

**CIVIL LAW UPDATE**

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**I. TORTS**

**A. Adult Protection Services Act (Vulnerable Adult Statute)**

**1. Voluntary Agreement for Arbitration**

*Mathews v. Life Care Centers of America, Inc.*, 524 Ariz. Adv. Rep. 13 (App. Div. 1, February 21, 2008) (Judge Irvine). ADULT PROTECTIVE SERVICES ACT DOES NOT PREVENT THE ENFORCEMENT OF THE VOLUNTARY ARBITRATION AGREEMENT ENTERED INTO BY AN ELDERLY PERSON'S AUTHORIZED REPRESENTATIVE. The plaintiff was admitted to Life Care Center of Paradise Valley suffering from diabetes and dementia thus qualifying him as a vulnerable adult under A.R.S. § 46-451(A)(5) & (10). Plaintiff's granddaughter had a general power of attorney to make decisions and enter agreements on his behalf and on the day he was admitted she signed an agreement on her own behalf and on behalf of her grandfather which stated "the execution of this arbitration agreement is voluntary and is not a pre-condition to receiving medical treatment at or for admission to the facility."

Subsequently, the plaintiff filed a lawsuit alleging negligence and vulnerable adult abuse/neglect/exploitation and the defendant filed a motion to compel arbitration. It was determined that an AAA arbitrators panel could not perform the arbitration as specified in the agreement and therefore substitute arbitrations would need to be found. Plaintiff's motion to dismiss was granted by the trial court on the basis that the agreement arbitrarily takes away the vulnerable adult's right to a trial by jury.

The language in the statute at issue is A.R.S. § 46-455(O) which states, "A civil action authorized by this section is remedial and not punitive and does not limit and is not limited by any other civil remedy or criminal action or any other provision of law. Civil remedies provided under this title are supplemental and not mutually exclusive."

The appellate court found for the defendant, ruling that an arbitration agreement is not a civil remedy nor a criminal action under the statute; instead, arbitration is a means to resolve a civil action in an alternative forum.

The court indicated that its ruling might be different if the plaintiff had lost his right to a jury trial involuntarily. Because this was a voluntary acceptance of an arbitration

clause, the court found there was no conflict in exercising that right voluntarily and the APSA's guarantee of civil remedies. In short, the plaintiff voluntarily gave up the right to a trial by jury by signing the agreement.

Further, the agreement in this case allows the arbitrator to apply and consider Arizona law. This will allow arbitrators in this case to consider the APSA in resolving the case.

## **B. Damages**

### **1. Ability of Minor to Recover for Medical Expenses Incurred While A Minor**

*Lopez v. Cole*, 214 Ariz. 536, 155 P.3d 1060 (App. Div. 1, April 12, 2007) (Judge Orozco). MEDICAL EXPENSES INCURRED BY A MINOR ARE THE RESPONSIBILITY OF THE MINOR'S PARENTS AND A CLAIM FOR THOSE EXPENSES CAN ONLY BE BROUGHT BY THE PARENTS. THE STATUTE OF LIMITATIONS IS NOT TOLLED FOR THE PARENT'S CLAIMS UNTIL THE MINOR REACHES MAJORITY. In 1992, the defendants' children cut a two foot square hole in the fence between their property and the neighbors. In 1993, while Laryn and his mother Melody Cole were staying with the Coles, his paternal grandparents, Laryn crawled through the hole and was kicked in the head by a horse.

Eight years later, Laryn's uncle and guardian ad litem filed a lawsuit to recover for his injuries and medical expenses against the Coles, the neighbors who owned the horse, and the mother alleging negligence and attractive nuisance. The mother and the neighbors settled their claims.

Subsequently, the trial court ruled that Laryn could not recover his medical expenses. The case went to trial and he was awarded \$30,000 but the jury found that the Coles were only 5% responsible (the jury found the mother to be 95% responsible for Laryn's injuries) resulting in a judgment against the Coles for \$1,500 plus \$2,046 in costs for a total award of \$3,546.

Laryn argues on appeal that his right to recover the medical expenses is not barred by the two year statute of limitations because it is tolled pursuant to A.R.S. § 12-502. The defense argued and the trial court agreed that the right to recover medical expenses belonged to the parents and was in fact barred by the statute of limitations. *Pearson & Dickerson Contractors, Inc. v. Harrington*, 60 Ariz. 354, 137 P.2d 381 (1943) holds that an action for damages for the medical expenses of an injured child is a child's parent and not the child. But, *Pearson* also held that a claim for medical expenses may be brought by a child if a parent has "consented to" recovery by the child. In other words, by their consent the parents may release their claim to the child in such a way that it amounts in the law to an assignment. Laryn argues that the parent's impliedly consented to his bringing the claims for medical bills but the court found there was no evidence in the record that the parents ever gave consent, implied or in fact. Laryn argues his parents consented by waiver because they did not

timely bring the claim on their own behalf. Waiver however is not the equivalent of consent and *Pearson* only allows for recovery where there is consent. When a party waives a right, he or she relinquishes the right, and any potential claim based on the right is extinguished. In contrast, a parental consent does not extinguish the claim but rather allows it to survive in another's hands.

Laryn next argues the doctrine of necessities, which other jurisdictions apply when the child is personally liable for expenses such as medical expenses because his parents cannot afford to pay them, if so, he may then recover them as part of his injury claim. Here, Laryn claims that the Arizona Health Care Cost Containment System has a lien for the medical expenses on the case which they can enforce against Laryn. However, the court found that because AHCCCS did not record such a lien within 60 days from the date of notification of the hospital discharge with the County Recorder pursuant to A.R.S. § 36-2915, there was no such right of recovery. Further there was no evidence that Laryn's parents were unable or unwilling to pay Laryn's medical bills or, importantly, that Laryn will ever be personally responsible for them.

Finally, Laryn's argument that public policy mandates one has the right to recover these expenses under Article 18, § 6 and Article 2, § 13 of the Arizona Constitution. A precedent to the public policy supporting such an argument under the Constitution would be that Laryn have a right to the medical expenses in the first place. Under Arizona law, absent his parent's consent he has no such right.

## **2. Lost Earning Capacity**

*Felder v. Physiotherapy Associates*, 215 Ariz. 154, 158 P.3d 877 (App. Div. 1, May 22, 2007) (Judge Irvine). LOST EARNING CAPACITY DAMAGES NEED NOT BE PROVEN WITH SPECIFICITY IN PERSONAL INJURY ACTION. In 1992, the Milwaukee Brewers drafted the plaintiff in the first round. From 1992 through 1996 he progressed from rookie league to Class A to AA to AAA level.

In 1996, plaintiff injured his elbow. He healed during the off-season but tore an elbow ligament during spring training in 1997. He had surgery to repair the ligament and the Brewers sent him to Physiotherapy for physical rehabilitation and paid his rehabilitation costs.

After some period of time in rehabilitation, one of the physiotherapy physiotherapist decided it was time for the plaintiff to begin hitting. They had him to go to their Tempe location and practice in a batting cage which was designed to allow rehabilitation pitchers to throw balls; it was not designed, intended, or safe for batting. While using the cage, plaintiff hit a ball that ricocheted off a concrete lip in the batter's box, bounced back at him and struck his left eye. He sustained a permanent eye injury which resulted in a blind spot in the middle of his vision as well as blurry vision that worsens in bright light. This injury ended his major league baseball career. In the trial in 2000, the plaintiff called player agent Slade Mead as an expert witness on the issue of damages. He opined that the plaintiff would have made

it to the major leagues. He conceded his opinion was speculative. The jury awarded \$8,000,000 apportioning 25% fault to the plaintiff for a net award of \$6,000,000.

On appeal the judgment was reversed on the basis that the lost earning claim was too speculative.

At his second trial, the plaintiff had Al Goldis testify as an expert witness for him about whether he would have played in the major leagues and the expected length of his career. Goldis was a special assistant to the General Manager of the New York Mets. He had twenty-seven years of experience in drafting, scouting and developing players. He was not paid to testify. He reviewed the Brewers pre-draft scouting reports and minor league coaching reports about the plaintiff. He testified to a reasonable degree of certainty that not only would the plaintiff have made it to the major leagues but that he would have been an impact player. Goldis also compared the plaintiff to major league players who hit 15 or more homeruns per season. He felt Felder had more power than Frank Thomas, a player that Goldis had drafted. Given that Thomas had been playing for approximately 17 years, Goldis testified that Felder's career would have lasted between 12 and 15 years. The evidence further showed that the plaintiff received some of the benefits usually afforded to major league players. When he injured his elbow in 1997, he was treated by a doctor and trainer who were assigned to work with major league players. The Brewers paid for his surgery and rehabilitation. It would have cost the Brewers less to just release him.

Felder also had Mead testify again and he said he was familiar with Felder while he was playing ball and that he was "a very high profile baseball player back when he was being drafted and coming out of Florida State University." Mead selected two comparable minor league players, Jeremy Burnitz and Geoff Jenkins, who moved on to the major leagues to compare with Felder. They were both college outfielders, first round draft picks, power hitters and played for the Brewers. Mead valued a seven year career for the plaintiff at \$27,790,440. The defense presented two experts who worked in major league baseball and stated that they did not think the plaintiff had a chance of making it in the majors.

Once the right to damages is established, uncertainty as to the amount of damages does not preclude recovery. Though absolute certainty is not required, the jury must be guided by some rational standard. Fairly compensating the injured person in a personal injury case may require trusting the jury to fairly evaluate evidence that is inherently uncertain but is the best evidence available. A central task for juries is resolving disputes over difficult and conflicting evidence.

Simply dreaming of a career as a professional athlete is not enough to create an issue of fact appropriate for a jury. However as the Restatement sets forth, it is desirable that "an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered."

The trier of fact must distinguish between persons with only vague hopes of entering a new profession and those with the demonstrated ability and intent to do so.

Here, the plaintiff had more than a vague hope of a successful career as a professional player. He had advanced within professional baseball and had signed another AAA contract. His injury plainly took away his chance to continue and advance as a player. As to what degree of reasonable certainty is required to establish his lost income damages, the degree of certainty that is reasonably required varies depending on the circumstances of each case. In an action for personal injuries “the law does not fix precise rules for the measure of damages but leaves their assessment to a jury’s good sense and unbiased judgment.” Some cases will simply not be conducive to a high degree of certainty because the future itself is uncertain. This does not, however, deprive an injured plaintiff of a remedy. A plaintiff may still claim damages in an amount supported by the best evidence available and the essential consideration is that the jury must be guided by some rational standard. For damage to a sports career, the evidence reasonably available will generally be what was presented at trial in this case – qualified expert testimony concerning the athlete’s prospects, statistics, showing past performance, and the comparative data concerning other athletes. Here, the jury learned in detail about his batting averages, fielding performances and injuries between 1992 and 1998. The jury was provided with evaluations from minor league coaches and opinions from several experts with major league player development experience. The jury also heard about the economics of baseball compensation including how long a professional’s career might be and what similar players were being paid.

Finally, because the plaintiff suffered serious physical harm, he is able to recover for his anxiety over his less than one percent chance of neovascularization of the eye.

### **3. Offset for Worker’s Compensation**

*Cundiff v. State Farm Mutual Automobile Insurance Company*, 217 Ariz. 358, 174 P.3d 270, (Sup. Ct., January 10, 2008) (Justice McGregor). UIM CANNOT BE OFFSET BY WORKERS’ COMPENSATION.

A Pima County Deputy Sheriff was involved in an automobile accident in 1997 and received worker’s compensation benefits as a result. The officer then sued the at-fault driver of the other vehicle and settled for \$15,000, the limit of the driver’s liability coverage. Thereafter the sheriff made an UIM claim under her personal motor vehicle liability insurance policy issued by State Farm which provided \$25,000 in UIM coverage. An arbitrator awarded \$40,000 in damages but when the plaintiff attempted to collect, the insured took the position that its policy provision allowing for an offset of workers’ compensation benefits applied and that therefore the plaintiff’s recovery was reduced to \$10,000. The plaintiff then sued State Farm seeking a declaratory judgment that the workers’ compensation offset provision was unenforceable per se or that she was deprived of her right to be made whole by virtue of the provision.

A.R.S. § 20-259.01(d) defines the scope of UIM coverage and states “to the extent that the total damages exceed the total applicable liability limits, the under-insured motorist coverage provided in sub-section B of this section is applicable to the difference.”

Here the plaintiff’s damages were \$40,000 minus the \$15,000 in liability coverage paid, resulting in a difference of \$25,000, the amount of the underinsured motorist coverage.

Because the UIM statute only allows an offset for liability coverage, the question becomes is workers’ compensation “liability insurance”?

The Arizona Supreme Court held that workers’ compensation is not liability insurance. The court found that both liability insurance and workers’ compensation “are types of casualty insurance, they are separate and distinct.” Liability insurance is “insurance against legal liability,” while workers’ compensation is “insurance of the obligations accepted by, imposed upon or assumed by employers under law.” Liability insurance, unlike workers’ compensation, provides coverage based on fault. Indeed, workers’ compensation is specifically designed to compensate without regard to fault. Accordingly, because workers’ compensation is not liability insurance, the statute does not permit consideration of workers’ compensation benefits in determining the amount of UIM coverage available to an insured.

State Farm’s analogy to uninsured motorist coverage is not persuasive to find a different result since the underinsured motorist coverage is defined differently than uninsured motorist. The statutory provision defining UM coverage expressly provides that such coverage is “subject to the terms and conditions of that coverage” and therefore the insurer may in the policy specifically set forth the right to an offset for workers’ compensation. Finally, the court held that its decision was to be applied prospectively as well as retroactively.

#### **4. Jury Finds Liability And No Damages: New Trial On Damages.**

*White v. Greater Arizona Bicycling Association*, 216 Ariz. 133, 163 P.3d 1083 (App. Div. 2, August 8, 2007) (Judge Brammer). WHERE A JURY FINDS DEFENDANT LIABLE FOR DEATH OF FATHER AND THERE WAS UNCONTESTED EVIDENCE SUPPORTING DAMAGE, FINDING OF LIABILITY MANDATES FINDING OF DAMAGES. The plaintiff’s decedent was participating in a bicycling event organized by the defendants when his bike tire got caught in a guard rail throwing him forward to his death. The jury ultimately awarded \$250,000 to the decedent’s surviving wife but nothing to his surviving children. Fifty percent fault was assessed against a non-party from the Department of Transportation, twenty-five percent to the decedent and twenty-five percent to defendant GABA. *Sedillo vs. City of Flagstaff*, 153 Ariz. 478, 480, 737 P.2d 1377, 1379 (App. 1987), holds it is error to permit a jury upon finding a defendant liable in a wrongful death action to fail to

award some damages to a claimant when that claimant's evidence of loss, economic or otherwise is uncontested.

The decision by one division of the Court of Appeals is persuasive with the other division. The trier of fact may not arbitrarily reject uncontradicted evidence when nothing intrinsic in the evidence itself or extrinsic in the circumstances cast suspicion on it.

The bottom line message in this case is that when defending you always want to challenge and counter plaintiff's damage evidence as jury nullification of a right to damages by a particular person or persons will not stand in the face of the liability finding and uncontroverted damage evidence. A jury may not properly disregard the testimony of a witness even an interested one without some reason to do so. Here the children of the decedent testified unequivocally about facts demonstrating compensable loss. Nothing in the record indicates that testimony is inconsistent or unbelievable nor was it contradicted in any way.

## **5. Punitive Damages: Admissibility of Alcohol Consumption**

*Belliard v. Becker*, 216 Ariz. 356, 166 P.3d 911 (App. Div. 1, August 23, 2007) (Judge Orozco). EVIDENCE OF ALCOHOL CONSUMPTION AND OTHER CONDUCT PRIOR TO AN ACCIDENT OCCURRING WHEN LIABILITY IS ADMITTED IS STILL ADMISSIBLE ON THE QUESTION OF PUNITIVE DAMAGES BUT CANNOT BE CONSIDERED BY THE JURY IN ASSESSING COMPENSATORY DAMAGES.

Defendant while driving northbound on Highway 101 in the right hand lane crossed over three lanes of traffic, ran into the steel cable separating northbound and southbound traffic and came to rest on the southbound side of the road facing north. Defendant then exited his vehicle and discovered the steel cable attached to his bumper. He then turned his car around and pulled out into the southbound traffic. As he drove away he "felt the jerk on the front end." Eventually the defendant lost control of his vehicle which came to rest a second time. He again exited his vehicle and found the cable wrapped around the axle. Later it was found he had dragged 1200 feet of cable down the highway for some distance.

The plaintiff was a passenger in another vehicle which as it entered the highway to travel southbound was passed by the defendant's vehicle. The vehicle plaintiff was riding in became entangled in the cable, started spinning and came to rest in an embankment. The plaintiff suffered a head injury.

At the scene, the investigating officer smelled alcohol on the defendant's breath. The defendant admitted to having had "a couple of drinks" earlier in the evening. He blew a .031 on a breathalyzer which led the officer to conclude he was not intoxicated and thus he was not charged with DUI.

Before trial, the defendant moved in limine to preclude any mention of alcohol consumption or the bars he visited prior to the accident on the basis it was not relevant or that the probative value was outweighed by the prejudicial effect of the evidence.

Plaintiff responded that the driving behavior of the defendant was not consistent with the action of a sober person and that it was in fact his attempt to avoid arrest for DUI that caused his accident, and therefore the alcohol consumption and bar hopping was relevant to prove his reckless conduct.

The Motion in Limine was granted and the plaintiff was awarded \$3,600 in damages which was approximately three times her medical bills from the hospital visits shortly after the accident but did not include over \$188,000 in expenses which arose a week later when her brain injury symptoms began to develop.

The Court of Appeals found that because the defendant had admitted liability, the alcohol consumption was not relevant to establish either negligence or liability. However, a punitive damage claim is based upon proof that a defendant “consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.” Alcohol consumption would be relevant to a question of whether the defendant behaved sufficiently recklessly to justify an award of punitive damages. Accordingly, the trial court erred in precluding this evidence on the question of punitives. The appellate court felt that there was sufficient evidence upon which a jury could conclude that the defendant behaved so recklessly as to be subject to punitives. Similarly, the evidence of driving across lanes of traffic, wrapping his vehicle around a cable and then driving down the road with the cable dragging behind would all be admissible as well on this point.

The appellate court felt that the jury in awarding compensatory damages had determined the bulk of the medical expenses were not caused by this accident and that this determination had nothing to do with the consumption of alcohol, the pre-accident conduct, or punitive damages, and therefore that verdict would not be disturbed.

The court recognized that whether to order a new trial just on the question of punitive damages was a question of first impression in Arizona. Finding that most states have approved such a procedure, the Arizona Court of Appeals found that where a distinct and severable issue is to be decided, a trial on that issue alone is appropriate unless such a trial would result in injustice. Here, the court found that the issue of punitive damages is distinct and severable from the issue of compensatory damages, particularly because the evidence of alcohol consumption is admissible only for purposes of proving punitive damages. The case was thus reversed and remanded for a retrial as to punitive damages only.

## C. Defamation

### 1. Failure to State a Claim/Accrual Against Governmental Entities/Interference with Business Relationship

*Dube v. Likins*, 216 Ariz. 406, 167 P.3d 93 (App. Div. 2, June 28, 2007) (Judge Howard). FAILURE TO STATE A CLAIM FOR INTERFERENCE WITH BUSINESS RELATIONSHIP SHOULD BE SUSTAINED WHERE NO SPECIFIC ALLEGATION OR SPECIFIC RELATIONSHIP WITH A SPECIFIC INDIVIDUAL OR ENTITY IS SET FORTH IN THE COMPLAINT. DEFAMATION CLAIM IS STATED EVEN WHERE THE ALLEGED PUBLICATION OCCURS BETWEEN AGENTS OF THE SAME ENTITY, APPLYING A QUALIFIED PRIVILEGE THAT SAID COMMUNICATIONS CAN ONLY CONSTITUTE DEFAMATION WHEN MADE IN BAD FAITH. In 1998, the plaintiff transferred to the University of Arizona as a post graduate student. In October 2002, he complained to the University that his dissertation advisor was acting improperly and requested a change. Plaintiff ultimately obtained his doctoral degree in May, 2004. In September of 2004 he sued the advisor for tortiously interfering with his ability to obtain a Ph.D. During discovery he claims he found additional information to support a similar claim against the University of Arizona and its administrators and sought to amend the complaint. The allegations against the University were dismissed based upon the running of the statute of limitations.

By case law Arizona uses a discovery rule for accrual of the statute of limitations. The statute accrues on the date the defendant knew or should have known he or she was injured by a particular defendant. However, Arizona Revised Statute §12-821.01 defines the accrual date differently for public entities only requiring that the plaintiff know or reasonably should know she has been damages without respect to what particular defendant may have caused the harm.

The plaintiff's claim was that the University had reported incorrect information to the Immigration and Naturalization Service which hampered his ability to obtain a degree as well as employment. Because the same allegations was stated in his first complaint this particular cause of action was time barred in that the amendment to the complaint was not filed until a year after the initial complaint was filed.

The plaintiff's attempt to allege a claim of interference with a business expectancy against the University and its employees was further deficient in that there were no factual allegations in the complaint that the University in some way assisted the faculty advisor in interfering with his business expectancy or somehow substantially aided or abetted the faculty advisor in the interference or the mere allegation of the failure to reveal an investigatory report was insufficient to establish the elements of this court and therefore the dismissal for failure to state a claim was appropriate. The tort requires the identification of a specific relationship with which the defendant interfered. There being no such allegation in the complaint the complaint was properly dismissed. The plaintiff alleged no such business relationship. Specifically

he failed to identify any specific employer with whom he sought employment and who was dissuaded from hiring him by acts for which the University officials could be held responsible. He did not even allege an employer of which the University officials were aware. Next the plaintiff argues that if in fact he failed to state a claim the court erred in not giving him time to again amend the complaint and properly state a claim. Here, the plaintiff was seeking the right to amend the complaint to allege that he in fact had a job expectancy in the field of engineering. Because such a new allegation would still not survive a motion to dismiss for failure to state a claim it was not improper for the court to deny the motion for leave to amend.

As to the plaintiff's claim of defamation with respect to the letter sent by the University President to his faculty advisor, the allegations in the complaint when taken as true could support finding that he allowed this claim timely because he did not know and would not have known about the alleged defamatory letter until less than a year before the filing.

As to whether or not the defamation claim stated a claim upon which relief could be granted the central issue was whether or not there was a publication. Essentially the letter in question was sent by the president to a professor. The issue of whether communication between two agents of the same principle constitutes publication is one of first impression and authorities are split across the country. The Arizona Court of Appeals, following the contemporary view as stated by Dan Dobbs in *The Law of Torts* held that such a communication does not fact constitute a publication but that a privilege prevents recovery where the statements are made in good faith. Statements that the plaintiff committed an "indiscretion" or "transgressions" and reference in the letters to use of University equipment as being "contrary to the professor's specific instructions" and therefore "unauthorized" could be construed as statements that the plaintiff acted in violation of University policy and could bring him into disrepute, contempt or ridicule and therefore constituted a claim for defamation.

Finally, statements in the letter with reference to "unhappy people" and "unconfirmed allegations" were found not to state a claim and those allegations were properly dismissed since the plaintiff was not adequately identified as the person to which such allegations were directed.

## **D. Defenses**

### **1. Qualified Immunity for Defamatory Statements by the Attorney General**

*Goddard v. Fields*, 214 Ariz. 175, 150 P.3d 262 (Ariz. App. Div. 1, January 16, 2007) (Judge Orozco). ATTORNEY GENERAL'S PRESS RELEASE CONCERNING DEFENDANTS ONLY ENTITLED TO QUALIFIED IMMUNITY (IMMUNE IF MADE IN GOOD FAITH). Arizona's Attorney General filed a lawsuit on behalf of five state agencies against a real estate developer alleging

numerous violations of Arizona law in the attempt to develop business and residential property adjoining state trust lands. The Attorney General issued a press release in conjunction with the lawsuit, and in a counter-claim the defendants allege the press release was defamatory. The Attorney General sought to have the counter-claim dismissed, taking the position that being an executive officer can publish statements even if defamatory and such statements are absolutely privileged. The trial court disagreed and found the Attorney General only has qualified immunity.

Absolute immunity would give complete protection to the Attorney General for anything he said whether it was defamatory or not. Qualified immunity, on the other hand, shields only those statements made in good faith.

## **2. Qualified Immunity for Failure to Retain Suspect in Custody**

*Greenwood v. State of Arizona*, 522 Ariz. Adv. Rep. 22, (App. Div. 1, January 22, 2008) (Judge Winthrop). POLICE IN ARIZONA HAVE QUALIFIED IMMUNITY AGAINST CLAIMS THAT THEY NEGLIGENTLY FAILED TO HOLD A SUSPECT IN CUSTODY AND THAT FAILURE TO HOLD RESULTED IN INJURY TO A THIRD PARTY. A murder suspect while fleeing from Phoenix police officers through city streets at a speed more than 75 miles per hour struck the plaintiffs' decedent's vehicle killing her. Later, the suspect was convicted of second degree murder, aggravated assault, theft and aggravated driving under the influence of alcohol.

At the time of the collision, the suspect had a lengthy criminal history which included six prior arrests for DUI-related offenses. Prior to the collision he was in fact arrested for a DUI offense but gave a false name. Because a fingerprint technician failed to correctly process his fingerprints, the prior arrests did not show up and he was ultimately released.

A.R.S. §12-8201.02 provides “unless a public employee acting within the scope of the public employee’s employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for the failure to make an arrest or the failure to retain an arrested person in custody.” Plaintiffs’ allege this immunity did not apply here because their claim was based upon negligent “recordkeeping” as opposed to negligent failure to “retain or arrest.” The court found this argument unpersuasive. The court pointed out that although the plaintiffs “frame their allegations in terms of recordkeeping, they did not allege that the recordkeeping, in and of itself, cause them harm. Instead, they alleged that the faulty recordkeeping resulted in [the suspect] being out of custody on January 5, 2003, and, as a result he was able to harm plaintiffs. This is the type of allegation that the legislature intended the qualified immunity statute to cover because at its core, it is an allegation that defendants failed to arrest or retain [the suspect] in custody. Further, if qualified immunity were inapplicable simply because the form of plaintiff’s allegations did not mimic the statute, it would encourage plaintiffs to purposely plead their claims to avoid the application of the statute.”

### **3. Judicial Immunity From Civil Suit For Court Employee**

*Burk v. State of Arizona*, 215 Ariz. 6, 156 P.3d 423 (App. Div. 1, March 6, 2007) (Judge Timmer), review denied September 25, 2007. A COURT EMPLOYEE'S EVALUATION REPORT WITH RESPECT TO VISITATION RIGHTS IN A COURT PROCEEDING ARE ABSOLUTELY PROTECTED BY A JUDICIAL IMMUNITY AND THE COURT IS NOT SUBJECT TO CIVIL LIABILITY. An employee of the Superior Court's Conciliation Services Department was asked to prepare an evaluation report with respect to a mother's request to modify visitation rights. The mother, as primary custodial parent, had requested that the father's visitation be changed from Sundays to Thursday through Sunday on alternating weeks. The court employee prepared a report recommending that the father become the primary custodial parent and the mother be allowed only supervised visitation. The mother objected and the court asked for a second evaluation by Dr. Ralph Earle. His report opposed the court employee's recommendations, advising the court to maintain the mother as the primary custodial parent and grant her a modification request. This recommendation was adopted by the court. Thereafter the mother sued the court employee and the state, alleging gross negligence, negligence, violation of 42 U.S.C. § 1983 and specifically violations of the plaintiff's right to exercise religion freely. This allegation was based upon the mother's theory that the court employee was attempting to ensure the child attended the Church of Jesus Christ of Latter Day Saints by restricting the father's visitation rights.

Judicial immunity provides that judges are absolutely immune from damages lawsuits for their judicial acts even when such acts are in excess of the jurisdiction or are alleged to have been done maliciously or corruptly. Judicial immunity is not limited to judges. Court officers, employees and agents who perform functions intimately related to or that are an integral part of the judicial process are also protected by the doctrine.

However, judicial immunity is not groundless. It has been found not to apply to probation officers who did not act pursuant to a court directive and had in fact ignored the specific direction of the court. In order to determine if actions by a court employee are outside the immunity, one must look at the nature of the act rather than the act itself to determine whether it was a judicial act.

Here the Superior Court referred the plaintiff's motion to modify parenting time to conciliation services for evaluation and report. The court employee of conciliation services performed this function and presented a report to the court for its consideration. Thus, regardless of any error or malice by the court employee in

performing her function, she performed a function that was an integral part of the judicial process thereby entitling her to the judicial immunity.

#### 4. **Contractual Limitation of Liability**

*1800 Ocotillo, LLC., v. The WLB Group, Inc.*, 522 Ariz. Adv. Rep. 37 (App. Div. 1, January 1, 2008) (Judge Timmer). PUBLIC POLICY DOES NOT PROHIBIT ENFORCEMENT OF CONTRACTUAL LIMITATION-OF-LIABILITY PROVISIONS IN CONSTRUCTION CONTRACTS OR ARCHITECT-ENGINEER PROFESSIONAL SERVICE CONTRACTS, BUT THE ENFORCEABILITY MUST ALWAYS BE DECIDED BY JURY. Ocotillo, a real estate developer contracted with WLB for engineering and survey work with respect to a townhouse project abutting a Salt River project canal. The contract specifically provided that any claims of negligence by WLB would be limited to a recovery of fees actually paid by the client.

Subsequently SRP refused to issue permits because the WLB plans incorrectly incorporated part of the canal right of way for the construction project. Ocotillo sued WLB for negligence in their work. WLB counter-claimed for unpaid fees and asserted that their exposure was limited to fees already paid.

In reliance upon A.R.S. § 10-2234, Ocotillo argued the limitation of liability was against public policy. The aforementioned statute provides that “a shareholder of a professional corporation is personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by the shareholder or by any person under the shareholder’s direct supervision.” The statute goes on to prohibit a professional from shielding himself or herself from liability by virtue of creating a professional corporation. The Arizona Court of Appeals distinguished the statute from the case at bar in that the statute only governs professional corporations. Rather, the court said it would expect the legislature to place such an expression of policy in statutes governing particular professionals noting that WLB is incorporated under Arizona’s general corporation law and not as a professional corporation and is not obligated to be incorporated as such.

Ocotillo then turned to A.R.S. § 32-159 which renders void a provision in a construction contract or architect-engineer professional service contract that “purports to require the promisor to indemnify, to hold harmless or to defend the promisee from or against liability for loss or damage resulting from the sole negligence of the promisee.” The court distinguished this statute as well finding that a limitation of liability provision does not exonerate the promisee but instead caps the amount of liability. The statute on the other hand prohibits contractual provisions that in fact exonerate the promisee and require a defense. Parties in Arizona are generally free to contract as they wish and limitation of liability provisions have been accepted in commercial contracts outside the construction industry. In short, if the legislature wanted to prohibit limitation of liability provisions, the court expected to specifically address that issue in the statutory language.

However, Article 18, Section 5 of the Arizona Constitution requires that the jury decide the enforceability of limitation of liability provisions. That section of the constitution states that “the defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall at all times be left to the jury.”

## 5. Governmental Immunity

*Tostado v. City of Lake Havasu*, 538 Ariz. Adv. Rep. 5, (Ct. App. Div. 1, September 9, 2008) (Judge Weisberg). NO ABSOLUTE IMMUNITY FOR CITY WHERE CITY FAILS TO ACT UNLESS CITY CONSIDERS ISSUE AND AFFIRMATIVELY DECIDES NOT TO ACT.

A Lake Havasu Fire Department official notified a local doctor about a concern regarding carbon monoxide levels in the Bridgewater channel of the lake. The doctor had the National Institute for Occupational Safety and Health [NIOSH] come out and test the channel and sure enough the levels were high. The doctor then sent the report to the mayor and city officials. When they failed to act on this report he then turned the report over to the local newspaper which published the results.

City officials discussed the letter from the doctor and the level of CO in the channel at a staff meeting but no official action was taken. Later the city held a meeting at which it decided to authorize Sonoma Technology Inc. to study the level of carbon monoxide in the channel but it did not implement any safety measure such as limiting channel traffic or putting up warning signs.

On May 13, 2003 Sonoma recommended that additional data be collected. Ultimately the city authorized this but on May 25, 2003 Mark Tostado drowned while at the channel. An autopsy revealed that Tostado’s body contained elevated levels of carbon monoxide. The medical examiner in fact concluded that it was the combined effects of the carbon monoxide and ethanol which rendered Tostado unconscious and unable to save himself.

A wrongful death action followed and the City moved for summary judgment on the grounds it owed Tostado no common law duty and that the City had no legislative immunity because the wrongful death complaint alleged negligence and gross negligence “in the exercise of a legislative function.” The summary judgment was granted by the trial court.

The court of appeals first disagreed with the superior courts refusal to give credence to a district court finding in *Heck v. City of Lake Havasu* where another individual drowned for the same reasons in the Channel as Tostado did three months later. The court of appeals noted that although the superior court was right that it was not bound by the district court’s ruling, the court of appeals found the reasoning in *Heck* to be sound and largely adopted it.

Next the court of appeals noted that absolute immunity for legislative functions is a question of law for the court and subject to *de novo* a review.

Arizona Revised Statute §12-820.01 gives absolute immunity for the exercise of “a juridical or legislative function.”

The City argued that its conduct here was squarely within the legislative function language. The City pointed that it had considered the problem and affirmatively decided to exercise its fact finding authority as a legislative body to learn more and hence hired Sonoma to do research which ultimately resulted in ordinances prohibiting boats from idling while beached in the channel and granting the police chief the discretionary authority to act in the event the air quality nonetheless continued to deteriorate.

The court of appeals noted that the enactment of the ordinances could not create immunity here since they were not enacted until after Tostado’s death. The court acknowledged that the city had held two council meetings and discussed the carbon monoxide problem and hired Sonoma to study it.

The Court found that a public entity is entitled to immunity if it “makes an actual decision or affirmative act,” but went on to state that “an actual decision is made when deciding to do something or deciding not to do something.” On the other hand, the statute does not immunize non-decisions, such as a failure to make a decision or a decision by default . . . there must be some form of “considered” decision, that is, one which consciously balances risks and advantages.”

Based upon this finding, the court of appeals pointed out that there was no evidence that the city here made an actual decision regarding whether to enact an ordinance or not, rather, the court found that the city’s decision was one by default because it decided to fund studies of the problem rather than vote on whether to enact the ordinance. “The city’s choice to postpone the decision of whether to enact an ordinance no matter how fully deliberated, is materially different than actually deciding whether to enact an ordinance. Because no actual decision making occurred, the city did not exercise a legislative function that is entitled to absolute immunity.”

The City’s second argument was that under A.R.S. §12-820.01(A)(2),(B) it was entitled to immunity under the “administration function” provision. Here the states that immunity exists when the government exercises an administrative function involving the determination of a fundamental governmental policy. Once again, where “no actual decision is made, there is no governmental function or statement of public policy at issue.”

Next the court turned to the issue of duty and found that “a government possessor of land owes a duty to public invitees to conform to a particular standard of conduct to protect against foreseeable and unreasonable risks of harm.” Based upon this

principal, the court of appeals found there was a question of fact as to whether or not the city possessed the channel. Arizona had quit-claimed to the city “all “right, title and interest” in the channel, which the city accepted. On top of that the city attorney had twice authored opinions for the city council and mayor that “the primary obligation” for law enforcement within the channel belonged to the city because the Channel was in fact held open for use by the public there was no question but that Tostado was an “invitee” and therefore owed a duty by the city.

## **E. Dram Shop Liability**

### **1. Superseding Intervening Cause**

*Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 153 P.3d 1064 (App. Div. 1, March 8, 2007) (Judge Winthrop). WHERE BAR ALLOWS PATRON TO BECOME INTOXICATED BUT DRIVES PATRON HOME AND PATRON THEN RETURNS TO THE BAR, DRIVES HER CAR FROM THE BAR PARKING LOT ONTO THE STREET CAUSING AN ACCIDENT, THE PATRON’S ACT OF RETURNING AND DRIVING HER CAR WAS A SUPERSEDING CAUSE AND THE BAR WOULD NOT BE LIABLE FOR THE RESULTING INJURIES IN THE ACCIDENT. Thunder Pass operates a tavern known as Spirits Bar and Grill. In February of 2005 Dawn Roque became intoxicated at the tavern. On leaving, she backed her vehicle into a parked Jeep in the parking lot and then drove forward over a parking block. A tavern employee confiscated her keys and called a taxi cab to transport her home. The cab never arrived. Another tavern employee eventually drove Roque and return her keys to her at her home. Within an hour and unbeknownst to the tavern employees, Roque returned to the parking lot behind the tavern to get her vehicle. Shortly thereafter, she collided head on with a vehicle drive by the plaintiff. Plaintiff sued the bar claiming liability under A.R.S. § 4-244 and respondeat superior.

Prior to 1983, the common law in Arizona barred claims against tavern owners even if they negligently overserved a patron who later caused injury to a third person. In 1983, this doctrine was abolished by the Arizona Supreme Court finding that tavern keeper liability could be premised on statutory authority, specifically A.R.S. § 4-244 (14). In essence, the Supreme Court held that tavern owners must exercise reasonable care in serving intoxicants to patrons who might later injure themselves or innocent third parties whether on or off the premises.

However, a tavern owner may be relieved of liability for an injury to which the owner has in fact made a substantial contribution (i.e., here overserving Roque) if the plaintiff’s injury occurs due to a later intervening event of independent origin for which the owner is not responsible. In this respect, the event must be an intervening event, that is one unforeseeable by a reasonable person in the position of the tavern owner and then looked back upon after the event, the intervening event must appear extraordinary.

In 1986, the legislature passed A.R.S. § 4-311 providing a licensee is liable for property damage and personal injuries if a court or jury finds that the licensee sold spirituous liquor to a purchaser who was obviously intoxicated, the purchaser consumed the liquor, and the consumption was the proximate cause of injury or property damage.

Here, the court held that the tavern's employees fulfilled their legal duty of affirmative, reasonable care to Roque and the public by separating Roque from her vehicle and arranging for as well as subsequently providing, the safe transportation of Roque to her residence. In part, this is based upon the express language in A.R.S. § 4-244(14) which requires the tavern owner to stop further service or sale of alcohol to an intoxicated person and to arrange for transportation of the intoxicated individual off the premises by a non-intoxicated person. There was no evidence that anyone knew Roque intended to return shortly thereafter to retrieve her car. Therefore, the tavernkeeper under these facts fulfilled its duty as a matter of law. Additionally, the court found that Roque's decision to return to the tavern and retrieve her automobile to be a superseding and intervening cause. Specifically the court concluded that "although as the plaintiff correctly notes, it is well known that highly intoxicated people make poor decisions, finding proximate causation based on such reasoning is simply too attenuated and might ultimately subject tavern owners to unlimited liability, a result that would no more serve the public policy than finding nonliability in all circumstances." Roque's decision to return that night to retrieve her vehicle while still intoxicated was unforeseeable and extraordinary, thus constituting a superseding, intervening event of independent origin that negated any negligence on the part of the tavern or its employees.

## **2. Liability for Seller**

*Henning v. Montecini Hospitality, Inc.*, 217 Ariz. 242, 172 P.3d 430 (App. Div. 2, December 20, 2007) (Judge Eckerstrom). WHERE SELLER OF BAR NO LONGER EXERCISED CONTROL OF EMPLOYEES, SELLER HAS NO DRAM SHOP LIABILITY.

Plaintiff's son was seriously injured while a passenger in a car driven by a friend. Both plaintiff and the friend had been consuming alcohol at Famous Sam's prior to the automobile accident. Plaintiff sued Famous Sam's for dram shop liability.

At the time of the incident, the bar was owned by Montecini Hospitality, Inc. but was being operated by Zimbow Enterprises, Inc., a company that was in the process of purchasing the bar.

Two months before the accident Montecini had executed a purchase agreement with Zimbow and Zimbow took possession of the bar. Zimbow obtained a temporary liquor license pending the finalization of the purchase agreement. The accident occurred after Zimbow took possession and assumed operation of the business but before ownership had fully passed from Montecini. Plaintiff sued Montecini and

Zimbow but then settled with Zimbow and proceeded against Montecini, who obtained summary judgment from the trial court on the basis that it did not employ into the alcohol server at the time of the accident.

There was evidence that up until the time of the accident, Montecini was still giving advice to Zimbow as to how to run the bar, including issues related to the service of alcohol. However, there was no evidence from which a jury could infer that the terms of the purchase agreement required Zimbow to follow Montecini's advice. Because there was no evidence of this, there was no evidence that Montecini controlled service of alcohol at the bar. In fact, the purchase agreement had shifted full function of the bar to Zimbow before the date of the accident.

Plaintiff also argued that the duty to exercise reasonable care in serving alcohol is non-delegable and that the seller cannot avoid liability by ceding control to a purchaser. However, under *Callender v. MCO Properties*, 180 Ariz. 435, 441, 885 P.2d 123, 129 (App. 1994), the court has explicitly found that a lessor can delegate to a lessee the duty to exercise reasonable care in serving alcohol. The same rationale should apply to the purchaser of a bar who assumes full control.

The plaintiff then argued *Gipson* and that a duty could be found from public policy grounds because of the high level of concern regarding alcohol-related injuries and deaths. However, the court found that in A.R.S. § 4-101 through 4-312 the legislature had gone to some lengths to limit the liability of non-licensees for serving alcohol and therefore the court could not enact a public policy in a different direction.

Finally, the plaintiff argued that the defendant should be liable for negligent hiring and training of the employees since they were first hired and trained by Montecini before Zimbow took over the business and hired them. The plaintiff relied on *McGuire v. Arizona Protection Agency*, 125 Ariz. 380, 381-82, 609 P.2d 1080, 1081-82 (App. 1980), where a homeowner was allowed to sue an alarm company after its former employee returned to the home, disconnected the alarm, and committed a burglary. The court distinguished the case because the alarm company had a continuing duty to the homeowner at the time of the theft even though the employee no longer worked for the defendant. Here, Montecini no longer employed or exercised any control over these employees at the time of the plaintiff's injury in the alleged tortious conduct. There was no evidence that the plaintiff was a customer of Montecini at the time Montecini trained or supervised the staff. The court specifically found that a defendant would not be liable for harms caused by the acts of a former employee in the context of dram shop liability. This finding was based primarily upon the long determined scope of a defendant's duty to third parties with reference to the defendant's right to control to person, i.e., where the defendant no longer exercises control and supervision of the employee it can no longer be liable for the employee's acts. To hold otherwise would mean that an employer could never escape potential liability for the actions of a former employee.

## **F. Duty And Causation**

### **1. Failure to Prove**

*Grafitti-Valenzuela v. City of Phoenix*, 216 Ariz. 454, 167 P.3d 711 (App. Div. 1, September 27, 2007) (Judge Barker). WHERE PLAINTIFF PRESENTED NO EVIDENCE OF PRIOR CRIMES AT BUS STOP AND NO EVIDENCE THAT CRIMINALS WHO ABDUCTED PLAINTIFF TOOK ADVANTAGE OF ALLEGED DEFICIENCIES IN BUS STOP IN ORDER TO MAKE ABDUCTION, SUMMARY JUDGMENT IS APPROPRIATE ON ISSUES OF EXECUTION OF DUTY AND CAUSATION.

On January 6, 2003 the eleven-year-old plaintiff was at a City of Phoenix bus stop when she was abducted and subsequently repeatedly sexually assaulted.

The City of Phoenix moved for summary judgment on the basis that there was no evidence of prior criminal activity at the bus stop in question and no evidence that the criminal took advantage of the alleged absence of a shelter and lighting in order to abduct the plaintiff. Therefore, plaintiff failed to prove duty, exercise of duty, causation and further the criminal's conduct was an intervening superseding cause.

On appeal, the Arizona Court of Appeals recognized under the recent Arizona Supreme Court case of *Gipson v. Kasey*, 214 Ariz. Adv. Rep. 141, 145, 150 P.3d 228, 232 (2007) the question of foreseeability is never relevant to the issue of duty. The Court of Appeals overturned the trial court's finding that there was no duty in this case and instead focused upon whether or not the duty of care was breached.

The court found that the existence of a duty must not be confused with the details of the conduct required to satisfy the duty and when there are no facts or reasonable inferences from the facts to support a breach of duty, summary judgment is appropriate.

The scope and nature of the conduct required to satisfy a duty to keep premises reasonably safe is limited to keeping them safe from those harms that are foreseeable harms. This however does not mean that the city is required to take every precaution possible to prevent crime; the city is only required to act reasonably under the circumstances.

The plaintiff's allegations were essentially that the city had failed to install a protective shelter and increase lighting at the bus stop and further failed to warn about the prospects of crime. However, the evidence presented in support of summary judgment which stood uncontroverted was that this was a low crime area and there were no prior criminal acts known to have occurred at this particular bus stop. There was also evidence that the plaintiff's mother had actually walked her to the bus stop and was aware of the absence of a shelter and the lighting conditions and nonetheless left her there alone. Further, there was no evidence that the criminal who abducted

her took advantage of the absence of a shelter or lighting before the kidnap. In fact, the evidence was that he walked up to her and spoke to her first before the abduction occurred.

The court found that if the city was required to install additional lighting and shelter at this particular bus stop it would be required to install the same at virtually every city bus stop in an attempt to prevent all crime at all locations. This is not what the law requires.

Because there was no evidence of prior crimes, the court held that a reasonable jury could not find that the city breached the duty of care it owed the plaintiff. This is particularly true where the evidence and the records showed that crime occurred at city bus stops no more frequently than it occurs anywhere else in the city. Thus, if the city were required to warn the plaintiff about a risk of criminal activity, it would be tantamount to requiring the city to warn each and every rider or their parent or guardian that crime exists throughout the city.

On the question of causation, the court found that a defendant's acts are the proximate cause of a plaintiff's injury only if they are a substantial factor in bringing about the harm. The "but for" test is frequently used to define causation, i.e., the injury would not have occurred "but for" the defendant's negligent conduct.

Relying on *Shaner v. Tucson Airport Authority*, 117 Ariz. 444, 573 P.2d 518 (App. 1977), the court found that there was no causation here. In *Shaner* a husband brought suit for the abduction and murder of his wife at the Tucson airport alleging that the poorly lit and unsecured parking lot was a contributing factor to the abduction. However, there was no evidence that either of these factors actually played any role in the abduction. In *Shaner* the court held that the evidence shows at most a possibility that the inadequately lighting and security was a substantial factor in bringing about Leesa's abduction but does not rise to the level of a reasonable probability.

Similarly here there was no evidence that the absence of lighting or a shelter in any way contributed to the plaintiff's abduction. It is possible it did but there was no evidence upon which a reasonable jury could conclude that the absence of these features caused this accident. Because the court's analysis of the breach of duty and causation are dispositive of the cause, it did not address the argument of superseding and intervening cause.

## **2. Giving Prescription Drugs to Others**

*Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (S. Ct., January 22, 2007) (Justice Bales/Justice Hurwitz concurring). EXISTENCE OF LEGAL DUTY NOT FACT SPECIFIC AND DOES NOT REQUIRE A FINDING OF FORESEEABILITY. The defendant attended an employee holiday party and gave prescription pain medication to a co-employee at the party. The defendant knew the employee receiving the

prescription medication was dating the plaintiff's decedent and that the plaintiff's decedent had asked for this pain medication in the past to use for recreational purposes. The defendant gave the co-employee eight Oxycontin pills which were later consumed by the plaintiff's decedent along with a large amount of alcohol. The plaintiff's decedent died that night as a result of the alcohol and drug consumption.

To begin with, the court found that the existence of a duty is a distinct issue from whether the standard of care has been met in any given case. "Duty is defined as an obligation recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." The standard of care is defined as "what the defendant must do, or must not do to satisfy the duty."

Whether the defendant owes a duty is a threshold issue in any case because defendants may not be held accountable for damages they carelessly caused no matter how unreasonable their conduct, if they have no duty.

The Court expressly held that foreseeability is not a factor to be considered by courts when making a determination as to the existence of a duty. Foreseeability necessarily involves an inquiry into the specific facts of an individual case and often determines whether a defendant acted reasonably or proximately caused the injury. These are questions of fact for the jury and do not relate to the question of duty. Foreseeable danger does not dictate the existence of duty but only the nature and extent of the conduct necessary to fulfill the duty.

Historically, duties of care have arisen from special relationships such as family relations, contractual relations, landowner-invitee relationships, tavern owner-patron relationships. However, a finding of duty does not necessarily depend on a pre-existing or direct relationship between the parties. In fact, the Court found that a fact-specific analysis of the relationship between the parties is a problematic basis for determining if a duty of care exists. The issue of duty is not a factual matter; it is a legal matter to be determined before the case specific facts are considered.

Public policy may also support the recognition of a duty of care. It is well settled that the existence of a statute criminalizing conduct is one aspect of Arizona law supporting the recognition of a duty. A criminal statute will establish a tort duty provided the plaintiff is within the group of people the statute is designed to protect.

In Arizona there are several statutes which prohibit the distribution of prescription drugs to persons lacking a valid prescription. A.R.S. § 36-2531(A)(6); § 32-1961(A); § 13-3408(A)(5). These statutes are specifically designed to avoid injury or death to people who have not been prescribed drugs who may not have a medical need for them and have not been instructed as to their proper usage and dangers. Clearly the plaintiff's decedent was within the class of persons intended to be protected by these statutes. It matters not that these criminal statutes are silent with respect to whether or not they are intended to create civil liability.

The plaintiff's decedent's own actions may reduce recovery under comparative fault principles or preclude recovery if deemed a superseding cause of the harm, but those are determinations of fact to be made by the jury.

Justice Hurwitz in his special concurring opinion found that the Third Restatement of Torts puts the matter ("an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm") in proper perspective and might very well be the best and easiest rule to apply in determining whether or not a duty exists. However here, the parties did not brief or argue this issue, so it will be left for another day.

### **3. Duty of City v. State to Maintain Intersection**

*State of Arizona v. City of Kingman*, 523 Ariz. 24, (App. Div. 1, February 14, 2008) (Judge Snow). INTERSECTION WHOLLY CONTROLLED AND MAINTAINED BY STATE WAS STATE'S SOLE RESPONSIBILITY AND CITY'S "JOINT EFFORT" TO IMPROVE THE INTERSECTION DID NOT CREATE DUTY ON CITY TO MAINTAIN INTERSECTION. Plaintiffs were injured when their vehicle collided with a trailer at an intersection in Kingman, Arizona. Plaintiff sued the city and state for improper control of the intersection. The city was dismissed on summary judgment based upon the fact that the state was solely responsible for the maintenance and control of the intersection and despite the fact the city had participated in a "joint effort" to improve the intersection. A.R.S. §12-332(A) vests the exclusive control and jurisdiction over state highways with the state and Department of Transportation. It was undisputed that the intersection in question was wholly within the state's control and jurisdiction pursuant to the statute. The state has the ability to share the duty to keep and maintain roadways by virtue of intergovernmental agreements with a city such as Kingman, A.R.S. §20-401(B), or when a city exercises actual control over the roadway. Thus, in *Sanchez v. City of Tucson*, 199 Ariz. 128, 953 P.2d 168 (1998), where the state had authorized the City of Tucson to install a traffic light, there was evidence upon which a jury could find joint control and a duty on both governmental entities to the injured plaintiff.

In the instant case, however, there was no evidence that ADOT ever authorized the city to exercise any authority to design or make any improvements on the intersection in question or that the city ever did so. Further there was no evidence of any IGA between the city and ADOT pertaining to this intersection. To the contrary, all facts seem to support the finding that the city recognized and accepted ADOT's control over the intersection prior to the accident. Although the city may have attempted to influence ADOT's decision on how to design and operate the intersection, this did not amount to "control over the intersection."

"In short, before a city can be held liable for actual control of an intersection that is part of the state highway system absent an IGA, the city must assume responsibility

for the planning or design of the intersection, or it must actually participate in maintaining or operating it.”

## **G. Fraud**

### **1. Civil Fraud – Constructive Fraud – Agency**

*Dawson v. Withycombe*, 216 Ariz. 84, 163 P.3d 1034 (App. Div. 1, July 24, 2007) (Judge Kessler). **DIRECTORS MAY BE PERSONALLY LIABLE TO CREDITORS AND POTENTIAL CREDITORS FOR MISREPRESENTATIONS MADE BY OTHER CORPORATE OFFICERS AND EMPLOYEES OF THE CORPORATION AS WELL AS FOR CONSTRUCTIVE FRAUD.** A private corporation by the name of Futech was planning to go public. The plaintiff Dawson was persuaded to invest in the company. He claims that he was promised a certain priority of security via the other lenders investing in the corporation which ultimately was not the case. Ultimately Futech went bankrupt. Following a jury verdict against the defendants in the amount of \$5 million the defendants appealed.

Defendants claim there was no fraud because all of the alleged representations were “statements of future prospects” which cannot form the basis for fraud. The law is that in order for it to be actionable fraud the false representation must be of a matter or fact which exists in the present or has existed in the past and cannot be predicated upon the mere expression of an opinion or upon representations in regard to matters or estimate or judgment. Here, a promise to give the plaintiff priority on his security interest constituted a representation as to the present status of that security interest and therefore an actionable misrepresentation existed.

Second, the defendants allege that its employee making the representation with respect to the security interest had no knowledge of the falsity of the representation. To the contrary the court found that the record amply demonstrated this employee had procured a good deal of the corporation’s financing information and was actively involved in its financial affairs. From this fact the jury could have inferred that the employee was well aware at the time that the loan agreement was drafted that there were encumbrances on the corporation’s assets that would not be subordinate to the plaintiff’s security interest. The Defendants claim that the plaintiff had not right to rely on the representations because he was provided with other financial information showing there were other security interests superior to any interest he could obtain. The court found the information provided the plaintiff did not speak to security interest but rather loans that could very well have been unsecure. Further once the party requests assurances, i.e. that his security interest is first, the alleged tortfeasor cannot misrepresent such assurances and then contend the alleged victim had no right to rely on the representations.

Under Arizona law a director cannot be liable without some kind of personal participation in the tort or at least acquiescence by knowledge of the tort combined with a failure to act. Plus a corporate officer or director is not liable for the torts of

other officers unless he takes part in the commission of the tort by personally voting for or otherwise participating in them. Directors are not liable for misrepresentations made by their agent if the agent in fact made them without their knowledge or instruction and in reality deceived them as well as the shareholders. Here there was no evidence of a personal agency relationship between the defendants and the employee and these facts will have to be produced at a new trial to sustain a verdict.

On the theory of “aiding and abetting” a person to be liable for such a tort must be shown to have known the tortfeasor’s conduct constituted a tort and the person substantially assisted or encouraged the primary tortfeasor in accomplishing the tort. There was no evidence that the defendants were aware of the fraudulent scheme to procure the loan thus the aiding and abetting theory must fail.

With respect to the conspiracy the plaintiff must show by clear and convincing evidence that the defendant and at least one other person agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means and accomplish the underlying tort which in turn caused damages. Here there was no clear and convincing evidence of an actual conspirator agreement by the defendants and the theory therefore must fail.

Plaintiffs also plead constructive fraud. Constructive fraud is a breach of legal or equitable duty which without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others violates public or public confidence or injures public interests. This tort does not require a showing of intent to deceive or dishonesty of purpose but it does require a fiduciary or confidential relationship. Further, the breach of duty by the person in a confidential or fiduciary relationship must induce justifiable reliance by the other to his detriment. There is no evidence that the plaintiff relied on any acts or inactions by the defendants to create the constructive fraud.

## **H. Implied Warranty of Habitability and Workmanlike Construction**

### **1. HomeBuilder – Vendors**

*The Lofts at Fillmore Condominium Association v. Reliance Commercial Construction*, 516 Ariz. Adv. Rep. 26 (App. Div. 2, November 6, 2007) (Judge Barker). IMPLIED WARRANTY OF HABITABILITY AND WORKMANLIKE CONSTRUCTION IS LIMITED TO “HOME BUILDER-VENDORS” BUT DOES NOT APPLY TO “NON-VENDOR HOMEBUILDERS.” Here, the defendant Reliance contracted with the plaintiff to perform work on a residential condominium conversion project which the developers owned and designed. Loft members purchased condos in the project from developers. The question arose whether Lofts had an implied warranty claim against Reliance for alleged construction defects when neither Lofts nor its members had a contractual relationship with Reliance for its work on the project. The court held they did not.

An implied warranty of good workmanship claim is a contract claim and it has long been the law that only parties to a contract may maintain such an action. *Hayden Bus. Ctr. Condo. Ass'n v. Pegasus Dev. Corp.*, 209 Ariz. 511, 512-13, 105 P.3d 158, 159 (App. 2005). The warranty allows the purchaser to recover in contract for defects in the structure itself as such defects render the home less than the purchaser bargained for.

*Richards v. Power Craft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984) created an exception to this rule. In *Richards*, some of the plaintiffs had purchased directly from the builder while others had purchased from previous owners. They all brought implied warranty claims and the Arizona Supreme Court on public policy grounds created an exception to the privity of contract requirement to allow all of these home purchasers to bring the claim. Public policy favored protection of innocent purchasers against builder-vendors who tend to be larger, more sophisticated entities. However, subsequently, in *Hayden* the court limited the *Richards* exception to apply only against “homebuilder-vendors.” Here the court defined “homebuilder-vendor” to mean a contractor who also sells to a purchaser who will live in the home. Reliance was not such an entity. Reliance sold its work to the developer.

Consequently, the exception should not apply here as the entity to whom Reliance sold its work was not an unsophisticated small entity.

## **I. Legal Malpractice**

### **1. Statute of Limitations – Discovery Rule**

*Keonjian v. Olcott*, 216 Ariz. 563, 169 P.3d 927 (App. Div. 2, October 18, 2007) (Judge Vasquez). LEGAL MALPRACTICE IS TORT GOVERNED BY TWO YEAR TORT STATUTE OF LIMITATIONS.

A mother and daughter signed a contract for the construction of house on real property in Green Valley, Arizona and asked the family lawyer to draft a deed and later a gift letter to appropriately apportion the interest in the real property between the mother and the daughter. A dispute regarding the mother’s percentage interest rose and the lawyer was sued for giving bad advice with respect to how the document should be drafted. The lawyer moved for summary judgment on the basis that the two-year statute of limitations had run.

The plaintiff argued that the contract statute of limitations should apply since the matter arose out of a contract between the attorney and client. Summary judgment was granted by the trial court.

The Court of Appeals first recognized that in Arizona legal malpractice claims are generally governed by the statute of limitations for tort claims in A.R.S. § 12-542 and that the discovery rule to determine when a cause of action for legal malpractice accrues applies. The discovery rule applies not only to the discovery of negligence

but also to discovery of causation and damage. Here, the statute began to run when the plaintiff became aware or should have been aware she was harmed. This occurred certainly no later than when she sued her daughter and her daughter's husband alleging misrepresentations in the deed and gift letter. This complaint was filed more than two years before the filing of the legal malpractice action.

Finally, the only time the contract statute of limitations might apply to a legal malpractice action is when there is a specific promise contained in the contract, the non-performance of which forms the basis of the claim. The fact that an attorney may have carried out a task in a negligent manner in violation of the duty imposed on him by law to represent his client in accordance with the applicable standard of care does not equal "non-performance" under the attorney-client contract.

## **J. Medical Malpractice**

### **1. Res Ipsa Loquitur**

*Sanchez v. Tucson Orthopaedic Institute*, 537 Ariz. Adv. Rep. 11 (Az. Ct. App. Div. 2, August 25, 2008) (Judge Eckerstrom). TO MAKE A MEDICAL NEGLIGENCE CLAIM OF RES IPSA LOQUITUR PLAINTIFF MUST DEMONSTRATE BY APPROPRIATE EXPERT AFFIDAVIT THAT BOTH DEFENDANTS CONTROLLED THE INSTRUMENTALITY THAT PROBABLY CAUSED THE INJURY. Here the plaintiff took the position that the negligence was the act of one doctor or another but did not attempt to prove or establish that the instrumentality was within the control of both. As such, the plaintiff could not avoid Dr. Levi and Tucson Orthopaedic's Motion for Summary Judgment.

### **2. Wrongful Life**

*Myers v. Hoffman-La Roche, Inc.*, 217 Ariz. 5, 170 P.3d 254 (App. Div. 1, October 5, 2007) (Judge Johnsen). PRODUCTS LIABILITY/MEDICAL MALPRACTICE: INJURY IN UTERO CAUSED BY ACCUTANE. INJURY CLAIM VERSUS WRONGFUL LIFE CLAIM, LEARNED INTERMEDIARY DOCTRINE, FAILURE TO STATE A CLAIM, ADEQUACY OF WARNINGS.

Plaintiff was born with severe cognitive and physical birth defects related to mother's consumption of acne prevention medication Accutane.

Plaintiff sued for injuries she sustained while in her mother's womb while mother was consuming the drug. A claim for wrongful life is not allowed under Arizona law. However, where the allegation is that the negligence caused plaintiff's injuries while in utero and seeks damages for those injuries, it is not a wrongful life case but rather a personal injury case and is allowed.

The Learned Intermediary Doctrine provides that the manufacturer or supplier of a prescription drug has no legal duty to warn the consumer of the dangers of its drug, as long as adequate warnings are provided to the prescribing physician.

The complaint alleged that a drug manufacturer failed to fully inform the prescribing physician of necessary safety precautions required to prevent risks anticipated in connection with the drug. Defendant's motion to dismiss would be denied where complaint alleged failure to provide adequate instructions to doctors on pregnancy prevention and not just inadequate warning regarding the dangers of the drug. A claim was stated for negligence against both the physician and the drug manufacturer that would withstand a motion to dismiss based on the Learned Intermediary Doctrine.

### 3. Vicarious Liability

*Law v. Verde Valley Medical Center*, 217 Ariz. 92, 170 P.3d 701 (App. Div. 1, November 13, 2007) (Judge Gemmill). IN MEDICAL MALPRACTICE ACTION, DISMISSAL WITH PREJUDICE OF DOCTOR ELIMINATED ANY VICARIOUS LIABILITY OF MEDICAL CENTER FOR THE CONDUCT OF THE DOCTOR. ELIMINATION OF JOINT LIABILITY HAS NOT CHANGED THE LAW WITH RESPECT TO VICARIOUS LIABILITY FOR THE ACTS OF A SERVANT VIS-A-VIS THE MASTER. Plaintiff's decedent died at the Verde Valley Medical Center when left alone he fell and hit his head. In the suit two doctors were sued based upon the allegation the death was caused by their failure to properly diagnose and treat the patient's condition which would have resulted in better supervision. However, before the trial, the doctors settled and there was a stipulation to dismiss them from the lawsuit with prejudice. Prior to trial VVMC was given summary judgment on the question of whether or not it was vicariously liable for the acts of the dismissed doctors. Arguing that where the master's liability is based solely on the negligent acts of his servant, a judgment in favor of the servant relieves the master of any liability and a dismissal with prejudice is the equivalent of a judgment on the merits.

Plaintiffs argued that this legal principle is no longer good law because of the enactment of the Uniform Contribution Among Tortfeasors Act which abolished joint liability.

The Arizona Court of Appeals disagreed, finding that although UCATA has abrogated joint liability for most tortfeasors it has not changed the law regarding vicarious liability. In fact, under A.R.S. §12-2506(D)(2), there is an express exception to the abolition of joint liability stating that "a party is responsible for the fault of another person [where] the other person was acting as an agent or servant of the party." Finally, although A.R.S. §12-2504 states that a release of one joint tortfeasor does not automatically release all other joint tortfeasors, this statute has no application here because it applies only to releases and covenants and not the right to sue or enforce a judgment, and the statute does not address dismissals with prejudice of pending actions. Finally, the doctors and VVMC are not true joint tortfeasors

under Arizona law. Any liability VVMC may have had for the actions or inaction of the doctor would have been vicarious and not a result of joint or concerted action.

#### **4. Preliminary Expert Opinion Affidavit**

*Sanchez v. Old Pueblo Anesthesia, P.C.*, 2 CA-CV 2007-1031, \_\_\_ Ariz. Adv. Rep. \_\_\_ (App. Div. 2, May 30, 2008) (Justice Eckerstrom). PRELIMINARY EXPERT OPINION AFFIDAVIT NECESSARY UNDER A.R.S. §12-2603 & 2604. EVEN WHERE PLAINTIFF ALLEGES DEFENDANT IS NEGLIGENT UNDER DOCTRINE OF RES IPSA LOQUITUR, DISMISSAL WITH PREJUDICE NOT APPROPRIATE SANCTION FOR FAILURE TO FILE AFFIDAVIT. Plaintiff had knee surgery and was left with permanent nerve damage to his leg. He sued the surgeon and anesthesiologist alleging he could not prove precisely how he was injured but that the injury could only have been the result of negligence of one or both defendants.

The plaintiff ultimately filed an affidavit signed by an expert orthopedic surgeon stating that the plaintiff's nerve injury was caused during the surgery and that "such damage would not occur during this kind of operative procedure unless there was negligence either by the Surgeon or by the Anesthesiologist." Further the expert noted an indication in the medical records that suggested the anesthesiologist had used a "popliteal block" which if used would have been below the standard of care.

The anesthesiologist moved to dismiss on the basis that the statute requires an affidavit signed by an expert in the same specialty as the defendant who has established not only his qualifications and expertise in that area but a breach in the standard of care. The anesthesiologist took the position that an orthopedic surgeon's affidavit even in the face of res ipsa loquitur theory did not meet the standards of the statute. The trial court agreed and dismissed the lawsuit.

The Court of Appeals first found that the res ipsa loquitur doctrine does not give the plaintiff license to sue healthcare practitioners without complying with A.R.S. §12-2604 and its expert affidavit requirement.

Restatement Second of Torts §328D requires that a plaintiff in a medical malpractice case who chooses to invoke res ipsa doctrine must nonetheless present expert testimony necessary to establish a departure from the relevant standard of care except when the negligence is so clear and apparent that a layman would recognize it. In this regard the court made special note of the fact that the plaintiff never took the position that the negligence claim could be proven without expert testimony and it is further uncontroverted that an orthopedic surgeon does not have the qualifications required under A.R.S. §12-2604 to express standard of care opinions regarding an anesthesiologist.

However, the court found the sanction of dismissal with prejudice to be inappropriate under A.R.S. §12-2603 and 2604. In fact, §12-2603 sets forth "an orderly procedure

by which the respective parties can litigate what expert witness testimony will be necessary and what experts must therefore be disclosed – and it does not contemplate dismissal with prejudice as a sanction for a deficient preliminary affidavit.” Specifically, the statute requires a claimant certify whether an expert is necessary and gives opposing counsel the option of seeking an order directing the claimant to serve an expert opinion affidavit. Where requested and granted, it is the trial court’s obligation to set a date within which the plaintiff has to comply. If this deadline is not met, the case is to be dismissed “without prejudice.” In any event, the parties are to be allowed “a reasonable time to cure any insufficient affidavit.”

According, the defendant’s motion to dismiss should have been treated as an application for further expert disclosure, the plaintiff should have been given a deadline for which to file such an affidavit and failure to do so should have resulted in dismissal without prejudice.

## **K. Preemption**

1. *Uhm v. Humana, Inc.*, 540 F.3d 980 (9<sup>th</sup> Circuit, August 25, 2008)(Judge Paez) MEDICARE PRESCRIPTION DRUG IMPROVEMENT AND MODERNIZATION ACT OF 2003 PREEMPTS STATE PRODUCT LIABILITY CLAIMS.

The plaintiff chose the defendant Humana as their part(D) provider for Medicare prescription drug benefits. They selected the “Social Security Check Deduction” as their method of premium payment.

After signing up and after Humana began receiving payment of premiums via the Medicare check deduction, the plaintiff nonetheless received none of the Medicare check deductions, received none of the identification cards, or information as to how to actually use the plan. As a result they were forced to pay higher prices for medications and brought a lawsuit alleging various state tort claims including breach of contract, violation of consumer protection statutes, unjust enrichment and fraud. The action was brought on behalf of all individuals who did not receive the benefits from Humana in a timely fashion or at all.

Humana moved to dismiss the lawsuit under Rule 12(b)(6) of the Federal Rules of Civil Procedure claiming that the Act provided administrative process for addressing the grievances which formed the basis of the civil lawsuit and that the Act’s express preemption provision controlled precluding the plaintiffs from bringing a state court action.

Specifically, 42 U.S.C. §1395w-112(g) provides under part C “the standards established under this act shall supercede any State law or regulation.”

The plaintiffs claim that because the central issue in their lawsuit was whether or not the defendant properly enrolled them in the plan that they were not subject to the Act’s administrative proceedings requirement. In other words, because they were not

enrolled they were not part of the plan and therefore not subject to administrative proceedings concerning the plan.

Factually, however, the Ninth Circuit concluded that because the plaintiffs had completed the necessary paperwork to become enrolled and submitted it to the defendant, they were “enrollees” for purposes of the Act and therefore governed by its grievance procedures.

Here the Act specially provided a procedure to complain about the failure of the defendant to provide the benefits offered under the policy once premiums were paid. The Act provided that the plaintiff should file with the defendant a requirement for a coverage determination and request reimbursement for the drugs they purchased out of pocket. Alternatively, the Act provides a “grievance procedure” to the extent the plaintiff’s claims were not satisfied by a “request for a coverage determination and reimbursement” the grievance procedure was adequate to address their problems.

Accordingly, the Ninth Circuit found the preemption language in the Act to “clearly and manifestly” show that the purpose of Congress was to preempt state claims in this area.

## **L. Products Liability**

### **1. Actions In Arizona Are Several And Not Joint and Several**

*State Farm Insurance Companies v. Premier Manufactured Systems, Inc.*, 217 Ariz. Adv. Rep. 222 (Sup. Ct. December 3, 2007) (Justice Hurwitz). PRODUCTS LIABILITY ACTIONS REQUIRE FAULT BE APPORTIONED AMONG TORTFEASORS AS SUCH ACTIONS ARE SEVERAL. Plaintiffs were insured by State Farm when they discovered a leak in their water filtration system which damaged their home and personal property. After paying the loss, State Farm brought subrogation action against Premier Manufactured Systems, Inc. who packaged and sold the water filtration system and Worldwide Water Distributing, Ltd. who manufactured the canisters and sold them to Premier.

Premier answered but Worldwide did not and default was entered against Worldwide. State Farm argued that Worldwide and Premier were jointly and severally liable but the defense argued that A.R.S. § 12-2506 rendered defendant’s liability several only and therefore required apportionment of fault between Premier and Worldwide. Worldwide had gone out of business and had no insurance coverage.

In 1984, the Arizona legislature eliminated the common law’s harsh results which required one defendant to bear the burden of paying the entire loss under principles of joint and several liability. A.R.S. §12-2501 to 2509 created right of contribution among joint tortfeasors and made their respective liabilities several only. The Act allows defendants to bring contribution as part of the underlying claim or in a separate action. Finally, the Act requires the apportionment of fault amongst

defendants joint tortfeasors, with one defendant seeking contribution from another by apportioning liability among tortfeasors according to their “relative degree of fault.” The abolishment of joint and several liability occurred by amendment in 1987. The only exception of several liability is if the parties are acting in “concert” or if one party was acting as an agent or servant of the other or where a party’s liability for fault of another arises out of a duty created by the Federal Employer’s Liability Act. Here, State Farm argued that Premier was an agent or servant of Worldwide. The Supreme Court disagreed, finding that the mere purchase of the product from a supplier does not establish a master-servant or principal-agent relationship between the buyer and the seller.

Although the duty not to distribute a defective product is a non-delegable one, the manufacturer and supplier both may be liable for selling a defective product and would not be vicariously liable for each other’s negligence.

A.R.S. § 12-2509(A) specifically provides that different parties both charged with strict liability are entitled to claim contribution against each other based upon the relative degrees of fault to which each contributed to the defect causing injury to the claimant.

Finally, the defendants argued that the abolition of joint and several liability in products liability actions is a violation of Article 18, Section 6 (the anti-abrogation clause)”. Under this constitutional provision the state’s earlier attempt to create a statute of repose for products liability actions was declared unconstitutional (*Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344, 861 P.2d 625, 629 (1993)). This statute was declared unconstitutional because a person could be barred from bringing an action even before the person sustained injury. In contrast, the abolition of joint liability does not prevent the possibility of redress for injuries as the claimant remains entirely free to bring his claim against all responsible parties. Nothing in the statute prevents the claimant from suing all participants in the defective product’s chain of distribution and obtaining a judgment for the full amount of his damages. An injured claimant may not be able to recover the full amount of his damages under regime of several-only liability when a defendant is insolvent or full collection of the judgment against each defendant is not possible. But as the court stated in *Jimenez v. Sears Roebuck and Company*, 183 Ariz. 399, 407, 408, 904 P.2d at 861, 869-70 (1995), “almost any statute dealing with tort actions will affect the amount or potential of recovery.” Our constitution provides only that a statute cannot limit the “amount recovered”; it is not a guarantee that the entire judgment will be collectable from a single defendant or indeed from any of the responsible parties.

## **2. Liability for Cattle On the Highway On An Open Range**

*Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 156 P.3d 1157 (App. Div. 1, May 8, 2007) (Judge Schwartz), review denied October 31, 2007. NO LIABILITY FOR LIVESTOCK ON PUBLIC HIGHWAY BASED ON MERE FAILURE TO PREVENT CATTLE FROM ENTERING FROM HIGHWAY. Plaintiffs were

driving from Phoenix to their home in Salome when they struck a cow on the roadway, causing their car to flip. The cow was on the road in an area where the highway reversed open range. The trial court granted summary judgment and the Court of Appeals affirmed.

In *Carro Company v. Lusby*, 167 Ariz. 18, 24, 804 P.2d 747, 753 (1990), the Arizona Supreme Court held that an owner of livestock owes a duty of ordinary care to a motorist traveling on a public highway and open range. However, in open range territory, the mere failure to prevent one's cattle from entering the highway, by erecting fences or otherwise, does not constitute conduct falling below the standard of care required of livestock owners.

Here, the plaintiffs argue that they showed more than the mere failure to keep cattle off the roadway. They established in deposition that the defendant knew that its cattle was getting on the roadway and knew from past ranching experience in other locations that raising cattle on an open range where there is a paved roadway results in a increased number of automobile-cattle collisions. However, the plaintiffs failed to establish that the defendants had any knowledge of any particular increased likelihood of collisions in the particular area where this accident occurred. In fact, the plaintiff's accident was the first collision with a cow on the roadway since the defendants began leasing the land and using it to raise cattle. The Court found that absent evidence that the defendant was aware of any personal injuries resulting from collisions between motorists and cattle on the Salome Highway across his open range property, a jury could not find the defendant had notice of any specific dangerous condition. In other words, the other similar incidents were not similar enough to this case to support liability.

Next, the plaintiffs argued that the defendant should have erected a sign to warn of the cattle. First, Arizona Revised Statute § 20-648 specifically prohibits anyone from erecting a sign on a highway which "purports to be or is an imitation of or resembles an official traffic control device . . . or attempts to direct the movement of traffic." Hence, any failure to post a sign would be the responsibility of the state and not the landowner or lessee of the land. Additionally, here the plaintiff had testified that he had traversed this land on this highway many times before, had seen cattle there before and was aware it was open range. Hence, there was no proof that the absence of a sign proximately caused this injury; the plaintiff was aware that cattle could be on the roadway even without the sign. Next the plaintiff argued that the defendant was negligent in allowing water tanks to be near the highway. However, the actual proof showed that there were no water tanks particularly close to the highway.

The next argument plaintiffs made was *res ipsa loquitur*, which failed because of the plaintiffs' inability to establish that the accident was of the type that would not have occurred in the absence of negligence. The plaintiffs did not show that a collision between an automobile and a cow on a highway through open range territory is the type of accident that would not occur absent negligence by the cow owner. There

was no expert testimony to that effect nor does common knowledge support such a contention.

### **3. Failure to Warn**

*Powers v. Taser International, Inc.*, 217 Ariz. 398, 174 P.3d 777 (App. Div. 1, December 31, 2007) (Judge Barker). PRODUCTS LIABILITY CLAIM OF FAILURE TO WARN IS NOT ENTITLED TO APPLICATION OF THE HINDSIGHT TEST APPLICABLE TO STRICT LIABILITY PRODUCTS CLAIMS. OFFER OF JUDGMENT CONDITIONED UPON CONFIDENTIALITY COMPLIES WITH RULE 68.

Plaintiff brought suit for injury sustained when he was subjected to the shock of a Taser-M26. Plaintiff was a sixteen year veteran of the Maricopa County Sheriff's Office and was being trained to use the Taser-M26. Materials that came with the taser said that it had been tested on animals and found to have no effect on heart rhythms, and had been deployed on more than three thousand persons with no long term effects. The materials did warn that short terms injuries could result from a fall associated with exposure to the M-26. The most significant injuries to date had been "cuts, bruises and abrasions." In the training, Powers was shown several videos of individuals being exposed to the M-26. As part of this training and as a prerequisite for certification to carry the M-26, the MCSO required all officers to be exposed to the electrical force of the M-26. Powers agreed to be exposed and was struck by the device. As a result he allegedly suffered a compression fracture of his T-7 spinal disc. The injury was so severe that he allegedly was unable to return to work as a Deputy Sheriff and resigned from the MCSO. He later sued taser alleging the produce was unreasonably dangerous and defective because it lacked adequate instructions and warning. The taser manufacturer defended on the basis that it did not know that the muscle contractions produced by the M-26 were strong enough to cause a fracture and it was not required to warn about dangers it did not know of.

The jury returned a verdict for the defense and the defense then enforced a Rule 68 (d) offer of judgment to obtain reasonable expert witness fees in excess of \$24,000. Powers' appealed, claiming that the court failed to properly give the "hindsight test" jury instruction and further that the offer of judgment was not enforceable because a requirement or condition of the offer was that it be kept confidential.

Under the "hindsight test" knowledge obtained subsequent to the actual injury could be imputed to Taser under a strict products liability claim. The trial court ruled that in a duty to warn case the "foresight" test applied, i.e., the manufacturer of the product must either know or reasonably should have known when the product was introduced into the stream of commerce of the danger that it should have warned about. Accordingly, throughout the trial, the trial court excluded evidence of subsequent testing of the M-26 except as it pertained to the feasibility of having performed that testing prior to Powers' injury. Despite these rulings, Powers requested that the trial court instruct the jury based on alternative to set forth in

Revised Arizona Jury Instruction Products Liability 4 (January 2005) which articulates that “a product, even if faultlessly made, is defective and unreasonably dangerous if it would be unreasonably dangerous for use in a reasonably foreseeable manner without an adequate warning or instruction.” Alternative 1 to this RAJI 4 instruction required that the manufacturer knew or reasonably should have known of the dangerousness. Alternative 2 however states a “a manufacturer or seller is presumably to have known at all relative times the facts that this accident and this trial have revealed about the harmful characteristics of the product and the consequences of its reasonably foreseeable use.” In the note to the RAJI, the committee stated that it was unable to determine how to reconcile *Dart v. Wiebe Manufacturing Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985) requiring the hindsight test with *Gosewisch v. American Honda Motor Co.*, 153 Ariz. 400, 737 P.2d 376 (1987).

Here, the Arizona Court of Appeals found that in *Dart* the hindsight test was first recognized by the court but not adopted in the context of a failure to warn case. In fact, the court expressly declined to reach the issue of whether the hindsight test should be applied in strict liability cases involving the failure to warn or those involving inherently dangerous products. *Dart* involved an allegation of a defective paper shredder that had no guard. The court in *Dart*, in order to distinguish a negligence claim from strict liability, found that under negligence whether the manufacturer knew or should have known of the defective would be relevant but under strict liability it is not the conduct of the manufacturer or designer which is primarily in question but rather the quality of the end result; the product is the focus of the inquiry.

This court then looked at pre-*Dart* cases which applied a “foreseeability” test and not the hindsight test. The court also noted that the *Dart* court relied in part upon observations by the commentators and proponents of the hindsight doctrine set forth in the Restatement. The court noted that since then there has been a change of opinion on this and that the Restatement (Third) which was published after *Dart* does not support the hindsight test. (This is important as this is the first Arizona case that I am aware of to give any credence to the Restatement (Third) which has generally been rejected by courts in favor of the Restatement (Second.) The Restatement (Third) provides that “a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.” The Restatement (Third) in fact rejects the hindsight test in design cases. The Court of Appeals here refused to extend that rule in Arizona since *Dart* is still good law in the issue of design cases at least until the Supreme Court says otherwise.

Additionally, the Court found that there were other reasons that a warning case should be distinguished from a design defect case. The warning defect relates to a failure extraneous to the product itself. While a manufacturing or design defect can be evaluated without reference to the conduct of the manufacturer, the giving of a warning cannot.

In conclusion, the court found that applying the hindsight test in warning defect cases would be tantamount to imposing a duty on manufacturers to warn of unknowable dangers. The doctrine of strict liability does not impose liability for every injury caused by a product. Strict liability is not absolute liability. Under strict liability, the manufacturer does not thereby become the insurer of the safety of the products' user. Unforeseeable risks arising from foreseeable product users by definition cannot specifically be warned against. A seller can only be charged with what its reasonable testing would reveal. The court notes that a majority of jurisdictions have rejected the hindsight approach in warning defect cases including California, and in reliance thereon so holds in Arizona.

As to the offer of judgment, Rule 68 expressly provides that an offer of judgment may be conditioned upon compliance with the terms and conditions specified in the offer. Thus, the mere fact that the defendant's offer was conditioned upon an agreement not to disclose the facts of the settlement or offer or the amount of the offer does not make the offer unenforceable. Powers argued that this provision prohibited him from actually filing the offer of judgment in acceptance with the court. The Court of Appeals however found that although a party may file the offer of judgment and the acceptance, this is not required to enforce it. Even if filing was necessary, the plaintiff had the option to request filing those documents under seal.

## **M. Professional Negligence**

### **1. Assignment of Insurance Agent Negligence Claim**

*Webb v. Gittlen*, \_\_\_ Ariz. Adv. Rep. \_\_\_, 174 P.2d 275 (Sup. Ct., January 10, 2008) (Justice Bales). INSURANCE AGENT MAY BE LIABLE TO CLIENTS FOR NEGLIGENT FAILURE TO RECOMMEND INSURANCE AND SUCH A CLAIM MAY BE ASSIGNED BY CLIENTS TO INJURED THIRD PARTIES.

Insureds purchased a liquor store and purchased a business and umbrella liability policy from defendant insurance agency. The insureds claimed the agent did not advise them of the availability of liquor liability coverage. Subsequently, the plaintiffs allegedly sold beer to a minor who gave it to another youth. The second youth drove his car into a cement barrier, killing the passenger, and a dram shop liability claim followed. The insureds tendered the claim to their insurer which denied coverage because the insureds did not have "liquor liability" coverage.

The insureds stipulated to a \$3 million judgment against them in exchange for a covenant not to execute by the wrongful death beneficiaries and in exchange for an assignment by the insured of their claims against the insurance company and insurance agent. This claim by the wrongful death beneficiaries *Webb* ensued. The claim was dismissed by the trial court on the basis that *Premium Cigars International Ltd. v. Farmer-Butler-Leavitt Insurance Agency*, 208 Ariz. 557, 96 P.3d 555 (App. 2004) held claims against an insurance agent for professional negligence are not assignable. The Court of Appeals affirmed.

In the beginning, the assignment of claims was disfavored. Originally you could only assign a “chose in action” to the crown. This was based primarily upon the view that litigation was undesirable social conduct. Over time the courts became more accessible and litigation perceived as a more appropriate means of resolving disputes. The inability to assign a claim became the exception and not the rule. Assigning personal injury claims, however, was that exception. The thinking was that unscrupulous people would purchase causes of action and traffic in lawsuits for pain and suffering.

Similarly, legal malpractice claims were found not to be assignable based not so much on fears of trafficking and lawsuits as the preservation and deference to the attorney-client relationship.

The Arizona Supreme Court found that “(1) claims generally are assignable except those involving personal injury; (2) the legislature may specify whether particular claims are assignable; and (3) absent legislative direction, public policy considerations should guide courts in determining whether to depart from the general rule.” *Id.* at 32.

The Arizona Supreme Court distinguished the attorney-client relationship from the insurance agent-client relationship and, based upon this distinction, found a negligence claim against the agent could be assigned to the injured third party. The court found that attorneys are fiduciaries with duties of loyalty, care and obedience which require the “utmost trust.” In contrast, insurance agents are not fiduciaries but instead owe only a duty of “reasonable care” to their clients.

Similarly, the court found that clients share more extensive and sensitive information with their attorneys than they do their insurance agents and that the attorney-client confidentiality protections protect broader interests and particularly the public’s interest in accessible legal advice by allowing people to consult their attorneys without fear of retribution. In contrast, the insurance agent confidentiality appears to protect only the client’s privacy, an interest with fewer societal ramifications.

The Arizona Supreme Court then went on to reject each of the agent’s arguments that public policy should bar such assignments. The court found that the relationship between the agent and the client is principally commercial and is not appreciably damaged by the right to assign an agent negligence claim to an injured third party.

Allowing the assignment does not expand potential plaintiffs to include injured non-clients. To the contrary, the assignment can only be for what the client had: breach of the duty to the client.

Next, the court rejected the argument that collusive stipulated judgments and settlements would be foisted upon insurance agents. The court held that Damron/Morris-type agreements are binding upon insurance carriers in the

insurer/insured relationship but would not have that same collateral estoppel effect on an insurance agent who is not a party to the judgment. “The insurance agent would be barred from re-litigating an issue only if among other things the agent or her privy was a party in a prior action in which the issue was actually litigated.” Insurers may be liable for Damron-type agreements because the insured must first prove the insurer declined an opportunity to defend and establish that the settlement was reasonable and prudent. Because an insurance agent has no duty to defend, the agent would not be bound by a stipulated judgment to which it was not a party.

## **N. Real Property**

### **1. Lis Pendens for Violating CC&RS.**

*Santa Fe Ridge Homeowners Association v. Bartschi*, 535 Ariz. Adv. Rep 48 (App. Div. 1) (July 29, 2008) (Judge Timmer). ENFORCEMENT OF CC&RS BY HOMEOWNERS’ ASSOCIATION REGARDING MAINTENANCE OF PROPERTY DOES NOT “AFFECT TITLE TO REAL PROPERTY” UNDER A.R.S. §12-1191 AND THEREFORE LIS PENDENS INAPPROPRIATE. The homeowners association brought a lawsuit seeking injunctive relief against one of its homeowners for not maintaining the landscaping on her property, failing to remove trash and debris and failing to remove a large crate. Simultaneously the homeowners association filed a lis pendens on the homeowners’ property. In essence a lis pendens provides constructive notice to prospective purchasers and lenders of a pending lawsuit that may affect the title to real property. However, a lis pendens is “groundless or has no basis only when the claim that the action affects title to real property as no arguable basis or is not supported by any credible evidence”.

Here, because the lawsuit at issue did not seek to establish the existence of a restrictive covenant and the homeowner did not dispute the viability of the CC&Rs, any injunction that might be entered would be personal against the homeowner and not run against the title to the property. There was no viable way that a judgment that might arise out of the injunction action could be binding on anyone other than the homeowner herself.

## **O. Vicarious Liability**

### **1. Liability of Business Owner for Intentional Tort of Independent Contractor**

*Simon v. Safeway, Inc.*, 217 Ariz. 330, 173 P.3d 1031 (App. Div. 2, December 20, 2007) (Judge Vasquez). GROCERY STORE OWNER CAN BE LIABLE FOR INTENTIONAL TORT OF INDEPENDENT CONTRACTOR SECURITY GUARD.

Plaintiff entered a Safeway Store to shop. He removed two cans of cat food from a shelf and then put them back. After purchasing other items he was confronted by a Sonoran Desert Investigation security guard who accused him of shoplifting. The

security guard lifted his shirt looking for concealed items and found none. The guard told the plaintiff not to return to the store. The plaintiff asked to speak to a manager. The guard escorted the plaintiff to a back room where the two engaged in a verbal and physical altercation during which the plaintiff was thrown to the floor and injured.

Plaintiff sued Safeway alleging physical and sexual assault and that Safeway was vicariously liable for the nondelegable duty to employ properly licensed and trained security guards. The plaintiff also alleged that Safeway was directly liable because it had negligently failed to train and supervise the guard. The trial court denied a motion for summary judgment but on a motion for reconsideration, plaintiff moved the court to defer its ruling so that additional discovery could be made. The court granted Safeway's motion for reconsideration, motion for summary judgment, and denied plaintiff's motion to continue. Later the plaintiff's motion for new trial was denied.

First, the Court of Appeals found that plaintiff's motion for more time was the equivalent of a Rule 56(f) motion and should have been granted. The plaintiff demonstrated that he wanted to take specific depositions to further investigate the nature of Safeway's relationship with the security guard and identified the individuals by name and the nature of their employment and thus how they likely had information on this topic. Here, although there was substantial evidence that the security guard was an independent contractor and therefore Safeway would not be responsible for his actions, there was an open question with respect to the Safeway's "right to control" this employee and the discovery the plaintiff requested would have gone directly to this point. Therefore, the motion to continue the hearing on the motion for summary judgment and motion for reconsideration in order to do more discovery should have been granted. Where such a request could lead to admissible evidence on the issue under consideration in a motion for summary judgment, the motion should be granted. Next, the court addressed the liability of a business owner for intentional torts of an independent contractor by looking at Restatement (Second) of Torts § 409-429. The general rule under Section 409 is that an employer is not liable for the acts of an independent contractor, but § 410-429 set forth a number of exceptions to this rule. None of these exceptions have a particular bearing on the facts of this case.

The court then looked at Restatement (Second) of Torts § 344 with respect to premises liability to define the duty Safeway owed to the plaintiff. In essence, this establishes the duty on a landowner to exercise care to business invitees with respect to all activities on the land and is not limited to dangerous conditions. Section 344 specifically states that the rule applies to the acts of independent contractors who are employed or are permitted to carry on activities upon the land. Finally, Safeway argued that it was not obligated to provide security services and did so voluntarily. As such, providing such service was not a nondelegable duty. The court disagreed, finding that although Safeway did not initially have a specific nondelegable duty, it voluntarily assumed that duty within the context of the heightened duty it already had to its business invitees having assumed the task of providing security services on its

premises, Safeway created for itself a personal nondelegable duty to protect its invitees from the intentionally tortious conduct of those with whom it had contracted to maintain a presence and provide security and therefore Safeway will be vicariously liable for the actions of the security guard if found liable in the first instance. Where a store invites customers to buy merchandise on to its premises, it cannot then bring independent contractors onto the premises to arrest those customers and shield itself from liability left by bringing in the security personnel. To hold otherwise would allow the store to benefit from the surveillance and punishment of shoplifters but to suffer no consequence for unjustified or unlawful arrests of law abiding citizens.

## 2. Acting In Concert

*Mein v. Cook*, 530 Ariz. Adv. Rep. 10, 1 CA-CV 07-0801 (Ct. App. Div. 1, April 24, 2008) (Justice Gemmill). JOINT LIABILITY DOES NOT APPLY WHERE DRAG RACERS WERE NOT “ACTING IN CONCERT” WITHIN THE MEANING OF A.R.S. §12-2506(D)(1). On the evening of the accident, the defendants attended a happy hour celebration held for one of their co-workers and then went to another bar and continued drinking until approximately 10:45 p.m. They then decided to go to one of the defendants’ homes to continue their socialization, driving in separate vehicles. Each defendant drove separately and the plaintiff rode as a passenger in one of the cars. When the two defendants came to stop at 48<sup>th</sup> Street on Ray Road, they began revving their engines and bantering. When the light turned green they “peeled out” reaching speeds in excess of eighty miles per hour and weaving in and out of traffic. As they went through the intersection of 44<sup>th</sup> Street and Ray Road, one of the defendants lost control of his vehicle and crashed, causing the plaintiff in the back seat of his car serious injuries.

In the complaint, the plaintiff alleged that both defendants were jointly liable under A.R.S. §12-2506(B)(1), alleging they were acting in concert and therefore jointly liable. Cross-motions for summary judgment were filed on this issue and the trial court granted defendant’s motion, determining that no reasonable jury could conclude the defendants’ actions were intentional which is one of the requirements for the “acting in concert” exception to the abrogation of joint and several liability.

The case went to trial and a jury returned a \$3.5 million verdict apportioning fault 70% against the driver of the car the plaintiff was riding in, 5% against the other driver, and 25% against the plaintiff.

The Arizona Court of Appeals found that the phrase “acting in concert” was defined by the legislature in A.R.S. §12-2506(F)(1) requiring a “conscious agreement to pursue a common plan or design to commit an intentional tort.” Otherwise “the parties must *knowingly agree* to commit the intentional tort. (Emphasis in original.) This specific language was added to the statute by amendment in 1987.

The legislature, however, did not define “intent” in this statute. As a result, the Court of Appeals turned to the Restatement (Second) of Torts §8A, where intent requires

“reference to the *consequences* of an act rather than an act itself.” Thus, defendants must have intended the harm caused by their drag racing or have been “substantially certain that these *consequences* would result from the act.” Here, although the jury could find that these defendants agreed to race upon public streets knowing they were drunk, the mere fact of drag racing while drunk is not a tort without damage. Reckless driving only becomes a tort if an accident occurs and someone is injured or harmed in some way. Absent evidence that [the defendants] had a desire to cause harm to [the plaintiff] or knowingly agreed to have a serious accident, they did not agree to commit an intentional tort within the meaning of A.R.S. §12-2506(D)(1).

Additionally, the court considered whether or not the harm that did result was “substantially certain” occur, thus creating the necessary intent. The court acknowledged that drag racing on a public street while under the influence of alcohol may constitute gross negligence, recklessness, or even wanton conduct but that it is not substantially certain that any damage or harm will result from that conduct.

In short, because there was no evidence to suggest that either defendant intended to cause any harm to the plaintiff or that such harm was “substantially certain” to occur by the mere act of drag racing while drunk, there would be no joint liability under Arizona statute.

## **P. Wrongful Death**

### **1. Medical Malpractice/Vulnerable Adult Survival of Cause of Action**

*In Re Estate of Winn*, 214 Ariz. 149, 150 P.3d 236 (S. Ct., January 23, 2007).  
WRONGFUL DEATH/PROBATE: ATTEMPT TO AVOID 2 YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE WRONGFUL DEATH CASE BY SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVE OF THE ESTATE AFTER THE 2 YEARS AND THEN BRINGING THE CLAIM ON BEHALF OF THE ESTATE IS BARRED BY A.R.S. § 14-3108(4) WHICH PROHIBITS THE USE OF ASSETS OR FUNDS IN THE ESTATE TO PROSECUTE AN ACTION MORE THAN TWO YEARS AFTER DEATH. The decedent’s claim for medical malpractice and adult abuse survived her death and became an asset of the estate. They could be brought by the personal representative of the estate if brought timely. Only the personal representative of the deceased may bring an action under A.R.S. § 14-3110 for violation of the Adult Protective Services Act. A.R.S. § 46-455 (B). But A.R.S. § 14-3108(4) requires such action be brought within 2 years of death if assets of the estate must be used to pursue the claims.

### **2. Evidence Of Decedent’s Death**

*Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, 158 P.3d 255 (App. Div. 1, May 24, 2007) (Judge Kessler). EVIDENCE OF THE MANNER OF A DECEDENT’S DEATH IS ADMISSIBLE ON THE ISSUE OF DAMAGES IN THE WRONGFUL DEATH CLAIM INSOFAR AS IT IS RELEVANT TO THE SURVIVOR’S OWN MENTAL ANQUISH RESULTING FROM THE DEATH AND NOT THE

SUFFERING OF THE DECEDENT PRIOR TO DEATH. In this wrongful death claim, the decedent perished after an automobile collision caused by the negligent acts of a Skyline employee. The decedent's vehicle burst into flames with the decedent pinned inside. He died of thermal and inhalation injuries.

His father and other survivors brought a wrongful death action pursuant to A.R.S. § 12-611. The defendant Skyline answered admitting its employee was negligent and this negligence caused the collision. The only issue at trial was the amount of damages.

In the Joint Pre-Trial Statement, the plaintiff listed as witnesses two people who were present at the scene, the accident report, the autopsy report, news videotapes of the fire and several photographs. Defendants filed a successful Motion in Limine to preclude this evidence.

Plaintiff's offer of proof demonstrated that the father of the decedent learned there had been a fire from his daughter-in-law and from the police, he told him the fire had been "horrific." He learned from the police there was nothing of the decedent's remains to identify and later from the police report that the decedent had burned alive. He testified that these facts were a great source of pain for him.

He further testified that he saw the video on television of the burning car which showed the burning vehicle, and the tarp beside the vehicle which he assumed was his son's body.

He called the medical examiner's office to arrange to identify the body. They asked him if he had spoken with the investigating officer. He had not, but when he did the officer told him "there is nothing to identify."

Later, the father spoke to the funeral director who told him there was nothing there. He obtained his son's wedding ring from his son's hand and had to scrub it clean from being scorched before he returned it to his daughter-in-law.

From reading the police report, the father learned from witness statements that his son's feet were trapped and could not be extricated, and he was alive when the fire consumed him. As a consequence of the condition of the remains there had to be a closed coffin at the funeral.

A jury awarded the plaintiff \$250,000 which was less than the defendant's \$300,000 offer of judgment.

Under Rule 403 of the Rules of Evidence, a balancing test is performed wherein the probative value of the evidence is balanced against its potential prejudice.

The Wrongful Death Act itself specifically states that the "jury should give such damages as it deems fair and just with reference to the injury resulting from the death

to the surviving parties.” A.R.S. § 12-613 interpreting case law has found these damages are to include “anguish, sorrow, stress, mental suffering, pain and shock.” The cases have also determined that “aggravating circumstances attending the wrongful act, neglect or default” are to be interpreted solely relating to punitive damages.

The Court looked to the Oxford English Dictionary definition of death which includes not just the mere state of death but the act of dying. It then looked to Black’s Law Dictionary which defined death “concurrently as the ending of life and the cessation of all vital functions and signs.” From these definitions it was concluded that both the manner in which a person’s mortal life ceases as well as the fact of death is within the definition of the statute. Further, in keeping with the remedial objective behind the Wrongful Death Act intended to compensate survivors for their losses, it is appropriate for evidence of the manner of the decedent’s death to be admitted provided it has a bearing upon the mental anguish suffered by the survivors. However, a survivor may not recover for mental anguish resulting from the negligent acts of the defendant prior to the decedent’s death, and such evidence is not relevant to the issue of damages. A survivor may not recover for mental anguish resulting from actual or perceived pain and suffering experienced by the decedent during the time leading up to death because such period of time precedes the death of the decedent. Consequently, evidence of the decedent’s conscious pain and suffering before his death is not relevant to a survivor’s damages and wrongful death claim.

Evidence indicating that the decedent may have been conscious and burned alive bears only the decedent’s pre-mortem pain and suffering and is not relevant to the plaintiff’s wrongful death claim. Evidence and witness accounts of the events that he may not have seen or been aware of are likewise inadmissible. Evidence pertaining to the death of which the plaintiff has been unaware has little probative value. In short, insofar as the manner of the decedent’s death increased the plaintiff’s mental anguish, it is relevant to his damages in his wrongful death claim. To the extent the evidence of manner of death dealt with pre-mortem pain and suffering it is irrelevant.

Under Rule 68(d), when an offer of judgment is made on behalf of more than one party and that offer is not apportioned between the parties, it may be invalid for the purposes of posing Rule 68 sanctions. However, when the relationship between the offerors is such that the unapportioned offer, compared to the final judgment, provided the offerees the ability to make a meaningful choice between accepting the offer and going forward with litigation, Rule 68 sanctions may be awarded.

Here, although the plaintiff brought his lawsuit against both Skyline and Skyline Industrial, he claimed he could not discern which of these defendants was making a \$300,000 offer of judgment. However, it is Skyline and not Skyline Industrial which admitted in its answer that the driver was negligent and that the driver was employed by Skyline. Later, plaintiff agreed to dismiss Skyline Industrial from the lawsuit before trial. Plaintiff made a similar offer of judgment to both defendants without distinguishing between each. The record supports the Superior Court’s ruling that the

offer need not be apportioned in this case. Plaintiff's complaint asserted his claims against Skyline and Skyline Industrial jointly and severally. A joint offer of judgment was an offer to settle Girouard's claim fully and finally thereby avoiding a trial. It was clear from the offer that the plaintiff would receive only one payment for settlement of his claim against both Skyline and Skyline Industrial.

## **Q. Wrongful Termination**

### **1. Tort Includes Fact of Discharge and Surrounding Circumstances**

*Higgins v. Assmann Electronics, Inc.*, 217 Ariz. 289, 173 P.3d 453, (App. Div. 1, December 13, 2007) (Judge Thompson). WRONGFUL TERMINATION TORT INCLUDES FACT OF DISCHARGE AND CIRCUMSTANCES SURROUNDING TERMINATION. A SUPERVISOR AND A COMPANY MAY BOTH BE PERSONALLY LIABLE FOR WRONGFUL TERMINATION. PRIOR BAD ACTS SUCH AS A PRIOR ALTERCATION WITH THE EMPLOYEE ARE ADMISSIBLE EVIDENCE.

The plaintiff had a consensual sexual relationship with the chief executive officer of the defendant employer. The supervisor went to the employee's home, knocked on the door, and when nobody answered, entered uninvited to find the employee and her male companion dressed only in bath towels. He assaulted the plaintiff and her companion and told the employee she was fired.

Plaintiff sued for wrongful termination and obtained a jury verdict of \$300,000 for the assault and \$300,000 against the supervisor and \$400,000 against the company employer. Both the employer and supervisor challenged the judgment on the basis they could not be liable for wrongful termination. The Court of Appeals, finding this an issue of first impression held that corporate officers are liable to those harmed by such officer's tortious conduct on behalf of the company they ostensibly serve. Public policy of the State of Arizona supports a finding that the supervisor could be held personally liable in a case where the company has invested its supervisor with day-to-day control over the company, including the right to fire and the supervisor has in fact exercised such control to harm another.

Defendant employer then argued that because the plaintiff could not separate the emotional distress and damages between the actual discharge and the assault and circumstances surrounding it, that she could not recover those damages against the employer. To the contrary, the Court of Appeals found that the wrongful discharge claim not only includes the actual discharge but circumstances surrounding it and particularly those circumstances which make the termination wrongful or tortious. In this case, those facts included not only that the supervisor fired the plaintiff but also that he assaulted her.

Next, the employer argued that it could not be liable for the actions of its supervisor since they were outside the course and scope of his employment and purely personal in nature as well as criminal.

The Court of Appeals disagreed. The supervisor was in fact acting on behalf of the employer when he fired the plaintiff. This was in fact a service in furtherance of the employer's business. This was further supported by the fact that nothing was done by the employer after the fact to suggest the employer considered the termination inappropriate or was not standing behind it.

Finally, the defendant objected to the admissibility of evidence that the supervisor had become embroiled in an altercation with a co-worker at a restaurant prior to the incident involved. There was some evidence the employer was aware of the supervisor's prior bad act and the evidence was offered to prove the employer did not adequately supervise its supervisor. It was further argued that this evidence demonstrated the relationship between the supervisor and the employer which supported plaintiff's claim that complaining about the supervisor to the employer would have been futile.

The Court of Appeals found that this evidence did have some probative value to demonstrate that the supervisor was fully in charge in Arizona and the company did not challenge his conduct or decisions. Its prejudicial effect was not so powerful as to overcome its probative value and the defendant failed to request a limiting instruction which would have told the jury not to consider this evidence for any reason other than to establish the supervisor's authority.

## **II. INSURANCE**

### **A. Automobile Liability Coverage**

*Odom v. Farmers Insurance Company of Arizona*, 216 Ariz. 530, 169 P.3d 120 (App. Div. 2, October 29, 2007) (Justice Pelander). NO COVERAGE WHERE POLICY PROVIDES COVERAGE ONLY FOR FAMILY MEMBERS OR THOSE USING VEHICLE WITH PERMISSION OF OWNER, AND INJURED PASSENGER'S CLAIM ARISING OUT OF INJURY SUSTAINED WHEN VEHICLE DRIVEN BY NON-FAMILY MEMBER WITHOUT OWNER'S PERMISSION.

Insured rented a vehicle for ten days from a car rental agency while in Oregon. Insured was the only authorized driver under the rental agreement. Nonetheless, insured loaned car to a third person who drove it after consuming alcohol and crashed into a house. The driver's passenger was seriously injured and brought a claim against the driver. Farmers denied coverage to the driver and refused to defend. The plaintiff obtained a judgment against the driver and thereafter agreed not to execute the judgment against the driver in return for his assignment of any rights against Farmers. The injured plaintiff then filed an action against Farmers alleging breach of

contract, obligation to defend and pay and for bad faith. The policy had limits of \$250,000 per person and \$500,000 per occurrence and the judgment was \$3,450,000.

The insurance policy issued by Farmers provided coverage only when the vehicle was being operated by a family member or with the permission of the owner. The Court of Appeals held there was no coverage and therefore there was no obligation to defend and no indemnity. There could be no bad faith claim based upon a refusal to defend and indemnify. The court's reasoning was that neither the Financial Responsibility Act nor any other law in Arizona would require the carrier to insure anyone other than family members and those using the vehicle with permission of the owner. Because the vehicle in question was a rental car, the insured's permission was not adequate to bring the driver within coverage under the policy.

## **B. Policy Terms**

### **1. Property Damage Insurance/Inland Marine Insurance/Fire Insurance**

*Liberty Insurance Underwriters, Inc. v. Weitz Company*, 215 Ariz. 80, 158 P.3d 209 (App. Div. 1, March 27, 2007) (Judge Johnsen). CERTAIN PROPERTY DAMAGE INSURANCE POLICIES IN ARIZONA MUST CONFORM TO TERMS RECITED IN THE PUBLISHED FORM "ARIZONA STANDARD FIRE POLICY" BUT "INLAND MARINE INSURANCE" POLICIES ARE EXEMPT FROM THE ARIZONA STANDARD FIRE POLICY REQUIREMENT. A BUILDER'S RISK POLICY INVOLVING A FIRE THAT OCCURRED AND CAUSED PROPERTY DAMAGE DURING THE CONSTRUCTION OF A BUILDING IS AN "INLAND MARINE INSURANCE POLICY" AND EXEMPT FROM THE ARIZONA STANDARD FIRE POLICY REQUIREMENTS."

A fire destroyed a dormitory that was under construction by Defendant Weitz on the West ASU campus. Weitz was insured by Liberty Insurance Underwriters subject to three warranty endorsements that accompanied the policy requiring he have adequate fire extinguishers on the job site, conduct a fire watch during all welding operations and other hot processes, and requiring him to inspect the premises for fire hazards at the end of each work day. After the fire, Liberty Mutual filed a declaratory relief action seeking a declaration that due to a failure to comply with a warranty endorsement there was no coverage.

Weitz responded by stating that the warranty endorsements were void because they did not comply with the Arizona standard fire policy requirements. Liberty countered that their policy was an inland marine policy exempt from those requirements. Defendant Weitz was granted summary judgment and an appeal followed. Arizona Revised Statute § 20-1503 requires all policies of fire insurance covering property include the New York fire policy, 1943 Edition form language. This form did not include the warranty endorsements urged by Liberty. No Arizona court has decided whether a builder's risk policy like the Liberty policy is a fire insurance policy subject to this requirement or an inland marine insurance policy which is expressly

exempt from this requirement. A.R.S. § 20-1501. Inland marine policies are defined as those that may cover “all manner of risks to goods in possession of a custodian not only while in transportation but also while on the premises of the owner, while stored or while in the custody of others.”

Builder’s risk insurance is a form of property insurance that typically covers only projects under construction, renovation or repair and insure against accidental losses, damages or destruction of property. The emerging consensus by other courts is that builder’s risk insurance is a form of inland marine insurance.

Looking to the Arizona Administrative Code and A.R.S. § 20-255, the Court concluded that a builder’s risk policy which includes coverage for “course of construction” risks intends that the builder’s risk policy be an inland marine policy. Weitz’ argument that the fire coverage under the builder’s risk policy ought to be severed and treated as coverage that must comply with standard fire policy language makes no sense since the coverages are intertwined and provide for an overall coverage of “any and all kinds of loss or damage.” The language of the policy simply does not suggest or allow for severance. As a consequence, the builder’s risk policy in question is an inland marine insurance policy and therefore exempt under A.R.S. § 20-1501 from the requirements of the Arizona standard fire policy and the warranty endorsements that Liberty contends were breached were not void under A.R.S. § 20-1503.

## **C. Primary Versus Excess Coverage**

### **1. Scope of Duty to Defend**

*Regal Homes, Inc., v. CNA Insurance Company*, 217 Ariz. 159, 179 P.3d 610 (App. Div. 1, November 29, 2007) (Justice Gemmill). CAUSAL NEXUS FOR OCCURRENCE TO “ARISE OUT OF” SOMETHING IS NOT “PROXIMATE CAUSE” BUT THAT OCCURRENCE WAS “INCIDENT TO OR CONNECTED WITH” THAT THING.

Regal was a homebuilder that constructed a residential community known as “The Shores.” It obtained primary commercial general liability (CGL) from Auto-Owners for 1995 and from Zurich from 1996-98. GMS was a subcontractor hired to do work on the project. There was a written agreement that GMS would obtain insurance. It was insured by CNA and Regal was identified in the certificates of insurance as an additional insured under the CNA policies.

The owner sued Regal for defects in the homes and Zurich and Auto-Owners defended the cases. CNA was asked to participate in the defense but refused, claiming it was only providing excess coverage for Regal. Neither Auto-Owners nor Zurich exhausted their primary limits in settling the case.

Zurich and Auto-Owners now claim that CNA was primary not excess and that CNA should provide reimbursement for defense costs and indemnity payments.

The CNA policy provided that it extended its coverage to Regal but that that coverage was limited to “a liability arising out of your work for that additional insured by or for you

. . . any coverage provided hereunder shall be excess . . . unless a contract specifically requires that this insurance be primary.” Here, although initially Regal’s president filed an affidavit that it was expected that GMS would obtain primary insurance for Regal, under oath in deposition he testified he didn’t know the difference between primary and excess coverage, and never expected or asked for primary coverage and otherwise was so vague with respect to what was being asked for that the plaintiffs could not meet their burden to establish that there was a contract requiring CNA to provide primary insurance. In short, although there was an oral contract, there was insufficient specification of the term so that the obligation involved could be ascertained. “Further, until a primary insurer offers its policy limit, the excess insurer does not have a duty to evaluate a settlement offer, to participate in a defense, or to act at all.” That did not occur here so CNA did not have a duty to defend or evaluate settlement offers under the facts of this case. In the underlying case it was determined as a matter of law that the plaintiff’s complaints were not the fault of GMS and/or proximately caused by acts of GMS. The plaintiff’s claim that water was infiltrating their home as a result of improper compaction of the backfill around the foundation walls and over the utility trenches. GMS orally contracted with Regal to provide the backfilling of the trenches around the foundation walls and over the utility trenches. At the trial the jury found Regal to be 100% at fault for the water infiltration and GMS to be free from fault. Under *Transp. Indem. Co. v. Carolina Cas. Ins. Co.*, 133 Ariz. 395, 299, 650 P.2d 134, 138 (1982), our Supreme Court found that “arising out of” is not synonymous with “proximate cause.” The Court found that the business of the named insured need not have caused the occurrence; it need only be related to it. This causal connection is much less than what is required under a proximate cause analysis. Thus, the Arizona Court of Appeals held that Auto-Owners and Zurich will have the burden of establishing Regal’s alleged liability to the plaintiff arose out of GMS’ work for Regal.

The court further explained that the duty to defend is different from the duty to indemnify. The duty to defend arises at the earliest stages of litigation and generally exists regardless of whether the insured is ultimately found liable. In evaluating CNA’s duty to defend, a determination must be made initially from the allegations in the complaint against Regal and the facts known at that time. It is conceivable that the nexus could be established for the duty to defend but not for the duty to indemnify. The insurer would have a duty to defend a suit alleging facts that if true would give rise to coverage even though there would ultimately be no obligation to indemnify if the facts giving rise to coverage were not established.

As to the Zurich policy, the “other insurance” clauses in Zurich’s and CNA’s policies were in direct conflict and cannot be read together or reconciled. Consequently,

being mutually repugnant they both must be disregarded and Zurich and CNA were therefore co-primary insurers of Regal during 1996 – 1998.

Consequently, all three primary insurers of Regal, Auto-Owners, Zurich, and CNA had a duty to defend Regal against the claims in the underlying litigation. All three policies were “occurrence policies.” There were allegations of occurrences from 1995 – 1998.

Where 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.

Here, a question of fact exists as to whether or to what extent Auto-Owners’ defense costs would have been decreased if CNA had joined in the defense of Regal.

With respect to the obligation to indemnify, because CNA was excess as to Auto-Owners because Auto-Owners did not exhaust its primary limits, under the language of those two policies there was no obligation for CNA to contribute to the settlement to the benefit of Auto-Owners.

On the other hand, CNA was a co-primary insurer with Zurich from 1996-1998. However, once again, Zurich did not exhaust its policy limits either. The insured did contribute money of its own towards the settlement. However, there is no evidence that this was done because CNA refused to offer any money. Rather there is a suggestion it was done because some of the claims were not covered under any of the policies. Therefore, Regal is found to have been a volunteer in this settlement. Finally, in a case in which the suit was settled and there was no allegation that the insurer that defended did not provide a proper defense, the insurer’s refusal to defend cannot result in any consequential damages to the insurer.

Finally, it was claimed that CNA was in bad faith for not participating in the defense of the claim. However, because there was no evidence that any insurance company presented the “other insurance” clauses to CNA and argued at the time the defense was undertaken and that CNA was a primary insurer, the court found CNA acted reasonably in relying on its policy provision that it did not provide such coverage as a matter of law and therefore could not be in bad faith.

#### **D. Reasonable Expectations**

*State Farm v. Grabowski*, 214 Ariz. 188, 150 P.3d 275 (Ariz. App. Div. 1, January 30, 2007) (Judge Timmer). REASONABLE EXPECTATIONS DOCTRINE REQUIRES FINDING THAT INSURER HAD REASON TO BELIEVE INSURED WOULD NOT HAVE AGREED TO EXCLUSION. Plaintiff’s decedent and the decedent’s husband were named insureds under a State Farm policy offering \$100,000/\$300,000 in primary limits along with umbrella policy for \$2,000,000, both written by State Farm.

Plaintiff's decedent and plaintiff's decedent's husband died in a one vehicle accident where the husband was the driver. The plaintiff brought a wrongful death claim against the husband driver. State Farm took the position that Exclusion Ten of the umbrella policy precluded plaintiff from recovering under the umbrella policy because it excluded coverage for injury to an insured.

Plaintiff argued that this exclusion defeated the insured's reasonable expectations. Specifically she argued that the insureds would have never accepted the umbrella coverage had they known that this exclusion applied to them.

In granting State Farm's request for a new trial, the Court of Appeals found that the trial court did not instruct the jury as to an essential element of the jury's inquiry: Whether State Farm had reason to believe that the insureds would not have agreed to the exclusion if they had been aware of its presence in the policy (Restatement § 211(d)). The Court of Appeals found that the trial court had properly instructed the jury that it could find the exclusion violated the insured's reasonable expectations if (1) the insureds did not receive full and adequate notice of the exclusion and it was unusual, unexpected, or emasculated apparent coverage, (2) some activity that could be attributed to State Farm would have created an objective impression of coverage in a reasonable insured, or (3) some activity that could be attributed to State Farm induced the insureds' belief they had coverage despite the exclusion. Based on this instruction, the jury could have found that the insured's reasonable expectations were defeated even if the insureds did not read the provision provided it was "unusual." Despite the fact that in response to an interrogatory the jury found the exclusion to be "bizarre or unexpected in nature, or commercially unreasonable," because the trial court did not advise the jury that it was to determine whether State Farm had reason to believe the insureds would not have agreed to the exclusion, this assumption would not be made.

Interestingly, State Farm was successful on this appeal despite the fact that both parties failed to send the trial transcript up to the Court of Appeals and therefore it was not considered by the court. Additionally, State Farm never moved for new trial. The Court found that an appealing party need not pursue a Motion for New Trial before appealing where its argument on appeal concerns only the legality of a challenged jury instruction rather than whether the evidence supported it.

## **E. Uninsured Motorist Coverage**

### **1. Reasonable Expectations**

*Cullen v. Koty-Leavitt Insurance Agency*, 216 Ariz. 509, 168 P.3d 917 (App. Div. 2, October 18, 2007) (Judge Brammer). UIM COVERAGE DOES NOT APPLY TO SON WHEN MOTHER WAS PROVIDED A VEHICLE THAT HAD UIM

COVERAGE WHERE SON WAS RIDING IN A DIFFERENT VEHICLE.  
BUSINESS ENTITY CANNOT HAVE “RELATIVES.” CONTRACT ATTACHED  
TO COMPLAINT AND PLAINTIFF’S CLAIM WAS NOT “MATTER OUTSIDE  
THE PLEADINGS” FOR PURPOSES OF MOTION TO DISMISS.

Cullen was injured while riding as a passenger in a vehicle owned by a third party. He filed a UIM claim under a policy insuring Sierrita Mining and Ranch Company which covered a specific vehicle used exclusively by Cullen’s mother. The policy made no mention of Cullen or his mother. The carrier denied the claim and Cullen sued for breach of contract and insurance bad faith, and further alleged the insurance agency involved had been negligent in structuring the coverage.

The trial court granted a Rule 12(b)(6) motion to dismiss for failure to state a claim which was granted because, based upon the allegations in the complaint, plaintiff was traveling in an automobile that was not covered under the policy in question and the policy did not offer “portable” UIM coverage.

First the Court of Appeals found that the trial court had properly treated the Rule 12(b)(6) motion as a motion to dismiss and not a motion for summary judgment even though the insurance contract itself was part of the court’s decision. The court found it was not additional material that would require the court to treat the motion as a motion for summary judgment because the contract was central to the plaintiff’s claim, was referred to in the complaint, and attached to the defendant’s motion to dismiss. It was appropriate for the court to consider it in ruling on the motion to dismiss.

Further, even though the plaintiff had submitted numerous affidavits and exhibits, the court was permitted to disregard those materials and only base its decision upon the allegations of the complaint and the insurance contract itself.

Next, the court found that the UIM language in the policy in question clearly did not provide coverage to this plaintiff. Plaintiff admitted that Sierrita was the named insured on the policy and that the policy defines “you or your” as the “first named insured” and, although it stated it provided coverage to relatives of the household of the named insured, a company like Sierrita cannot have “relatives.” On the other hand, the court found that if the plaintiff had been injured while occupying the covered vehicle listed in the policy, he would have coverage.

Next the court addressed the plaintiff’s reasonable expectations argument, i.e., that he had a reasonable expectation that since Sierrita was providing his family with a car that was insured, the policy would cover him for injuries sustained at the hands of an uninsured motorist regardless of which vehicle he was riding in when the injuries occurred. First, the court noted that the plaintiff had no right to have reasonable expectations here since he was not a party to the contract. His complaint could stand only if Sierrita had a reasonable expectation that this plaintiff would be covered under the policy. Thus the plaintiff’s expectations were not relevant.

The court then set forth four criteria to be applied in evaluating a reasonable expectation claim. Reasonable expectations will be applied to required coverage (1) where the contract terms, although not ambiguous, cannot be understood by the reasonably intelligent consumer; (2) where the insured did not receive full and adequate notice of the term and it is unusual or unexpected or emasculates apparent coverage; (3) where some activity reasonably attributed to the insurer would create an objective impression of coverage; and (4) where some activity reasonably attributable to the insurer has induced a particular insured to reasonably believe that he had coverage even where expressly and ambiguously denied in the policy.

Here, because the plaintiff did not allege any of these factors applied and only claimed that he personally had reasonable expectations, granting the motion to dismiss was appropriate.

## **2. No Offset for Worker's Compensation**

*Cundiff v. State Farm Mutual Automobile Insurance Company*, \_\_\_ Ariz. \_\_\_, 174 P.3d 270, (Sup. Ct., January 10, 2008) (Justice McGregor). UIM CANNOT BE OFFSET BY WORKERS' COMPENSATION.

A Pima County Deputy Sheriff was involved in an automobile accident in 1997 and received worker's compensation benefits as a result. The officer then sued the at-fault driver of the other vehicle and settled for \$15,000, the limit of the driver's liability coverage. Thereafter the sheriff made an UIM claim under her personal motor vehicle liability insurance policy issued by State Farm which provided \$25,000 in UIM coverage. An arbitrator awarded \$40,000 in damages but when the plaintiff attempted to collect, the insured took the position that its policy provision allowing for an offset of workers' compensation benefits applied and that therefore the plaintiff's recovery was reduced to \$10,000. The plaintiff then sued State Farm seeking a declaratory judgment that the workers' compensation offset provision was unenforceable per se or that she was deprived of her right to be made whole by virtue of the provision.

A.R.S. § 20-259.01(d) defines the scope of UIM coverage and states "to the extent that the total damages exceed the total applicable liability limits, the under-insured motorist coverage provided in sub-section B of this section is applicable to the difference."

Here the plaintiff's damages were \$40,000 minus the \$15,000 in liability coverage paid, resulting in a difference of \$25,000, the amount of the underinsured motorist coverage.

Because the UIM statute only allows an offset for liability coverage, the question becomes is workers' compensation "liability insurance"?

The Arizona Supreme Court held that workers' compensation is not liability insurance. The court found that both liability insurance and workers' compensation "are types of casualty insurance, they are separate and distinct." Liability insurance is "insurance against legal liability," while workers' compensation is "insurance of the obligations accepted by, imposed upon or assumed by employers under law." Liability insurance, unlike workers' compensation, provides coverage based on fault. Indeed, workers' compensation is specifically designed to compensate without regard to fault. Accordingly, because workers' compensation is not liability insurance, the statute does not permit consideration of workers' compensation benefits in determining the amount of UIM coverage available to an insured.

State Farm's analogy to uninsured motorist coverage is not persuasive to find a different result since the underinsured motorist coverage is defined differently than uninsured motorist. The statutory provision defining UM coverage expressly provides that such coverage is "subject to the terms and conditions of that coverage" and therefore the insurer may in the policy specifically set forth the right to an offset for workers' compensation. Finally, the court held that its decision was to be applied prospectively as well as retroactively.

## **F. Morris Agreement**

### **1. Prejudgment Interest Upon Court Approval of Settlement; Estoppel**

*Pueblo Santa Fe Townhomes Owners' Assoc., Inc. v. Transcontinental Ins.*, 525 Ariz. Adv. Rep. 17 (App. Div. 1, March 13, 2008) (Judge Johnsen). INSURER ESTOPPED FROM ASSERTING COVERAGE DEFENSE BY WAITING EIGHTEEN MONTHS; PRE-JUDGMENT INTEREST DOES NOT ACCRUE UNTIL COURT APPROVES AMOUNT OF MORRIS AGREEMENT. The plaintiff's homeowners' association sued a general contractor for construction defects and the contractor served a notice of claim upon its insurer CNA in less than two months. CNA retained a law firm to represent contractor.

The policy in question was a commercial general liability policy with a "your work" exclusion essentially excluding coverage for damage to "work or operations performed by you." CNA interpreted this to mean that although it might be liable for damages "resulting from" defective work it would not be responsible to pay for the cost to repair or replace the poor workmanship in the first place. This was a \$2.3 million item of damage.

Although it was CNA's normal practice to issue an immediate reservation of rights letter to an insured under these circumstances, for a reason never explained, that did not occur for some eighteen months on this case. In the interim, destructive testing was performed upon the defective work which resulted in expert witness conclusions that the chemical content of the stucco used by the contractor was inadequate and caused all the cracking.

The insured was not informed of a destructive testing deadline and the defense hired by CNA failed to retain an expert to participate in the destructive testing on the insured's behalf. Other defendants began settling and preserving indemnity agreements against the insured. The insured ultimately entered into a \$1.1 million Morris agreement with the plaintiff after CNA filed its declaratory relief action seeking a declaration of no coverage.

The entire issue at trial was whether or not CNA was estopped from denying coverage based on its delay in reserving rights to contest the coverage. The trial court made detailed findings in which it concluded that CNA's eighteen month delay prejudiced the insured because the insured did not have the opportunity to have its own expert participate in the destructive testing that took place at a time when the insured was unaware that CNA disputed coverage for the damage to the stucco.

In analyzing the estoppel claim, the court first recognized that as soon as an insurer determines it has a coverage defense, a "conflict of interest" is created between it and the insured. The insurer has an obligation at that point to notify the insured of the conflict so the insured can protect itself in the litigation with the claimant. One such means of protection for the insured was to enter into a Morris agreement with the claimant. Where the insurer continues to exercise exclusive control over the defense of the insured without informing the insured of the conflict, the insured has no reason to act to protect its right.

CNA argued that the claimant had no right to pursue an estoppel claim against it but rather this right lay only with the insured. The court, however, in reviewing the language in the Morris agreement found that the insured clearly intended to transfer all of its rights and claims against CNA including the right to assert estoppel. Here, where the insurer failed to put the insured on notice of the conflict of interest while exclusively controlling the defense, and particularly where during this time the ability to properly defend was lost when the destructive testing deadline ran, CNA was estopped. "An insurer that has failed to promptly reserve its rights does not escape the consequences of that failure simply because its insured assigns its coverage rights to another."

Here it is was clear that the stucco was cracking badly and that the damages were in the millions. It was likewise clear that this insured who had done the stucco work was the primary target. The best defense this insured had was to blame the design and construction of the interior of the building, the walls and foundations shifting, and not the stucco work. The only way to effectively present this defense was to have participated in the destructive testing when the stucco was pulled away from the walls and the underlying support members were examined. The failure of the lawyers hired by CNA to hire an expert to participate in this testing, or to inform the insured, removed the insured's only chance to deflect responsibility for the majority of the damage which CNA was ultimately going to claim it did not cover.

The trial court's award of pre-judgment interest on the \$1.1 million Morris agreement back to the date of the signing of that agreement was improper. The Court of Appeals found that the judgment and damages were not liquidated until determined by the court to be reasonable. "Pre-judgment interest begins to accrue when the amount of damages can be computed with exactness, not when the amount of damages still must be determined by opinion or discretion."

Finally, the court found that the trial court could not award attorneys' fees under A.R.S. § 12-341.01(B) in an amount more than "the amount paid or agreed to be paid" to the party's attorneys. Here the agreement was a 38% contingency fee and therefore the award of fees could not exceed that contingency amount.

### **III. CIVIL PROCEDURE**

#### **A. Contractual Agreement to Arbitrate**

##### **1. Rule 12 Dismissal Based On Contractual Agreement to Arbitrate; Implied Agency and Appellate Jurisdiction**

*Ruesga v. Kindred Nursing Centers West*, 215 Ariz. 589, 161 P.3d 1253 (App. Div. 2, July 18, 2007) (Judge Pelander). IN ORDER FOR RULE 60 (C) DISMISSAL BASED ON REQUIRING AN ORDER COMPELLING COMPULSTORY ARBITRATION IS NOT APPEALABLE. IMPLIED AGENCY MAY EXIST WHEN SPOUSE SIGNS FOR HUSBAND. Plaintiff wife checked her husband into the Desert Life Rehabilitation Care Center. At the time she checked him in she was presented with a number of documents including an agreement to waive a right to pursue any claims against Desert Life in a civil action and instead submit any such claims to compulsory arbitration. The decedent's wife signed the agreement on behalf of her husband who later died in the facility resulting in a wrongful death action for medical negligence and breach under A.R.S. §§ 46-454 and 455, violation of Arizona's Adult Protective Services Act, Breach of Contract and Fraud.

Desert Life moved to dismiss the claim under Rule 12 based upon the wife's signature on the compulsory arbitration dispute resolution agreement along with its clerk's affidavit that the agreement was explained to and signed by the decedent's wife. Initially the trial court denied the motion. Later after discovery, Desert Life submitted several documents which demonstrated that prior to the Plaintiff's decedent's admission to Desert Life, the wife had signed documents purporting to be the legal representative and agent of her husband and with her husband's knowledge and at least implied consent. Upon submission of these documents pursuant to a Rule 60(c)(2) Motion for Relief from Prior Ruling, the court dismissed the action ordering the parties to arbitrate all claims in accordance with the terms of the arbitration agreement.

First the Court of Appeal noted that it did not have jurisdiction under Arizona Revised Statute § 12-2101 (c) & (d) as there was no "special order made after final

judgment” to appeal from. The court’s order from which the estate appealed merely compelled arbitration. The legislature has not made such orders appealable. See A.R.S. § 12-120.21 & 2101 & 2101.01. There was never a final judgment entered in the case. The trial court’s order granting Rule 60(c) relief by and of itself does not make the order appealable. It has long been recognized in Arizona that an order compelling arbitration is not a final judgment and therefore not an appealable order. Nonetheless, the court of appeals choose to accept jurisdiction *sua sponte* under its special action jurisdiction.

The court then established that although the question of agency in this case is a question of fact, Revised Statute § 12-1502(A) requires that where a party denies the existence of an agreement to arbitrate the Superior Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party.” Based upon this language, the court found it is not a jury question but rather a matter for the court to determine whether or not the parties are bound by an agreement to binding arbitration.

Here the court found that documents signed by the decedent’s wife and acknowledged by him established an implied agency allowing the wife to bind the husband to compulsory arbitration. The court noted that the mere fact the party is married to another does not establish this agency. However, the only meaningful difference between a principle agent relation existing between spouses and that existing between non-spouses is the degree of proof required to establish and define the agency relationship. Desert Life produced several medical records that revealed a history of the wife’s acting and making decision on the husband’s behalf including the wife’s signature as “agent or legally authorized representative.” In other documents it was shown that the husband has consented to his wife’s control of his care and his insurance matters. There was no evidence submitted to contradict this apparently implied agency.

## **2. Discovery of Special Education Records and Scope of Medical Records Privilege**

*Catrone v. Miles*, 215 Ariz. 446, 160 P.3d 1204 (App. Div. 1, June 26, 2007) (Judge Barker). FEDERAL STATUTES PROTECT PRIVACY BUT DO NOT CREATE PRIVILEGE PREVENTING COURT FROM ORDERING PRODUCTION OF ACADEMIC OR SPECIAL EDUCATION RECORDS – EXPECTATION OF PRIVACY AS TO PRIVILEGED VERSUS CONFIDENTIAL RECORDS. The parents of a child with numerous cognitive and hearing defects sued the child’s doctor’s hospital for medical malpractice. The parents had a child one year old who required special education for learning disabilities which included speech and comprehension difficulties as well as cognitive impairments. One of the defenses was that the plaintiff’s problems were genetic and therefore the defendant’s sought discovery of the academic and special education records of the older child.

The trial court found the plaintiff did not have a “special education records privilege” and ordered the records be produced under seal for in camera review by court to

determine if they contain information subject to the physician patient privilege. After this review the court ordered production of the documents with the exception of certain pages and redactions due to this privilege. The court further ordered in the interest of significant privacy concerns that the parties agree to a protective order for the documents.

The plaintiffs sought reconsideration specifying that certain additional records should be reviewed again and be except from disclosure due to the physician-patient privilege. The motion was denied and the special action followed. On appeal the plaintiff alleged that the special education records are protected by the medical records privilege (A.R.S § 12-2292) and further protected by an educational records and/or special education records privilege and third if not protected by privilege the trial court had abused its discretion in compelling the production of academic records.

The existence of a privilege is a legal issue reviewed de novo. Privilege statutes which impede the truth finding function are restrictively interpreted.

Records in question were signed by a school psychologist, physical therapist, occupational therapist and speech therapist.

First the court found that the school psychologist need not be licensed if he or she is certified by the Department of Education. Further the medical records privilege does not apply to speech therapists because Title 32 does not require licensing for speech therapist. (See A.R.S. §§ 12-2291(4)(a) and 32-101-4161).

The statutory privilege for medical records covers only records that relate to the “physical or mental health or condition” of a patient and are maintained “for purposes of patient diagnosis or treatment.” A.R.S. §12-2291(5). While special education records do relate to the physical or mental health or condition of a student they are created for the purpose of tailoring an educational program that will best accommodate the child’s disability. This is not the same as diagnosis or treatment of a person with disabilities in a medical setting. Some records in the educational setting may be privileged and others may not. However, the mere participation of a school psychologist or therapist in the process does not alter the fact that much of the special educational records are maintained for the purpose of education and not treatment.

Accordingly, the court held that special education records are not protected in their entirety by the medical records privilege. The trial judge properly addressed this concern by conducting an in-camera review of the documents and withholding and redacting specific information protected by the medical privilege. Remaining records were not so privileged. With respect to this alleged special education records privilege by statute § 15-141(A) provides that the right to inspect and review educational records and the release of such records is governed by Federal law (20 U.S.C. § 1232g, 1232h & 1232i)

Federal regulations track the statute and allow disclosure of such records without consent if disclosure is to comply with the judicial order or lawfully issued subpoena. 34 C.F.R. § 99.31(a)(9)(i).

Generally a privilege will protect records from disclosure even by court order. The federal and state statutes do not use the term “privileged” with respect to educational records. The court found that the federal and state statutes not only do not use the term “privileged” but do not create an independent privilege for educational records. Contrary, these statutes and regulations actually allow for disclosure pursuant to Court order. Although the Disability Education Act, 20 U.S.C. § 1401 – 1482 require the secretary to protect the confidentiality of data and information in the records, “privileged” and “confidential” are not synonymous. Consequently the statutes and regulations do not create privilege for educational records in general or the subset of special education records at issue here. Here, the court found that the statutory requirement of “confidentiality” is merely an additional factor the court must consider before disclosure may occur. The trial court must first apply the traditional relevant standard to determine whether the records sought are “reasonably calculated to lead to the discovery of admissible evidence under Rule 26(b)(1). If this test is met, the trial court must then determine whether the statutory interest in confidentiality substantially outweighs the interest in production of the documents. To make this determination the trial court should consider (1) the strength of the relationship between the confidential information and the issue in dispute, (2) the harm that may result in the dissemination of the confidential information (3) whether protective devices limiting the disclosure of the information (such as in-camera inspections and “need to know” orders) can significantly reduce the harm from dissemination, (4) whether the information can be obtained from other sources more convenient and less burdensome (5) whether the party seeking to preclude production is the party that put the need for the document at issue (6) any other factors pertinent to determining whether confidentiality should outweigh production.

Thus, when a party makes a discovery request for material that the trial court has found discoverable pursuant to Rule 26, the interest in confidentiality may typically be satisfactorily protected by in-camera review and an order limiting disclosure of the information to those with a need to know for the purposes of the litigation. These interests can be further protected at trial through the sealing of the record and, the closing of the courtroom to certain portions of the trial proceedings where the confidential information is discussed.

Under the facts of this case the discovery sought is to be found strongly related to the core issues in the litigation, i.e. whether the disabilities at issue were caused by malpractice or genetics.

With respect to the harm that might result in the ability to limit that harm should disclosure be ordered, the trial court here properly considered and safeguarded confidentiality and privacy interests when it conducted an in-camera review and issued a protective order limiting the dissemination of the records to those who need

to know. The plaintiff failed to show substantial harm would result if this limited disclosure was allowed.

Additionally, there was no showing that this same information could be obtained from a more convenient or less burdensome source.

As to the fifth factor of the records sought put at issue by the older children so that particular factor weighs in favor of the older child's right to privacy and confidentiality. However, the point that brought the action, the older brother's educational records, became relevant and should be discoverable under the limitations set forth by the court. This is particularly true where the court expressly precluded production of medical records.

### **3. Discovery of Identity of E-mail Account Holder**

*Mobilisa, Inc. v. Doe*, 217 Ariz. Adv. Rep. 103, 170 P.3d 712 (App. Div. 1, November 27, 2007) (Judge Timmer). TO DISCOVER ANONYMOUS INTERNET SPEAKER'S IDENTITY MUST SHOW ADEQUATE NOTICE TO SPEAKER, REQUESTING PARTY'S CAUSE OF ACTION CAN SURVIVE SUMMARY JUDGMENT WITHOUT SPEAKER'S IDENTITY AND A BALANCE OF PARTY'S COMPETING INTEREST FAVORS DISCLOSURE.

Ludlow, the Chief Executive Office of Mobilisa, a company that provides wireless and mobile communication systems to customers including the government and military entities, used his Mobilisa e-mail account to send in intimate message to Sheriff Smith. Later an anonymous sender somehow obtained this e-mail and sent it an unknown number of individuals including members of Mobilisa's management team stating "is this a company where you want to work?"

Mobilisa then filed suit in Washington naming John Does I-10 alleging violations of two federal laws relating to electronic communications (18 U.S.C. § 1030 & 2701), and asserting a common law claim of trespass to chattel. The essence of the claim was that the defendants accessed Mobilisa's protected computer system and e-mail accounts without or in excess of authorization and Mobilisa sought damages and injunctive relief. Thereafter, the plaintiff filed an application pursuant to A.R.C.P. 30(h) requesting Arizona Superior Court in Maricopa County to issue a subpoena based on a commission for subpoena authorized by the State of Washington to compel The Suggestion Box, the anonymous mailer's internet provider, to disclose the identity of the anonymous e-mailer. The anonymous e-mailer was notified of the request and through an attorney objected, stating he had not accessed Mobilisa's computers in order to send the e-mail and asserting his First Amendment right to not be identified. After a lengthy analysis of the law in this area around the country, the Arizona Court of Appeals held that in order to compel discovery of an anonymous speaker's identity, the requesting party must show: 1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request; (2) the requesting party's cause of action could survive a motion for summary judgment

on elements not dependent on the speaker's identity; and (3) a balance of the party's competing interest favors disclosure.

#### 4. **Sanctions: Dismissal for Failure to Disclose Unfavorable Information**

*Rivers v. Solley*, 523 Ariz. Adv. Rep. 31 (App. Div. 1, February 5, 2008) (Judge Orozco). PLAINTIFF'S FAILURE TO DISCLOSE PRIOR INJURY SUPPORTED TRIAL COURT'S DISMISSAL OF COMPLAINT AS AN APPROPRIATE SANCTION. The plaintiff was a veteran basketball player who played Division 1 basketball and on a semi-pro team in Italy and Chile in 2000 and 2001. In March 2002, the plaintiff and his passengers were involved in an automobile accident where he claimed he sustained back and knee injuries.

Subsequently, he tried out for an American Basketball Association team but claims he was unable to complete the tryouts because of his injuries. During discovery, the plaintiff revealed a prior March 30, 2002, accident, but did not disclose yet another one he was involved in on March 1, 2002. Following the March 1 accident the plaintiff was sent to the emergency room where he told physicians he was suffering with pain he rated 8 on a scale of 10 and numbness in his leg. Pain medication was prescribed.

Later, at a deposition, the plaintiff testified he had been involved in only two car accidents prior to his March 17, 2002 accident which was the subject of the lawsuit. One such accident was in February of 1996 and another in January of 1999.

Later, the plaintiff reported to a doctor during an independent medical examination that he had not been in any prior accidents even though his medical records reflected otherwise. The plaintiff failed to reveal the March 1, 2002, accident in answers to interrogatories as well. Finally, the plaintiff never produced any records concerning the March 1, 2002, accident, and in his Rule 26.1 disclosure statement was silent on this accident. Shortly before trial defense counsel learned of the March 1, 2002, accident after subpoenaing the American Family Insurance file concerning an arbitration the plaintiff had had regarding the March 30, 2002 accident. The trial court held a hearing in which the plaintiff testified concerning the failure to disclose. As a result of this hearing the court ordered the case dismissed.

In the dismissal, the trial court found that the plaintiff had knowingly and continuously failed to disclose the March 1 accident and, based on Rule 37(d), a party or attorney's "knowing failure to timely disclose damaging or unfavorable information shall be grounds for imposition of serious sanctions . . . including dismissal . . ."

The appellate court recognized that there is a strong preference that matters be decided on the merits and that lesser sanctions be considered when appropriate. However, where the court makes an express finding that a party as opposed to

counsel has obstructed discovery and the court considered and rejected lesser sanctions as a penalty, dismissal is appropriate.

Here, the disclosure came to light shortly before trial and was the malfeasance of the client not the attorney, and because it was not discovered until the eve of trial a brief continuance could not have cured the resulting prejudice.

The court found it significant that here the trial court had conducted a hearing, took testimony from the plaintiff and in the court's order specifically analyzed, considered and rejected less serious sanctions.

## **B. Dismissal**

### **1. Motion to Dismiss**

*Cullen v. Koty-Leavitt Insurance Agency*, 216 Ariz. 509, 168 P.3d 917 (App. Div. 2, October 18, 2007) (Judge Brammer). UIM COVERAGE DOES NOT APPLY TO SON WHEN MOTHER WAS PROVIDED A VEHICLE THAT HAD UIM COVERAGE WHERE SON WAS RIDING IN A DIFFERENT VEHICLE. BUSINESS ENTITY CANNOT HAVE "RELATIVES." CONTRACT ATTACHED TO COMPLAINT AND PLAINTIFF'S CLAIM WAS NOT "MATTER OUTSIDE THE PLEADINGS" FOR PURPOSES OF MOTION TO DISMISS.

Cullen was injured while riding as a passenger in a vehicle owned by a third party. He filed a UIM claim under a policy insuring Sierrita Mining and Ranch Company which covered a specific vehicle used exclusively by Cullen's mother. The policy made no mention of Cullen or his mother. The carrier denied the claim and Cullen sued for breach of contract and insurance bad faith, and further alleged the insurance agency involved had been negligent in structuring the coverage.

The trial court granted a Rule 12(b)(6) motion to dismiss for failure to state a claim which was granted because, based upon the allegations in the complaint, plaintiff was traveling in an automobile that was not covered under the policy in question and the policy did not offer "portable" UIM coverage.

First the Court of Appeals found that the trial court had properly treated the Rule 12(b)(6) motion as a motion to dismiss and not a motion for summary judgment even though the insurance contract itself was part of the court's decision. The court found it was not additional material that would require the court to treat the motion as a motion for summary judgment because the contract was central to the plaintiff's claim, was referred to in the complaint, and attached to the defendant's motion to dismiss. It was appropriate for the court to consider it in ruling on the motion to dismiss.

Further, even though the plaintiff had submitted numerous affidavits and exhibits, the court was permitted to disregard those materials and only base its decision upon the allegations of the complaint and the insurance contract itself.

Next, the court found that the UIM language in the policy in question clearly did not provide coverage to this plaintiff. Plaintiff admitted that Sierrita was the named insured on the policy and that the policy defines “you or your” as the “first named insured” and, although it stated it provided coverage to relatives of the household of the named insured, a company like Sierrita cannot have “relatives.” On the other hand, the court found that if the plaintiff had been injured while occupying the covered vehicle listed in the policy, he would have coverage.

Next the court addressed the plaintiff’s reasonable expectations argument, i.e., that he had a reasonable expectation that since Sierrita was providing his family with a car that was insured, the policy would cover him for injuries sustained at the hands of an uninsured motorist regardless of which vehicle he was riding in when the injuries occurred. First, the court noted that the plaintiff had no right to have reasonable expectations here since he was not a party to the contract. His complaint could stand only if Sierrita had a reasonable expectation that this plaintiff would be covered under the policy. Thus the plaintiff’s expectations were not relevant.

The court then set forth four criteria to be applied in evaluating a reasonable expectation claim. Reasonable expectations will be applied to required coverage (1) where the contract terms, although not ambiguous, cannot be understood by the reasonably intelligent consumer; (2) where the insured did not receive full and adequate notice of the term and it is unusual or unexpected or emasculates apparent coverage; (3) where some activity reasonably attributed to the insurer would create an objective impression of coverage; and (4) where some activity reasonably attributable to the insurer has induced a particular insured to reasonably believe that he had coverage even where expressly and ambiguously denied in the policy.

Here, because the plaintiff did not allege any of these factors applied and only claimed that he personally had reasonable expectations, granting the motion to dismiss was appropriate.

## **2. Failure to State A Claim**

*Myers v. Hoffman-La Roche, Inc.*, 217 Ariz. 5, 170 P.3d 254 (App. Div. 1, October 5, 2007) (Judge Johnsen). PRODUCTS LIABILITY/MEDICAL MALPRACTICE: INJURY IN UTERO CAUSED BY ACCUTANE. INJURY CLAIM VERSUS WRONGFUL LIFE CLAIM, LEARNED INTERMEDIARY DOCTRINE, FAILURE TO STATE A CLAIM, ADEQUACY OF WARNINGS.

Plaintiff was born with severe cognitive and physical birth defects related to mother’s consumption of acne prevention medication Accutane.

Plaintiff sued for injuries she sustained while in her mother's womb while mother was consuming the drug. A claim for wrongful life is not allowed under Arizona law. However, where the allegation is that the negligence caused plaintiff's injuries while in utero and seeks damages for those injuries, it is not a wrongful life case but rather a personal injury case and is allowed.

The Learned Intermediary Doctrine provides that the manufacturer or supplier of a prescription drug has no legal duty to warn the consumer of the dangers of its drug, as long as adequate warnings are provided to the prescribing physician.

The complaint alleged that a drug manufacturer failed to fully inform the prescribing physician of necessary safety precautions required to prevent risks anticipated in connection with the drug. Defendant's motion to dismiss would be denied where complaint alleged failure to provide adequate instructions to doctors on pregnancy prevention and not just inadequate warning regarding the dangers of the drug. A claim was stated for negligence against both the physician and the drug manufacturer that would withstand a motion to dismiss based on the Learned Intermediary Doctrine.

### **3. Adequacy of Pleadings Under Rule 8**

*Cullan v. Auto Owners Ins.*, No CV07-0402-PR \_\_\_ Ariz. Adv. Rep. \_\_\_\_ (Ariz. Sup. Ct.) (Justice McGregor). RULE 8 OF ARIZONA RULES OF CIVIL PROCEDURE REQUIRES COMPLAINT BE PLED WITH SUFFICIENT SPECIFICITY TO SHOW PLEADER IS ENTITLED TO RELIEF.

The plaintiff was injured in an automobile accident and received benefits from a third party's insurance policy, thereafter filing an underinsured motorist claim under his mother's policy with Auto Owners on his mother's Dodge Caravan, which was the vehicle he was operating when the accident occurred.

Auto-Owners denied the plaintiff's claim. Subsequently, the plaintiff sued Auto-Owners for breach of contract and bad faith. Auto-Owners moved to dismiss under Arizona Rules of Civil Procedure 12(b)(6)- Failure to state a claim upon which relief could be granted. The trial court granted the motion.

In analyzing whether or not the trial court and the court of appeals were correct in dismissing plaintiff's complaint for failure to state a claim, the court first recognized that the Arizona supreme court, and only the supreme court has the authority to "make rules relative to all procedural matters in any court. . . and interpret rules of procedure." Thus, the Arizona Supreme Court held it was not bound by the more liberal standard announced recently by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) despite the almost identical language of Rule 8 in the Federal Rules and under the Arizona Rules.

The Arizona Supreme Court then went on to find that Rule 8 does “not permit a trial or appellate court to speculate about hypothetical facts that might entitle the plaintiff to relief . . . courts are limited to considering the well-pled facts and all reasonable interpretations of those facts.” In contrast, the Supreme Court in *Twombly* held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove [no set of facts in support of his claim which would entitle him to relief.” *Id.* At 45-46.

## C. Governmental Immunity

### 1. Scope of Immunity of Post Office for Delivery of Mail

*MB Financial Group, Inc. v. United States Postal Service*, No. 06-56267 , \_\_\_ F.3d \_\_\_, (9<sup>th</sup> Circuit, September 25, 2008). (Judge Schroeder). THE UNITED STATES POST OFFICE IS NOT IMMUNE FOR FAILING TO MAKE AVAILABLE A POST OFFICE BOX TO CUSTOMER IT HAD PROMISED TO PROVIDE A BOX.

The issue in this case was whether or not the United States Postal Service (USPS) can be held liable for failing to make available a post office box it was obligated to provide for receipt of plaintiff’s business mail.

MB Financial Group [MB] sells mail order mortgage loans. It depends upon receiving mailed in responses to its solicitations from potential customers.

MB rented a post office box from the USPS branch office in San Diego and paid for six months usage. The USPS apologized and acknowledged that it “may have been at fault” for the “premature closure of [the] PO Box” due to “improper handling of fees.”

MB sued USPS for negligence and breach of contract. USPS moved to dismiss under Rule 12 of the Federal Rules of Civil Procedure for failure to state a claim on the basis that it has immunity for “any claim arising out of the loss, miscarriage or negligent transmission of letters or postal matter.” Section 2680(b) & 1346(b) of the Federal Tort Claims Act.

The United States Supreme Court first recognized that the postal service is “an independent establishment of the executive branch” 39 U.S.C. §201, and therefore enjoys sovereign immunity absent a waiver. However, Congress provided such a waiver in the Postal Reform Act (PRA) where it specifically provides that the USPS has the power to “sue and be sued in its official name.” It is true that there is an exception for claims arising out of the negligent transmission of mail.

To determine whether the failure to provide a post office box falls within this exception to the waiver of sovereign immunity, the court first looked at the decision of *Dolan v. U.S. Postal Service*, 546 U.S. 481 (2006). In this case a plaintiff sued when she fell over boxes negligently placed at her doorstep by the postal service.

Here the Supreme Court found the issue was the negligent placement of boxes after they had already been delivered and not the actual transmission of mail and therefore the exception did not apply. Based upon this reasoning the 9<sup>th</sup> circuit in this case determined that “the alleged negligence was not in transmitting the mail to the proper place of delivery. Rather, it was in the admittedly improper handling of the MD Financials payments for its post office box, and the failure to process the renewal. The negligence occurred after the mail was transmitted to the post office.” Accordingly, plaintiff did state a claim for negligence and on essentially the same facts a proper claim for breach of contract. The plaintiff alleged he paid for the box for six months and that the USPS breached the contract by not providing the box for that full term.

#### **D. Judgments**

##### **1. Certification as Final Judgment – Appellate Jurisdiction - Claim for Attorney’s Fees.**

*Kim v. Mansoori*, 214 Ariz. 457, 153 P.3d 1086 (App. Div. 2, March 23, 2007) (Judge Eckerstrom). JUDGMENTS UNDER RULE 54(b) INAPPROPRIATE WHERE REQUEST FOR ATTORNEYS’ FEES NOT ADJUDICATED AFTER DETERMINATION ON THE MERITS. The Plaintiff sued for specific performance and breach of contract. The defendant denied he had signed the contract and alleged his real estate agent had fraudulently done so. The plaintiff amended the complaint and brought the agent into the action alleging fraud. The agent then moved for partial summary judgment on the plaintiff’s claim for attorneys’ fees under A.R.S. § 12-341.01 because the action did not arise out of contract. The plaintiff responded that the motion was premature and procedurally inappropriate because Rule 4(g)(2) of the Arizona Rules of Civil Procedure requires that attorney’s fees be decided after a decision on the merits. After hearing, the court granted the motion for partial summary judgment and ruled that the plaintiffs were not entitled to attorneys’ fees under A.R.S. § 12-341.01 because there was no contract between the plaintiff and the real estate defendant. Thereafter a form of judgment with Rule 54(b) language was submitted to the court and, despite plaintiff’s objection, signed by the court. The primary objection was that the claim for attorneys’ fees was not a separate claim and therefore the judgment should not be certified under Rule 54(b) as a final appealable judgment.

The Arizona Court of Appeals held that Rule 54(g)(2) specifically requires “that determination as to the claimed attorneys’ fees shall be made after a decision on the merits of the case.” This rule expressly precludes that determination on attorneys’ fee request prior to a decision on the merits.

In conclusion, attorneys’ fees under A.R.S. § 12-341.01 should not be decided until after a determination of the case on the merits and Rule 54(b) cannot be read to authorize the certification of a judgment expressly prohibited by Rule 54(g)(2).

## **E. Jurors' Right to Opt Out**

### **1. Right to Opt Out at Age 75; Medical Statements Confidential**

*Stewart v. Carroll*, 214 Ariz. 480, 154 P.3d 382 (App. Div. 1, March 13, 2007) (Judge Norris), review denied September 25, 2007. STATUTORY PROVISION ALLOWING A PERSON 75 YEARS OF AGE OR ORDER TO OPT OUT OF JURY SERVICE IS CONSTITUTIONAL. PERSONAL PRIVACY RIGHTS OF JURORS ALLOW THEM TO MAINTAIN CONFIDENTIALITY OF MEDICAL STATEMENTS DESPITE CONSISTUTIONAL PROVISION REQUIRING OPEN COURTS. Arizona Revised Statute § 21-202 provides that a prospective juror 75 years of age may submit a written statement to the court requesting they be excused from service. Upon receipt of such request, the judge or jury commissioner shall excuse the prospective juror from service. Additionally, A.R.S. § 21-202(B)(1) allows a person to be excused temporarily from jury service if the judge or jury commissioner finds the prospective juror has a mental or physical condition that causes the juror to be incapable of performing jury service. In order to be so excused the prospective juror must submit a "medical statement" from a physician licensed in Arizona that explains the mental or physical condition which renders them unfit. These documents are not public records and are not to be disclosed the general public. Plaintiff asks the municipal court to declare these provision unconstitutional in that they violate the plaintiff's right to a fair cross-section of the community and the constitutional requirement that courts be open to the public. The court held that the plaintiff failed to present any evidence that citizens 75 or older constitute a distinct group such that allowing them to opt out of jury service would deprive a criminal defendant of the common sense judgment of the community, would give rise to the appearance of unfairness or would interfere with the responsibility and right all Americans share in ensuring the fair administration of justice. Other courts addressing similar issues have found that in order for a group to be "distinctive" under the 6<sup>th</sup> Amendment, it must be defined and limited by some clearly identifiable factors, by a common thread of basic similarity in attitude, ideas, or experiences running through the group, or by a community of interest among the members of the group such that the groups' interest cannot be adequately represented if the group is excluded from the jury selection process.

Finally the legislature's decision to maintain the confidentiality of medical statements submitted by prospective jurors does not infringe on the constitutional requirement of "public judicial proceedings"; rather, it accommodates the legitimate personal property rights of prospective jurors. Individuals who are called for jury duty do not forfeit their privacy rights when they are called. As a matter of public policy, the court wants to encourage jury service and requiring prospective jurors to run the risk of having their private mental or physical conditions made public would not do so.

## **F. Jury**

### **1. Jury Coercion**

*State of Arizona v. Fernandez*, 216 Ariz. 545, 169 P.3d 641 (App. Div. 1, October 18, 2007) (Judge Brown). JURY COERCION/SUPPLEMENTAL CLOSING ARGUMENT/JUROR IMPASSE.

In a murder trial the jury became deadlock arguing on the issue of premeditation and sent a question out asking the judge for more instructions on the concept. Instead, the judge ordered supplemental closing argument by the prosecutor and defense attorney to explain the principles. Rule 22.4 of the Arizona Rules of Criminal Procedure specifically allows additional argument by counsel when jurors reach an impasse. Here, the court instructed the jury it could not add anything to the legal definition of premeditation but attempted to satisfy the jury's apparent need for clarification by additional closing argument. Trial judges have inherent power and discretion to adopt special individualized procedures designed to promote the ends of justice in each case that comes before them as long as such procedures are not inconsistent with statutory or constitutional provisions or other rules of court.

Jury coercion exists when the trial court's actions or remarks, viewed in the totality of the circumstances, displace the independent judgment of the jurors, or when the trial judge encourages a deadlocked panel to reach a verdict. This did not occur here.

## **G. Notice of Claim**

### **1. Amount and Supporting Facts Accurate/Waiver**

*Jones v Cochise County*, 218 Ariz. Adv. Rep. 372 (Ct. App. Div. II, June 30, 2008)(Brammer) WHERE NOTICE OF CLAIM STATES ATTY WILL RECOMMEND SETTLEMENT FOR A SPECIFIC AMOUNT CLAIM STATUTE MET/COUNTY WAIVES DEFICIENCY OF NOTICE WHERE IT LITIGATES A YEAR AND A HALF BEFORE RAISING DEFENSE.

The plaintiff was severely injured by a Cochise County Sheriff Deputy on an emergency call who struck him as he walked along he shoulder of the roadway. His notice claim set forth a \$128,211.48 in medical expenses, set forth the specifics of his injuries and offered to settle for \$4,250,000 with the offer remaining open for 60 days.

A year and half, seven depositions, several disclosures and all three plaintiffs' depositions into the case the defense reads *Deer Valley* amends its answer to allege a deficient notice of claim. The trial court grants defendant's motion for summary judgment. The Court of Appeals disagreed, reversed and remanded.

Justice Brammer writing for the court said the purpose of ARS sec 12-8201.01 is not to put form over substance. To state a specific amount that the attorney would recommend to his client and to put a deadline for this "offer" was sufficient to put the government on notice as to what the case could settle for. Further, if the government

truly found the notice deficient it should have told the claimant so. The government fails to show how this notice impaired its ability to investigate and evaluate this claim.

Further, the plaintiff is not required to give specific rationale, facts and argument for each item of special and general damages. Setting forth specials with as much specificity as is practical setting forth generally how the injury has affected the plaintiffs and giving a lump sum for which it can be settled is all that the statute requires.

Finally, where the alleged deficiencies in the notice of claim are not raised for a year and a half after much investigation, discovery, disclosure and even offers of judgment the government waives its right to put form over substance and seek dismissal of the action for alleged technical deficiencies.

## **2. Delivery**

*Lee v. State of Arizona*, 528 Ariz. Adv. Rep. 17. (Ariz. Sup. Ct., April 25, 2008) (Justice Bales). NOTICE OF CLAIM: PROOF OF MAILING NOTICE OF CLAIM CREATES QUESTION OF FACT EVEN WHERE STATE DENIES RECEIPT. The plaintiff crashed his car through a highway guard rail injuring himself and killing three passengers. The state moved to dismiss the complaint, claiming that A.R.S. §12-821.01(A) had not be complied with because the state had never received a notice of claim.

In response, a “proof of service” signed by a staff member of the attorney’s firm attested to the fact that the notice had been sent to the Attorney General via regular United States mail more than one week before the statutory deadline. The superior court granted the motion to dismiss and this was affirmed by the Court of Appeals. The Supreme Court vacated the Court of Appeals’ and trial court’s rulings finding that a question of fact is created by the proof of service from the plaintiff’s attorney’s staff.

The Supreme Court noted that the statute requires the plaintiff “file” the notice of claim and that this means actual delivery of the notice to a person authorized to accept service. It is undisputed that the plaintiff is free to use regular mail to accomplish this. This dispute arises over what proof is required to show that a “filing” occurred when the state denies receiving the notice of claim.

The Arizona Supreme Court first noted that it has long recognized the “mail delivery rule.” This rule creates a presumption of receipt when there is proof a letter has been properly addressed, stamped, and deposited into the United States mail. However, a denial of receipt by the recipient destroys the presumption of delivery but the fact of mailing still has “evidentiary force.” The denial of the receipt simply creates an issue of fact for the factfinder to determine as to whether or not there was actual delivery. Where the notice of claim statute is silent as to what proof is required to show a

notice was “filed” or “delivered,” the longstanding mail delivery rule will apply. “The rule is not a legal fiction; it reflects the commonly recognized fact that the mail almost always works. Thus, although a denial of receipt rebuts the legal presumption that a piece of mail was received, a factfinder may still infer from the fact of mailing that the mail did reach its destination.” The legislature certainly has the power to specify what is required to accomplish a filing or delivery and, when it is silent on the subject, the common law rules of course apply. [A] government office’s inability to locate a notice of claim may indicate it was never received, but it may also indicate that it was received and later misplaced.” Which conclusion is more the particular facts and circumstances and this question is best decided by the factfinder.

The court also found it interesting to note that the state on its notice of claim form instructs people to mail the form as opposed to serving it with a process server.

The majority opinion was written by Justice Bales and a vehement dissent offered by Chief Justice McGregor. The gist of the dissent is that the Rules of Civil Procedure require that a plaintiff “shall file” the notice “as set forth in Arizona Rules of Civil Procedure.” The Arizona Rules of Civil Procedure require that in order for something to be “filed” there must be actual delivery and receipt. Justice McGregor further relied on a great deal of authority in other jurisdictions based on different statutes and rules rejecting the mailbox rule under these criterias.

### **3. Specificity**

#### **A. Sum Certain**

*Deer Valley v. Houser*, 214 Ariz. 293, 152 P.3d 490 (Sup. Ct., February 26, 2007) (Justice McGregor). NOTICE OF CLAIM LETTER MUST SPECIFY AMOUNT FOR WHICH CLAIM CAN BE SETTLED OR IT IS DEFECTIVE.

Plaintiff was a school teacher in the Deer Valley United School District and asserted a claim of wrongful termination against her employer. The claim letter stated that she “lost her previous salary of \$68,000 per year and an additional \$7,000 per year for summer school” and that she had “anticipated a \$6,000 raise for the upcoming school year and similar appropriate pay increases thereafter. As a teacher in the District she will earn \$36,800 this year.” The letter went on to state that she “anticipated earning \$35,000 per year or more going forward over the next eighteen years. That her compensatory damages for emotional distress amounted to no less than \$300,000 and that her damage to reputation was in the amount of \$200,000 or more.” In conclusion the letter stated that the plaintiff “hereby makes demand on the District for payment of these said amounts.”

Subsequently a lawsuit was filed and the defendant moved to dismiss on the basis that the notice of claim was deficient. The trial court denied the motion, the defendant brought a Special Action and this was accepted by the Arizona Supreme Court.

The Arizona Supreme Court acknowledged that the purpose of the notice statute was to allow the public entity an opportunity to investigate, assess liability, and possibly resolve the case short of litigation. The Arizona Supreme Court overturned the trial court finding that the Notice of Claim statute specifically and unequivocally requires the notice contain a “specific amount” for which the claim “can be settled” and “the facts supporting the amount.” A.R.S. §12-8210.01(A). The court found that although here the plaintiff specified specific dollar amounts supporting the alleged damages in the case she never set forth a precise amount that she was willing to settle for nor did she set forth adequate supporting facts for her numbers. The court particularly focused on the plaintiff’s repeated use of qualifying language such as “approximately \$35,000 per year or more,” “similar appropriate pay increases,” and she stated that her damages for emotional distress and harm to her reputation are “no less than” \$300,000 and \$200,000. The court found that these statements “simply do not define a specific amount that the plaintiff would have accepted to resolve or dispute with the District.”

The plaintiff alleged that the court should apply a “reasonableness standard” so that if the primary intent of the statute has been met the notice of claim letter should be satisfactory even if a specific amount for which the case could settle was not articulated. This was based upon the holding in *Young v. City of Scottsdale*, 193 Ariz. 110, 970 P.2d 945 (App. 1998). The Arizona Supreme Court rejected and overruled *Young* stating that the statute does not discuss or mention a reasonableness standard and therefore this was not the appropriate standard for analyzing a notice of claim. In contrast the statute had a “clear and unequivocal” statement requiring “a specific amount” in the notice of claim.

In conclusion, the court found that the plaintiff’s claim must be dismissed because of a deficient notice of claim and because the 180 days had now run for filing an appropriate notice of claim, the plaintiff’s claim would be forever time barred.

## **B. Sum Certain**

*Yollin v. City of Glendale*,, 536 Ariz. Adv. Rep. 20, (Az. Ct. App. Div. 1, August 5, 2008) (Judge Kessler). OFFERING TO SETTLE FOR \$150,000 AND PROVIDING A SUMMARY PLUS 100 PAGES OF MEDICAL RECORDS SUFFICIENT TO MEET SUM CERTAIN REQUIREMENT FOR NOTICE OF CLAIM.

The plaintiff filed a notice of claim with the City of Glendale alleging personal injury when he fell on a sidewalk slickened by fluid leaking from a city vehicle. He claimed that he had suffered injuries to his “head, jaw, back, shoulder and pelvic area.” He set forth the identity of his treating doctors, outlining \$19,400 in medical bills, lost wages, pain and suffering and demanded to settle the case for the specific sum of \$150,000. In exchange for which he offered to release Glendale and its agents and employees from liability. He also attached supporting documents including 100 pages of medical records detailing his condition, treatment, ongoing suffering, inability to work and medical bills.

Glendale never responded to the claim. However, after suit was filed Glendale moved to dismiss the complaint for failure to meet the “sum certain” requirement for a notice of claim. The trial court agreed and the plaintiff appealed.

The Court of Appeals overturned the trial court’s ruling finding that the plaintiff had met the sum certain requirement. The plaintiff specifically stated in his demand that he would “release the city of Glendale and the agents and employees from any liability associated with the claim for \$150,000.” The fact that he also indicated he was willing to negotiate does not eliminate the fact that had Glendale accepted this offer the plaintiff would have been bound to accept it.

The Court of Appeals further found there were adequate “supporting facts” submitted with the Notice of Claim to support the \$150,000 demand. The language requiring supporting facts in A.R.S.§12-821.01(A) does not require an articulation of legal theories or theories of recovery. It only requires the facts be set forth and support the amount demanded. In other words, the “plain meaning of the statute and its purpose alike support the inference that the supporting facts requirement demands a recitation of how past events harmed the claimant and led to his offer.” This does not mean that the plaintiff needs to disclose every possible fact supporting his offer including how to calculate pain and suffering. A Notice of Claim does not “require trial proof of damages or a disclosure statement sufficient to satisfy Rule 26.1. Here where the plaintiff gave a precise amount of medical expenses, attached voluminous medical records and bills to support it, the supporting fact requirement was met. Finally, the Court of Appeals found that the claims statute does not require the plaintiff to articulate some mathematical formula or method of calculation for the damages claimed.

### **C. Class Action**

*City of Phoenix v. The Honorable Kenneth L. Fields*, 530 Ariz. Adv. Rep. 26, (1CA-SA 07-0152) (App. Div. 1) (April 22, 2008) (Judge Hall). NOTICE OF CLAIM IN CLASS ACTION LAWSUIT MUST STATE SPECIFIC AMOUNT THAT MATTER “MIGHT” SETTLE FOR TO COMPLY WITH STATUTE. Several employees of the City of Phoenix submitted a notice of claim to the city declaring their intention to file a lawsuit for claimed failure to permit them to participate in benefits such as retirement and pension plans provided other city employees. The notice of claim stated with respect to the amount of damages that it would seek “a sum of money representing the difference between what each claimant and each class member was entitled to receive as benefits by comparison to those benefits each claimant and each class member actually received in an amount not less than \$10 million.”

The claim further stated claimants were entitled to funds which amounted to what should have been contributed to a retirement plan for these employees in an amount which was believed to be “greater than \$50 million and less than \$100 million.”

Finally, the notice of claim asked for attorneys' fees in an amount not less than \$1.5 million."

Later, the notice of claim was amended to include additional claimants but did not change in any other respects.

After a lawsuit was filed, the city moved for summary judgment claiming A.R.S. §12.821.01(A) and *Deer Valley Unified School District v. Houser*, 214 Ariz. 293, 152 P.3d 490 (2007), were violated in that a specific amount for which the case could be settled had not been articulated in the notice of claim.

The plaintiff responded by claiming that *Deer Valley* should be limited to individual claims, not class actions, and should only be applied prospectively.

The trial court held that *Deer Valley* did apply retroactively but also found it did not apply to class actions.

First, the Court of Appeals noted that the claim statute was mandatory in its language requiring that all notice of claims "*shall* also contain a *specific amount* for which the claim can be settled and the facts supporting that amount." Additionally, the statute applies broadly to all "persons who have claims" and provides no exception for class actions.

The plaintiff most cogent argument was that to require strict compliance with the notice of claim statute in class actions would render it impossible to bring a claim against a governmental entity for class action relief. A would-be class representative has no authority or capability to make a specific settlement demand on behalf of as-yet unidentified class members before a complaint is filed. Arizona Rule of Civil Procedure 23(e) requires a class action settlement be approved by the trial court and therefore a potential class representative cannot submit a notice of claim with a "specific amount" that the representative can "guarantee would settle the case."

Responding to this argument, the Court of Appeals found that it was not "at liberty to judicially create an exemption to the statute's all-encompassing language. There is no constitutional right to file a class action . . . and it is not our function to question the wisdom of a legislative enactment."

Instead, the court found the notice of claim statute could be satisfied by identifying an amount which the class representative "would be willing to settle for, subject to class certification and court approval." The court found that the language "can be settled" in the statute does not require the plaintiff guarantee settlement will occur for that amount even if agreed to by the public entity. Instead, the court interpreted this language in the statute to require claimants to specify "an amount for which they would be *willing* to settle."

Finally, the plaintiff's claim that it could not acquire the documents necessary to make an intelligent settlement demand without discovering documents in the litigation process was rejected in part because the plaintiffs had not attempted to find this information via a public records request.

## **H. Offers Of Judgment**

### **1. Unapportioned Joint Offers**

*Short v. Petty*, 214 Ariz. 353, 153 P.3d 374 (App. Div. 1, March 13, 2007) (Judge Parker), review denied and ordered depublished on March 13, 2007. (WHERE UNAPPORTIONED JOINT OFFER OF JUDGMENT PROVIDES OFFEREEES WITH ABILITY TO MAKE MEANINGFUL CHOICE, JOINT OFFER NEED NOT BE APPORTIONED IN ORDER TO COMPLY WITH RULE 68.)

### **2. Expert Witness Fees Include Trial and Pretrial Fees**

*Levy v. Alfaro*, 215 Ariz. 44, 160 P.3d 1201 (App. Div. 1, June 19, 2007) (Judge Barker) (review denied October 30, 2007). ARIZONA RULE OF CIVIL PROCEDURE 68 ALLOWS AN AWARD OF EXPERT WITNESS FEES CHARGED BY EXPERT BEFORE TRIAL AS WELL AS DURING TRIAL. The plaintiffs had their automobile damaged when the defendant opened the passenger side door of its vehicle into the side of the vehicle driven by the plaintiff.

Prior to trial the defense filed a \$6,800 offer of judgment. The offer was not accepted. The jury returned a verdict in the amount of \$6,294.02.

The court entered judgment on the verdict awarding the plaintiff \$6,294.02 plus taxable costs of \$2,779.10. This judgment was offset then by the judgment of \$16,092.70 awarded as a sanction under Rule 68(d). In essence, the defendant claimed that because the jury verdict was less than the amount of the offer of judgment he was entitled to recover among other things \$10,977.50 for his expert witness fees. A portion of these fees included court testimony and a even larger portion for reviewing depositions, conferencing with attorneys, preparing to testify and other pre-trial activities. After the offset, the court entered a judgment of \$7,018.88 in favor the defendant.

Rule 68(a) provides that if the judgment "finally obtained is equal to, or more favorable to the offeror than the offer, the offeree must pay, as a sanction, those reasonable expert witness fees and double the taxable costs of the offeror."

Nowhere does the rule limit expert fees to trial testimony. The rule only requires the fees be reasonable.

It is true that Rule 54(f)(2) limits the recovery of expert fees to trial testimony in medical malpractice actions. However, this rule has no application to Rule 68(d).

The bottom line is that Rule 68 is intended to encourage settlement and avoid protracted litigation. Rule 68(d) separates “reasonable expert witness fees” from taxable costs. The purpose for the provision for “reasonable expert witness fees” would be lost if it was limited to those expert witness fees already recoverable as costs.

## **I. Statute of Limitations**

### **1. Legal Malpractice – Discovery Rule**

*Keonjian v. Olcott*, 216 Ariz. 563, 169 P.3d 927 (App. Div. 2, October 18, 2007) (Judge Vasquez). LEGAL MALPRACTICE IS A TORT GOVERNED BY TWO YEAR TORT STATUTE OF LIMITATIONS.

A mother and daughter signed a contract for the construction of house on real property in Green Valley, Arizona and asked the family lawyer to draft a deed and later a gift letter to appropriately apportion the interest in the real property between the mother and the daughter. A dispute regarding the mother’s percentage interest rose and the lawyer was sued for giving bad advice with respect to how the document should be drafted. The lawyer moved for summary judgment on the basis that the two-year statute of limitations had run.

The plaintiff argued that the contract statute of limitations should apply since the matter arose out of a contract between the attorney and client. Summary judgment was granted by the trial court.

The Court of Appeals first recognized that in Arizona legal malpractice claims are generally governed by the statute of limitations for tort claims in A.R.S. § 12-542 and that the discovery rule to determine when a cause of action for legal malpractice accrues applies. The discovery rule applies not only to the discovery of negligence but also to discovery of causation and damage. Here, the statute began to run when the plaintiff became aware or should have been aware she was harmed. This occurred certainly no later than when she sued her daughter and her daughter’s husband alleging misrepresentations in the deed and gift letter. This complaint was filed more than two years before the filing of the legal malpractice action.

Finally, the only time the contract statute of limitations might apply to a legal malpractice action is when there is a specific promise contained in the contract, the non-performance of which forms the basis of the claim. The fact that an attorney may have carried out a task in a negligent manner in violation of the duty imposed on him by law to represent his client in accordance with the applicable standard of care does not equal “non-performance” under the attorney-client contract.

## **2. Medical Malpractice Vulnerable Adult Under Probate Code**

*In Re Estate of Winn*, 214 Ariz. 149, 150 P.3d 236 (S. Ct., January 23, 2007) (Justice Berch). WRONGFUL DEATH/PROBATE: ATTEMPT TO AVOID 2 YEAR STATUTE OF LIMITATIONS FOR MEDICAL MALPRACTICE WRONGFUL DEATH CASE BY SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVE OF THE ESTATE AFTER THE 2 YEARS AND THEN BRINGING THE CLAIM ON BEHALF OF THE ESTATE IS BARRED BY A.R.S. § 14-3108(4), WHICH PROHIBITS THE USE OF ASSETS IN THE ESTATE TO PROSECUTE AN ACTION MORE THAN TWO YEARS AFTER DEATH. Here the decedent's claim for medical malpractice and adult abuse survived her death and became an asset of the estate and could be brought by the personal representative of the estate if brought timely. Only the personal representative of the deceased may bring an action under A.R.S. § 14-3110 for violation of the Adult Protective Services Act A.R.S. § 46-455(B). But A.R.S. § 14-3108(4) requires such action be brought within 2 years of death if assets of the state must be used to pursue the claims.

## **3. Minor's Medical Expenses**

*Lopez v. Cole*, 214 Ariz. 536, 155 P.3d 1060 (App. Div. 1, April 12, 2007) (Judge Orozco). MEDICAL EXPENSES INCURRED BY A MINOR ARE THE RESPONSIBILITY OF THE MINOR'S PARENTS AND A CLAIM FOR THOSE EXPENSES CAN ONLY BE BROUGHT BY THE PARENTS. THE STATUTE OF LIMITATIONS IS NOT TOLLED FOR THE PARENT'S CLAIMS UNTIL THE MINOR REACHES MAJORITY. In 1992, the defendants' children cut a two foot square hole in the fence between their property and the neighbors. In 1993, while Laryn and his mother Melody Cole were staying with the Coles, his paternal grandparents, Laryn crawled through the hole and was kicked in the head by a horse.

Eight years later, Laryn's uncle and guardian ad litem filed a lawsuit to recover for his injuries and medical expenses against the Coles, the neighbors who owned the horse, and the mother alleging negligence and attractive nuisance. The mother and the neighbors settled their claims.

Subsequently, the trial court ruled that Laryn could not recover his medical expenses. The case went to trial and he was awarded \$30,000 but the jury found that the Coles were only 5% responsible (the jury found the mother to be 95% responsible for Laryn's injuries) resulting in a judgment against the Coles for \$1,500 plus \$2,046 in costs for a total award of \$3,546.

Laryn argues on appeal that his right to recover the medical expenses is not barred by the two year statute of limitations because it is tolled pursuant to A.R.S. § 12-502. The defense argued and the trial court agreed that the right to recover medical expenses belonged to the parents and was in fact barred by the statute of limitations. *Pearson & Dickerson Contractors, Inc. v. Harrington*, 60 Ariz. 354, 137 P.2d 381 (1943) holds that an action for damages for the medical expenses of an injured child

is a child's parent and not the child. But, *Pearson* also held that a claim for medical expenses may be brought by a child if a parent has "consented to" recovery by the child. In other words, by their consent the parents may release their claim to the child in such a way that it amounts in the law to an assignment. Laryn argues that the parent's impliedly consented to his bringing the claims for medical bills but the court found there was no evidence in the record that the parents ever gave consent, implied or in fact. Laryn argues his parents consented by waiver because they did not timely bring the claim on their own behalf. Waiver however is not the equivalent of consent and *Pearson* only allows for recovery where there is consent. When a party waives a right, he or she relinquishes the right, and any potential claim based on the right is extinguished. In contrast, a parental consent does not extinguish the claim but rather allows it to survive in another's hands.

Laryn next argues the doctrine of necessities, which other jurisdictions apply when the child is personally liable for expenses such as medical expenses because his parents cannot afford to pay them, if so, he may then recover them as part of his injury claim. Here, Laryn claims that the Arizona Health Care Cost Containment System has a lien for the medical expenses on the case which they can enforce against Laryn. However, the court found that because AHCCCS did not record such a lien within 60 days from the date of notification of the hospital discharge with the County Recorder pursuant to A.R.S. § 36-2915, there was no such right of recovery. Further there was no evidence that Laryn's parents were unable or unwilling to pay Laryn's medical bills or, importantly, that Laryn will ever be personally responsible for them.

Finally, Laryn's argument that public policy mandates one has the right to recover these expenses under Article 18, § 6 and Article 2, § 13 of the Arizona Constitution. A precedent to the public policy supporting such an argument under the Constitution would be that Laryn have a right to the medical expenses in the first place. Under Arizona law, absent his parent's consent he has no such right.

#### **4. Equitable Tolling**

*McCloud v. State of Arizona*, 217 Ariz. 82, 170 P.3d 691 (App. Div. 2, November 9, 2007) (Judge Brammer). EQUITABLE TOLLING OF STATUTE OF LIMITATIONS ON BASIS OF EXCUSABLE NEGLIGENCE: MULTIPLE ILLNESSES, INJURIES AND DEATH IN PLAINTIFF'S ATTORNEY'S FAMILY AND ILLNESS OF "BACK UP" ATTORNEY RETAINED TO HELP PRIMARY ATTORNEY ON CASE DOES NOT CONSTITUTE "EXCUSABLE NEGLIGENCE" UNDER THE EQUITABLE TOLLING STATUTE.

On April 1, 2005 a DPS Officer was searching for a restaurant when he rear-ended the plaintiff's vehicle. Plaintiff filed an administrative claim pursuant to A.R.S. § 12-821.01 against the State of Arizona in a timely fashion but did not file his lawsuit until nearly three month after the one year statute of limitations (A.R.S. § 12.821) had run.

Plaintiff's attorney sought relief under the doctrine of equitable tolling.

First, the court found that a determination of whether equitable tolling should apply is a decision for the court even when there are fact issues. This is true because by definition this is an equitable remedy and in such cases the trial court is the fact finder. This holding is a matter of first impression in Arizona.

Similarly, the standard for review under this circumstance is also an issue of first impression in Arizona. The Court of Appeals found that a "abuse of discretion" standard should be applied.

In other cases, Arizona courts have found the doctrine of equitable tolling to apply. For example, it applied when a second wrongful death claim was untimely filed after successful verdict on the first claim was overturned on appeal due to a defective service of process, where the plaintiff was a prisoner and failed to timely file notice of claim against the state because he first pursued his claims through the Prisoner's Administrative Grievance procedure and where the "right to sue" letter from the Arizona Attorney General's Office contained an incorrect date by which the plaintiff was required to sue on his claim.

Similarly, federal courts have acknowledged the right to equitable tolling when a claimant received inadequate notice of her right to file suit, where a motion for appointment of counsel was pending, or where the court has misled the plaintiff into believing that she had done everything required of her.

There are no Arizona cases that have considered whether the doctrine of equitable tolling excuses late filing based on an attorney's illness. Many other courts have found this is not an appropriate ground for equitable relief. Here, the Arizona Court of Appeals found that in "certain rare cases, attorney illness [could] be the extraordinary circumstances in which the doctrine of equitable tolling should apply. It is clear, however, that this is a doctrine that should be used only sparingly. The principles of equitable tolling do not extend to a garden variety claim of excusable neglect." Here, although plaintiff's counsel's affidavit in support of his motion provided significant detail about the events surrounding his, his wife's, his sister's, and his parents' and the backup attorney's illnesses and the ultimate death of his parents, the affidavit does not suggest that he was so disabled for the nine months he had this case that he could not have taken steps to ensure his client was protected. In fact, the affidavit showed that he was capable, despite several surgeries and his wife's disability, to relocate his mother from Phoenix to Tucson and to arrange for the care of his brother. He was able to handle the arrangements and winding up the financial affairs of his mother when she died. Even assuming these events made it difficult for him to concentrate on his work, he was able to obtain a backup attorney for assistance and even stated in his affidavit that this attorney was not a personal injury attorney and he did not expect this attorney to learn the various statutes of limitations. Plaintiff's attorney was supposed to guide the backup attorney but failed to do so.

In those cases where illness was allowed to support an equitable tolling claim the attorney had suffered a significant incapacitating disability. That is not this case.

The court then analyzed plaintiff's claim that the one year statute of limitations would not apply if the plaintiff can prove the police officer was not acting in the "course and scope of his employment" at the time of his accident. A.R.S. §12-821 used to specifically require that the "public employee" be acting within the "course and scope of employment" in order for the one year statute to apply. In 1994, the legislature removed the "course of employment" language. Nonetheless, the Arizona Court of Appeals found that the only reasonable interpretation of A.R.S. §12-821 is that a public employee is protected by a one year statute only when he is acting within the course and scope of his employment.

An employee's conduct falls within the scope of employment if it is a kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business even if the employer has expressly forbidden it. Whether an employee's tort is within the scope of employment is generally a question of fact. Just because the officer was driving a State of Arizona vehicle does not necessarily mean he was acting within the scope of his employment. The plaintiff should have the right to have the jury decide whether or not the one year statute applies based upon the course and scope analysis.

The court rejected the State's argument that A.R.S. § 41-1743 requires officers whether on duty or not to interview if they witness a crime, accident or civil traffic violation. The court rejected this argument because it would effectively mean all police officers are protected by the one year state of limitations no matter what they are doing where or when. Finally, workers' compensation cases defining the course and scope of employment are not appropriate for determining that doctrine in a tort case. In workers' compensation, the statutes are written very broadly to provide employees are within the course and scope to make workers' compensation available to them. The same rationale does not apply in tort cases.

##### **5. Failure to State a Claim/Accrual Against Governmental Entities/Interference with Business Relationship/Defamation**

*Dube v. Likins*, 216 Ariz. 406, 167 P.3d 93 (App. Div. 2, June 28, 2007) (Judge Howard). FAILURE TO STATE A CLAIM FOR INTERFERENCE WITH BUSINESS RELATIONSHIP SHOULD BE SUSTAINED WHERE NO SPECIFIC ALLEGATION OR SPECIFIC RELATIONSHIP WITH A SPECIFIC INDIVIDUAL OR ENTITY IS SET FORTH IN THE COMPLAINT. DEFAMATION CLAIM IS STATED EVEN WHERE THE ALLEGED PUBLICATION OCCURS BETWEEN AGENTS OF THE SAME ENTITY, APPLYING A QUALIFIED PRIVILEGE THAT SAID COMMUNICATIONS CAN ONLY CONSTITUTE DEFAMATION WHEN MADE IN BAD FAITH. In 1998, the plaintiff transferred to the University of Arizona as a post graduate student. In October 2002, he complained to the University that his dissertation advisor was

acting improperly and requested a change. Plaintiff ultimately obtained his doctoral degree in May, 2004. In September of 2004 he sued the advisor for tortiously interfering with his ability to obtain a Ph.D. During discovery he claims he found additional information to support a similar claim against the University of Arizona and its administrators and sought to amend the complaint. The allegations against the University were dismissed based upon the running of the statute of limitations.

By case law Arizona uses a discovery rule for accrual of the statute of limitations. The statute accrues on the date the defendant knew or should have known he or she was injured by a particular defendant. However, Arizona Revised Statute §12-821.01 defines the accrual date differently for public entities only requiring that the plaintiff know or reasonably should know she has been damages without respect to what particular defendant may have caused the harm.

The plaintiff's claim was that the University had reported incorrect information to the Immigration and Naturalization Service which hampered his ability to obtain a degree as well as employment. Because the same allegations was stated in his first complaint this particular cause of action was time barred in that the amendment to the complaint was not filed until a year after the initial complaint was filed.

The plaintiff's attempt to allege a claim of interference with a business expectancy against the University and its employees was further deficient in that there were no factual allegations in the complaint that the University in some way assisted the faculty advisor in interfering with his business expectancy or somehow substantially aided or abetted the faculty advisor in the interference or the mere allegation of the failure to reveal an investigatory report was insufficient to establish the elements of this court and therefore the dismissal for failure to state a claim was appropriate. The tort requires the identification of a specific relationship with which the defendant interfered. There being no such allegation in the complaint the complaint was properly dismissed. The plaintiff alleged no such business relationship. Specifically he failed to identify any specific employer with whom he sought employment and who was dissuaded from hiring him by acts for which the University officials could be held responsible. He did not even allege an employer of which the University officials were aware. Next the plaintiff argues that if in fact he failed to state a claim the court erred in not giving him time to again amend the complaint and properly state a claim. Here, the plaintiff was seeking the right to amend the complaint to allege that he in fact had a job expectancy in the field of engineering. Because such a new allegation would still not survive a motion to dismiss for failure to state a claim it was not improper for the court to deny the motion for leave to amend.

As to the plaintiff's claim of defamation with respect to the letter sent by the University President to his faculty advisor, the allegations in the complaint when taken as true could support finding that he allowed this claim timely because he did not know and would not have known about the alleged defamatory letter until less than a year before the filing.

As to whether or not the defamation claim stated a claim upon which relief could be granted the central issue was whether or not there was a publication. Essentially the letter in question was sent by the president to a professor. The issue of whether communication between two agents of the same principle constitutes publication is one of first impression and authorities are split across the country. The Arizona Court of Appeals, following the contemporary view as stated by Dan Dobbs in *The Law of Torts* held that such a communication does not fact constitute a publication but that a privilege prevents recovery where the statements are made in good faith. Statements that the plaintiff committed an “indiscretion” or “transgressions” and reference in the letters to use of University equipment as being “contrary to the professor’s specific instructions” and therefore “unauthorized” could be construed as statements that the plaintiff acted in violation of University policy and could bring him into disrepute, contempt or ridicule and therefore constituted a claim for defamation.

Finally, statements in the letter with reference to “unhappy people” and “unconfirmed allegations” were found not to state a claim and those allegations were properly dismissed since the plaintiff was not adequately identified as the person to which such allegations were directed.

#### **6. Accrual – Foreign Judgments – Out-of-State Order for Prejudgment Interest**

*Grynberg v. Shaffer*, 216 Ariz. 256, 165 P.3d 234 (App. Div. 1, August 21, 2007) (Judge Weisberg). WHERE REGISTRATION OF AN OUT-OF-STATE ORDER FOR PREJUDGMENT INTEREST TOOK PLACE AFTER THE EXPIRATION OF THE APPLICABLE ARIZONA STATUTE OF LIMITATIONS, TRIAL COURT PROPERLY VACATED THE REGISTRATION.

Plaintiff obtained a Colorado verdict against the defendant which was ultimately reduced to an order and judgment granting prejudgment interest. The judgment on appeal was affirmed in April 2003.

In January 2006 the plaintiff registered the prejudgment interest order in Arizona pursuant to the Uniform Enforcement of Foreign Judgments Act [UEFJA]. Defendant objected to the registration and moved to vacate it on the basis that the Arizona statute of limitations controlling registration of foreign judgments was four years and had expired. The trial court agreed and vacated the Arizona filing and this appeal followed.

Both parties agreed that A.R.S. § 12-544(3) applies to the filing of foreign judgments under UEFJA. The question was when does this four-year statute of limitations accrue?

The Arizona court of appeals found that it accrues as soon as the judgment becomes enforceable.

Here, the judgment was obtained in Colorado at the trial level. The defendant then appealed but did not file a supersedeas bond. In Colorado, as in Arizona, if you do not file a supersedeas bond when appealing a judgment, the judgment remains enforceable despite the appeal.

Additionally, in Arizona there is a procedure for staying execution of a registered foreign judgment until the appeal in the foreign jurisdiction is final. The court of appeals found this procedure would be meaningless if the accrual of the statute of limitations for registering a foreign judgment were not to run until the appeal was final where no supersedeas bond was filed.

Accordingly, in Arizona the four-year statute of limitations for registering a foreign judgment begins to run the day the foreign judgment can be enforced or collected upon in the jurisdiction where it is obtained.

## **7. Declaratory Relief Action**

*La Canada Hills Limited Partnership v. Kite*, 217 Ariz. 126, 171 P.3d 195 (App. Div. 2, September 10, 2007) (Judge Eckerstrom). STATUTE OF LIMITATIONS ON DECLARATORY RELIEF ACTION BASED UPON SUBSTANCE OF THE ACTION AND RELATIONSHIP OF THE PARTIES.

A partner defaulted on payments of partnership agreement and the other partners sought to dissolve the partnership by way of declaratory relief action. The defendant moved for summary judgment on the basis that the contract statute of limitations ran before the action was brought and therefore it was time barred. Plaintiffs responded that the declaratory relief action was governed by the partnership statute of limitations (A.R.S. §12-544) and not the contract statute of limitations. The partnership statute of limitations would not accrue until the partners had ceased their business dealings with each other. The court held that the determination of the applicable statute of limitations would be governed by an examination of the substance of the action brought to identify the relationship out of which the claim arose and the relief sought. Here the central issue sought to be resolved in the declaratory relief action was related to the partnership agreement in an effort to dissolve the partnership and establish an accounting. Consequently, the partnership statute of limitations was applicable and the action was timely.

## **8. Extending Time for Post-Trial Motions and Appeal**

*Haroutunian v. Valueoptions, Inc.*, 534 Ariz. Adv. Rep. 9, (Ct. App. Div 2, July 10, 2008) (Justice Pelander). WHERE CLERK FAILS TO SEND NOTICE TO PARTIES REGARDING THE ENTRY OF A JUDGMENT AND A PARTY MOVES TO ENLARGE THE TIME FOR APPEAL AND POST-TRIAL MOTIONS AS SOON AS NOTICE IS RECEIVED, TRIAL COURT HAS DISCRETION IN GRANTING EXTENSION BUT SHOULD NOT REQUIRE A SHOWING OF “GOOD CAUSE” OR “EXCUSABLE NEGLECT.”

The plaintiff won a \$365,000 verdict against the defendant Valueoptions for negligent mental health care and elder abuse under A.R.S. §46-455(B). Thereafter the plaintiff filed a motion requesting attorney's fees and costs. In a minute entry the court denied the motion and stated it would "sign the form of judgment submitted by [plaintiff] after deleting the costs and attorney's fee."

The signed judgment was filed on February 21, 2007 but the court failed to distribute notice as required by Rule 58(e) of the Arizona Rules of Civil Procedure. Notice was finally mailed on March 27, 2007 well past the 15 day deadline for filing post-trial motions and the thirty day time limit for the filing a notice of appeal. As soon as notice was received Valueoptions timely filed its motion under Arizona Rule of Civil Appellate Procedure 9(a) seeking to expand time to appeal and Rule 6(b) of the Arizona Rules of Civil Procedure seeking to enlarge the time for filing post-trial motions.

Rule 58(a) of the Arizona Rules of Procedure state that the "filing with the clerk of the judgment constitutes entry of such judgment." This is important because that date of filing triggers the deadline for filing post-trial motions and for prosecuting an appeal.

Rule 58(e) specifically requires the trial court clerk to distribute to all parties "immediately upon the entry of judgment . . . a notice of the entry of judgment stating the date of entry."

Under A.R.C.P. 9(a) a party entitled to appeal the case but who does not receive notice from the clerk within 21 days of its entry, upon a showing that no party would be prejudiced, may seek an extension of time to file a notice of appeal not to exceed 14 days.

Here the trial court find the facts to be undisputed that Valueoptions did not receive notice of the entry within 21 days of it occurring and also found it uncontroverted that the plaintiff had not shown any prejudice should the allow an extension of time to file the notice. However, the trial court found that because Valueoptions failed to show "excusable neglect" or "good cause" for not having independently discovered the date of entry of the judgment, the motion to enlarge time was denied. Specifically the court found that a reasonable attorney would have called the court's chambers or the clerk of court to find out about the entry of date of judgment after receiving a minute entry from the court saying the judgment was going to be signed.

The Court of Appeal overruled the trial court finding that no where in the Rule 9 A.R.C.A.P or Rule 6 of the A.R.C.P is there a requirement the moving party show "excusable neglect" or "good cause". The court found that the trial court does have discretion as to whether or not to allow the time limits to be enlarged and when the court basis that ruling upon an improper standard the rule must be overturned.

Here the court found it significant that the trial court's minute entry itself does not constitute a judgment or entry of judgment. Further, the minute entry only said the judge was going to sign the judgment and said nothing about when it would be filed. Actually filing after signature by the court is what constitutes "entry of judgment."

Further, the Court of Appeals found there was no hearing or evidence taken on the question of whether or not a "reasonable attorney would have called the court or clerk."

Finally, the court also found that time should have been enlarged under Rule 6(b) of the Arizona Rules of Civil Procedure for filing post-trial motions. This rule was amended in 1994 the same time as A.R.C.A.P 9(a) was amended and the amendment included identical language that was added Rule 9(a). The advisory note says that the purpose of the amendment was to deal with situations where parties don't receive actual written notice of the entry of a judgment and to avoid the inequity of the time limit for appeals and post-trial motions to run when there has been no notice. In conformance with this policy reason for the amendment and in an effort to read the rules to be consistent and complimentary, the court found that the time for post-trial motions likewise should have been extended by the trial court.

## **J. Summary Judgment**

### **1. Failure to Request Continuance on Motion**

*Best v. Edwards*, 522 Ariz. Adv. Rep. 30 (App. Div. 1, January 31, 2008) (Judge Weisberg). IF A PARTY OPPOSING A MOTION FOR SUMMARY JUDGMENT NEITHER REQUESTS A CONTINUANCE NOR FILES AN AFFIDAVIT EXPLAINING WHY HE IS UNABLE TO COUNTER THE MOVING PARTY'S EVIDENCE, THE TRIAL COURT DOES NOT ERR IN PROCEEDING TO RULE ON THE MOTION. A MATERIAL MODIFICATION TO A CONTRACT SUBJECT TO THE STATUTE OF FRAUDS MUST ALSO BE IN WRITING. A MODIFICATION TO A REAL ESTATE OPTION CONTRACT THAT EXTENDS THE LIFE OF THE OPTION IS A MATERIAL MODIFICATION AND MUST COMPLY WITH THE STATUTE OF FRAUDS. Defendant received summary judgment on plaintiff's action for specific performance of a real estate option agreement.

Plaintiff entered into a written contract with defendants giving him the exclusive option to purchase certain real property but he did not exercise the option by the deadline set forth in the contract. Instead he recorded an amendment to the option contract extending the deadline, which was signed only by him, and then attempted to exercise the option prior to that deadline. When the defendant refused to convey the property, the plaintiff sued for specific performance. The defendant moved for summary judgment on the basis that the amendment to the option could not be enforced since it was not signed by the defendant regardless of any claimed oral understanding between the parties based upon the statute of frauds. Although the

plaintiff responded to the motion for summary judgment, there was no evidence submitted in the response to counter the contract language attached to defendant's motion for summary judgment. Instead, on appeal the plaintiff argued that discovery would have established that plaintiff sent a letter confirming an extension on the option which was never responded to by the defendants and therefore was agreed to.

Arizona Rule of Civil Procedure 56(f) allows a party opposing a motion for summary judgment to request more time for additional discovery. Where the party fails, however, to ask for this relief, a trial court does not err in proceeding to rule on the motion. Hence the court's granting defendants' motion for summary judgment was appropriate, as was the award of attorney's fees to the defendant both by the trial court and court of appeals.

Further, on the legal principles at issue, an option contract for real estate is clearly within Arizona's statute of frauds and in order to amend a document controlled by the statute of frauds, the amendment itself must be likewise in writing and signed by both parties. This is because an option to purchase agreement that modifies a material term such as the options expiration date must likewise comply with the statute of frauds. Such a holding advances the purpose of the statute of frauds and avoids the assertion of claims based on "uncertain memory and unrecorded expression."

Finally, plaintiff's equitable estoppel argument failed because he was unable to allege any particular detriment arising out of his reliance upon an oral extension of the option contract other than the loss of the benefit of the agreement itself. In order to establish equitable estoppel, more is required than mere loss of the benefit of the alleged agreement such as performance under the contract by the party harmed. This was not alleged nor proven here, therefore defendant's summary judgment was properly granted.

## **K. Statute of Frauds and Equitable Estoppel**

### **1. Part Performance**

*Owens v. M.E. Scheep Limited Partnership*, 529 Ariz. Adv. Rep. 3 (Sup. Ct., March 8, 2008) (Justice Hurwitz). THE STATUTE OF FRAUDS NOT APPLICABLE ONLY WHERE "PART PERFORMANCE UNEQUIVOCALLY REFERS TO CONTRACT AND SUPPLIES KEY TO WHAT IS PROMISED." Family members held a piece of property as tenants in common when they received a citation from the City of Phoenix requiring cleanup of vegetation on the land. The family members could not agree how to properly clean up the lot particularly to respect to the removal of certain trees. The family members therefore agreed to partition the property amongst themselves so that those wishing to remove trees could do so without affecting the decision others might make regarding their portion of the property. Later, one of the family members challenged the oral partitioning of the property and a lawsuit and counterclaim followed. The family member objecting to the partitioning claimed that the agreement was oral only and barred by the statute of

frauds. The partnership countered, stating that part performance of the contract and detrimental reliance upon that performance took the contract and the oral agreement to petition the real estate outside of the statute of frauds. The act claimed to constitute partial performance was the partnership's payment of one-third of the cost of removing trees from the objecting family members' partition portion of the real estate. Because here, the payment of a part of the tree removal fees did not unequivocally refer to the oral contract itself, and more importantly did not supply the key to what was promised, i.e., petitioning of the land and equalization payment to family members with lesser valued land as a result of the partitioning, the statute of frauds barred enforceability of the oral partitioning agreement.

## **2. Res Judicata Collateral Estoppel**

*Beltran v. Harrah's Arizona Corporation*, 535 Ariz. Adv. Rep 30 (App. Div. 2) (July 31, 2008) (Judge Espinosa). TRIBAL COURT JUDGMENTS RECOGNIZED BY COMITY/PROCEDURE FOR TURNING TRIBAL COURT JUDGMENT INTO STATE COURT JUDGMENT NOT REQUIRED WHEN APPLYING PRINCIPLES OF ISSUE PRECLUSION/WHERE PLAINTIFF HAD FULL AND FAIR CHANCE TO LITIGATE INDISPENSABLE PARTY AND STATUTE OF LIMITATIONS ISSUE COLLATERAL ESTOPPEL WOULD PREVENT HIM FROM RELITIGATING THIS ISSUE IN A SEPARATE ACTION IN STATE COURT. Plaintiff suffered a slip and fall injury at Harrah's on the Indian reservation. He brought a claim against Harrah's only in the tribal court. A motion to dismiss that claim was filed on the basis that the Ak-Chin Community under tribal law was an indispensable party and had not been named in the suit. The plaintiff then tried to amend the complaint to bring the tribe in but this was not allowed because the statute of limitations had already run.

Thereafter the plaintiff brought a civil lawsuit in the Pinal Superior Court suing Harrahs and the tribe. The tribe and Harrahs moved to dismiss on the basis of res judicata, collateral estoppel and that the tribe was an indispensable party with sovereign immunity not subject to Pinal County Superior Court.

In response the plaintiff argued that the tribe and Harrahs had failed to turn the tribal judgment into a judgment recognizable in Arizona courts by virtue of Arizona Rules of Procedure Tribal Court Civil Judgment 1. The Court of Appeal found that a party's failure to avail itself of the benefits of this rule did not prevent the party from issue preclusion defenses. Specifically the court held the exclusive means by which a tribal court judgment may be recognized an enforced.

In Arizona courts have generally recognized tribal court judgments as a matter of comity. In otherwords, the judicial decision of the tribal court are followed not as a matter of obligation but out of deference and mutual respect.

The court went on to find that the plaintiff's claim had been denied due process and the trial court was unfounded based upon correspondence from plaintiff's counsel

which established among other things that he made a conscious decision not to sue the tribe believing there was a sovereign immunity issue that any evidence of a promise to provide him with names of entities that needed to be used was dated after the running of the statute of limitations and due process was not violated.

On the issue of collateral estoppel the court found the trial judgments to be dispositive of the civil action if not the superior court.

Specifically there were two issues fully and fairly litigated in tribal court: Whether or not the tribe was an indispensable party and the running of the statute of limitations. There was a final judgment entered upon these issues and the plaintiff had a full opportunity to litigate them before the judgment was issued. Accordingly, the plaintiff is collaterally estopped to bring this action and plaintiff's complaint should be dismissed. The tribe cannot be a party to the litigation and because it has been found to be an indispensable party to plaintiff's claim against Harrah a dismissal of the complaint pursuant to Rule 19(b) of the Arizona Rules of Civil Procedure is appropriate. This is particularly so where the plaintiff chose to pursue the matter in tribal court and see the matter through to final judgment before filing the state court action.

#### **IV. EVIDENCE**

##### **A. Reporter – Informant Privilege**

###### **1. TV News Broadcast**

*Flores v. Cooper Tire and Rubber Company*, 526 Ariz. Adv. Rep. 25 (App. Div. 1) (March 25, 2008) (Judge Portley). TELEVISION NEWS STATION DID NOT BREACH CONFIDENTIALITY ORDER IN BROADCASTING STORY REGARDING SAFETY OF COOPER TIRES IN LIGHT OF REPORTER-INFORMANT PRIVILEGE. The plaintiff sued Cooper Tire alleging that a defective tire resulted in a tread separation and the death of the plaintiff's parents.

During the trial of the case there was a confidentiality order that all court trial exhibits containing confidential information would not become part of the public file, and would not be accessible to the public. A television reporter agreed to be bound by this confidentiality order.

When the reporter asked the court for clarification, she was told that although she could report some things, when it came to "specific documents that are the subject of these confidentiality orders, you cannot disclose their content to the public."

Subsequent to the trial, a "confidential source" provided the reporter with documents related to the safety and durability of the tires which were not bates stamped or otherwise identified as documents protected by the protective order. Subsequently, the reporter used two of the documents for a story that ran concerning the safety of the tires.

Prior to airing the news story, the reporter contacted Cooper's representative, asked for an interview and advised that she had Cooper documents dating back to 1996 which showed Cooper knew about the problems with the tire and had refused to pursue safety measures suggested by its own employees due to cost concerns. Cooper declined to participate in the interview and did not advise the reporter that the documents in question were protected.

Thereafter, Cooper claimed the documents broadcast were protected and demanded the broadcast be taken off the television station's website, that its source of the information be revealed, and that it admit that it had violated the protective order. Although the television station did take the spot off the website, it had refused to reveal its source.

The court found that the reporter-informant privilege had not been waived under these circumstances and that the source for the documents used on the newscast was independent from outside this litigation" and therefore it was permissible for the station to run its story with the documents.

A.R.S. §12-2237 provides that a person engaged in media work "shall not be compelled to testify or disclose in legal proceeding . . . the source of information procured or obtained by him for publication . . ."

Cooper claimed that because the television station had intervened in the underlying action and sought an order to seek a declaration that it was permitted to air the broadcast and unseal the documents, it had waived the reporter-informant privilege. However, the court found this intervention to be of a defensive nature in light of Cooper's ongoing effort to obtain an order that the protective order had been breached.

The court found the public policy supporting the privilege mandated the court construe any waiver narrowly. It is public policy that news sources be protected so that the public will know information that otherwise might not have been revealed absent the confidentiality.

It is not a waiver to actually use documents provided to a reporter by a confidential source in a news story.

Here, the court held an in camera conference with the television station to determine that its confidential source was in fact outside the scope of the protective order and therefore the broadcast was appropriate. This procedure was found by the appellate court not to violate Cooper's due process rights.

## **B. Damages**

### **1. Lost Earning Capacity**

*Felder v. Physiotherapy Associates*, 215 Ariz. 154, 158 P.3d 877 (App. Div. 1, May 22, 2007) (Judge Irvine). LOST EARNING CAPACITY DAMAGES NEED NOT BE PROVEN WITH SPECIFICITY IN PERSONAL INJURY ACTION. In 1992, the Milwaukee Brewers drafted the plaintiff in the first round. From 1992 through 1996 he progressed from rookie league to Class A to AA to AAA level.

In 1996, plaintiff injured his elbow. He healed during the off-season but tore an elbow ligament during spring training in 1997. He had surgery to repair the ligament and the Brewers sent him to Physiotherapy for physical rehabilitation and paid his rehabilitation costs.

After some period of time in rehabilitation, one of the physiotherapy physiotherapist decided it was time for the plaintiff to begin hitting. They had him to go to their Tempe location and practice in a batting cage which was designed to allow rehabilitation pitchers to throw balls; it was not designed, intended, or safe for batting. While using the cage, plaintiff hit a ball that ricocheted off a concrete lip in the batter's box, bounced back at him and struck his left eye. He sustained a permanent eye injury which resulted in a blind spot in the middle of his vision as well as blurry vision that worsens in bright light. This injury ended his major league baseball career. In the trial in 2000, the plaintiff called player agent Slade Mead as an expert witness on the issue of damages. He opined that the plaintiff would have made it to the major leagues. He conceded his opinion was speculative. The jury awarded \$8,000,000 apportioning 25% fault to the plaintiff for a net award of \$6,000,000.

On appeal the judgment was reversed on the basis that the lost earning claim was too speculative.

At his second trial, the plaintiff had Al Goldis testify as an expert witness for him about whether he would have played in the major leagues and the expected length of his career. Goldis was a special assistant to the General Manager of the New York Mets. He had twenty-seven years of experience in drafting, scouting and developing players. He was not paid to testify. He reviewed the Brewers pre-draft scouting reports and minor league coaching reports about the plaintiff. He testified to a reasonable degree of certainty that not only would the plaintiff have made it to the major leagues but that he would have been an impact player. Goldis also compared the plaintiff to major league players who hit 15 or more homeruns per season. He felt Felder had more power than Frank Thomas, a player that Goldis had drafted. Given that Thomas had been playing for approximately 17 years, Goldis testified that Felder's career would have lasted between 12 and 15 years. The evidence further showed that the plaintiff received some of the benefits usually afforded to major league players. When he injured his elbow in 1997, he was treated by a doctor and trainer who were assigned to work with major league players. The Brewers paid for his surgery and rehabilitation. It would have cost the Brewers less to just release him.

Felder also had Mead testify again and he said he was familiar with Felder while he was playing ball and that he was “a very high profile baseball player back when he was being drafted and coming out of Florida State University.” Mead selected two comparable minor league players, Jeremy Burnitz and Geoff Jenkins, who moved on to the major leagues to compare with Felder. They were both college outfielders, first round draft picks, power hitters and played for the Brewers. Mead valued a seven year career for the plaintiff at \$27,790,440. The defense presented two experts who worked in major league baseball and stated that they did not think the plaintiff had a chance of making it in the majors.

Once the right to damages is established, uncertainty as to the amount of damages does not preclude recovery. Though absolute certainty is not required, the jury must be guided by some rational standard. Fairly compensating the injured person in a personal injury case may require trusting the jury to fairly evaluate evidence that is inherently uncertain but is the best evidence available. A central task for juries is resolving disputes over difficult and conflicting evidence.

Simply dreaming of a career as a professional athlete is not enough to create an issue of fact appropriate for a jury. However as the Restatement sets forth, it is desirable that “an injured person not be deprived of substantial compensation merely because he cannot prove with complete certainty the extent of harm he has suffered.”

The trier of fact must distinguish between persons with only vague hopes of entering a new profession and those with the demonstrated ability and intent to do so.

Here, the plaintiff had more than a vague hope of a successful career as a professional player. He had advanced within professional baseball and had signed another AAA contract. His injury plainly took away his chance to continue and advance as a player. As to what degree of reasonable certainty is required to establish his lost income damages, the degree of certainty that is reasonably required varies depending on the circumstances of each case. In an action for personal injuries “the law does not fix precise rules for the measure of damages but leaves their assessment to a jury’s good sense and unbiased judgment.” Some cases will simply not be conducive to a high degree of certainty because the future itself is uncertain. This does not, however, deprive an injured plaintiff of a remedy. A plaintiff may still claim damages in an amount supported by the best evidence available and the essential consideration is that the jury must be guided by some rational standard. For damage to a sports career, the evidence reasonably available will generally be what was presented at trial in this case – qualified expert testimony concerning the athlete’s prospects, statistics, showing past performance, and the comparative data concerning other athletes. Here, the jury learned in detail about his batting averages, fielding performances and injuries between 1992 and 1998. The jury was provided with evaluations from minor league coaches and opinions from several experts with major league player development experience. The jury also heard about the economics of baseball compensation including how long a professional’s career might be and what similar players were being paid.

Finally, because the plaintiff suffered serious physical harm, he is able to recover for his anxiety over his less than one percent chance of neovascularization of the eye.

## **2. Jury Finds Liability And No Damages: New Trial On Damages.**

*White v. Greater Arizona Bicycling Association*, 216 Ariz. 133, 163 P.3d 1083 (App. Div. 2, August 8, 2007) (Judge Brammer). WHERE A JURY FINDS DEFENDANT LIABLE FOR DEATH OF FATHER AND THERE WAS UNCONTESTED EVIDENCE SUPPORTING DAMAGE, FINDING OF LIABILITY MANDATES FINDING OF DAMAGES. The plaintiff's decedent was participating in a bicycling event organized by the defendants when his bike tire got caught in a guard rail throwing him forward to his death. The jury ultimately awarded \$250,000 to the decedent's surviving wife but nothing to his surviving children. Fifty percent fault was assessed against a non-party from the Department of Transportation, twenty-five percent to the decedent and twenty-five percent to defendant GABA. *Sedillo vs. City of Flagstaff*, 153 Ariz. 478, 480, 737 P.2d 1377, 1379 (App. 1987), holds it is error to permit a jury upon finding a defendant liable in a wrongful death action to fail to award some damages to a claimant when that claimant's evidence of loss, economic or otherwise is uncontested.

The decision by one division of the Court of Appeals is persuasive with the other division. The trier of fact may not arbitrarily reject uncontradicted evidence when nothing intrinsic in the evidence itself or extrinsic in the circumstances cast suspicion on it.

The bottom line message in this case is that when defending you always want to challenge and counter plaintiff's damage evidence as jury nullification of a right to damages by a particular person or persons will not stand in the face of the liability finding and uncontroverted damage evidence. A jury may not properly disregard the testimony of a witness even an interested one without some reason to do so. Here the children of the decedent testified unequivocally about facts demonstrating compensable loss. Nothing in the record indicates that testimony is inconsistent or unbelievable nor was it contradicted in any way.

## **C. Experts**

### **1. Wrongful Death Action: Evidence of Decedent's Death**

*Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, 158 P.3d 255 (App. Div. 1, May 24, 2007) (Judge Kessler). EVIDENCE OF THE MANNER OF A DECEDENT'S DEATH IS ADMISSIBLE ON THE ISSUE OF DAMAGES IN THE WRONGFUL DEATH CLAIM INsofar AS IT IS RELEVANT TO THE SURVIVOR'S OWN MENTAL ANQUISH RESULTING FROM THE DEATH AND NOT THE SUFFERING OF THE DECEDENT PRIOR TO DEATH. In this wrongful death claim, the decedent perished after an automobile collision caused by the negligent

acts of a Skyline employee. The decedent's vehicle burst into flames with the decedent pinned inside. He died of thermal and inhalation injuries.

His father and other survivors brought a wrongful death action pursuant to A.R.S. § 12-611. The defendant Skyline answered admitting its employee was negligent and this negligence caused the collision. The only issue at trial was the amount of damages.

In the Joint Pre-Trial Statement, the plaintiff listed as witnesses two people who were present at the scene, the accident report, the autopsy report, news videotapes of the fire and several photographs. Defendants filed a successful Motion in Limine to preclude this evidence.

Plaintiff's offer of proof demonstrated that the father of the decedent learned there had been a fire from his daughter-in-law and from the police, he told him the fire had been "horrific." He learned from the police there was nothing of the decedent's remains to identify and later from the police report that the decedent had burned alive. He testified that these facts were a great source of pain for him.

He further testified that he saw the video on television of the burning car which showed the burning vehicle, and the tarp beside the vehicle which he assumed was his son's body.

He called the medical examiner's office to arrange to identify the body. They asked him if he had spoken with the investigating officer. He had not, but when he did the officer told him "there is nothing to identify."

Later, the father spoke to the funeral director who told him there was nothing there. He obtained his son's wedding ring from his son's hand and had to scrub it clean from being scorched before he returned it to his daughter-in-law.

From reading the police report, the father learned from witness statements that his son's feet were trapped and could not be extricated, and he was alive when the fire consumed him. As a consequence of the condition of the remains there had to be a closed coffin at the funeral.

A jury awarded the plaintiff \$250,000 which was less than the defendant's \$300,000 offer of judgment.

Under Rule 403 of the Rules of Evidence, a balancing test is performed wherein the probative value of the evidence is balanced against its potential prejudice.

The Wrongful Death Act itself specifically states that the "jury should give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties." A.R.S. § 12-613 interpreting case law has found these damages are to include "anguish, sorrow, stress, mental suffering, pain and shock."

The cases have also determined that “aggravating circumstances attending the wrongful act, neglect or default” are to be interpreted solely relating to punitive damages.

The Court looked to the Oxford English Dictionary definition of death which includes not just the mere state of death but the act of dying. It then looked to Black’s Law Dictionary which defined death “concurrently as the ending of life and the cessation of all vital functions and signs.” From these definitions it was concluded that both the manner in which a person’s mortal life ceases as well as the fact of death is within the definition of the statute. Further, in keeping with the remedial objective behind the Wrongful Death Act intended to compensate survivors for their losses, it is appropriate for evidence of the manner of the decedent’s death to be admitted provided it has a bearing upon the mental anguish suffered by the survivors. However, a survivor may not recover for mental anguish resulting from the negligent acts of the defendant prior to the decedent’s death, and such evidence is not relevant to the issue of damages. A survivor may not recover for mental anguish resulting from actual or perceived pain and suffering experienced by the decedent during the time leading up to death because such period of time precedes the death of the decedent. Consequently, evidence of the decedent’s conscious pain and suffering before his death is not relevant to a survivor’s damages and wrongful death claim.

Evidence indicating that the decedent may have been conscious and burned alive bears only the decedent’s pre-mortem pain and suffering and is not relevant to the plaintiff’s wrongful death claim. Evidence and witness accounts of the events that he may not have seen or been aware of are likewise inadmissible. Evidence pertaining to the death of which the plaintiff has been unaware has little probative value. In short, insofar as the manner of the decedent’s death increased the plaintiff’s mental anguish, it is relevant to his damages in his wrongful death claim. To the extent the evidence of manner of death dealt with pre-mortem pain and suffering it is irrelevant.

Under Rule 68(d), when an offer of judgment is made on behalf of more than one party and that offer is not apportioned between the parties, it may be invalid for the purposes of posing Rule 68 sanctions. However, when the relationship between the offerors is such that the unapportioned offer, compared to the final judgment, provided the offerees the ability to make a meaningful choice between accepting the offer and going forward with litigation, Rule 68 sanctions may be awarded.

Here, although the plaintiff brought his lawsuit against both Skyline and Skyline Industrial, he claimed he could not discern which of these defendants was making a \$300,000 offer of judgment. However, it is Skyline and not Skyline Industrial which admitted in its answer that the driver was negligent and that the driver was employed by Skyline. Later, plaintiff agreed to dismiss Skyline Industrial from the lawsuit before trial. Plaintiff made a similar offer of judgment to both defendants without distinguishing between each. The record supports the Superior Court’s ruling that the offer need not be apportioned in this case. Plaintiff’s complaint asserted his claims against Skyline and Skyline Industrial jointly and severally. A joint offer of judgment

was an offer to settle Girouard's claim fully and finally thereby avoiding a trial. It was clear from the offer that the plaintiff would receive only one payment for settlement of his claim against both Skyline and Skyline Industrial.

## **2. Admissibility of Alcohol Consumption Regarding Punitive Damages**

*Belliard v. Becker*, 216 Ariz. 356, 166 P.3d 911 (App. Div. 1, August 23, 2007) (Judge Orozco). EVIDENCE OF ALCOHOL CONSUMPTION AND OTHER CONDUCT PRIOR TO AN ACCIDENT OCCURRING WHEN LIABILITY IS ADMITTED IS STILL ADMISSIBLE ON THE QUESTION OF PUNITIVE DAMAGES BUT CANNOT BE CONSIDERED BY THE JURY IN ASSESSING COMPENSATORY DAMAGES.

Defendant while driving northbound on Highway 101 in the right hand lane crossed over three lanes of traffic, ran into the steel cable separating northbound and southbound traffic and came to rest on the southbound side of the road facing north. Defendant then exited his vehicle and discovered the steel cable attached to his bumper. He then turned his car around and pulled out into the southbound traffic. As he drove away he "felt the jerk on the front end." Eventually the defendant lost control of his vehicle which came to rest a second time. He again exited his vehicle and found the cable wrapped around the axle. Later it was found he had dragged 1200 feet of cable down the highway for some distance.

The plaintiff was a passenger in another vehicle which as it entered the highway to travel southbound was passed by the defendant's vehicle. The vehicle plaintiff was riding in became entangled in the cable, started spinning and came to rest in an embankment. The plaintiff suffered a head injury.

At the scene, the investigating officer smelled alcohol on the defendant's breath. The defendant admitted to having had "a couple of drinks" earlier in the evening. He blew a .031 on a breathalyzer which led the officer to conclude he was not intoxicated and thus he was not charged with DUI.

Before trial, the defendant moved in limine to preclude any mention of alcohol consumption or the bars he visited prior to the accident on the basis it was not relevant or that the probative value was outweighed by the prejudicial effect of the evidence.

Plaintiff responded that the driving behavior of the defendant was not consistent with the action of a sober person and that it was in fact his attempt to avoid arrest for DUI that caused his accident, and therefore the alcohol consumption and bar hopping was relevant to prove his reckless conduct.

## **3. Expert Not Allowed to Opine on the Ultimate Question of Apportioning Fault Amongst Parties and Non-Parties**

*Webb v. Omni Block, Inc.*, 216 Ariz. 349, 166 P.3d 140 (App. Div. 1, September 6, 2007) (Judge Weisburg). Plaintiff had a home built and the home failed when adhesive used to hold the slump block together failed. The defendant manufactured the adhesive.

At trial, defense expert testified not only as to the reason for the building failure but opined as to what percentage of fault should be attributed to the plaintiffs. The defendant and a variety of non-parties at fault were involved in the building the house. Plaintiff objected on the basis that the expert should not have been allowed to give an opinion as to the ultimate issue in the case. The defendants responded by arguing the Rules of Evidence specifically allows an expert to testify regarding the ultimate issue for the jury. The court noted that the rule in fact does allow experts to testify to an ultimate issue. The rule is not without limit. The opinion testimony must still be held to the trier of fact and cannot be held in legal conclusions that simply opine “how jury should decide case.”

Opinion testimony by an expert witness that encompasses an ultimate issue is generally admissible when it allows the trier of fact to use as a term that has both a lay factual meaning and a legal meaning and it is clear that the witness is using only the factual term. On the other hand, testimony regarding ultimate issues has been excluded because it simply told the jury how to decide the case. When the testimony amounts to nothing more than an expression of the experts general beliefs as to the how the case should be decided or the amount of damages which would be just, the testimony is generally excluded. These are conclusory expressions that are worthless to the trier of fact. In *Jamas v. Krpan*, 116 Ariz. 216, 568 P.2d 1114 (App. 1977), an expert medical doctor was not permitted to testify that the conduct of the defendant amounted to “gross negligence.” Although a jury may not be competent to determine medical malpractice without the aid of an expert testimony that the physician can deviated from the accepted standard of care, it does not necessarily follow that the jury need be informed the degree of gravity of deviation. Questions which merely authorize the witness to tell the jury what result to reach or not are generally permitted.

Here, where the defense expert not only testified with respect to the roles and responsibilities of parties and non-parties to the lawsuit but actually testified to what he felt was the appropriate apportionment of fault as to each party. The testimony with respect to apportioning of percentages of fault constituted an admissible legal conclusion under Rule 704. It was permissible to testify with respect to duties and responsibilities but it was for the jury to determine percentages of fault.

The Motion in Limine was granted and the plaintiff was awarded \$3,600 in damages which was approximately three times her medical bills from the hospital visits shortly after the accident but did not include over \$188,000 in expenses which arose a week later when her brain injury symptoms began to develop.

The Court of Appeals found that because the defendant had admitted liability, the alcohol consumption was not relevant to establish either negligence or liability. However, a punitive damage claim is based upon proof that a defendant “consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others.” Alcohol consumption would be relevant to a question of whether the defendant behaved sufficiently recklessly to justify an award of punitive damages. Accordingly, the trial court erred in precluding this evidence on the question of punitives. The appellate court felt that there was sufficient evidence upon which a jury could conclude that the defendant behaved so recklessly as to be subject to punitives. Similarly, the evidence of driving across lanes of traffic, wrapping his vehicle around a cable and then driving down the road with the cable dragging behind would all be admissible as well on this point.

The appellate court felt that the jury in awarding compensatory damages had determined the bulk of the medical expenses were not caused by this accident and that this determination had nothing to do with the consumption of alcohol, the pre-accident conduct, or punitive damages, and therefore that verdict would not be disturbed.

The court recognized that whether to order a new trial just on the question of punitive damages was a question of first impression in Arizona. Finding that most states have approved such a procedure, the Arizona Court of Appeals found that where a distinct and severable issue is to be decided, a trial on that issue alone is appropriate unless such a trial would result in injustice. Here, the court found that the issue of punitive damages is distinct and severable from the issue of compensatory damages, particularly because the evidence of alcohol consumption is admissible only for purposes of proving punitive damages. The case was thus reversed and remanded for a retrial as to punitive damages only.

#### **4. Medical Expert Witness Qualification Requirements**

*Seisinger v. Siebel*, 532 Ariz. Adv. Rep. 8 (Ariz. Ct. App. Div. 1, on June 17, 2008) (Judge Irvine). ARIZONA REVISED STATUTE §12-2604(A) REQUIRING AFFIDAVIT BY MEDICAL DOCTOR IN SAME SPECIALITY AS DEFENDANT TO SUPPORT FILING LAWSUIT VIOLATE SEPARATE OF POWERS UNCONSTITUTIONAL. THE PLAINTIFF FILED A MEDICAL MALPRACTICE LAWSUIT CLAIMING THAT A DEFENDANT DOCTOR NEGLIGENTLY ADMINISTERED A SPINAL EPIDURAL. THE PLAINTIFF FILED AN AFFIDAVIT FROM A MEDICAL DOCTOR WHO WAS NOT IN THE SAME SPECIALITY AS THE DEFENDANT. Prior to trial the defense moved in limine to preclude plaintiff’s expert from testifying because he did not qualify under Arizona Revised Statute §12-2604(A).

The statute in question specifically requires that in order to maintain a medical malpractice lawsuit the plaintiff must file an affidavit establishing that the standard of care has been breached and the affidavit must be signed by a medical doctor with the

same specialty and certifications as the defendant and that doctor must be actively practicing a majority of the time in clinical medicine or teaching. The trial court agreed with the defense and granted the motion and this appeal followed. The Arizona Court of Appeals found that the Arizona Constitution clearly requires the three main branches of government remain separate and distinct. Under Article 3 to the Arizona Constitution a legislative enactment will be found in violation of the separation of powers if it “unreasonably limits or hampers” the judicial system in performing its function.

Arizona Constitution Article 6, Section 5(5) gives the exclusive power to the Arizona Supreme Court to establish rules relative to procedural matters in any court. Pursuant to this mandate, the Arizona Supreme Court has enacted Arizona Rules of Evidence, 701 to 706 which govern the admissibility of expert witness testimony. Specifically Rule 702 provides that an expert with “scientific, technical or other specialized knowledge” which will “assist the trier of fact” may testify. Prior to the enactment of Arizona Revised Statute §12-2604(A) the Arizona courts had consistently held that an expert need not be of the same medical specialty as the defendant in the medical malpractice action to be competent to testify regarding the standard of care.

Accordingly, the Arizona Court of Appeals held that Arizona Revised Statute §12-2604(A) violates the Arizona Constitution Separate of Powers Provision in that it directly conflicts with Rule 702 of the Rules of Evidence. The court found that were legislative enactments merely supplement an existing rule, no conflict will be found. However here, by imposing a much stricter standard than the rules of evidence, there was a clear conflict and therefore the statute was unconstitutional.

For support his holding the court referred to *Barsema v. Susong*, 156 Ariz. 309, 751 P.2d. 969 (1988) which held that a statute precluding introduction of evidence showing bias of an expert due to the experts affiliation with the insurer for the defendant was unconstitutional as it violated the rules of evidence which allow the admission of such evidence for purposes other than to prove fault.

## **D. Hearsay Evidence**

### **1. Statement of Victim to Medical Professional**

*State v. Lopez*, 522 Ariz. Adv. Rep. 12 (App. Div. 2, January 22, 2008) (Judge Howard). SEXUAL ASSAULT VICTIM WHO MAKES STATEMENTS TO NURSE TO ALLOW NURSE TO LOCATE INJURIES ARE STATEMENTS RELEVANT TO DIAGNOSIS OR TREATMENT AND WITHIN HEARSAY EXCEPTION. After being sexually assaulted, a victim was transported to the hospital and examined by a registered nurse. The nurse testified at trial against the criminal defendant that “looking for injury is the main purpose” of her examination and that collecting evidence for the police was “another purpose.” During her examination of the patient she asked “what happened?” in order to know “where to look for injury.” The victim’s response included details of the attacker’s physical

contact with the victim and its effect. This evidence although hearsay was admissible under Arizona Rules of Evidence 803(4), as a statement “made for purposes of medical diagnosis or treatment in describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

Here, the patient’s statements were made consistent with her desire to receive medical care as she was injured during the attack. She received medication for infection or sexually transmitted disease as well as birth control medication as a result of the examination and treatment. Clearly the patient’s apparent motive was consistent with receiving medical care. Further it was reasonable for a physician to rely on the information from the patient in making a diagnosis and providing treatment. An accurate history was important to determine what happened in order to know where to look for injuries.

## **E. Incriminating Statements**

### **1. Admissibility of Incriminating Statements Made By Accused During Investigation By Arizona Medical Board**

*State of Arizona v. Honorable John R. Ditsworth*, 216 Ariz. 339, 166 P.3d 130 (App. Div. 1, September 6, 2007) (Judge Hall). INCRIMINATING STATEMENTS MADE BY THE ACCUSED DURING INVESTIGATION BY THE ARIZONA MEDICAL BOARD ARE REQUIRED TO BE TURNED OVER TO THE PROPER AUTHORITIES INVOLVED IN THE CRIMINAL INVESTIGATION AND THEREFORE ARE NOT PRIVILEGED IN THE CRIMINAL ARENA WHERE THEY ARE OTHERWISE PRIVILEGED FOR CIVIL MATTERS.

The defendant was a medical doctor in general practice when a young female patient claimed the doctor had sexually molested her during an examination regarding a yeast infection and annual pap smear.

The Board of Medical Examiners started an investigation and placed the accused in a two-week outpatient treatment program at the Sexual Recovery Institute which specializes in assessing and treating sexually addictive behaviors.

Although initially the doctor denied any inappropriate contact, he ultimately admitted during the investigation to the inappropriate touching of the plaintiff.

Subsequently, a grand jury proceeding took place and the prosecutor introduced to the grand jury the incriminating statements which had been produced to him by the Medical Board pursuant to A.R.S. §§ 32-1401 to 1491.

The trial court ruled that the incriminating statements were privileged and inadmissible based upon holdings in two civil cases, *Roman Catholic Diocese of*

*Phoenix v. Superior Court*, 204 Ariz. 225, 229, 62 P.3d 970, 974 (App. 2003) and *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970).

The Arizona Court of Appeals found the trial court's ruling misplaced its reliance upon these cases because they were both civil suits, where § 32-1451.01(C) and (E) preclude disclosure or the admissibility of such evidence. A.R.S. § 32-1451(O) supersedes these statutes in the criminal context and requires their disclosure to the appropriate authorities pursuing criminal prosecution. The Court of Appeals found that this statute was more than just a "notice" statute in that the legislature intended that evidence of this nature be available and used to prosecute individuals where it would effectively protect the public health, safety and welfare.

#### **F. Foundation and Authentication Requirements for Admission of Video**

*State of Arizona v. Haight-Gyuro*, 218 Ariz. Adv. Rep. 356 (Ct. App. Div. 2) (June 18, 2008) (Judge Brammer). ACCURACY IS AN ELEMENT OF AUTHENTICATION UNDER RULE 704 & 403 AND ONLY "REASONABLY FAITHFUL REPRESENTATION" REQUIRED. The defendant was charged with using a stolen credit card to purchase specific items at a retail store. A store surveillance camera recorded the purchase.

The defendant moved to suppress the surveillance video arguing that no one could lay the proper testimony that this was a completely accurate depiction of the defendant making the alleged purchases. The defendant argued that although authentication requirements, ie. testimony that the tape came from the store surveillance system, how the tape was made and preserved, there was inadequate proof that what is depicted on the video accurately shows what the state claims it shows.

The Arizona Court of Appeals first found that accuracy is a component of authentication. In so doing the court adopted the "silent witness" theory of authentication. This doctrine establishes that "photographic evidence may draw its verification, not from any witness who has actually viewed the scene portrayed on the film but from other evidence that supports the reliability of the photographic product." Here, the objects that were stolen were clearly displayed on the video and a figure closely resembling the defendant signing the credit card slip were shown with the goods. A store employee testified that he ran surveillance cameras, how he put the tapes in the machines, how he could locate a specific transaction if he knew the date and time based on a receipt, how this specific expert was obtained was adequate authentication along with what was shown on the tape itself to allow for admission of the video recording. "A video recording or photograph, however, need not be perfectly accurate – it nearly be a "reasonably faithful representation." . . . a photograph will be admissible so long as the discrepancies between it and its subject are not mysteriously misleading either because they are minor or because the witness explains them "in such a way that the jury would not be misled."

