 113 Ariz. 304, 552 P.2d 1198 (1976). This determination is normally referred to as the loss of earning capacity determination. The claimant has the burden of proving the initial loss of earning capacity

caused by the injury. Oliver v. Industrial Commission, 14 Ariz.App. 200, 481 P.2d 886 (1971). A failure of the injured workman to make a good faith and reasonable effort to secure work may support a finding that the industrial injury is not the cause of the employee's loss of earnings. See, e.g., Schnatzmeyer v. Industrial Commission, 77 Ariz. 266, 270 P.2d 794 (1954). Also, the burden of going forward with the evidence in a loss of earning capacity hearing does not shift to the employer if the injured employee fails to prove he has made a good faith and reasonable effort to find other work. See, e.g., Wiedmaier v. Industrial Commission, 121 Ariz. 127, 589 P.2d 1 (1979), and cases cited therein.

However, Arizona's statutory scheme does not require that a claimant always prove his reduced earning capacity by showing an unsuccessful good faith effort to obtain suitable employment. A claimant may meet his burden of proof by relying upon expert testimony to show the type of work the claimant is able to perform with his industrial injuries, and the amount which would be earned in such employment. Such evidence could satisfy the claimant's duty to mitigate his damages. Hoffman v. Brophy, 61 Ariz. 307, 149 P.2d 160 (1944). See also Employers Mut. Liab. Ins. Co. of Wisc. v. Industrial Commission, 25 Ariz.App. 117, 541 P.2d 580 (1975), in which the injured employee was excused from seeking employment by showing medical restrictions on the type of activities he could perform plus evidence of his advanced age and lack of education. Also see generally Annot., 89 A.L.R.3d 13 (1979), and cases cited therein.

Once the initial loss of earning capacity has been determined, payment of benefits continues unless forfeited or suspended, pur-

suant to A.R.S. §§ 23-1071, -1026(E), -1027, -1028, and -1047(D) or (E),[1/] or changed pursuant to A.R.S. § 23-1044(F). A.R.S. § 23-1044(F) allows only three grounds for a petition to change benefits: the petitioner must show that, since the award, either the employee's industrially caused physical condition has changed, his earning capacity has been reduced, or his earning capacity has increased. Petitions for an increase of benefits based on a reduction of earning capacity are filed, quite naturally, by injured claimants. The Bryant case relied upon by respondent and the hearing judge arose out of a petition by the injured claimant seeking to increase the benefits as a result of a loss of employment after the initial award of benefits. The Hobbs and Whitlock cases involved the initial determination of loss of earning capacity. The Bryant case stands for the proposition that a claimant may not obtain an increase of his workmen's compensation benefits based on a reduction in his earning capacity when the evidence shows that he voluntarily left his job and his reduced earnings were the result of his own action. Had Mr. Franco petitioned in this case for an increase in his benefits, the hearing judge would have been required to consider whether he had voluntarily removed himself from the labor market.

On the other hand, petitions to reduce workmen's compensation benefits based on an increased earning capacity are filed, quite naturally, by carriers or employers, based on improvements in the injured

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1/ A.R.S. § 23-1071 provides for forfeiture of benefits if an employee leaves the state for more than two weeks without commission approval; -1026(E) and -1027, reduction or suspension of compensation of an employee who refuses treatment or acts so as to imperil or retard his recovery; -1028, forfeiture of benefits after a conviction for making false statements to obtain compensation; and -1047(D) and (E), suspension of benefits for failure to report earnings to the commission.

workman's earning capacity. However, nowhere does the statute provide for a reduction of previously established loss of earning capacity benefits based on a subsequent voluntary withdrawal by the claimant from the labor market. The question under our statutory scheme is whether there has been an increase in the earning capacity of the employee.

No reported Arizona decision has been cited which discusses the effect of a worker's retirement on his workmen's compensation benefits. However, we are guided by the reasoning in analogous cases and cases from other jurisdictions. Workmen's compensation temporary benefits were not reduced or eliminated in the case of an injured worker who was subsequently imprisoned for a criminal offense and thereby removed from the labor market. Bearden v. Industrial Commission, 14 Ariz.App. 336, 483 P.2d 568 (1971). Nor were they apparently reduced or eliminated in the case of a student who did not compete in the open labor market while attending school. Wimmer v. Industrial Commission, 26 Ariz.App. 524, 549 P.2d 619 (1976). Contra, Feudi v. Big Apple Store #34, 46 A.D.2d 967, 362 N.Y.S.2d 55 (1974).

Confinement in a public institution or hospital has been held not to deprive the injured worker of continued benefits, absent a statutory prohibition. Neal v. Stuart Foundry Co., 250 Mich. 46, 229 N.W. 595 (1930); Ogden Union Ry. & Depot Co. v. Industrial Commission, 85 Utah 124, 38 P.2d 766 (1934). The rationale of such cases is that the purpose of workmen's compensation is to reimburse injured workers for loss of earning capacity, not loss of earnings. See Blair, Reference Guide to Workmen's Compensation Law, Sec. 11:18 (1974).

Retirement of the claimant was expressly held not to deprive

Because the uncontroverted medical testimony in this case is that petitioner's industrially-caused condition has permanently restricted her functional ability to return to work as a meat wrapper, the award finding no permanent impairment was in error. Our disposition of the matter makes it unnecessary to reach the other arguments raised by petitioner, including those regarding the fairness of the proceedings.

The award is set aside.

SANDRA D. O'CONNOR, Presiding Judge
Department C

CONCURRING:

LAURANCE T. WREN, Judge

DONALD F. FROEB, Judge

5/ (Continued from page 7)

A.R.S. § 23-1044(H) was amended by Laws 1980, Ch. 246, § 33. It legislatively overrules Langbell, at least insofar as converting an otherwise scheduled disability into an unscheduled one is concerned. A.R.S. § 23-1044(H), as amended, provides:

> Any single injury or disability listed in subsection B of this section which is not converted into an injury or disability compensated under subsection C of this section by operation of this section shall be treated as scheduled under subsection B of this section regardless of its actual effect on the injured employee's earning capacity.

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FILED JUN 29 1981

GLEN D. CLARK, CLERK

By _____

UNITED RIGGERS ERECTORS, Petitioner-Employer, HARTFORD ACCIDENT AND INDEMNITY COMPANY, Petitioner-Carrier, vs. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CHARLES BATTAGLIA, Respondent-Employee.	1 CA-IC 2408 DEPARTMENT C O P I N I O N

Special Action - Industrial Commission

ICA Claim No. 122-10-2804

Carrier No. 957 C 66414

Administrative Law Judge Jerry C. Schmidt

AWARD AFFIRMED

O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS
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Attorney for Respondent-Employee — Tucson

O'C O N N O R, Judge

The employer, United Riggers Erectors, and the insurance carrier have brought this Industrial Commission special action to challenge a loss of earning capacity award to a claimant who has been incarcerated in a prison. The respondent employee, Charles Battaglia, suffered an industrial injury while working for the petitioner in 1977. His workmen's compensation claim was accepted for benefits by the carrier, and benefits were paid until July 28, 1978, when the carrier iasued a notice of claim status terminating benefits with a permanent partial disability of 15%. Thereafter, Mr. Battaglia pled guilty to mail fraud and was sentenced to three years in a federal penitentiary. After Mr. Battaglia was sentenced, the Industrial Commission issued its findings determining that he had a 56.67% reduction in his monthly earning capacity as a result of the industrial injury. The carrier requested a hearing after which the administrative law judge found that the employee had sustained a 54.93% reduction in his earning capacity. The administrative law judge also determined that Mr. Battaglia's incarceration did not prevent him from receiving permanent partial disability benefits, and he allowed proof of loss of earning capacity by the use of expert testimony and hypothetical questions. The award was affirmed on administrative review, and this special action was filed.

Petitioners raise three issues: (1) whether the employee's incarceration constitutes a voluntary removal from the job market, thereby precluding him from receiving permanent partial disability benefits; (2) whether the employee's status as a prisoner creates an economic condition precluding him from proving a loss of earning capacity; and (3) whether loss of earning capacity may be proven by hypothetical questions of an expert witness.

With respect to the first issue raised by petitioners, they contend that the employee's inability to work and to seek suitable

employment is the result of his own criminal conduct and his subsequent incarceration, and that the employee was required to prove that he had made a good faith and reasonable effort to find other employment. The administrative law judge rejected petitioner's contentions and concluded that the case was governed by Bearden v. Industrial Commission, 14 Ariz. App. 336, 483 P.2d 568 (1971). The Bearden case held that a claimant was not disqualified from receiving total temporary disability benefits during his confinement in prison for a criminal offense. The court found that:

> . . . [T]he Arizona Legislature has not provided for the forfeiture or suspension of compensation and accident benefits during the period of the prison confinement of a claimant serving a sentence less than life. We find no extensions of time within which to process and protect his workmen's compensation rights during a period of confinement. We expressly refrain from expressing an opinion as to the effect of a life sentence whereby one is declared to be civilly dead.

14 Ariz. App. at 343, 483 P.2d at 575.

Mr. Battaglia was seeking permanent, rather than temporary, disability benefits. A.R.S. § 23-1041 provides in part that:

> Every employee. . . who is injured by accident arising out of and in the course of employment . . . shall receive the compensation fixed in this chapter on the basis of such employee's average monthly wage at the time of injury.

A.R.S. § 23-1044(C) provides in part that:

> [W]here the injury causes permanent partial disability for work, the employee shall receive during such disability compensation equal to fifty-five percent of the difference between his average monthly wages before the accident and the amount which represents his reduced monthly earning capacity resulting from the disability, but the payment shall not continue after the disability ends, or the death of the injured person. . . .

No provision in the workmen's compensation statutes expressly prohibits payment of disability benefits during periods when the claimant is confined in a penal or other institution.[1] Many Arizona

[1] Footnote on next page.

decisions involving the burden of proof in loss of earning capacity hearings enunciate the concept of requiring a claimant to prove he has made a good faith and reasonable effort to find other employment after his industrial injury has become stationary. The injured claimant has the burden of proof in establishing that he is entitled to compensation. Wiedmaier v. Industrial Commission, 121 Ariz. 127, 589 P.2d 1 (1979); Standard Accident Ins. Co. v. Industrial Commission, 66 Ariz. 247, 186 P.2d 951 (1947). However, once the injured worker has shown that his industrial injury prevents him from returning to his former job, that he has a permanent partial disability resulting from the injury, and that he has made a good faith and reasonable effort to find other work, then the burden of going forward with the evidence shifts to the employer. See, e.g., Wiedmaier v. Industrial Commission, supra, and cases cited therein. As explained in Wiedmaier:

> After a workman has received an unscheduled injury and the percentage of permanent disability has been determined, if suitable work that he can do in his disabled condition is not available in the area where the workman resides the measure of workman's loss of earnings is the salary he received before the injury. The workman has an obligation, however, to take such work as he is able to perform and is available in order to mitigate the amount of compensation that may be due him. Timmons v. Industrial Commission, 20 Ariz. App. 57, 510 P.2d 56 (1973). Not only does this reduce the amount of benefits that must be paid, but usually has a beneficial rehabilitative result as far as the injured workman is concerned. If suitable work is available and the workman refuses to take the job, the carrier must pay only an amount based upon what he would have received had he accepted the work available.

121 Ariz. at 128-29, 589 P.2d at 2-3 (emphasis added).

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[1] [from previous page] The workmen's compensation statutes provide for suspension or reduction of benefits under certain circumstances which do not include periods of confinement in penal institutions. See, e.g., A.R.S. §§ 23-1071 (absence from the state without Commission approval), 23-908 (failure to report accident and refusal of employer's medical examination), 23-1026 (refusal of medical examination), 23-1027 (unreasonable refusal of medical treatment).

The respondent employee has not claimed disability benefits over and above the amount that he says is based on the proof of what he could have earned had he been out of prison and able to accept the work available, considering his industrially caused physical impairment. We believe the administrative law judge correctly determined that under present Arizona law and on the facts of this case, the employee was not precluded from receiving permanent partial disability benefits by virtue of his incarceration. It is not our function to question the wisdom of the legislative scheme, but to interpret and apply the statutes as they have been enacted.

In further support of their first argument, petitioners cite Bryant v. Industrial Commission, 21 Ariz. App. 356, 357-58, 519 P.2d 209, 210-11 (1974), for the proposition that "where the predominant cause of an injured workman's changed economic status is of his own making ... the Industrial Commission will not subsidize [him] for his miscalculations." The Bryant case arose out of a petition by an injured worker to readjust or rearrange his disability benefits pursuant to A.R.S. § 23-1044(F) after he voluntarily left his post-injury job to take a better job, but the new position was terminated after a short time, leaving him without a job and unable to find any employment. Bryant's reduced earnings were caused by his voluntary action, not by his industrial injury.[2]

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[2]In this regard, we also note such cases as Todd v. Hudson Motor Car Co., 328 Mich. 283, 43 N.W.2d 854 (1950), in which the partially disabled injured employee had been reemployed at the same salary at lighter work. He was fired for the illegal act of gambling at work and applied for and received compensation for partial disability during the resulting six month period of unemployment. The Michigan Supreme Court set aside the award of benefits, holding:

> It is the duty of a disabled employee to cooperate not only by accepting tendered favored employment which he is physically able to perform [citation omitted], but also by refraining from criminal conduct. . . . Where he engages in criminal gambling activities (continued next page)

We find the facts of the present case distinguishable from those of Bryant. Mr. Battaglia did not lose his job due to his voluntary criminal conduct, but rather because of his industrial injury. After the injury, he attempted to return to his job with the petitioner employer, but was unable to continue because of back pain and quit work some ten days after the injury. The record does not show that he has ever returned to work.

The question in the present case is whether the evidence was sufficient to support an initial determination that the employee had a loss of earning capacity caused by the existence of the permanent partial disability for work. A.R.S. § 23-1044(D) sets forth some of the factors to be considered in making this determination. The voluntary conduct of the claimant resulting in his incarceration and inability to work in order to mitigate his loss of earnings does not preclude him from proving the amount of his reduced monthly earning capacity caused by his job related physical impairment, based on an assumption that he could accept suitable employment. The employee's status as a prisoner does not excuse him from complying with the various requirements of the workmen's compensation statutes. Continental Casualty Co. v. Industrial Commission, 113 Ariz. 116, 547 P.2d 470 (1976). On the other hand, it does not preclude him from receiving benefits if he meets his burden of proof. Bearden v. Industrial Commission, supra. Moreover, A.R.S. § 13-904(D) provides in part that "[t]he conviction of a person for any offense shall not work forfeiture of any property, except if a forfeiture

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[2] (continued)

> while at work and is discharged for that cause, he will not be entitled to compensation for the resultant loss of earnings. His favored employment has ceased through his own volition and turpitude and not by reason of his accidental injury.

Id. at 289, 43 N.W.2d at 856.

is expressly imposed by law." The right to receive workmen's compensation benefits is a property right. Bugh v. Bugh, 125 Ariz. 190, 608 P.2d 329 (App. 1980). In the absence of legislation providing for a suspension of workmen's compensation benefits during periods while the claimant is incarcerated, A.R.S. § 13-904(D) indicates that the imprisonment does not preclude the award of benefits if the employee is otherwise entitled to receive them.

Petitioners' second contention is that the employee's incarceration is an economic circumstance which caused his loss of earning capacity, and he is thereby precluded from receiving benefits, citing Wiedmaier v. Industrial Commission, supra, and Fletcher v. Industrial Commission, 120 Ariz. 571, 587 P.2d 757 (App. 1978). Wiedmaier and Fletcher establish that where there are no jobs available solely because of general economic circumstances or other reasons unrelated to the industrial injury, the employee is not entitled to receive workmen's compensation benefits.[3] As stated in Wiedmaier:

> Where the workman shows he has made a good faith effort to obtain employment and that none is available, the carrier may show that the inability of the workman to obtain employment is not due to the workman's physical condition, but due to the fact that economic conditions are such that no jobs are available. [citation omitted] This follows the intent of the Workman's Compensation Act that the workman should be compensated for loss of earning capacity only. [citation omitted] Where there are no jobs available because of economic conditions, the workman is not prevented from obtaining work because of his physical impairment. He would not be hired regardless of his physical condition. Therefore, he has suffered no loss of earning capacity because of his industrial injury.

121 Ariz. at 129, 589 P.2d at 3 (emphasis added).

[3] Wiedmaier involved a widespread scarcity of construction jobs due to economic conditions in the construction industry and Fletcher, the closure of a copper mine which was "economically catastrophic to the area", 120 Ariz. at 572, 587 P.2d at 758.

However, the Industrial Commission

> ...should consider not only the actual impairment of the physical and mental capacity of the injured person to do work, but whether and to what extent his injury is likely to deprive him of the ability to secure the work which he might do if he were permitted to attempt it.

Ossic v. Verde Central Mines, 46 Ariz. 176, 191, 49 P.2d 396, 402 (1935).

As stated in Fletcher:

> The standard applied in virtually all of the cases which have come to our attention is that when a claimant loses employment as a direct result of economic or other reasons unrelated to his injury, he may nevertheless be entitled to compensation if he is able to show that the difficulties in finding other employment are due to his injuries.

120 Ariz. at 573, 587 P.2d at 759.

In this case, two labor market experts testified at the hearing. Both evaluated the employee's employment potential with regard to his age, education, training, work experience and his industrially caused physical limitations. Both conducted labor market surveys of the metropolitan Tucson area. Both experts agreed that, because of the respondent employee's industrial injury, his employment opportunities are limited to relatively sedentary unskilled jobs which pay low wages. Their testimony supported the findings of the hearing judge that the employee had the capacity to be employed in one of several positions available at a shooting equipment factory in Tucson at a rolled back monthly wage of $450.63. The findings and award were not based on any incapacity to work resulting from the employee's incarceration. The award has compensated the employee for his losses attributable to his industrial injury rather than for any loss attributable to his incarceration.

Finally, petitioners contend that the award may not be based solely on the hypothetical testimony consisting of questions

and answers by the expert witnesses where the employee made no attempt to seek employment. The hearing judge determined otherwise, finding that under cases such as Wiedmaier v. Industrial Commission, supra:

> [T]here is no logical or legal reason to assume that the only way a claimant can meet his burden of establishing the amount of his reduced earning capacity is through the showing of an unsuccessful good faith effort to secure suitable employment. One of the specific evidentiary guidelines that a hearing officer is required to consider in establishing the amount representing the applicant's reduced earning capacity under § 23-1044 D is " ... [T]he type of work the injured employee is able to perform subsequent to the injury... ." The undersigned can perceive of no legal reason why the applicant could not elect to meet his burden by relying upon his expert employment witness to show the type of available post injury work that the applicant was able to perform with his residual injuries and the amount that might be earned in such employment. The principle underlying the applicant's duty to mitigate his damages, see, Hoffman v. Brophy, 61 Ariz. 307, 149 P.2d 160 (1944) could be satisfied in such event by basing the loss of earning capacity award upon what the applicant would have merited had he accepted the available work within his capacities, Wiedmaier v. Industrial Com'n, supra; Bierman v. Magma Copper Company, 88 Ariz. 21, 352 P.2d 356 (1950).

We agree. As this court stated in Bearden, supra:

> We recognize that it may be difficult to determine loss of earning capacity while a person is confined with a disability which is less than a total disability, whether that total disability be permanent or temporary. The fact that a particular case presents a difficult problem does not resolve the case into one of no compensation.

Id. at 342-43, 483 P.2d at 574-75.

We believe the hearing judge correctly determined that the award could be based on the hypothetical testimony of the expert witnesses. Franco v. Industrial Commission, 1 CA-CIV 2372 (filed June 25, 1981).

The award is affirmed.

SANDRA D. O'CONNOR, Judge

CONCURRING:

LAURANCE T. WREN, Judge

DONALD F. FROEB, Judge

 CT 100 O'Connor

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Answers to Some Accusations

"With this nomination, the Administration has effectively said, 'Goodbye, we don't need you.' " That was the angry complaint of Mrs. Connaught Marshner, head of the National Pro-Family Coalition, at a Washington press conference, where luminaries of the New Right launched an all-out attack on Ronald Reagan's first nominee to the Supreme Court. Armed with accusations against Sandra O'Connor's record in the Arizona state senate—some of them gleaned from records, others based on insinuation and surmise—the critics charged that she is soft on touchstone social problems like abortion.

None of the charges have anything to do with O'Connor's suitability for a seat on the Supreme Court; by the standards of the New Right the seven Justices who recognized the constitutional right to an abortion in the 1973 *Roe* vs. *Wade* case would be disqualified for their decision. Moreover, it is unlikely that the New Right accusations will influence many Senators.

The New Right's complaints against O'Connor center on four issues:

Abortion. Right-to-lifers have attacked O'Connor for votes she cast as a state legislator on several separate bills. In 1973 she co-sponsored a measure that would make "all medically acceptable family-planning methods and information" available to anyone who wanted it. These "methods," her critics contend, might be interpreted to include abortion. In a vote of the Arizona senate's judiciary committee the following year, O'Connor reportedly opposed a "right-to-life memorial" that called upon Congress to extend constitutional protection to unborn babies, except where the pregnant mother's life was at stake. Also in 1974, she opposed a University of Arizona stadium bond issue after a rider had been attached banning state abortion funding to the university hospital.

O'Connor as Arizona senator

O'Connor does not recall her vote on the pro-life memorial (it was not officially recorded). She has solid, if legalistic, explanations for her other two votes. A strict constructionist, she does not believe that her family-planning measure could be interpreted to include abortion. The bond-issue rider, she believed, was not germane to the bill and therefore violated the state constitution.

Equal Rights Amendment. O'Connor, as her critics accurately charge, favored passage of the amendment by the state legislature in 1972, and two years later attempted to put ERA before the voters in a referendum. But she did not subsequently press for its passage. Her critics fail to note that other conservatives favored ERA at first and later changed their minds. In any case, Arizona is one of the states least likely to ratify ERA.

Pornography. Charges that O'Connor is soft on pornography are soft indeed. Principally, they stem from what New Rightists call her "drastic amending" of a bill that would have banned adult bookstores within a one-mile radius of schools and parks. O'Connor altered the restriction to 4,000 feet, but she clearly had no desire to corrupt youth. One possible motive: getting state law to conform with federal statutes, thus reducing the possibility of court challenges.

Drinking. In 1972, according to O'Connor's critics, she challenged a Democratic Senator who sought to remove the right to drink alcoholic beverages from a bill that would grant 18-year-olds all the rights of adulthood. The implication of the criticism is that O'Connor was soft on booze. The implication is wrong. O'Connor's point was that the proposed amendment was far too vague and a bill that included it might not withstand a challenge from the courts.

Apart from the disclosure by the White House that she described abortion as "personally repugnant," O'Connor remained silent last week about all of the New Right charges. Her suitable explanation: she would reserve her statements for the Senate confirmation hearings.

Time v. 118 July 20, 1981 p. 11

Press Flubs O'Connor Rank

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WHEN STANFORD University announced that Supreme Court nominee Sandra Day O'Connor was ranked third in the same law school class in which Justice William H. Rehnquist was ranked first, it seemed every reporter in the country had the same idea: find number two.

"The phone was ringing off the hook about it," said Jane Arnold of Stanford's public information office.

The journalistic scramble turned up an embarrassing problem: there apparently was no number two in the Stanford Law School Class of 1952. Nor a number one or three, for that matter.

The only thing resembling a class ranking that the law school could produce was the fact that both Mr. Rehnquist and Mrs. O'Connor were among 10 members of the class of 102 to be elected to the Order of the Coif, the national legal honorary society.

Stanford's news service director, Robert Beyers, said the school got the supposed rankings from a story by Lou Cannon in the Washington Post. The Post told its readers that the source for the rankings had been White House officials, who, the Post said, had gotten their information from Mr. Rehnquist.

Mr. Rehnquist was not available for comment last week.

July 27, 1981 v.3 — *David Berreby*

THE NATIONAL LAW JOURNAL · p.2

'Vindictive' Person Opposing O'Connor, President Asserts

By Fred Barbash
Washington Post Staff Writer

President Reagan, in a letter to an Illinois anti-abortion leader, has said that opposition to Supreme Court nominee Sandra Day O'Connor is being "stirred up" principally by one "vindictive" person in Arizona.

The letter itself is stirring up more anger among conservatives. Reagan did not name the "vindictive" person, but conservatives think he is referring to one of their most prominent anti-abortion activists, Arizona Dr. Carolyn Gersters.

In addition, data on O'Connor's voting record contained in the letter appears inaccurate, and conservatives again are charging Reagan with being uninformed on the history of his nominee.

Gersters reportedly started the criticism of O'Connor's abortion voting record in the Arizona legislature, and that led to an outcry from anti-abortionists following the O'Connor nomination.

Reagan's Aug. 3 letter, verified by the White House yesterday, was in response to a letter of protest sent to him by Marie Craven, secretary of the Illinois Pro-Life Coalition.

"I believe that most of the talk about the appointment was stirred up principally by one person in Arizona," Craven quoted Reagan's letter as saying. "I have done a great deal of checking on this and have found this person has something of a record of being vindictive," the president added without elaborating.

Reagan went on to describe, inaccurately, O'Connor's legislative vote in 1974 on a rider prohibiting abortions at the University of Arizona hospital. Reagan wrote Craven that the Arizona Senate "turned that down" because its members, including O'Connor, thought it was unconstitutional.

Legislative records indicate that the rider became law with Senate approval. O'Connor voted against it, according to legislative records.

CT 1088 O'Connor

CHICAGO TRIBUNE
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Patrick Buchanan

Reagan letter fuel for 'pro-lifers'

WASHINGTON — In an angry defense of his Supreme Court nomination of Judge Sandra Day O'Connor, President Reagan has charged the past president of the National Right-to-Life Committee with having "something of a record of being vindictive."

The unusual personal attack — clearly directed against Dr. Carolyn F. Gerster of Arizona — came in response to an impassioned letter of protest to the President from Marie Craven of Chicago. Mrs. Craven, an Irish Catholic mother of five and a Reagan Democrat in 1980, had written the President protesting the O'Connor nomination.

"I believe that most of the talk about my appointment was stirred up principally by one person in Arizona," the President replied. "I have done a great deal of checking on this and have found this person has something of a record of being vindictive. I have not changed my position. I do not think I have broken my pledge. Mrs. O'Connor has assured me of her personal abhorrence for abortion. She has explained, as her attacked did not explain, the so-called vote against preventing university hospitals in Arizona from performing abortions."

The "attacker," Dr. Gerster, an Arizona physician and for 10 years a leader in the Right-to-Life movement, is a longtime acquaintance of Judge O'Connor's and claims to have been in an "adversary position" while the latter was Republican leader in the Arizona Senate in the mid-1970s. Dr. Gerster is a prime mover in the campaign to effect withdrawal of the O'Connor nomination.

WHAT TRIGGERED the attack, unprecedented for the President, was a six-page letter from Mrs. Craven, asserting that Reagan — with the O'Connor nomination — had betrayed the Right-to-Life movement, had broken his platform pledge to nominate anti-abortion judges and justices, had committed a breach of faith. Saying she had prayed for the President's recovery from the March attempt on his life, she added she could not now see her way even to joining a welcoming crowd at O'Hare Airport.

Stung, the President appears to have dictated the typed response. Whether the letter was cleared by White House staff is not known. But it seems likely to catapult Dr. Gerster into greater prominence, stun the Right-to-Life movement, and reignite the embers of opposition to Judge O'Connor.

When Mrs. Craven received the letter she was "terribly upset." "His blanket statement astonishes me . . . it is ridiculous . . . He's trying to blame the whole thing on one person . . . She (Dr. Gerster) is not alone in her objection."

(Ironically, Carolyn Gerster was the movement leader to whom candidate Reagan made his personal commitments in a meeting in Rye, N.Y., Jan. 17, 1980. From that meeting, there issued almost universal support from the Right-to-Lifers for Reagan's nomination and election.)

WHILE THE President's letter detailed Judge O'Connor's reasons for voting against an amendment to a football stadium bill to outlaw abortions in Arizona university hospitals — she said it was nongermane, therefore, unconstitutional — it did not mention the three O'Connor Senate votes that have caused the Right-to-Lifers the greatest anguish.

The first was the 1970 vote by Sandra O'Connor in Judiciary Committee for legislation that "would remove all legal sanctions against abortions performed by licensed physicians," according to the Arizona Republic. (Judge O'Connor told Kenneth W. Starr of the Justice Department she "had no recollection of how she voted" on the bill.)

The second was Sen. O'Connor's co-sponsorship in 1973 of the Family Planning Act, which would have furnished "all medically acceptable family planning methods and information" including "surgical procedures" to anyone regardless of age. According to an opposition editorial in the Republic, the bill "could put the state into the business of encouraging abortions."

The third was Judge O'Connor's vote in Senate Judiciary against a memorial to the U.S. Congress to extend constitutional protections to the unborn — i.e., a Human Life Amendment. (It carried 4 to 2.)

ACCORDING TO Mrs. Craven, the President's failure to mention these three critical votes raises the question as to whether Reagan is accurately or fully informed on the O'Connor record.

In the penultimate paragraph of his letter, President Reagan restated his personal beliefs:

"I still believe that an unborn child is a human being and that the only way that unborn child's life can be taken is in the context of our long tradition of self-defense, meaning that, yes, an expectant mother can protect her own life against even her own unborn child's, but we cannot have abortion on demand or whim or because we think the child is going to be less than perfect."

Between the President's rhetoric and the O'Connor record there would appear to be an unbridgeable chasm for the Right-to-Life movement — a chasm almost certain to be broadened and deepened by the President's letter to Marie Craven.

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O'Connor

p. A8 ... Wednesday, September 2, 1981 THE WASHINGTON POST

O'Connors' Worth Tops $1.1 Million

By Jim Mann
Los Angeles Times

Sandra D. O'Connor, President Reagan's choice to be the first woman on the Supreme Court, has told the Senate Judiciary Committee that she and her lawyer husband have a net worth of more than $1.1 million.

According to data the committee released yesterday, more than half of the O'Connors' assets are in their home, now valued at $300,000, and in her husband's interests in a private Phoenix law firm.

Mrs. O'Connor also told the Judiciary Committee, in response to a questionnaire, that "I am keenly aware of the problems associated with 'judicial activism' . . . and [believe] that judges have an obligation to avoid these difficulties by recognizing and abiding by the limits of their judicial commissions."

While Mrs. O'Connor's financial statement did not exactly duplicate those that Supreme Court justices are required to file, it appeared to indicate that, if confirmed, she would be the second or third wealthiest member of the court. Justice Lewis F. Powell Jr. has filed financial statements showing that he and his wife have assets of well over $2 million, and Chief Justice Warren E. Burger has indicated that he has assets in the range of $1 million.

The calculation of the O'Connors' net worth was prepared July 14, and was submitted to the committee, along with other requested information, on Aug. 26.

Although she had filed some financial statements as an Arizona state legislator and appeals court judge, those earlier documents gave no details on the value of her investments.

According to the new filing, an interest in the law firm of Fennemore, Craig, Von Ammon & Udall, in which her husband, John J. O'Connor III, is a senior partner, is worth $342,850 — more than a third of the O'Connors' joint assets. With about 50 lawyers, the firm is one of Arizona's largest.

Mrs. O'Connor assured the Judiciary Committee that she would disqualify herself from participating in any case in which her husband's firm had been involved. The law firm has represented a number of forest products, railroad and mining companies — among them the Kennecott Copper Corp. and the Shell Oil Co.

Besides their home and the Phoenix law practice, the O'Connors' largest financial holding is her block of 13,083 shares in the Lazy B Cattle Co., the sprawling southern Arizona cattle and sheep ranch operated by her parents. She valued her interest in the ranch at $211,421, a figure she told the committee was "agreed to by the Internal Revenue Service in a 1975 gift tax return audit."

The O'Connors listed $48,000 in liabilities, the largest being a mortgage on their Phoenix home.

In response to a Judiciary Committee question about her view of the role of the judiciary within the American system of government, Mrs. O'Connor responded:

"Judges are not only not authorized to engage in executive or legislative functions, they are also ill-equipped to do so . . . . Judges who purport to decide matters of public policy are certainly not as attuned to the public will as are the members of the politically accountable branches."

She made no effort to play down her work as a feminist in her answers to the committee. Asked about her actions on behalf of the principle of "equal justice under law," she wrote as part of her answer: "As a legislator, I worked to equalize the treatment of women under state law by seeking repeal of a number of outmoded Arizona statutes."

Mrs. O'Connor is to appear before the committee when it opens hearings on her nomination next week.

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Christian Science Monitor p. 3

Sept. 3, 1981

New Right strategy: let's drag out O'Connor's confirmation hearing

Focus: abortion, women's rights, school prayer

By Julia Malone
Staff correspondent of The Christian Science Monitor
Washington

Abortion foes are gathering a head of steam for a last push against Judge Sandra Day O'Connor, the first woman to be named to the US Supreme Court.

One opponent spent two weeks scouting out Mrs. O'Connor's record in Arizona and combing through records of the years she served as Republican majority leader in the state senate.

Armed with his detailed report, right-to-life supporters have been knocking on senatorial doors charging that the Arizona appeals court judge is a feminist and a liberal — or at least, not a conservative.

So far no US senator has publicly opposed President Reagan's choice for the high court. But opponents say they hope conservative senators will ask enough tough questions at her confirmation hearings Sept. 9-11 to drag them out longer than planned.

And as a reminder of their disapproval, thousands of abortion foes are gathering in Dallas for a rally Sept. 3. While organizers deny that it is a "stop O'Connor" rally, her nomination clearly sparked the meeting.

Members of ultra-conservative groups hope that the hearings next week will reveal not only that O'Connor has consistently supported abortion rights but that she has been liberal in areas of criminal penalties and women's rights. Conservative Caucus director Howard Phillips labels her past record "radical feminist."

However, William Billings, director of the National Christian Action Coalition, spent two weeks in Arizona and claims to have done the most exhaustive study of O'Connor's record. He says that the nominee hardly fits into any particular political mold and that he hopes to shock liberals, too.

For example, Mr. Billings found that in 1973 then-state Senator O'Connor voted for a

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bill to prohibit labor unions from making political campaign contributions. And in 1972 she voted for a measure urging Congress to call a constitutional convention to pass an amendment to put voluntary prayers back into classrooms.

O'Connor also voted to urge the President and Congress to oppose handgun controls, and she has twice backed measures aimed at halting busing for racial balance in schools.

As evidence that O'Connor had liberal leanings, Billings found that she spoke out against a bill to restore the death penalty in 1973. According to one report, she remarked to the Arizona senate judiciary committee, "Georgia has the highest homicide rate in the nation and the highest rate of execution."

Among her other "wrongs," in view of her conservative opponents, O'Connor as a state legislator introduced an act to abolish public drunkenness as a crime and voted to lower the legal drinking age from 21 to 19.

From 1972 to 1974 O'Connor pushed for ratification of the Equal Rights Amendment (ERA) in the state legislature. (Arizona has never ratified the constitutional amendment.) She sponsored a bill to lift the eight-hour restriction on working days for women.

As further evidence of Judge O'Connor's "feminism," critics are pointing to her term on the Defense Advisory Committee on Women in the Armed Forces, during which she favored dropping restrictions, such as a ban on Navy women from serving on combat ships.

What most rankles her opponents, who are virtually all "right-to-lifers," is her record on abortion. In 1970 O'Connor reportedly voted in the judiciary committee for a proposed bill that would have legalized abortion long before the US Supreme Court struck down anti-abortion laws in 1973.

A US Department of Justice memorandum dated last July 7 reports that during a telephone interview Judge O'Connor said she could not recall her 1970 committee vote, which was not officially recorded. However, a local newspaper report said that she had voted for the 1970 bill, which eventually failed in the state Senate.

Mr. Billings also found that in 1974 O'Connor opposed a move urging Congress to overturn the Supreme Court ruling permitting abortions. And in the same year, she voted against an appropriations bill for the University of Arizona Hospital because it had an anti-abortion provision. The July Justice Department memorandum reports that she voted no "on the ground that the Arizona Constitution forbade enactment of legislation treating unrelated subject matter." (The bill, including the rider, was made law, however.)

"I don't think we have anything devastating" on O'Connor, says Peter B. Gemma Jr., executive director of the National Pro-Life Political Action Committee. But he contends that the information is enough to prolong the hearings.

"We're hoping that she will give the kind of answers that are indicative of her past" during the hearings, says Mr. Gemma, whose strategy is to make them so long and controversial that the nominee will drop her name. Recalling the two cases of President Nixon's appointees who were forced out by controversy, Gemma

says, "We hope to create that kind of atmosphere."

The only nonideological criticisms that opponents say they have found involve charges of conflicts-of-interest during her 1970-1974 years in the Arizona Senate. However, the charges appear to be weak, and even her opponents are not emphasizing them.

One charge is that she voted for an automobile dealership licensing bill that made it more difficult for new dealerships to move into the state. At the time her husband, John Hay O'Connor III, was serving on the board of directors of a car dealership company. Mr. O'Connor, a lawyer, explained in a telephone interview that he had "no financial interest" in the company.

As a state senator, Mrs. O'Connor voted for 12 banking and financing bills, although she was serving at the time on the board of a major bank.

John P. Frank, a Phoenix lawyer and a foremost expert on judicial conflict-of-interest law, calls conflict charges in these cases "frivolous." He said that only those who had a direct financial interest have conflicts, not persons serving on boards or as advisers or lawyers.

Mr. Frank, who served as the US Senate's expert witness when it probed a conflict-of-interest charge against Nixon Supreme Court nominee Judge Clement F. Haynesworth Jr., said he sees no such difficulties for O'Connor. Adding that he is neither a political ally nor close friend of Judge O'Connor, Frank points out that she has been "cautious if anything to a fault."

"She is aware that you've got enemies out there if you're a front-line woman," he says. He points to the fact that she disqualified herself from voting on a handful of banking bills even though it was not absolutely necessary.

She drew some criticism in 1970 when she proposed amendments to an air-pollution law. One Arizonan charged her with trying to weaken the law, which would benefit Kennicott Copper Company, a client of her husband's firm. Senator O'Connor responded in the Senate journal that the changes strengthened the law.

Judge O'Connor, who arrived in Washington, D.C., Sept. 2, must first undergo questioning from the Senate Judiciary Committee and then win a confirmation vote in the full Senate before taking a seat on the high court, which opens its fall term Oct. 5.