

Medical Malpractice Litigation in Arizona

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ARIZONA'S CURRENT LEGAL CLIMATE FOR MEDICAL MALPRACTICE LAWSUITS

- Trends in the number of medical malpractice lawsuits filed
- Trends in jury verdicts
- Possible explanations for trends
- Legislative impact
- Recent judicial decisions of interest

TRENDS IN NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED

- Statistics taken from Attorney Kay M. Cooper's February 2007 Article, "Medical Malpractice: The Prognosis," [Arizona Attorney](#)

TRENDS IN NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED

■ MARICOPA COUNTY

- ◆ 2005 - 446 med mal lawsuits filed
- ◆ 2006 - 323 med mal lawsuits filed

27.6 percent decline

TRENDS IN NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED

■ PIMA COUNTY

- ◆ 2005 - 110 med mal lawsuits filed
- ◆ 2006 - 67 med mal lawsuits filed

39 percent decrease

TRENDS IN NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED

■ YAVAPAI COUNTY

- ◆ Percentage of med mal lawsuit filings decreased 55 percent from 2002 to 2006

■ Counties Outside Maricopa and Pima

- ◆ 2006 - 53 total med mal lawsuits

- ◆ *Apache, Greenlee, and Santa Cruz Counties have not had med mal lawsuit filed in two years*

TRENDS IN NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED

- *Percentage make-up of med mal cases in total civil filings also has decreased*
 - ◆ 2000 - 1.32 percent of all civil filings
 - ◆ 2006 - 0.85 percent of all civil filings

TRENDS IN NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED

- FILINGS HAVE FLUCTUATED BEFORE

- MARICOPA COUNTY

<u>FY</u>	<u>MM</u>	<u>TCF</u>	<u>%</u>
◆ <u>1999-2000</u>	387	31,181	1.24
◆ <u>2000-2001</u>	446	28,005	1.59
◆ <u>2001-2002</u>	460	31,123	1.48
◆ <u>2002-2003</u>	507	34,860	1.45
◆ <u>2003-2004</u>	449	36,164	1.24
◆ <u>2004-2005</u>	446	36,013	1.24
◆ <u>2005-2006</u>	323	34,946	0.92

TRENDS IN NUMBER OF MEDICAL MALPRACTICE LAWSUITS FILED

- PIMA COUNTY

<u>FY</u>	<u>MM</u>	<u>TCF</u>	<u>%</u>
◆ <u>1999-2000</u>	144	6,749	2.13
◆ <u>2000-2001</u>	132	6,039	2.19
◆ <u>2001-2002</u>	136	6,172	2.20
◆ <u>2002-2003</u>	93	6,929	1.34
◆ <u>2003-2004</u>	80	6,936	1.15
◆ <u>2004-2005</u>	110	7,204	1.53
◆ <u>2005-2006</u>	67	7,063	0.95

TRENDS IN ARIZONA JURY VERDICTS

- *In the past 5 years:*
 - ◆ *135 Medical Malpractice Cases Went To A Jury*
 - ◆ 110 DEFENSE VERDICTS
 - ◆ 81.5 PERCENT

TRENDS IN ARIZONA JURY VERDICTS

- Personal Experience
 - ◆ 16 MM jury trials since 2000 (excludes JMOL award and mistrial)
 - ◆ 15 defense verdicts
 - ◆ 93.8 percent . . . BUT

- ◆ 1 Plaintiffs' verdict = \$2.2 million

TRENDS IN ARIZONA JURY VERDICTS

- Plaintiff's Verdict Case – November, 2006
 - ◆ Plaintiff was Sheriff's Deputy
 - ◆ Criminal intentionally ran over in line of duty
 - ◆ Severe bilateral pelvic fractures
 - ◆ ORIF surgery
 - ◆ Went to client for rehab
 - ◆ Alleged that client's nurse shoved up on side to weigh, and transferred to x-ray table by legs, causing hardware to displace
 - ◆ Had re-do surgery, and after six months of rehab returned to limited work
 - ◆ Wife was nurse at St. Joseph's
 - ◆ At time of trial, back to regular duty with few limitations
 - ◆ 20 percent total disability WC allowed into evidence

TRENDS IN ARIZONA JURY VERDICTS

- RECENT PLAINTIFF'S VERDICTS
 - ◆ 06/06 - \$5.8 million (Kidney transplant, Pulmon.)
 - ◆ 03/07 - \$5.1 million (Withered Leg, Orthopod)
 - ◆ 07/06 - \$3.5 million (Retinal detach., Hospital)
 - ◆ 11/06 - \$2.2 million (ORIF surgery, Rehab Center)
 - ◆ 08/06 - \$1.5 million (Elder abuse, Nursing Home)
 - ◆ 03/07 - \$1.5 million (Brachial Plexus, OB/GYN)
 - ◆ 09/06 - \$900,000 (Comp. Synd., Vas. Surg, Hosp.)
 - ◆ 10/06 - \$101,740 (Psychiatric, ValueOptions)
 - ◆ 11/06 - \$7,000 (Coffee spill case, Hospital)

POSSIBLE REASONS FOR TRENDS

- Decrease In Filings Trend
 - ◆ Ebb and Flow theory
 - ◆ Hard cases for Plaintiffs to win
 - ★ Fairly conservative jury pools
 - ◆ Expensive to litigate
 - ★ Cost of Experts
 - ★ Cost of treating physicians
 - ★ Documents voluminous
 - ◆ Anti-plaintiff sentiment due to tort reform publicity

POSSIBLE REASONS FOR TRENDS

- Increase In Verdict Amount Trend
 - ◆ \$1 million no longer perceived to be that much money
 - ◆ Perceived breach of trust costly after benefit of doubt flees
 - ◆ Something in cases angers jurors

LEGISLATIVE IMPACT

- Article 2, Section 31 of the Arizona Constitution states: "No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person."
 - ◆ Arizona's constitutional ban on damages strikes fear into the hearts of most medical malpractice liability insurers.

- ◆ The cap will remain unless the Arizona Constitution is amended, or the federal government passes tort reform that includes caps.

LEGISLATIVE IMPACT

- A.R.S. § 12-561 defines an action for medical malpractice in pertinent part as follows:

“Medical malpractice action’ or ‘cause of action for medical malpractice’ means an action for injury or death against a licensed health care provider based upon such provider's alleged negligence, misconduct, errors or omissions, or breach of contract in the rendering of health care, medical services, nursing services or other health-related services or for the rendering of such health care, medical services, nursing services or other health-related services, without express or implied consent. . .”

LEGISLATIVE IMPACT

- A.R.S. § 12-562(A) states:

“A medical malpractice action shall not be brought against a licensed health care provider except on grounds set forth in § 12-561.”

LEGISLATIVE IMPACT

- A.R.S. § 12-563 defines standard of care and the two elements required for a prima facie medical malpractice case:

1. The health care provider failed to exercise that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances[;] [and]

2. Such failure was a proximate cause of the injury.

LEGISLATIVE IMPACT

- A.R.S. § 12-2603 relates to newly adopted legal requirements for certification of whether expert witness testimony is needed in a medical malpractice case:

- ◆ When a medical malpractice lawsuit is filed, a plaintiff must file a certification of whether expert testimony is required:

- ★ If certifies “yes,” then plaintiff must file a preliminary expert affidavit **addressing both standard of care and causation** with the initial disclosure statement. (Due 40 days after last defendant files answer)

LEGISLATIVE IMPACT

- A.R.S. § 12-2603, continued:

- ★ If certifies “no,” then defendant health care providers can make motion to contest certification. Court then can order affidavit to be filed if it finds expert testimony should be required.

- ◆ Failure to comply results in dismissal of case without prejudice sua sponte or on motion by defendants

LEGISLATIVE IMPACT

- A.R.S. § 12-2604 sets specific criteria that expert witnesses must meet to testify on the issue of standard of care in medical malpractice cases:
 - ◆ Must be licensed health care provider in this or another state, **and**:
 - ◆ If health care provider against whom testimony will be offered is a specialist, expert must meet the following:
 - ★ Same specialty as defendant
 - ★ If defendant is board certified, expert also must be board certified in the same specialty as defendant

LEGISLATIVE IMPACT

- A.R.S. § 12-604, continued:
 - ◆ During the year immediately preceding the occurrence giving rise to the lawsuit, the expert must have devoted a majority of his or her professional time to either or both of the following:
 - ★ The active clinical practice of the same health profession as the defendant, and if the defendant is a specialist, in the same specialty;
 - ★ The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant, and if the defendant is a specialist, in the same specialty

LEGISLATIVE IMPACT

- A.R.S. § 12-604, continued:
 - ◆ Exact same requirements for expert serving as a SOC against or for a general practitioner--either or both of the following for the year preceding the occurrence giving rise to the lawsuit:
 - ★ majority of his or her professional time in active clinical practice as a general practitioner;
 - ★ Active instruction at accredited professional school, residency or clinical research program in same health profession as defendant

LEGISLATIVE IMPACT

- A.R.S. § 12-2604 continued
 - ◆ If defendant is a health institution that employs a health care professional against whom or in whose favor expert testimony will be offered, the same requirements apply
 - ◆ Legislature allowed courts to retain power to disqualify experts on additional grounds outside these requirements
 - ◆ Experts cannot testify if any portion of their fee is contingent on the outcome of the case

LEGISLATIVE IMPACT

- A.R.S. § 12-2605 is often referenced as the “I’m sorry” statute.
 - ◆ Purpose is to allow health care providers to express sympathy and to apologize for an unanticipated medical outcome to the patient and/or relatives without fear that it will be used as an admission against them in litigation.

LEGISLATIVE IMPACT

- A.R.S. § 12-2605, continued:

In any civil action that is brought against a health care provider as defined in §12-561 or in any arbitration proceeding that relates to the civil action, any statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence that was made by a health care provider or an employee of a health care provider to the

patient, a relative of the patient, the patient's survivors or a health care decision maker for the patient and that relates to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care is inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

RECENT JUDICIAL DECISIONS OF INTEREST

- **Gourney v. Meaney, 214 Ariz. 226, 150 P.3d 799 (App. 2007)**
 - ◆ Preliminary expert affidavit requirement of A.R.S. § 12-2603 requires expert to state defendant health care provider:
 - ★ Violated required standard of care, assuming facts alleged by Plaintiff are true and accurate;
 - ★ Caused Plaintiff's claimed injuries and damages

RECENT JUDICIAL DECISIONS OF INTEREST

- **Stanley v. McCarver, 208 Ariz. 219, 92 P.3d 849 (Ariz. 2004)**
 - ◆ Arizona Supreme Court held no physician patient relationship necessary for radiologist to be held liable to prospective employee
 - ★ Prospective employee applied for job
 - ★ Employer required pre-employment tuberculosis screening
 - ★ Chest x-ray done by independent contractor radiologist, communicated results to portable x-ray company regarding nodule, as well as prospective employer

RECENT JUDICIAL DECISIONS OF INTEREST

- **Stanley v. McCarver, continued**
 - ★ Portable x-ray company and prospective employer failed to communicate it to prospective employee, and she was not hired
 - ★ Later diagnosed with cancer, sued portable x-ray company, prospective employer and radiologist
 - ★ Arizona Supreme Court held summary judgment improper, radiologist did owe a duty, and whether he fulfilled that duty by reporting findings to portable x-ray company and employer was for jury to decide

MEDICAL MALPRACTICE LITIGATION IN ARIZONA

- Number of lawsuits filed appears to be decreasing
- Most jury verdicts are in favor of health care provider
- Higher jury verdicts for Plaintiffs when they do occur
- Arizona Legislature is seeking to cut back on frivolous suits
- Arizona Courts expand potential liability