JONES, SKELTON & HOCHULI, P.L.C.

REFERENCE GUIDE TO AZ LAW

VERSION 26

Published 2022

Our Reference Guide covers many areas of Arizona law, highlighting the most common issues associated with civil litigation. This resource is intended to provide a general overview of the subject matter, and is a supplement to the personal service we provide to our clients. It should not be relied upon as the sole source of information, and should not be substituted for competent professional legal advice for a particular situation. Should you have any questions, we encourage you to contact the authors listed at the end of each chapter or any JSH attorney.

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CHAPTER 16: MEDICAL LIABILITY

MEDICAL MALPRACTICE CLAIMS

Medical malpractice, also commonly referred to as medical negligence, is a cause of action that occurs when a licensed health care provider violates the applicable standard of care in providing treatment to a patient, causing the patient to suffer injury. A.R.S. § 12-561. To establish a prima facie claim for medical malpractice a plaintiff must prove the following: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached his or her duty to the plaintiff; (3) the breach was the proximate cause of the plaintiff's injury; and (4) damages. A.R.S. § 12-563.

The first element of a medical malpractice action is duty. Arizona courts traditionally held that a formal doctor-patient relationship must be established before a duty of care is owed. ***Hafner v. Beck***, 185 Ariz. 389, 391, 916 P.2d 1105, 1107 (Ct. App. 1995). But Arizona courts have expanded the breadth of the duty owed beyond the formal doctor-patient relationship requirement. For example, in ***Stanley v. McCarver***, 208 Ariz. 219, 226 ¶ 22, 92 P.3d 849, 856 (2004), the court held that a consulting radiologist owed a duty of reasonable care to the patient despite the absence of a direct doctor-patient relationship. *See also* ***Ritchie v. Krasner***, 221 Ariz. 288, 296 ¶ 18, 211 P.3d 1272, 1280 (Ct. App. 2009) (independent medical examiner owed claimant a duty of reasonable care despite the lack of a formal doctor-patient relationship); ***Diggs v. Arizona Cardiologists, Ltd.***, 198 Ariz. 198, 202 ¶ 22, 8 P.3d 386, 390 (Ct. App. 2000) (express contractual relationship was not necessary to find that a cardiologist whom the patient's emergency room physician informally consulted owed the patient a duty of care because the cardiologist voluntarily undertook to provide his expertise to the emergency room physician, knew it was necessary for the patient's protection, and knew the emergency physician would rely on it); ***Lasley v. Shrake's Country Club Pharmacy, Inc***., 179 Ariz. 583, 587, 879-80 P.2d 1129, 1132-33 (Ct. App. 1994) (pharmacist owed a duty to comply with the applicable standards of care when dispensing potentially addictive drugs to a customer)*; cf.* ***Golob v. Arizona Med. Bd.***, 217 Ariz. 505, 509 ¶ 12, 176 P.3d 703, 707 (Ct. App. 2008) (evidence supported board's findings that physician deviated from standard of care by prescribing medicine over the internet for individuals without establishing a physician-patient relationship or performing physical examinations).

The second element in a medical malpractice action is a breach of duty. The duty owed in a medical malpractice action is the duty to act in accordance with the applicable standard of care. The standard of care is generally defined as the degree of care, skill, and learning that would be expected under similar circumstances of a reasonably prudent health care provider practicing in the same specialty in Arizona. *See* ***Jaynes v. McConnell***, 238 Ariz. 211, 217 ¶ 19, 358 P.3d 632, 638 (Ct. App. 2015) (evidence of expert's personal practices was relevant for the jury to determine the applicable standard of care and to evaluate expert's credibility); *see also* ***Bell v. Maricopa Med. Ctr***., 157 Ariz. 192, 196, 755 P.2d 1180, 1184 (Ct. App. 1988) (jury can consider protocols as evidence of the standard of care). A healthcare provider breaches his or her duty to act in accordance with the standard of care if he or she fails to exercise the degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to

which he or she belongs within the state acting in the same or similar circumstances. A.R.S. § 12-563.

Normally, the plaintiff in medical malpractice cases must establish the standard of care with expert testimony. *See, e.g.*, ***Riedisser v. Nelson***, 111 Ariz. 542, 544, 534 P.2d 1052, 1054 (1975). The only time expert medical testimony is not required to establish the standard of care is where the negligence is so grossly apparent that laymen would have no difficulty recognizing it. *Id*. Such cases are rare.

The third and fourth elements in a medical malpractice action are proximate cause and damages. A plaintiff must establish that the health care provider's negligence was the proximate cause of his/her injuries. Specifically, the plaintiff must demonstrate "a natural and continuous sequence of events stemming from the defendant's act or omission, unbroken by any efficient intervening cause, that produces an injury, in whole or in part, and without which the injury would not have occurred." ***Barrett v. Harris***, 207 Ariz. 374, 378 ¶ 11, 86 P.3d 954, 958 (Ct. App. 2004). Proximate cause must be proven through expert medical testimony unless the connection is readily apparent to the trier of fact. ***Seisinger v. Siebel***, 220 Ariz. 85, 94 ¶ 33, 203 P.3d 483, 492 (2009); *see also* A.R.S. § 12-2601 et seq.; ***Sampson v. Surgery Ctr. of Peoria, LLC***, 251 Ariz. 308, 311 ¶ 15, 491 P.3d 1115, 1118 (2021) ("a plaintiff must show that causation is probable, not merely speculative").

Preliminary Expert Affidavit Requirement

Arizona law requires the plaintiff in a medical malpractice action to support his or her claim with a preliminary affidavit from a properly qualified expert. A.R.S. § 12-2603. The statute requires the plaintiff to serve this affidavit at the time initial disclosure statements are exchanged. Initial disclosures are due thirty days after the defendant files a responsive pleading to the plaintiff's complaint. Rule 26.1, Ariz. R. Civ. P. The preliminary expert affidavit must contain at least the following: (1) the expert's qualifications to opine on the defendant's standard of care or liability; (2) the factual basis for each claim against the defendant; (3) the defendant's acts, errors or omissions that the expert believes violate the standard of care; and (4) how those acts, errors or omissions caused or contributed to the plaintiff's claimed damages. Failure to serve the required preliminary expert affidavit shall result in the dismissal of the claim without prejudice. A.R.S. § 12-2603(F). However, the court has wide discretion to allow a plaintiff additional time to cure an insufficient expert affidavit.

Normally, defendants raise the lack of a qualifying preliminary expert affidavit in a motion to dismiss; thus, the statutory requirement of dismissal without prejudice (to give plaintiff a chance to provide a valid preliminary affidavit) makes sense. In ***Preston v. Amadei***, 238 Ariz. 124, 357 P.3d 159 (Ct. App. 2015), however, the defendant did not challenge the plaintiff's preliminary affidavit. He waited and filed a summary judgment motion arguing the plaintiff had no qualified expert to testify that defendant fell below the standard of care. The court of appeals held that the trial court should have allowed the plaintiff additional time to substitute another standard of care expert. *Id.* at 131 ¶ 19, 357 P.3d at 166; *see also* ***Sanchez v. Old Pueblo Anesthesia, P.C.***, 218

Ariz. 317, 324 n.10, 183 P.3d 1285, 1292 n.10 (Ct. App. 2008) ("We merely hold that, under the particular circumstances here, where the Sanchez's' inability to remedy the violation of § 12–2604 within the deadline arose from Old Pueblo's approximate six-month delay in raising a challenge on that basis, such a drastic sanction [of dismissal with prejudice] is not supported by the record before us.").

The Arizona Supreme Court has since disapproved of *Preston* and *Sanchez*, holding that the A.R.S. §12-2603(F) "opportunity to cure" does not automatically entitle a plaintiff the chance to substitute a new expert at the summary judgment stage; that remedy is limited to challenges to the preliminary affidavit. ***Rasor v. Northwest Hosp.***, 243 Ariz. 160, 165 ¶ 24, 403 P.3d 572, 577 (2017) (allowing an automatic substitution of expert provision to carry beyond the preliminary and discovery phases defeats the overall purpose of A.R.S. §12-2603). Furthermore, the Hospital was not required to challenge the plaintiff's proposed expert's preliminary affidavit as a prerequisite to challenging it on summary judgment. *Id. But see* ***St. George v. Plimpton***, 241 Ariz. 163, 168 ¶ 30, 384 P.3d 1243, 1248 (Ct. App. 2016) (holding that the proper recourse for a plaintiff whose expert's qualifications are challenged for the first time at the summary judgment stage is to seek relief for additional discovery under Rule 56(d)).

Expert Witness Qualifications

Expert witnesses in medical malpractice actions are required to possesses certain minimum qualifications to provide standard of care testimony. Pursuant to A.R.S. § 12-2604(A), a witness may not give expert testimony on the standard of care unless the person is licensed as a health professional in Arizona or another state and the person meets the following criteria:

1. If the party against whom or on whose behalf the testimony is offered is or claims to be a specialist, the expert must have specialized, at the time of the occurrence that is the basis for the action, in the same specialty or claimed specialty as the party against whom such testimony is offered. If the party against whom the testimony is offered is or claims to be a specialist who is board certified, the expert witness shall be a specialist who is board certified in that specialty or claimed specialty; and

2. 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: (a) the active clinical practice of the same health profession as the defendant and, if the defendant is or claims to be a specialist, in the same specialty or claimed specialty; (b) 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 or claims to be a specialist, in an accredited health professional school or accredited residency or clinical research program in the same specialty or claimed specialty.

Similar requirements apply to general practitioners. If the defendant in a medical malpractice action is a health care institution that employs a licensed health professional accused of

malpractice, the statute applies as if the health professional was the defendant against whom the testimony is offered. A.R.S. § 12-2604(B).

"Specialty," for purposes of the statute, refers to a limited area of medicine in which a physician is or may become board certified. This includes subspecialties and is not limited to the 24 member boards on the American Board of Medical Specialties (ABMS). ***Baker v. University Physicians Healthcare***, 231 Ariz. 379, 386 ¶ 22, 296 P.3d 42, 49 (2013). Likewise, "specialist" is someone who devotes a majority of his or her professional time to a particular specialty. *Id*.

"Claimed specialty" refers to situations in which a physician purports to specialize in an area that is eligible for board certification, regardless of whether the physician in fact limits his or her practice to that area. *Baker, supra*.

Under this statute, an expert witness testifying against a board-certified specialist in a medical malpractice action must be board-certified in the same specialty as the defendant physician, even if physician does not claim to have been a board-certified specialist at time he treated the patient. ***Awsienko v. Cohen***, 227 Ariz. 256, 257 P.3d 175 (Ct. App. 2011) (expert witness who was not a board-certified specialist in either cardiovascular disease or interventional cardiology was not qualified to render standard of care opinion against physician who was board-certified in both areas, in medical malpractice action against the physician, despite argument that expert's criticisms were unrelated to any cardiac treatment; statute contained no such exception). *But see Baker*, 231 Ariz. at 384 ¶ 12, 196 P.3d at 47 ("The standard of care, however, necessarily depends on the particular care or treatment at issue. . . . Thus, only if the care or treatment involved a medical specialty will expertise in that specialty be relevant to the standard of care in a particular case."). Thus, in ***Sanchez v. Old Pueblo****, supra*, the court held that an orthopedic surgeon could not testify in a medical malpractice action arising from knee surgery against an anesthesiologist defendant, even if the orthopedic surgeon might have the necessary qualifications and experience to knowledgeably address the standard of care for anesthesiologists in the context of the specific operation at issue. In ***Baker***, *supra*, a father sued a physician specializing in pediatric hematology-oncology for the death of his 17-year-old daughter after being treated for blood clots. The trial court was within its discretion in concluding that the defendant physician was practicing within her specialty of pediatric hematology-oncology at time of the treatment, and that the father's proposed expert, who was board certified in internal medicine and in hematology and oncology, did not meet the statutory requirement of being certified in same specialty as the defendant physician, even though the proposed expert might also have competently provided treatment. *See also* ***Rasor****, supra* (upholding the determination that a wound care nurse was not qualified to testify as standard of care expert against an ICU nurse because she had not spent the majority of the preceding year working as an ICU nurse).

As of the publication date of this Guide, the Arizona Supreme Court is considering two important issues in a medical negligence case. The first is whether a plaintiff can avoid having to obtain qualified medical experts by labeling her claim as one against the "institution," even though the claim is that unnamed "practitioners," lumped as a group, fell below the standard of care by

failing to appropriately treat the patient. The court of appeals ruled plaintiff was bringing an institutional claim against the entity and need not comply with A.R.S. § 12-2604 at all. The Supreme Court granted review and will hopefully clarify that claims against an entity need to allege more than simply allegedly negligent care decisions. Instead, institutional claims are ones such as the entity's policies were inadequate, the entity failed to maintain safe facilities and equipment, or failed to select competent physicians, or failed to supervise its employees. The second issue in *Windhurst* is whether a registered nurse is qualified to testify to the cause of death in a wrongful death case. ***Windhurst v. Ariz. Dept of Corrections***, 252 Ariz. 240 (Ct. App. 2021), review granted April 5, 2022.

A.R.S. § 12–2604 applies to Adult Protective Services Act (APSA) claims that are based on allegations of medical negligence. ***Cornerstone Hosp. of Se. Ariz., L.L.C. v. Marner ex rel. Cnty. of Pima***, 231 Ariz. 67, 72 ¶ 10, 290 P.3d 460, 465 (Ct. App. 2012) (holding that a registered nurse (RN) was qualified to testify about the standard of care required of a licensed practical nurse (LPN) or certified nurse assistant (CNA)). However, A.R.S. § 12-2604 does not apply to the admission of expert testimony during physician disciplinary proceedings because a disciplinary proceeding is not "an action alleging medical malpractice" to which the statute applies. ***Kahn v. Arizona Med. Bd***., 232 Ariz. 17, 21 ¶ 23, 300 P.3d 552, 556 (Ct. App. 2013).

This statute has been held constitutional against an equal protection and due process challenge, because it neither imposes a burden upon a plaintiff at filing nor unduly limits who a plaintiff can employ as an expert; rather, it specifies the type of evidence a plaintiff must offer to prove one of the elements of a medical malpractice claim. ***Governale v. Lieberman***, 226 Ariz. 443, 447 ¶ 11, 250 P.3d 220, 224 (Ct. App. 2011).

Though A.R.S. § 12-2604 conflicts with Rule 702, Ariz. R. Evid. (which allows experts to testify if they are simply qualified by knowledge, experience, education, or training), the statute does not violate the separation of powers because it is not a procedural rule of evidence. Instead, it creates a substantive requirement for bringing a medical malpractice claim. ***Seisinger v. Siebel***, 220 Ariz. 85, 95 ¶ 38, 203 P.3d 483, 493 (2009).

Burden of Proof

The burden of proof in a medical malpractice claim is typically a "preponderance of the evidence" standard. Thus, the plaintiff must demonstrate that the health care provider more likely than not violated the applicable standard of medical care and caused the patient's injury. However, there is a heightened burden of proof in a few limited circumstances. For example, students such as residents and interns enrolled in educational or training programs are not liable in a medical malpractice action for injury that occurs as a result of the care they provide unless the plaintiff proves gross negligence by clear and convincing evidence. A.R.S. § 12-564. Additionally, emergency room doctors, on-call medical specialists, hospitals or hospital employees are liable for their emergency treatment only if the plaintiff presents clear and convincing evidence that the medical care provider committed malpractice. A.R.S. § 12-572; *see also* ***Stafford v. Burns***, 241 Ariz. 474, 479 ¶ 15, 389 P.3d 76, 81 (Ct. App. 2017) (heightened burden of proof applies to all

patients who go to hospital's emergency department "for what may be an emergency condition") (emphasis in original).

Loss of Chance

In some cases, a jury is permitted to determine that a defendant probably caused the plaintiff's injury if the plaintiff demonstrates that the plaintiff suffered a "loss of chance" at a better outcome. ***Thompson v. Sun City Cmty. Hosp., Inc.***, 141 Ariz. 597, 608, 688 P.2d 605, 616 (1984). In ***Thompson***, a patient was transferred to another hospital at a time when he needed emergency care. The patient survived but suffered residual impairment of his leg. The plaintiff's expert testified that there would have been a "substantially better chance" of full recovery if surgery had been performed immediately. *Id.* at 607, 688 P.2d at 615.

This looser standard of causation is limited to cases in which the defendant undertook to protect the plaintiff from harm but whose negligence increased the risk of harm or deprived the plaintiff of a significant chance of survival or better recovery. *See* RESTATEMENT (SECOND) OF TORTS § 323 ("One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . . his failure to exercise such care increases the risk of such harm."); *see also* ***Clemens v. DMB Sports Clubs Ltd. P'ship***, 2015 WL 8166584, at *3 (Ariz. Ct. App. Dec. 8, 2015) (rejecting a loss of chance claim where the plaintiff did not prove the defendant "negligently interrupted a chain of events" that would have given the plaintiff a chance for a better outcome).

Res Ipsa Loquitur

In very limited circumstances, a plaintiff can bring a claim against a medical provider without direct proof of negligence under the doctrine of *res ipsa loquitur*, which is Latin for "the thing speaks for itself." In order to prove a res ipsa claim, a plaintiff must prove three elements:

1. The injury does not ordinarily occur in the absence of negligence;

2. The instrumentality of harm was in the defendant's exclusive control; and

3. The plaintiff is not in a position to show how the instrumentality of harm caused the injury.

In ***Tucson Gen. Hosp. v. Russell***, 7 Ariz. App. 193, 437 P.2d 677 (1968), a plaintiff was injured when an x-ray machine fell on her while she was lying on the x-ray table due to an improperly positioned pivot shaft. The court of appeals held there was sufficient evidence for a jury to infer the hospital's negligence through a theory of res ipsa loquitur on the basis that (1) mechanical failure of a pivot shaft does not ordinarily occur in the absence of negligence where the undisputed evidence was that "somebody didn't put it in properly;" (2) the x-ray machine was in the hospital's possession and control for nine years prior to the injury notwithstanding the use of contractors to service the machine; and the plaintiff had no means by which to determine how

or when the pivot shaft was improperly positioned. *Id.* at 196, 437 P.2d at 680 ("The res ipsa doctrine is a particular application of the use of circumstantial evidence.").

The application of the doctrine is not appropriate where there are multiple potential causes of an injury. In a case involving a plaintiff who developed neck pain immediately following abdominal surgery and was found to have a herniated cervical disk, the defendants offered expert testimony that the plaintiff's condition could have been triggered by some mechanism other than surgical positioning such as "coughing, sneezing, or merely awakening in the morning." ***Faris v. Doctors Hosp., Inc.***, 18 Ariz. App. 264, 266, 501 P.2d 440, 442 (1972). Likewise, in ***Korak v. Para***, 2019 WL 3429164, at *2 (Ariz. Ct. App. July 30, 2019), the court of appeals rejected a res ipsa theory when the plaintiff's expert testified that her splenic artery injury following a laparoscopic cholecystectomy could have been caused either by a surgical instrument or by the plaintiff's post-operative pancreatitis. *See also* ***McWain v. Tucson Gen. Hosp.***, 137 Ariz. 356, 369, 670 P.2d 1180, 1183 (Ct. App. 1983) ("The mere fact that an occurrence is rare does not lead to the application of the doctrine.").

Res ipsa loquitur is also not applicable in the context of multiple, independent theories of liability against separate defendants. In a case involving a total knee replacement that failed, the plaintiff put forth two competing theories under the doctrine of res ipsa: (1) the surgeon failed to properly lock in or size the implant at the time of surgery; or (2) the locking mechanism on the device was defective, thereby implicating the manufacturer. ***Cook v. Hawkins***, 2019 WL 2442263, at *1 (Ariz. Ct. App. June 11, 2019). The court of appeals affirmed summary judgment in favor of both defendants because the plaintiff failed to show exclusive control of the instrumentality of harm by either defendant and further failed to show that the plaintiff's injury was probably the result of either defendant's negligence. *Id.* at *3 (The plaintiff's "offer of two independently sufficient potential causes for the implant's failure (based on different negligence at different times by different parties) means that [the plaintiff] failed to present evidence sufficient to support an inference that either individual defendant's negligence was probably responsible for [the plaintiff's] injuries.").

Limitations on Liability

While an individual, corporation or institution can be sued for medical malpractice, there are some limits placed on cases that can be brought against healthcare providers. For example, A.R.S. § 12-562 states that a medical malpractice action shall not be brought against a licensed healthcare provider for assault and battery. However, a battery cause of action can be brought when the claim alleges a lack of consent. ***Duncan v. Scottsdale Med. Imaging, Ltd.***, 205 Ariz. 306, 310 ¶ 13, 70 P.3d 435, 439 (2003) ("[C]laims involving lack of consent, i.e., the doctor's failure to operate within the limits of the patient's consent, may be brought as battery actions[, while] true "informed consent" claims, i.e., those involving the doctor's obligation to provide information, must be brought as negligence actions."). In cases involving "conditional consent," use of the typical RAJI battery instruction will not suffice as the issue is whether the defendant willfully performed "an unconsented to" procedure outside the scope of patient consent, not whether the defendant intended to cause harm or offensive contact. ***Carter v. Pain Ctr. of Ariz.***, 239 Ariz.

164, 167 ¶ 9, 367 P.3d 63, 71 (Ct. App. 2016). The requested "conditional consent" instruction should have been read to the jury. *Id*

Additionally, a corporation can be held vicariously liable for the actions of its employees and can be sued directly for failing to supervise or for negligently supervising its employees. *See, e.g.*, ***North Star Charter Sch., Inc. v. Valley Protective Servs., Inc.***, 2016 WL 7209681 at 5 ¶¶ 20-21 (Ariz. Ct. App. 2016) ("expert testimony is either required or appropriate to establish the standard of care for a claim of negligent hiring, training, and supervision of [skilled] personnel"). A medical malpractice action based upon breach of contract for professional services is not available unless such contract is in writing. A.R.S. § 12-562(C).

Comparative Fault

Under Arizona's comparative fault scheme, each defendant is liable only for his or her own percentage of fault. *See* A.R.S. §12-2506 (abolishing joint and several liability except for (1) those acting in concert; (2) vicarious liability or persons acting as agent of the party; and (3) Federal Employer's Liability Act). The Arizona Supreme Court held that a defendant may name as a nonparty at fault the physician who subsequently provided negligent care to an injured plaintiff and thereby enhanced the harm to the plaintiff. Allowing this is consistent with Arizona's Uniform Contribution Among Tortfeasors Act (UCATA). ***Cramer v. Starr,*** 240 Ariz. 4, 10 ¶ 21, 375 P.3d 69, 75 (2016) (holding the "original tortfeasor rule" provision of RESTATEMENT (SECOND) OF TORTS is not the law in Arizona because UCATA allows for apportionment of fault among successive tortfeasors, not only joint tortfeasors).

Statute of Limitations

In Arizona, a medical malpractice action must be commenced within two years after the cause of action accrues. A.R.S. § 12-542. A malpractice cause of action accrues under the discovery rule once a patient is put on reasonable notice to investigate whether his or her injury may be attributable to negligence. ***Walk v. Ring***, 202 Ariz. 310, 316 ¶ 24, 44 P.3d 990, 996 (2002). The statute of limitations on claims by a minor or incapacitated adult will be tolled until two years after the age of majority (18 years) or after competency is re-established. Courts have placed limits on the tolling doctrine, however. Conclusory allegations that a plaintiff was temporarily "too sick" or unable to manage his or her daily affairs will not qualify as objective evidence of mental disability sufficient to toll the statute of limitations for an adult. ***Kopacz v. Banner Health***, 245 Ariz. 97, 101 ¶ 16, 425 P.3d 586, 590 (Ct. App. 2018).

Exception to Collateral Source Rule

The collateral source rule generally prevents defendants in tort cases from introducing evidence that another source has provided payments or benefits to the injured party. ***Taylor v. Southern Pac. Transp. Co***., 130 Ariz. 516, 519, 637 P.2d 726, 729 (1981); RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979). This means that payments made to the injured party from another source, such as an insurer, are not credited against the defendant's potential liability even if those payments cover all or part of the harm for which the defendant is liable. The reasoning behind the collateral

source rule is that a tortfeasor should not receive a windfall and escape liability simply because the party he injured had the foresight to purchase insurance. The rule punishes a party who commits a tort by making sure the party is unable to escape liability merely because a plaintiff was able to recover from another source. ***Lopez v. Safeway Stores, Inc.,*** 212 Ariz. 198, 202-03 ¶ 14, 129 P.3d 487, 491-92 (Ct. App. 2006).

Medical malpractice actions are a statutory exception to the collateral source rule. Pursuant to A.R.S. § 12-565, a defendant in a medical malpractice action may introduce evidence of payments or benefits a plaintiff received from a source independent of the defendant. If a defendant chooses to show a plaintiff has received payments or benefits from another source, the plaintiff may then introduce evidence of payments he made to secure those payments or benefits (such as insurance premiums). The plaintiff may also show that any recovery from the defendant is subject to a lien, that the plaintiff is legally obligated to reimburse the provider of the payments, or that the provider of the payments or benefits has a right of subrogation to plaintiff's tort recovery in the medical malpractice action. The purpose of this exception is to help medical professionals obtain insurance coverage at reasonable rates by eliminating medical malpractice plaintiffs' double or triple recovery. By reducing the amount insurers are required to pay out in lawsuits, the exception allows insurers to provide lower malpractice premiums. ***Eastin v. Broomfield***, 116 Ariz. 576, 585, 570 P.2d 744, 753 (1977). The Arizona Supreme Court has held that the medical malpractice exception to the collateral source rule is constitutional. *Id*.

ADULT PROTECTIVE SERVICES ACT (APSA) CLAIMS

In addition to claims for medical malpractice, nursing facilities, medical directors of nursing facilities, and even acute care hospitals can be subject to liability under Arizona's Adult Protective Services Act (APSA). *See* A.R.S. § 46-451 et seq. In order to prevail on an APSA cause of action, a plaintiff must prove that the patient was: (1) a "vulnerable adult;" (2) who was the subject of "neglect, abuse or exploitation." A "vulnerable adult" is defined as:

> [A]n individual who is 18 years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment. Vulnerable adult includes an incapacitated person.

A.R.S. §§ 46-451(A)(11); 14-5101(3) (defining an incapacitated person as lacking sufficient understanding or capacity to make or communicate responsible decisions due to mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, or chronic intoxication).

If the plaintiff can prove that the patient was a vulnerable adult, the plaintiff must next prove that the patient was neglected, abused or exploited.

"Neglect" is defined as:

> [T]he deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain a vulnerable adult's minimum physical or mental health.

A.R.S. § 46-451(A)(8).

"Abuse" is defined as any of the following:

- Intentional infliction of physical harm;
- Injury caused by negligent acts or omissions;
- Unreasonable confinement; or
- Sexual abuse or sexual assault.

A.R.S. § 46-451(A)(1).

"Exploitation" is defined as the illegal or improper use of an incapacitated or vulnerable adult's resources for another's profit or advantage. A.R.S. § 46-451(A)(5).

The Arizona Supreme Court has held that despite the use of the plural words "acts" or "omissions" in the APSA, a plaintiff does not necessarily have to demonstrate a pattern of multiple negligent acts or omissions in order to support a claim of abuse. ***Estate of McGill ex rel. McGill v. Albrecht***, 203 Ariz. 525, 530 ¶ 16, 57 P.3d 384, 389 (2002) ("We therefore conclude that we can neither automatically limit the negligent act or omission wording of A.R.S. § 46–451(A)(1) to a series of negligent acts nor say that a single act of negligence involving an incapacitated person will never give rise to an APSA action. We hold instead that to be actionable abuse under APSA, the negligent act or acts (1) must arise from the relationship of caregiver and recipient, (2) must be closely connected to that relationship, (3) must be linked to the service the caregiver undertook because of the recipient's incapacity, and (4) must be related to the problem or problems that caused the incapacity."). Due to confusion and discrepancies in applying the four-part *McGill* test, the Arizona Supreme Court has since adopted a more straightforward test, requiring that APSA claimants now prove that (1) a vulnerable adult (2) has suffered an injury (3) caused by abuse (4) from a caregiver. ***Delgado v. Manor Care of Tucson***, 242 Ariz. 309, 313 ¶ 19, 395 P.3d 698, 702 (2017). It remains to be seen if this test will be applied more consistently.

If the plaintiff can meet his burden of proving that a vulnerable adult was subject to neglect, abuse or exploitation, the plaintiff can then claim damages for the pre-death pain and suffering of the patient if the patient is deceased. ***In re Guardianship/Conservatorship of Denton***, 190 Ariz. 152, 156–57, 945 P.2d 1283, 1287–88 (1997) (estate may recover damages for pain and suffering pursuant to § 46–455 after the death of an elder abuse victim).

Where APSA conflicts with another statute that takes away specific remedies provided by APSA, APSA usually controls to promote the legislature's intent in passing APSA to protect elder abuse victims' remedies against caregivers. *See* A.R.S. § 46-455(O) ("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."); *see also* ***In re Estate of Winn***, 214 Ariz. 149, 152 ¶ 15, 150 P.3d 236, 239 (2007) (limitations placed on personal representatives by the probate code do not restrict APSA claims); ***Bailey-Null v. ValueOptions***, 221 Ariz. 63, 69 ¶ 13, 209 P.3d 1059, 1065 (App. 2009) (exhaustion of remedies doctrine did not apply to APSA claim).

However, this precept applies only where statutes conflict. Statutes are followed if they do not conflict with APSA. As such, APSA does not "provide[ ] for damages for the inherent value of a human life." ***In re Estate of Winn***, 225 Ariz. 275, 276 ¶ 5, 237 P.3d 628, 629 (Ct. App. 2010) (alteration in original). Nor does APSA bar the application of comparative fault. ***Wallace v. Heilman***, 2009 WL 325447, at *3 (Ariz. Ct. App. Feb. 10, 2009).

Because of tort reform efforts, other plaintiff-friendly sections of the APSA, including a 7-year statute of limitations and recovery of attorneys' fees, have been removed from the statute.

Importantly, an APSA cause of action is separate and distinct from a wrongful death cause of action. If the patient is deceased, an APSA cause of action is essentially a personal injury claim made on the decedent's behalf by the decedent's estate which alleges damages related to the decedent's pre-death neglect, abuse or exploitation. An APSA cause of action and a wrongful death cause of action can be contemporaneously brought in any lawsuit involving a decedent who was a vulnerable adult prior to his death.

This concept becomes clear in the APSA cases discussing the enforceability of arbitration agreements or clauses in nursing home admitting documents. APSA does not prevent the enforcement of a voluntary arbitration agreement entered into by an elderly person or an elderly person's authorized representative. ***Mathews ex rel. Mathews v. Life Care Ctrs. of Am., Inc.***, 217 Ariz. 606, 610 ¶ 19, 177 P.3d 867, 871 (Ct. App. 2008). But such clauses or agreements cannot bind the elderly person's statutory beneficiaries without their consent. *See* ***Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.***, 234 Ariz. 18, 25 ¶ 27, 316 P.3d 607, 614 (Ct. App. 2014) (claim asserted under APSA was derivative of resident's rights and fell within scope of arbitration clause, whereas wrongful-death claim was independently held by the decedent's statutory beneficiaries and therefore not subject to arbitration clause); ***Dueñas v. Life Care Ctrs. of Am., Inc***., 236 Ariz. 130, 138-39 ¶ 25, 336 P.3d 763, 771-72 (Ct. App. 2014) (express language in nursing home agreement purporting to bind statutory heirs to arbitrate their wrongful death claims is not valid or enforceable).

Acute care hospitals may be liable under APSA because acute care hospitals provide care to vulnerable adults and are not expressly exempted by the statutory language of APSA. ***In re Estate of Wyatt***, 235 Ariz. 138, 140 ¶ 10, 329 P.3d 1040, 1042 (2014). However, APSA's enforcement scheme suggests the legislature did not intend to include the State as a potential defendant and, while law permits an APSA action to be filed against a person or an enterprise, the State is neither a person nor an enterprise. ***Estate of Braden ex rel. Gabaldon v. State***, 228 Ariz. 323, 326 ¶ 12, 266 P.3d 349, 352 (2011).

Punitive damages are awardable in APSA cases. In ***Newman v. Select Specialty Hosp.-Ariz., Inc.***, 239 Ariz. 558, 562-63 ¶¶ 14-16, 374 P.3d 433, 437-38 (Ct. App. 2016), the court of appeals held that evidence that the hospital's nurses and employees had been ordered to reposition the patient, clean his wound, and administer medication, and understood the importance of these precautions and the risk of improper care of pressure sores, but failed to follow these orders, was sufficient to send the punitive damage claim to the jury under a "conscious disregard" standard. *But see* ***In re Estate of Fazio***, 2009 WL 1830719, at *5 (Ariz. Ct. App. June 25, 2009) (Evidence of defendant's alleged understaffing, fraudulent charting, and specific instances of its failure to properly treat decedent did not support a claim that it acted with an "evil mind." Defendant's conduct, although negligent and a violation of APSA, is not equivalent to a conscious disregard of a substantial risk of significant harm to decedent or other residents).

If you have questions regarding the information in this chapter, please contact the author.

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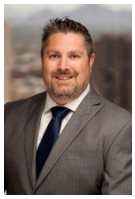

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