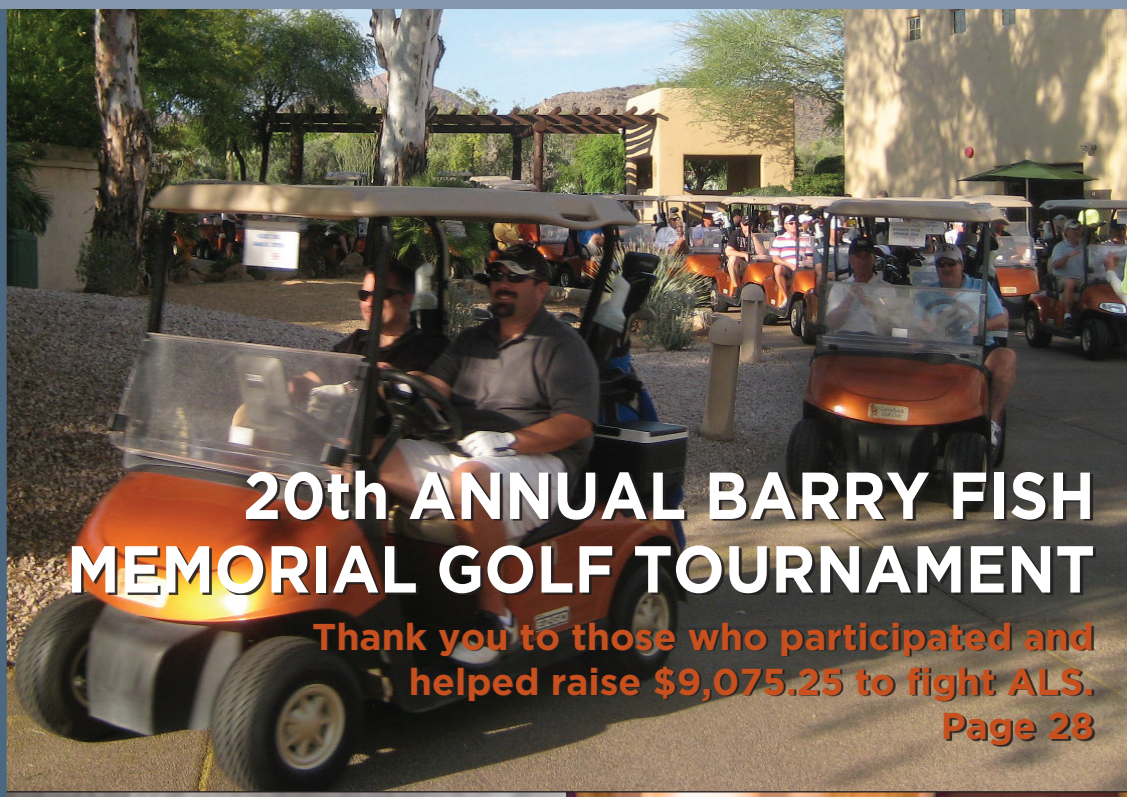
The Arizona Association of Defense Counsel

Common Defense

SUMMER 2015

A Magazine for Arizona Defense Attorneys



20th ANNUAL BARRY FISH MEMORIAL GOLF TOURNAMENT

Thank you to those who participated and helped raise $9,075.25 to fight ALS.
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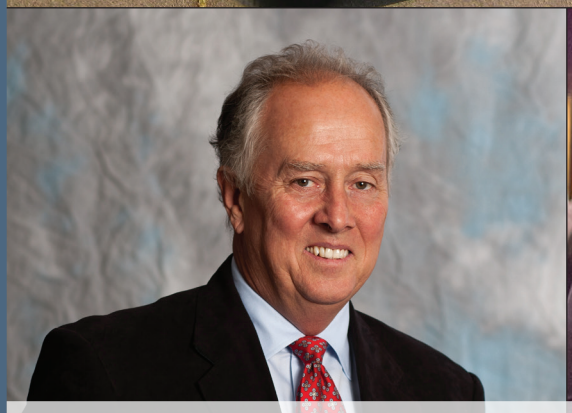

An interview with Ben Thomas Distinguished Service Award Honoree

This award will be presented at the Past President's Fall Kickoff on September 24 at the Phoenix Country Club.
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2015 Annual Retreat Vegas Style!

The AADC celebrated its 50th anniversary by taking our Annual Meeting to Las Vegas.
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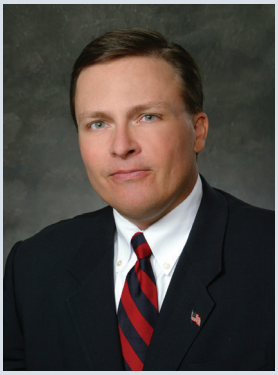

President's Message

What a privilege it is to serve as the President of the Arizona Association of Defense Counsel in this its fiftieth year! We started in 1965 when a group of lawyers in Phoenix who practice in the area of tort defense formed what was then known as the Phoenix Association of Defense Counsel. The way we practice law certainly has changed in the last half-century: from stenos, typewriters, legal-size paper, and ubiquitous ashtrays to e-mails, paperless offices, on-line libraries, and video conferencing.

As times have changed, so has the membership and diversity of the AADC. Today we have more than 1,000 members statewide, with varied practice areas, including business litigation, construction defect, employment, government liabilities, and medical malpractice. We have listened to our members and raised the voice of the civil defense bar by filing amicus briefs, weighing in on proposed legislation and rule changes, and reviewing judicial candidates. More changes are coming.

Beginning this fall the AADC will make its CLE programs more accessible to members across the state through video conferencing. We also will be updating our website and expanding our outreach through LinkedIn and other social media. Also look for us to continue our popular signature events, such as our Fall Kickoff at the Phoenix Country Club and judicial receptions in Tucson and Phoenix at exciting venues.

The coming spring will see the return of our Young Lawyers Division softball tournament, our Barry Fish Memorial Golf Tournament, held time last spring at the Camelback Golf Club in Paradise Valley, and our annual meeting, where just a few months ago we learned about the "Reptile Theory" of trial strategy and dined and rubbed elbows with Chef Mario Batali and other celebrities in Las Vegas. Look for our "save the date" e-mails as we line up these events for next spring and plan to get involved.

How lawyers practice law and how this organization delivers value to its members might have changed, but the esprit de corps and professionalism of the members of this organization remain constant, linking us to our predecessors. We can be proud of our heritage of upholding the interests of the defense bar. We also should be grateful for the privilege of defending the interests of the individuals and businesses that provide the services and goods that have built our state and quality of life.

Please feel free to contact me or any member our Board of Directors with suggestions as to how the AADC can better serve you, articles and news items for publication in our magazine, legislative or rule change issues, or any other matter of interest to the defense bar and our clients. Our Board welcomes your input, and we look forward to seeing you at our upcoming events!

Scott Day Freeman, Esq.
President

Contents

Correspondence and articles are welcome and should be sent to the Editor. Email articles for submission to Holly Davies at hdavies@lorberlaw.com. The right is reserved to select materials to be published. Material accepted for publication becomes property of the Arizona Association of Defense Counsel.

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2015 - 2016 AADC CALENDAR OF EVENTS

SPECIAL EVENTS

Past President's Fall Kick Off	September 24, 2015 Phoenix Country Club 2901 N. 7TH St. Phoenix, AZ 5:00- 7:30 pm
Phoenix Judicial Reception	December 3, 2015 Location TBD
Tucson Judicial Reception	December 10, 2015 Arizona Inn 2200 E. Elm St. Tucson, AZ 5:00- 7:30 pm
Barry Fish Memorial Golf Tournament	Tentative Date: April 30, 2016 Camelback Golf Club 7847 N Mockingbird Ln, Scottsdale, AZ 85253

ADVOCACY LUNCHEONS

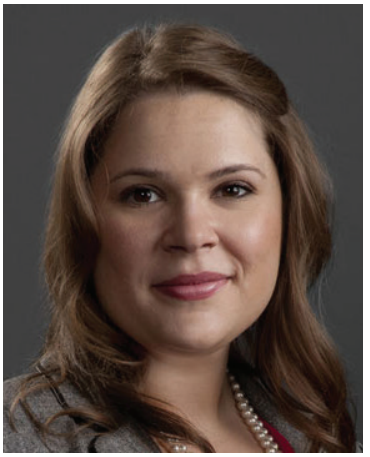
Advocacy luncheons are held from 12 - 1 pm at Gust Rosenfeld, One E. Washington St., 15th Floor, Phoenix

Sept. 9, 2015	Effective Meeting Management *Speaker: Michele Feeney, Esq.*
Oct. 14, 2015	Challenging Billed Medical Expenses *Speakers: Amanda Heitz, Esq. and Travis Wheeler, Esq., Bowman & Brooke*
Nov. 18, 2015	Cybersecurity *Speaker: David Grant, Altep, Inc.*
Dec. 9, 2015	TBD The December luncheon is tentatively scheduled to be held in Tucson.
Jan. 13, 2016	*Speaker: Liz Gilbert*
Feb. 10, 2016	Appellate Advocacy *Speaker: Lori Voepel*
March 9, 2016	*Speaker: Blair Moses*
April 13, 2016	*Speaker: Kelly MacHenry*
May 11, 2016	*Speaker: Gena Sluga and Micalann Pepe*

Is *Abbott v. Banner Health* the Win that Signals the Loss?: Rethinking Medical Damages in Arizona

By Amanda Heitz, Esq. and Travis Wheeler, Esq.

Bowman and Brooke, LLP



Amanda Heitz, Esq.

Travis Wheeler, Esq.

Late last year, the plaintiffs' bar was cheering the Arizona Court of Appeals' decision in *Abbott v. Banner Health Network*, 236 Ariz. 436, 341 P.3d 478 (Ct. App. 2014). It arises from the situation where a medical provider "bills" one amount for care, but then accepts a much lower amount as payment from the Arizona Health Care Cost Containment System (AHCCCS). Plaintiffs argued, and the Court of Appeals agreed, that federal preemption precludes AHCCCS-participating medical providers from asserting "balance billing" liens for amounts in excess of what they agreed to accept as payment in full by participating in the Medicaid program. As a consequence of the Abbott decision, after satisfying any AHCCCS liens against the amount actually paid for their care, AHCCCS plaintiffs can keep the sum of any verdict or settlement without worrying about liens from their medical providers.

At first blush, this dispute between plaintiffs and their medical providers does not seem to have much application to the personal injury defense bar. However, when it comes to medical bills, plaintiffs want to have it both ways. Although they do not want to be liable for balance billing liens that cut into their recoveries, they do want to include the balance billing amount as recoverable damages in personal injury suits against alleged third-party tortfeasors. This is untenable. *Abbott* means that the health care providers, in seeking reimbursement for their services, are limited to what AHCCCS paid. So too should plaintiffs, in seeking recovery of medical expenses in a personal injury suit, be limited to what AHCCCS paid. The larger, unpaid, unenforceable "bills" should be disregarded. Thus, *Abbott* plays into the ongoing dispute in Arizona, and across the country, concerning "billed versus paid" past medical expenses and the amount of damages claimed in personal injury cases.

Lopez v. Superior Court and the Billed Versus Paid Issue in Arizona

When plaintiffs argue they are entitled in personal injury cases to the full amount of their medical providers' "bills," and not merely the amount paid by government programs or insurance, they rely on the collateral source rule as interpreted by a 2006 Arizona Court of Appeals case, *Lopez v. Safeway Stores, Inc.,* 212 Ariz. 198, 129 P.3d 487 (App. 2006). The collateral source rule is a hoary damages doctrine meant to prevent windfalls to defendants. In short, the rule provides that when a plaintiff receives compensation from a source other than the defendant, the defendant is still responsible for the entire value of the damages. For example, let's say that a plaintiff breaks her arm when she is hit by a car while on her bicycle. In response, members of her cycling club raise money to cover her medical bills. When the plaintiff sues the driver who hit her, the collateral source rule prevents the driver from arguing that he is not liable for her medical bills because the plaintiff had no out-of-pocket loss.

Lopez was a slip and fall case, where the plaintiff's medical "bills" totaled approximately $60,000. The provider accepted about 1/3 of that amount from insurance and "wrote off" the remaining 2/3. *Id.* at 199, 129 P.3d at 488. The defendant argued that the plaintiff should have been permitted to present only evidence of the amount actually paid for her care, not the larger billed amount. *Id.* The court of appeals disagreed, finding that the plaintiff was entitled to recover both the full "charged" amount, not just the amount that her care providers agreed to accept from insurance. *Id.* at 207, 129 P.3d at 496. The reasoning of *Lopez* tracks a traditional

view that both the amount paid by insurance and the amount "written off" by the provider are "benefits" of insurance. The idea is that the insured plaintiff pays her insurance company to negotiate down the medical bills below the market rate, as well as to pay the remaining amount, so both amounts should be excluded by the collateral source rule.

Challenging the Result of *Lopez* and How *Abbott* Can Help

Although *Lopez* is something of a stumbling block to challenging a plaintiff's medical damages, it is not the insurmountable obstacle that some defense attorneys and nearly all plaintiffs' attorneys assume that it is. *Lopez* does *not* mean that a plaintiff is automatically entitled to the amount reflected on a hospital bill. One important, and often overlooked, aspect of *Lopez* is that the defendant stipulated that if it was not permitted to present the lesser "paid" amount, then the full "billed" amount would be deemed "reasonable and customary." *Id.* at 202 & n.4, 129 P.3d at 491 & n.4. Accordingly, the court of appeals did not address whether the full billed amount was in fact reasonable. *Id.* No defendant ever needs to make the *Lopez* stipulation, which relieves the plaintiff of his or her burden of proof.

Reasonableness is the ultimate challenge to any "billed" medical claim. Plaintiffs are entitled to recover only the "reasonable expenses" of their past medical care. RAJI (Civil) 5th, Personal Injury Damages 1. If the amount is not reasonable, plaintiffs cannot recover it. Moreover, the bills alone are not *prima facie* evidence of their own reasonableness. *See Canyon Ambulatory Surgery Ctr. v. SCF Arizona*, 225 Ariz. 414, 422-24, 239 P.3d 733, 740-43 (App. 2010); *Larsen v. Decker*, 196 Ariz. 239, 243-44, 995 P.2d 281, 285-86 (App. 2000). Plaintiffs are usually ill-prepared for attacks on the reasonableness of bills. They are often ready with a doctor to testify that the *services* were medically reasonable and necessary, but not an administrator, billing specialist, or other expert with foundation to address the reasonableness of the costs.

As courts across the country have come to realize, health care providers routinely recover only a fraction of the amount "billed" for care. *See Stanley v. Walker,* 906 N.E.2d 852, 857 (Ind. 2009) (noting that hospitals ordinarily accept approximately 40% of the billed amount in full satisfaction). Also, it is increasingly recognized that the billed amounts for medical care are arbitrary. In the case of hospital charges, the bills are generated from a hospital-specific price list called a "chargemaster." As Steven Brill explained in a recent issue of *Time Magazine* devoted to medical billing, "[n]o hospital's charge-master prices are consistent with those of any other hospital, nor do they seem to be based on anything objective." Steven Brill, *Special Report: Why Medical Bills Are Killing Us*, Time Magazine, Mar. 4, 2013, at 22. These chargemaster rates were established decades ago and have continued to rise essentially automatically, leading to preposterous results, such as a single dose of an over-the-counter painkiller costing nearly as much as a year's supply of the same medication. Hospital officials frequently admit that these rates are wholly unrelated to the actual cost of care and do not represent the amounts the provider actually expects to receive for services rendered. These are merely numbers on a ledger that routinely add up to 3 to 4 times what the health care provider actually receives.

Understanding that almost nobody pays the billed amount, and that it is not based on anything objective, helps rebut a claim that the billed amount is reasonable. *Abbott* helps as well, because it provides that, at least when dealing with AHCCCS, the full billed amount is not just an arbitrary number that providers expect to be ignored, it is a number that they are precluded from collecting. *Abbott* means that no one is actually entitled to the higher amount that was never paid by AHCCCS, which makes the number easier to disregard in a personal injury case. AHCCCS plaintiffs can no longer point to balance-billing liens as justification to claim as damages an amount greater than the providers actually accepted as payment in full.

Reasonableness is the strongest basis upon which to challenge a plaintiff's claimed medical expenses—it highlights that plaintiffs have the burden of proving every aspect of their cases, including damages, and it is consistent with *Lopez*, which expressly does not deal with reasonableness. That said, it is important to note that *Lopez* is also vulnerable to attack because its logical underpinning does not accurately describe the health care marketplace. As explained above, *Lopez* rests on an assumption that an insurer

Is *Abbott v. Banner Health* the Win that Signals the Loss?
(continued)

drives down an insured's bills below the market rate. Therefore, "write-offs" are seen as a collateral source benefit. Moreover, one traditional justification of applying the collateral source doctrine to insurance "write-offs" is to encourage the purchase of insurance. However, especially in light of the Affordable Care Act, this is no longer realistic—if it ever was. The reality is that insurers dominate the medical marketplace, which means the amount paid by insurance is closer to a market rate than the arbitrary "billed" amount that is almost never paid. When all the participants in the market pay the insurance rate, that insurance rate is not a negotiated discount. Also, a judicial rule of damages aimed to encourage people to purchase insurance is no longer needed.

Nationwide, the Law of Medical Damages Is Changing.

With its logical premise increasingly undercut, *Lopez* could be reconsidered and overturned. Indeed, over the last fifteen years, courts and legislatures around the country have begun to reject *Lopez*-style interpretations of the collateral source rule.

Several states now generally endorse the view that medical damages are the amount paid for care as opposed to the amount billed. North Carolina, Oklahoma, and Texas have all adopted this standard. N.C. Gen. Stat. Ann § 8C-1, Rule 414; Ok. Stat. § 3009.2; Tex. Civ. Prac. & Rem. Code § 41.0105. In other states, the appellate courts have endorsed a broad paid-only approach. Perhaps the most thorough and influential ruling on this topic, the California Supreme Court's opinion in *Howell v. Hamilton Meats & Provisions,* 257 P.3d 1130 (Cal. 2011), held that a plaintiff may not recover the undiscounted sum of a medical bill that is never paid by or on behalf of the injured person. Courts in New York and Pennsylvania have reached the same conclusion. *Kastick v. U-Haul Co. of W. Mich.,* 292 A.D.2d 797, 798 (N.Y. App. Ct. 2002); *Moorhead v. Crozer Chester Med. Ctr.,* 765 A.2d 786, 790 (Pa. 2001). Other courts have reached the same conclusion in the limited circumstances of medical expenses covered by Medicare. *See Dyet v. McKinley,* 81 P.3d 1236 (Idaho 2003); *Bozeman v. State,* 879 So.2d 692 (La. 2004).

Other jurisdictions have adopted a hybrid approach. For example, in Missouri, by statute, a rebuttable presumption exists that the amount accepted by a provider for services rendered "represents the value of the medical treatment." Mo. Ann. Stat. § 490.715. In Massachusetts, an appellate court decision sensitive to the danger of the jury finding out that the plaintiff was insured, allows defendants to call medical providers to present testimony about the "range of payments" that the providers accept as full reimbursement for the services rendered. *Law v. Griffith*, 930 N.E.2d 126, 135 (Mass. 2010). And Ohio permits the parties to present evidence of both the full billed amount and the paid amount. *Robinson v. Bates*, 857 N.E.2d 1195 (Ohio 2006). Indiana's and Kansas's high courts have followed this approach, but forbid mentioning the source of any payment on the plaintiff's behalf. *Stanley*, 906 N.E.2d 852; *Martinez v. Milburn Enter. Inc.*, 233 P.3d 205, 220 (Kan. 2010).

Still other states have statutes that partially reverse the common law collateral source rule after verdict. In some states, the court makes a post-verdict adjustment to the judgment to exclude any damages that have or will be compensated by certain collateral sources, though these statutes have significant exceptions. *See, e.g., White v. Jubitz Corp.,* 219 P.3d 566, 572 (Or. 2009) (concluding that statute did not apply to private insurance or Medicare benefits). In some states, amounts that were never paid are considered "collateral sources" that are subtracted from the ultimate judgment. *See, e.g., Goble v. Frohman,* 901 So. 2d 830, 833 (Fla. 2005); *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010).

Conclusion

It is tempting to hope that *Abbott* is a sign of things to come or that it will open the door to a reconsideration of *Lopez*. Though it deals only with AHCCCS, its reasoning underscores the hypocrisy of the plaintiffs' bar's position with respect to damages. When it cuts into the plaintiffs' bottom line, the amount the treating provider accepted as payment is the amount owed, regardless of the supposed reasonableness of the charge. But when it comes to demanding payment from a defendant, the amount paid has nothing to do with the damages. *Abbott*, of course, is not a sea change, does not invalidate *Lopez*, and still faces a hurdle in front of the Arizona Supreme Court, but perhaps its reasoning will start to nudge the law in a more fair direction. But until that day comes, reasonableness is still the key to challenging medical damages.

Sullivan v. Pulte Home Corp.: Court of Appeals Rules That Subsequent Owners Cannot Bring Tort Claims Against Builders For Non-Injury Construction Defect Claims

By Louis Horowitz, Esq.

Louis Horowitz, Esq.

A new decision from the Arizona Court of Appeals has changed the rules on construction defect causes of action again. The decision in *Sullivan v. Pulte Home Corp.* (CA-CV 14-0199, App. Div. 1, July 28, 2015) restores the long-standing Arizona rule that subsequent owners of homes cannot bring tort claims for non-injury construction defect claims. This has the effect of fixing problems with the Statute of Repose and indemnity that existed as a result of other recent decisions.

From 1984 until 2010 Arizona homeowners had their available causes of action defined in the decision *Woodward v. Chirco Construction Co.,* 141 Ariz. 514, 687 P.2d 1269 (1984), and discussed further in *Nastri v. Wood Bros. Homes, Inc.*, 142 Ariz. 439, 690 P.2d 158 (App. 1984). After the rulings in *Woodward* and *Nastri,* a plaintiff could pursue damages for the need to repair a home under contract theory, including the implied warranty. Damages for personal injury or injury to personal property could be pursued under tort theory.

Arizona's Supreme Court ended this distinction in 2010 through its decision *Flagstaff Affordable Housing L.P. v. Design Alliance,* 233 Ariz. 320, 223 P.3d 664 (2010). The decision involved claims of an architect's professional negligence. The Court explained that previous decisions including *Woodward* and *Nastri,* supra, did not properly interpret previous rulings on the Economic Loss Rule and defined a new rule applicable to all construction defect cases. Parties who contracted with each other are limited to contractual remedies unless their contracts expressly preserve tort remedies. The decision did not extend the reasoning to claims by parties who were not in privity. After this decision, there was no clear rule to prevent subsequent homeowners from seeking damages for repair costs under tort theory.

The dispute between Plaintiffs Sullivan and Defendant Pulte Home Corp. has resulted in three reported decisions so far. Plaintiffs are second owners of a home who alleged damages for the cost of repair to an allegedly defective retaining wall. An Appellate decision, *Sullivan v. Pulte Home Corp.,* 231 Ariz. 53, 290 P.3d 446 (App. 2012), focused on fee recovery for Implied Warranty causes of action. The Supreme Court in *Sullivan v. Pulte Home Corp.,* 232 Ariz. 344, 306 P.3d 1 (2013) vacated part of the decision regarding negligence claims, and remanded to Superior Court. It ruled that the Economic Loss Doctrine did not apply but that the court should still determine whether Plaintiffs could maintain their negligence claim for economic damages. Defendant argued, and the Superior Court agreed, there was no duty to protect subsequent homeowners from economic harm. Plaintiffs argued there was a duty based on the building codes and on statutes and regulations applicable to contractor regulation. The Court of Appeals found in the latest ruling that there was no duty to protect subsequent owners from purely economic losses.

Design Alliance left a possibility of subsequent purchaser negligence claims for repair costs. Now there is a reported decision that specifies there is no duty to create that kind of liability. This could allow elimination of present claims for repair costs under negligence theory. It also fixes problems for builders that arose when the potential causes of action for repairs were not limited to contact claims. The Statue of Repose applies to contract-based claims only, which created some problems that are fixed now that the available causes of action for most construction defect cases are limited to contract claims again:

Sullivan v. Pulte Home Corp. (continued)

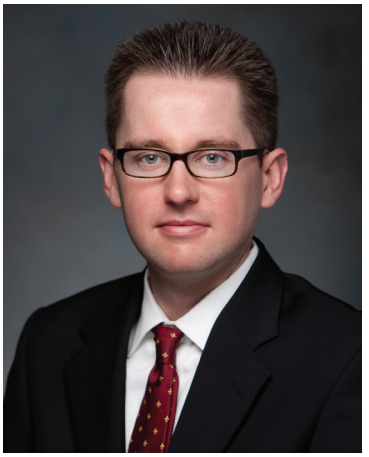
The Statute of Repose applies to all non-injury construction claims again. It bars all claims based on contract-based causes of action if they are brought more than eight years after substantial completion (with a potential extension up to one year and some limited statutory tolling provisions). After *Design Alliance* there was a hole in the effectiveness of the Statute because a subsequent purchaser could still pursue their damages indefinitely under negligence theory. A two-year Statute of Limitations period for negligence claims applies but does not even begin to run until a plaintiff knows or reasonably should know about the potential claim. Until this latest ruling, a subsequent purchaser plaintiff could ask for repair costs under negligence theories any number of years after completion if the damages occurred or were discovered within two years of filing suit. Now only injury damages can be pursued after the Repose period.

This also solves the problem where a builder or seller could have potential indefinite exposure for construction defects, even though it could have contractual indemnity rights limited by the Statute of Repose.

This case could still be subject to reconsideration by the Court of Appeals or review by the Supreme Court. Watch this space for updates.

AADC Young Lawyers Division President's Message

By Jason Kasting, Esq.



Jason Kasting, Esq.

It has been a privilege to serve on the Young Lawyers Division board for the past several years, so I am pleased to begin the new term as the board's President. We have an exciting term ahead.

In the year to come, the Young Lawyers Division will pursue numerous events, projects, and goals. For example, we will host several happy hours, in which young lawyers throughout Arizona can connect and develop their professional network. We will also host our two annual half-day CLE events (one in the Fall and one in the Spring) featuring topics pertinent to issues young lawyers encounter in the early years of practice. On February 20, 2016, we will host our annual charity softball tournament, which will benefit Southwest Human Development, Arizona's largest nonprofit organization dedicated to early childhood development for children ages birth to five.

Recently, the Young Lawyers Division, in collaboration with the Arizona Association of Defense Counsel, began a mentor program that pairs young lawyers with more senior lawyers. Several of Arizona's finest defense attorneys have graciously offered their time to serve as mentors to the next generation of leaders. During the next year, we hope to significantly increase participation in the mentor program, because it offers mentors and mentees valuable perspective and intangible benefits. The time commitment associated with the program is low, and it has been very rewarding and enjoyable for those who have participated so far. If you would like to serve as a mentor to a young lawyer, or if you are a young lawyer who would like to be matched with a mentor, please contact me directly at jkasting@jshfirm.com.

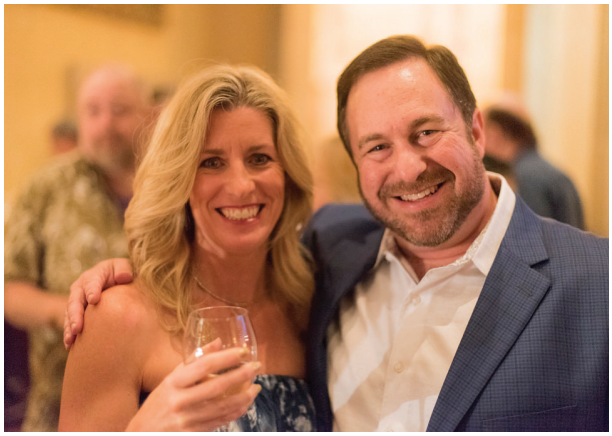
Lastly, we will make additional efforts this year to recruit new young lawyers who can benefit from the Young Lawyers Division's events and services. If there are any new or existing young lawyers within your firm, agency, or organization who you believe would benefit from participation in our great network, events, and services, please have them contact me directly at jkasting@jshfirm.com so we can determine the best way for them to become involved.

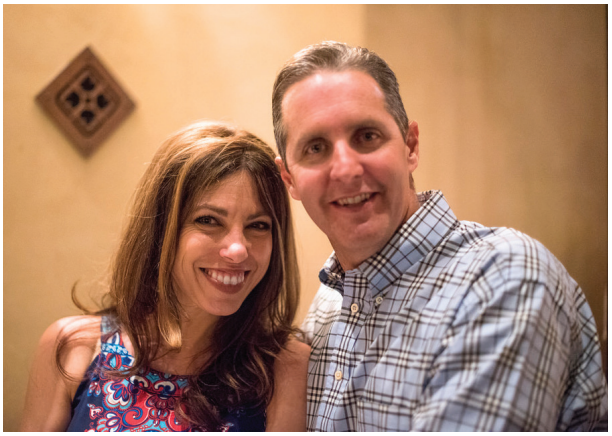
Keep an eye out for announcements regarding our upcoming happy hours, the Arizona Association of Defense Counsel mentor program, our Fall CLE, and our February 20, 2016 charity softball event. We invite you to join us at one of our events in the year to come.

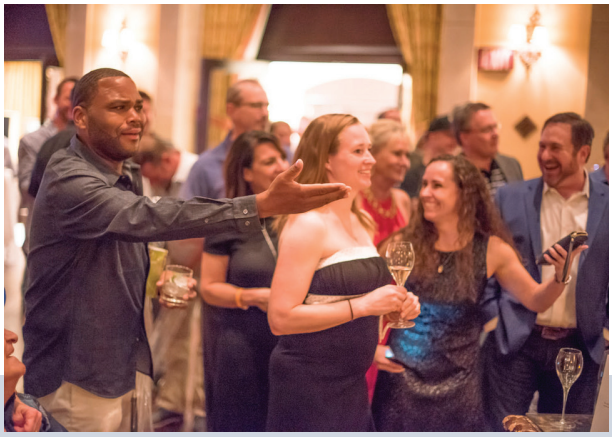
Jason Kasting
YLD President

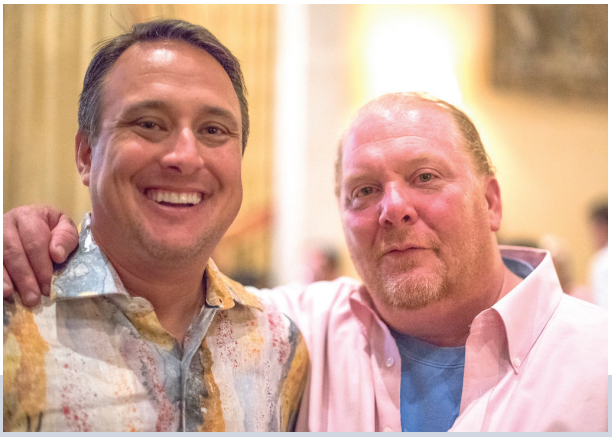
2015 Annual Retreat – Vegas Style

The AADC held its Annual Meeting is Las Vegas in June at the Wynn Resort. Horse racing, reptile theory, celebrity dining and more filled the weekend. If you are interested in planning next year's Retreat, please contact the AADC at admin@azadc.org to join the planning committee.



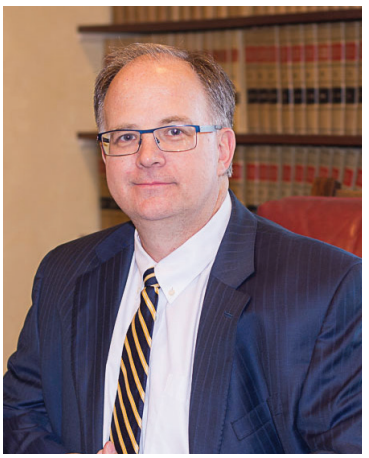






Statutory Interpretation at the Arizona Supreme Court

By Andrew Petersen, Esq.



Andrew Petersen, Esq.

During a recent oral argument before Division II of the Arizona Court of Appeals, the attorney arguing before the court referred to Bryan Garner's and Justice Scalia's book *Reading Law: The Interpretation of Legal Texts*. One of our judges quickly retorted that for those of us who do not spend a lot of time reading "grammar books," the attorney should focus her argument on the particular statute. Regardless of how some may feel about Bryan Garner's and Justice Scalia's book, the textualist position they advocate and others have long advocated has had a tremendous influence on courts.

How are statutes interpreted at the Arizona Supreme Court? After marinating in the court's opinions, here are my thoughts on the approach each of the Arizona Supreme Court justices take in judging statutes. This is not an article on statutory interpretation. For that, one can read Garner and Scalia's book, any of the other hundreds of articles and books on statutory interpretation, or the recommendations I discuss below. Rather this is my categorizing. I am, of course, not the first to consider this. There are, for example, two student notes within the past few years on statutory construction in the Arizona Supreme Court.[1]

Let's start with where there is consensus in methodology.

First, each of our justices tells us the goal is to ascertain legislative intent and to start with the language of the text. This makes sense. After all, it is the text that demands interpretation. *See, e.g., Wilks v. Manobianco*, ___ Ariz. ___ (July 9, 2015) (author Berch) ("'When interpreting a statute, our primary goal is to give effect to the legislature's intent.' *J.D. v. Hegyi*, 236 Ariz. 39, 40 ¶ 6, 335 P.3d 1118, 1119 (2014). We derive that intent by examining the statute's language; if the language is ambiguous, we look to the statute's history, context, consequences, and purpose. *Glazer v. State*, 237 Ariz. 160, 163 ¶ 12, 347 P.3d 1141, 1144 (2015). 'Absent a clear manifestation of legislative intent to displace a common law cause of action, 'we interpret statutes with every intendment in favor of consistency with the common law.'' *Orca Commc'ns Unlimited, LLC v. Noder*, 236 Ariz. 180, 182 ¶ 10, 337 P.3d 545, 547 (2014) (quoting *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 422 ¶ 12, 87 P.3d 831, 835 (2004).").

Second, each tells us to question whether a statute is ambiguous by considering the text, whether there is more than one reasonable interpretation, and where such an interpretation leads. *See, e.g., State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 346 P.3d 984 (2014) (author Brutinel; Timmer dissenting) ("That § 28–1381(A)(3) is subject to more than one reasonable interpretation, one of which might render it unconstitutional, highlights its ambiguity. Furthermore, we 'construe statutes, when possible, to avoid constitutional difficulties.' *State v. Gomez*, 212 Ariz. 55, 60 ¶ 28, 127 P.3d 873, 878 (2006) (citing *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 272, 872 P.2d 668, 676 (1994).").

Third, each recognizes that words cannot be read in isolation from the context in which they are used. There is effort to harmonize statutes and rules. *See, e.g., Metzler v. BCI-Coca-Cola Bottling Co. of Los Angeles*, 235 Ariz. 141 (2014) (author Pelander) ("We seek to harmonize, whenever possible, related statutory and rule provisions. *State v. Hansen,* 215 Ariz. 287, 289 ¶ 7, 160 P.3d 166, 168 (2007)."); *J.D. v. Hegyi,* 236 Ariz. 39 (2014) (author Bales) ("Words in statutes, however, cannot be read in isolation from the context in which they are used. See *Adams v. Comm'n on Appellate Court Appointments,* 227 Ariz. 128, 135 ¶ 34, 254 P.3d 367, 373 (2011); see also *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ('The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which

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1 Erin F. Norris, *Estate of Braden Ex Rel. Gabaldon v. State and Statutory Construction in the Arizona Supreme Court*, 54 Ariz. L. Rev. 311 (Spring 2012); Katherine Hollist, *A House Divided: Statutory Interpretation Problems Exemplified by Whitman I, Montgomery, and Whitman II,* 56 Ariz. L. Rev. 1227 (2014).

that language is used, and the broader context of the statute as a whole.')).").

Fourth, the justices follow the principles of limiting answers to the issue reviewed and avoiding constitutional difficulties. *See, e.g., State v. Gomez*, 212 Ariz. 55 (2006) (author Bales; Berch dissenting, McGregor joins).

Fifth, the justices express deference to an agency's interpretations of its own rules. *See, e.g., Pima County v. Pima County Law Enforcement Merit System Council,* 211 Ariz. 224 (2005) (author Berch) ("We defer to an agency's reasonable interpretations of its own regulations. *Ariz. Water Co. v. Ariz. Dep't of Water Res.,* 208 Ariz. 147, 154, ¶ 30, 91 P.3d 990, 997 (2004) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).").

Sixth, the justices depart from statutory precedent (super precedent) only on rare occasions. *See, e.g., Sell v. Gama*, 231 Ariz. 323 (2013) (author Pelander) ("We are mindful of the importance of *stare decisi*s, and how that doctrine demands caution in overruling a prior decision, especially given the high burden of departing from previous interpretations of a statute. *State v. Hickman*, 205 Ariz. 192, 201 ¶ 38, 68 P.3d 418, 427 (2003). But, adhering to the approach set forth in *Gunnison* and approved in the 1996 legislation, we find sufficient justification to follow *Central Bank* and overrule *Davis*, which was based solely on federal case law that has since changed.").

There seems to be considerable agreement among the justices when we consider the lack of dissents. As discussed below, over the past five years there have been nine. Differences in a justice's framework for deciding cases may be highlighted in those cases where he or she writes or responds to a dissent. Divergence usually comes after a statute is declared ambiguous, i.e., when a statute is susceptible to more than one reasonable interpretation. When there is ambiguity (which is not infrequent), then other tools may be used including legislative history, canons of construction, effects and consequences, the spirit and purpose of the law, and precedent. One justice may find ambiguity where another does not. *See, e.g., State ex rel Montgomery v. Harris*, 237 Ariz. 98, 103 (2014) (author Brutinel; Timmer dissenting).

The approaches I consider as a framework for categorizing the justices are:

PURPOSIVE APPROACH - Meaning that a judge should construe a statute to execute the legislative purpose. Recommended reading: Robert Katzman, *Judging Statutes* (Oxford 2014).

TEXTUAL APPROACH - Meaning that a statute's text is primary and determinative. Recommended reading: Garner and Scalia's *Reading Law: The Interpretation of Legal Texts* (West 2012).

PRAGMATIC OR INTEGRATIVE APPROACH - Meaning that statutory language is important but calling for a pragmatic and reasonable construction of statutes. Recommended reading: J. Harvie Wilkinson III, *Cosmic Constitutional Theory* (Oxford 2012).

I qualify each category "soft" when I see a justice consider and acknowledge the opposite approach.

Here is where I categorize each justice:

Justice Berch (appointed 2002): SOFT PURPOSIVE APPROACH. Justice Berch is rather difficult to categorize. Consider her concurring and dissenting opinion in *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 555 (2005) (recognizing legislative history as providing insight into statutory interpretation and citing Justice Breyer's article, *On the Uses of Legislative History in Interpreting Statutes*, 65 Cal. L. Rev. 845, 847 (1992)). Her initial focus is on text with less emphasis on meaning and purpose particularly in criminal cases. *See, e.g, Roubos v. Miller,* 214 Ariz. 416 (2007) (author Berch); *Town of Gilbert's Prosecutor's Office v. Downie ex rel. Maricopa County,* 218 Ariz. 466 (2008) (author Berch); *State v. Gomez*, 212 Ariz. 55, 61 (2006) (author Bales; Berch dissenting, McGregor joins).

Chief Justice Bales (appointed 2005): PURPOSIVE AND SOFT PRAGMATIC APPROACH. Focus is on legislative intent and purpose, willing to give a broad overview and consideration of related statutes in ascertaining the meaning of legislation and avoid – to borrow his words – "squinting to find clues" within ambiguous text. *See, e.g., Arizona Citizens Clean Elections v. Brain*, 234 Ariz. 322, 398 (author Timmer; Bales dissenting, Berch joins). He rejects using canons of construction when these restrict perceived legislative purpose. *See, e.g, Baker v. University Physicians Healthcare,* 231 Ariz. 379 (2013) (author

Statutory Interpretation *(continued)*

Bales). He has cited Justice Scalia for the proposition that context matters although Justice Scalia considers context in a more limited fashion. *Adams v. Commission on Appellate Court Appointments,* 227 Ariz. 128, 135 (2011) (author Bales; Brutinel dissenting in part, Pelander concurring).

Vice Chief Justice Pelander (appointed 2009): SOFT TEXTUAL AND SOFT PRAGMATIC APPROACH. Focus remains on text. He consults dictionaries, uses canons of construction, harmonizes statutes, less analysis of effects and consequence or the spirit and purpose of the law. He will consider legislative history. *See, e.g., Fleming v. State of Arizona,* ___ Ariz. ___ (decided July 9, 2015) (author Pelander).

Justice Brutinel (appointed 2010): SOFT TEXTUAL AND SOFT PRAGMATIC APPROACH. *See, e.g., Estate of Braden v. State*, 228 Ariz. 323 (2011) (author Brutinel; Bales dissenting, Hurwitz joins); *State v. Pena*, 235 Ariz. 277 (2014) (author Brutinel); *Fields v. Elected Officials' Retirement Plan*, 234 Ariz. 214 (2014) (author Brutinel).

Justice Timmer (appointed 2012): TEXTUAL APPROACH. *See, e.g., Arizona Citizens Clean Elections v. Brain,* 234 Ariz. 322 (2014) (author Timmer; Bales dissenting, Berch joins).

Over the past five years, opinions with dissents are as follows (cases involving statutory interpretation are marked with an *):

2010: Total opinions 40; one dissent:

In re Phillips, 226 Ariz. 112 (2010) (author Pelander; Weisburg dissenting).

2011: Total opinions 36; four dissents:

**State v. Regenold*, 226 Ariz. 378 (2011) (author Berch; Pelander dissenting)

**Estate of Braden v. State*, 228 Ariz. 323 (2011) (author Brutinel; Bales dissenting, Hurwitz joins)

**Adams v. Commission on Appellate Court Appointments*, 227 Ariz. 128 (2011) (author Bales; Brutinel dissenting in part, Pelander concurring)

State v. Styers, 227 Ariz. 186 (2011) (author Berch; Hurwitz dissenting).

2012: Total opinions 38; no dissents.

2013: Total opinions 39; no dissents.

2014: Total opinions 35: two dissents:

**Arizona Citizens Clean Elections v. Brain*, 234 Ariz. 322, 398 (2014) (author Timmer; Bales dissenting, Berch joins)

**State ex rel Montgomery v. Harris*, 237 Ariz. 98 (2014) (author Brutinel; Timmer dissenting).

2015: Total opinions to date 21: two dissents:

**Glazer v. State,* 237 Ariz. 160 (2015) (author Timmer; Bales dissenting in part)

Guerra v. State, 237 Ariz. 183 (2015) (author Pelander; Bales dissenting, Berch joins).

Similar methodology is used by the justices, and the distance between soft purposiveness and soft textualism on this court may not be significant. In saying this, I do not want to understate the shift in statutory interpretation from thirty years ago. Statutory interpretation is dramatically different from thirty years ago. Consider, for example, the court's introduction in *Calvert v. Farmers Ins. Co. of Arizona,* 144 Ariz. 291, 294 (1985) (author Gordon):

> The cardinal rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute. *Phoenix Title & Trust Co. v. Burns*, 96 Ariz. 332, 395 P.2d 532 (1964); *Payne v. Knox*, 94 Ariz. 380, 385 P.2d 514 (1963). **In determining the Legislature's intent in enacting a statute, this Court will look to the policy behind the statute and the evil which it was designed to remedy.** *Cohen v. State*, 121 Ariz. 6, 588 P.2d 299 (1978); *City of Mesa v. Salt River Project Agr. Imp. & Power District*, 92 Ariz. 91, 373 P.2d 722 (1962). Additionally, we will look to the words, context, subject matter, and effects and consequences of the statute. *State ex rel. Flournoy v. Mangum*, 113 Ariz. 151, 548 P.2d 1148 (1976) (emphasis added) (Gordon author).

Thirty years ago, the playing field was purposive with the court first looking "to the policy behind the statute and the evil which it was designed to remedy." In 2009, a lower appellate court started its approach with the purposive language used in *Calvert*, and the Arizona Supreme Court later vacated the decision. *Ballesteros v. American Standard Ins. Co. Of Wisconsin*, 223 Ariz. 269, 274 (App. 2009), *vacated* 226 Ariz. 345 (2010) (author Berch). Today, the playing field is textual.

Statutory Interpretation *(continued)*

The textual approach is evident in the court's decision in *Deer Valley Unified School Dist. No. 97 v. Houser*, 214 Ariz. 293 (2007). To many, the court was seen to have taken a hardline approach in interpreting the notice of claim statute. There was considerable criticism of the court by the bar and lower courts because of the court's strong textual interpretation. Others have argued the court retreated from that position for pragmatic reasons. *See* John Barwell, *City of Phoenix v. Fields, and Backus v. State: Undoing Deer Valley*, 51 Ariz. L. Rev. 503 (2009). The approach since *Deer Valley* is softer, but the methodology remains textual.

One reason why cases are reviewed by the court is the need to correct an appellate court's statutory interpretation. For example, the court has recently corrected the court of appeals' interpretation of statutory words including "driver" (*Fleming v. State of Arizona,* ___ Ariz. ___ (2015)) and "obligation" (*Metzler v. BCI-Coca Cola Bottling Co. Of Los Angeles*, 235 Ariz. 141 (2014)). In these decisions, both written by Vice Chief Justice Pelander, the court unanimously reversed the appellate courts. Appellate court judges are well-versed in statutory interpretation, and I would expect more disagreement among our justices when other seasoned judges have held otherwise. The court of appeals' analyses were textual in *Fleming and Metzler.* Yet, the Arizona Supreme Court determined those decisions went awry after more careful consideration of history and context. History and context are difficult to judge and tend toward relativism. In *Metzler,* context includes a canon of construction: *ejusdem generis*. In *Fleming,* legislative history requires construing immunity provisions narrowly.

The lack of dissent or even concurring opinions may signify that the justices strongly seek consensus. This may explain narrow and shorter opinions. Consensus may also mean that while each justice views statutory interpretation a little differently, when the justice agrees with the result, there is no reason to challenge the path. Rather like religious pluralism. Consensus, however, may disable the full development of a meaningful debate on difficult issues, and it may not be conducive to providing direction to lower courts in future cases. *See* Ethan Leib and Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 Yale L.J. Online 47 (July 30, 2010). Consensus may conceal the substantive debate and provide "little guidance for those seeking to understand how the law will be interpreted in the future." *Id.* at 62. Leib and Serota make a compelling argument that the rule of law is healthier when there is diversity and dissensus because the justices are required to more fully engage the parties' arguments as well as the other justices' reasoning. The parties are entitled to the full deliberative process, and the goal of the court should not be consensus when it shortchanges the parties' arguments. *Cf.,* Abbe Gluck, *Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750 (2010) (arguing that statutory interpretation in state courts is "modified textualism" and an interpretative consensus has emerged).

As for what we can expect, each justice authors approximately six to eight opinions each year; there are few tea leaves to read. I do not expect that the court will grant review in more cases. The court will remain the same until justices begin to retire. There may be more disagreement on our court than shown in its opinions. Perhaps more disagreement will surface. These opinions are mine, and I am open to debate. All points of view are welcome.

Is it time to use a Life Care Planner? How to evaluate if a plaintiff life care plan lacks merit

By Dawn Cook, RN, LNCP-C, CLCP, CLNC

Dawn Cook

INTRODUCTION

In cases involving serious injury, the question usually arises whether to retain a life care planning expert witness. This question can be tricky depending on the case, and there are numerous considerations.

First, one should consider whether the case in question is one where the defense wants to discuss damages at all. The strategy may be to defend on liability. If the defense calls a damage witness, the jury may erroneously conclude the defense has somehow conceded damages.

Second, one should consider whether a defense life care planner is really warranted. If the plaintiff has indeed suffered a severe or catastrophic permanent injury, then it is probable that the plaintiff needs significant future care, and a life care plan for the plaintiff is reasonable. If the plaintiff has retained a reasonable life care planning expert, then perhaps the strategy would be to cross-examine that expert on appropriate points and leave it at that.

If the plaintiff's life care planning expert is not reasonable, then certainly, it is appropriate to hire a defense life care planning expert to rebut the plaintiff's expert. Alternatively, simply cross-examining the plaintiff's expert may be the best option. However, if the case is one in which a plaintiff's verdict is a significant risk, it makes sense to have a defense life care planning expert to present a reasonable plan so that the jury can be swayed that the defense damage case is the one to accept.

A question that sometimes arises is whether to retain a life care planning expert if the plaintiff has not done so. In such a situation, it would be anticipated that the plaintiff would present evidence on future medical care needs and related care through physician testimony and that physicians would opine on the cost of care. The plaintiff may need several witnesses to establish the evidence in this fashion.

It is often advisable to have a life care planning expert in these circumstances for the simple reason that presenting the life care planning evidence through one witness is a clear and efficient way to present the evidence. The witness can gather all the relevant information and present it to the jury in a comprehensive form.

Lastly, life care planning witnesses must be credible and present realistic plans. Sometimes, life care plans on both sides of the fence come to unrealistic conclusions, ignore pertinent data and reflect bias to the side of the case that retained the expert. This sort of life care plan invariably backfires at trial.

Credibility wins cases. If the damages are significant, the damages are significant. The defense will not carry the day if it presents damage evidence that is unbelievable. The jury may well conclude that other aspects of the defense case, including on liability, are also unbelievable.

Benefits of a Rebuttal Life Care Plan

A rebuttal life care plan will assist you, the defense attorney, to identify the specific shortcoming of the plaintiff's life care plan. You can separate the actual issues of the personal injury or medical malpractice case from pre-existing conditions and subsequent illnesses or injuries. You can help the trier of fact to understand the impact or lack of impact of the injury on the plaintiffs personal and professional life and your can help to give a reasonable estimate of the cost of all the future medical and non-medical care related to the injury. If you need to challenge the validity and cost of future medical damages in the plaintiff's life care plan, a capable rebuttal should satisfy your needs.

Is it time to use a Life Care Planner? *(continued)*

A life care plan is developed as a personalized projection of the injured person's present and future medical expenses as a result of the injury or the alleged negligence. A certified nurse life care planner usually prepares the report, although other professionals also engage in life care planning. The plan is usually supplemented by an economist's report that identifies the present day value of the life care plan. Future medical expenses including home care are one of the largest categories of damages claimed by a disabled or injured plaintiff and it can significantly affect the damages reward.

How can you be sure that the life care planner you have retained can provide the best representation of the actual future needs of the plaintiff? The usual defense is to attack life care plans by arguing that the life care plan has no foundation and that the costs are inaccurate and unneeded. A jury is then free to consider the plan much as it does any other type of evidence, that is, by interpreting the validity of the report as each juror sees fit.

We will discuss issues to be considered when considering a rebuttal life care plan, including the qualifications of the life care planner, methodology used, foundation and costing techniques. Each of these factors is important in determining the validity of plaintiff's life care plan and in fact, the success of your defense.

What is a Life Care Plan?

In terms of litigation, a life care plan is an expert report that can be created by the plaintiff's counsel or by defense counsel. The goal is to have a well-supported list all of the required care and costs related to the injury, for the rest of the person's life.

Without a plan, everyone may be just guessing.

Role of a Life Care Planner:

The American Association of Nurse Life Care Planners (AANLCP) defines nurse life care planning in this way: "The specialty practice in which the nurse life care planner utilizes the nursing process for the collection and analysis of comprehensive client-specific data in the preparation of a dynamic document. This document provides an organized, concise plan that estimates for the reasonable and necessary (and reasonably certain to be necessary) current and future healthcare needs with the associated costs and frequencies of goods and services. " (AANCLP, 2008)

Methodology of a Life Care Plan and a Rebuttal Life Care Plan:

The steps to develop a life care plan include reviewing the medical records, interviewing the injured client, communicating with care providers, developing a list of required or beneficial services, treatment and equipment and researching the costs. The steps to review or rebut a life care plan include reviewing the medical records; reviewing the documentation of the plaintiff interview, care provider input and the methods of researching costs. An analysis of any depositions and expert reports I also made. Bolstered with this additional information, your expert can help define what problems are related to the accident and what Is not related to the accident. Then the usual, reasonable and customary costs of the actual needs can be specified.

Common Errors:

1. Qualifications and the CV:
The qualifications of the plaintiff life care planner may be a justification for having the report disqualified. Examine the CV for education, training, certification and participation in ongoing education in life care planning.

Life care planners must meet the Federal Rules of Evidence 702:

> Rule 702. Testimony by Expert Witnesses[1]
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> **(b)** the testimony is based on sufficient facts or data;
> **(c)** the testimony is the product of reliable principles and methods; and
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Who can prepare a life care plan?

Education:
Persons professionally involved in health care, including nurses, physicians, physical therapists, rehabilitation specialists and

1 https://www.law.cornell.edu/rules/fre/rule_702 accessed 6/10/15.

Is it time to use a Life Care Planner? *(continued)*

other allied health care workers could prepare a life care plan. Generally most persons qualified to write a life care plan have significant experience in health care. Licensing for most health care professionals can be verified with their professional licensing body.

Training:
There are several courses in life care planning and the length is generally 120 hours including the development of a student life care plan.

Certification:
There are currently three certifications in life care planning and none have been challenged as to the validity of the certification.

- Certified Life Care Planner (CLCP) from the International Commission for Health Care Certifications (ICHCC) and certifications can be verified at http://www.ichcc.org/clcp.html. Various health care professionals can become certified through the ICHCC.

- Registered Nurses are also qualified to be certified as a Nurse Life Care Planner (CNLCP) or as a Lifetime Nurse Care Planner (LNCP-C). Certifications can be verified at http://cnlcp.org/verification/ and at http://lncp-c.weebly.com/certification.html

Associations and ongoing life care planning education:
There are three associations of life care planners and they all conduct annual conferences. Some have webinars on a regular basis and mentorship programs to foster new professionals to the field.

- American Association of Nurse Life Care Planners, http://aanlcp.site-ym.com

- Lifetime Nurse Care Planners, http://lncp-c.weebly.com/index.html

- International Academeny of Life Care Planners, http://www.rehabpro.org/sections/ialcp

Watch for: lack of qualifications, lack of certification, lack of experience in hands on health care, lack of on-going education in life care planning.

2. Methodology of the life care planner:
Did the life care planner use a standard methodology? Are they able to explain the usual methodology of life care planners? Can they knowledgably describe all of the activities they engaged in when developing the life care plan? Is there enough detail in the report so that your rebuttal life care planner could replicate the details and decisions made during the plan's development? Does the plan explain why standard methodology was not used, for example if the plaintiff was in a coma and there are no family members, perhaps it is justified that an interview was omitted.
Watch for: disorganized report, lack of methodology, unclear how information was obtained, dates of receiving materials, meeting with plaintiff and descriptions of meeting with physicians or other care providers is missing.

3. Is the plan comprehensive?
Perhaps the plaintiff decided to use a treating or IME physician as a life care planner. It is unlikely that they have taken a course in life care planning and it is unlikely that the plan is comprehensive. Usually the plan will only include medical care and it won't include home care, equipment or supplies needed for the injured condition. This is like having only half of a life care plan in cases of catastrophic injury. Frequently, the physician life care plan does not have detailed costing and this opens the plan up to challenges as to validity.
Watch for: the life care plan does not include all needs and the costs may be too high or too low.

5. Are the medical records up to date and include pre-existing conditions?
The plaintiff attorney is usually the one who supplies medical records to the life care planner. If medical records do not cover the time before the incident, pre-existing conditions may be wrongly included in the life care plan.
Watch for: the life care plan does not include any mention of pre-existing conditions.

6. Interviews of Plaintiff
The usual methodology of a life care plan is to interview the plaintiff. The ideal interview is in their home along with their family and any care providers. This is especially true for plaintiffs who need specialized equipment such as wheelchairs or who have cognitive issues. A face-to-face interview can reveal future needs and home care issues that may be missed by a telephone interview. If the client is brought to the life care planner and interviewed away from their home, it is difficult to evaluate the home for accessibility for equipment and supplies.

The record should document the date, times and location of the

Is it time to use a Life Care Planner? *(continued)*

interview as well as the names of who was present. If equipment is used, descriptions of the shortcoming of the home are vital for developing a plan for home modifications.

Watch for: no mention of the date, time and location of plaintiff interview, who was present. No mention of equipment used at home. No photos of the plaintiff or equipment or the home, if appropriate.

7. Foundation for Opinions

There must be a documented reason or justification for every item listed in the tables or charts of future medical and non-medical needs. For physician care, there must be medical records, letters, expert reports, notes of an interview or other evidence that an appropriate physician or health care provider is recommending the future medical care. Likewise, the plan must indicate support for every item in the plan, for example an explanation of the difficulties getting on and off of the toilet would accompany the recommendation for a bathroom grab bar. Nursing care in the home must have a detailed explanation of the methodology used to determine the levels and hours of care.

Watch for: no support for recommendations in the report, lack of qualification of life care planner to make the recommendation, no evidence of collaboration with qualified providers, lack of letter or notes of physician input, lack of input from the plaintiff and his family.

8. Costing evidence

Each and every item in the tables or charts must indicate the item or service, the frequency and the cost. There should be evidence of how costs were obtained, for example, by using old bills, calling for two to three quotes or using standard national published databases. If calling offices or when comparing prices on the Internet, the source of the cost. It is best to have two or three quotes written in the report and then use the average cost. When using national databases, the source should be clearly indicated and evidence that the cost was adjusted for the geographic area that the plaintiff will receive care.

Watch for: lack of description of the item or service, lack of the frequency of the item. Lack of good research into the cost for the particular item.

FINALLY:

These are some of the most basic and important aspects to a life care plan. If the plaintiff has a qualified life care planner who interviews the plaintiff, reviews medical records from before the incident and close to the present time, collaborates with physicians and providers and who plans, justifies and researches the cost for every item on the life care plan, they may have a good report.

If there is evidence that the plaintiff life care plan is inadequate, you may benefit by retaining a life care planner experienced in rebuttal life care plan reports.

The rebuttal should examine each phase of the life care plan. Were all of the medical records available actually evaluated by the plaintiff life care planner? Were pre-existing conditions excluded as future costs? Did the interview get well documented and does it support the recommendations for home care, housekeeping services, home modifications and equipment? Did physician and other health care providers support all of the medical services? Were costs obtained in a reproducible manner?

Your Rebuttal life care plan should also include summaries of any depositions and expert reports that have been produced. Expect that a good plaintiff life care planner may provide a rebuttal to your rebuttal life care plan! It's all about examining the evidence and providing expert opinions!

Let's Hear It For The Defense

David Garner, Milton Wagner and Myles Morrison Obtain Defense Verdict and Saves Insurance Broker Client $26 Million

David Garner, Milton Wagner and Myles Morrison, attorneys at Lewis Roca Rothgerber, LLP, obtained a defense verdict for insurance broker client against claims brought by a national bank. After getting caught up in the housing boom of the mid 2000's and playing fast and loose with its lending practices, a national bank ended up being defrauded by one of its mortgage lending partners, to the tune of $26 million. When the national bank sought to recover some of its losses through an insurance claim under the "servicing contractor" coverage of its fidelity bond, the carriers denied the claim. A two-year court battle between the national bank and the carriers ensued, resulting in a settlement for half of the $15 million policy limits. Not satisfied, the national bank quickly turned around and sued the insurance broker days before statute of limitations was purported to run, alleging the insurance broker's failure to obtain proper insurance coverage for the loss and seeking compensatory, consequential, and punitive damages. Two years, seven expert reports, two dozen depositions across the country, over 1.3 million documents, and countless discovery disputes later, the insurance broker successfully eliminated nearly $70 million in claimed punitive and other damages through a series of summary judgment motions. The remaining $21 million claim went to a 9-day bench trial in late April/early May, with post-trial briefing and findings/conclusions submitted at the end of May.

In an eighteen-page ruling issued in June, 2015, the court rejected each and every one of national bank's arguments and wholly adopted the insurance broker's positions in every respect: (1) rejecting plaintiff's heightened standard-of-care theories, and finding that the insurance broker's procured appropriate coverage, consistent with the national bank's instruction and the information provided; (2) finding no breach of the applicable standard; and, in any event, (3) concluding that the national bank failed to prove causation because (a) the loss fell within the plain language of the policy the insurance broker procured, (b) no better coverage was commercially available, and (c) even if such coverage were available, the national bank would not have been able to procure it, based on the national bank's lax controls and its decision to do business with a mortgage originator who had been repeatedly sanctioned and fined by the Arizona Department of Financial Institutions for unlawful and other inappropriate conduct.

Douglas Glasson and JC Patrascioiu Obtain Defense Verdict in Wrongful Death Case

Douglas Glasson and JC Patrascioiu, attorneys at Curl & Glasson, obtain defense verdict in wrongful death case. Decedent son, age 48, a handyman and day laborer, was survived by his mother, in her mid-seventies, who brought suit for his wrongful death. Plaintiff alleged Decedent son, who lived with Plaintiff, was her primary caregiver, had worked at Defendant's residence for several years, and was picked up and taken to Defendant's residence by Defendant. Plaintiff also alleged Defendant had covered the bottom of his home's attic with blown-in insulation which hid a platform/walkway in the attic, and created a hazardous condition, which caused Decedent son to fall through the ceiling.

Defendant, in his mid-forties, a registered nurse, denied liability, advancing the defense that he and Decedent son both went into the attic and Defendant showed the work area to Decedent son. Defendant alleged he had noticed a leak in the ceiling and had moved some insulation to locate the source of the leak. Defendant also alleged he and Decedent son left the premises to purchase the materials necessary to repair the leak, and upon their return, Decedent son went to the attic alone. Defendant called Michael J. Kuzel, P.E., a safety and human factors engineer, who was of the opinion that Defendant's attic met all applicable building codes and standards, and no dangerous condition existed. It was also Mr. Kuzel's opinion that Decedent son must have had a low center of gravity prior to his fall, as though he was kneeling at the site of the leaking pipe. Additionally, it was Mr. Kuzel's opinion that Plaintiff, who fell through the ceiling headfirst, made no attempt to catch himself as he fell, which supported the conclusion that Decedent son was unconscious before he fell. Plaintiff alleged that, as a result of Defendant's negligence, Decedent son sustained blunt force trauma to his head and died. Defendant argued that Decedent son's fall was most consistent with Decedent son passing out from low blood sugar, low blood pressure, a heart attack, or excessive heat.

During closing arguments, Plaintiff's counsel argued that Defendant sent Decedent son to work in an attic that had no ventilation, during the hottest part of the day and, if Decedent son

Let's Hear It For The Defense *(continued)*

had passed out due to the heat, Defendant was liable. Plaintiff's counsel also argued that Defendant did not report the incident to his insurance carrier for several days, which suggested that he could have altered the scene after the incident. Plaintiff's counsel asked jury to award Plaintiff $1 million past damages, plus $50,000 per year future damages for her life expectancy of 8. 8 years. Defense counsel argued no hazardous condition existed in the attic. The jury deliberated for approximately two hours before returning a defense verdict.

Tom Hall Obtains Defense Verdict in Motor Vehicle Accident Case

Tom Hall, an attorney at DeCiancio Robbins, PLC, obtained a defense verdict in an automobile accident case. Plaintiff alleged she sustained a cervical disc extrusion at C5-C7, lumbar injuries necessitating surgery, torn left medical meniscus and torn right rotator cuff, requiring surgery, as a result of a rear end accident that occurred on October 7, 2010. Defendant admitted negligence but denied causation and further argued that there was a scheme between some of the treating providers, lawyers and a funding company (National Health Finance) to increase the medical specials. During discovery, Plaintiff retained a billing specialist to testify as to the reasonable medical expenses. Also during discovery, Plaintiff abandoned her claims of lumbar issues as related to the accident, since Defendant discovered a long history of prior lumbar complaints and ER treatment. And, Plaintiff lowered her claimed damages, given the involvement of National Health Finance.

Prior to trial, the parties stipulated to Plaintiff's reasonable medical expenses of $36,000.00. Plaintiff asked the jury to award $36,000.00 for past damages, $25,000.00 for future treatment and $140,000.00 for pain and suffering, for a total request of $200,000.00. Mr. Hall argued causation and requested a defense verdict. The jury deliberated for approximately three hours before returning a unanimous defense verdict.

David Curl Obtains Defense Verdict on Appeal from $30,285 Arbitration Award

David Curl of Curl & Glasson successfully obtains defense verdict on appeal of a $30,285 arbitration award. Plaintiff, a 62 year old plumber, alleged that while stopped for a red traffic signal, was rear-ended by Defendant. Plaintiff alleged he sustained cervical, thoracic, and lumbar soft tissue injuries plus an injury to the left foot. Defendant admitted negligence but disputed causation and damages. At arbitration, plaintiff was awarded $30,285. Defendant appealed.

At trial, Mr. Curl successfully argued that Plaintiff was not injured as a result of the accident and that Plaintiff's medical experts relied upon Plaintiff's statement as to how he was allegedly injured and disregarded or failed to identify other symptoms that suggested that the alleged injuries were not caused or related to the subject automobile accident. The jury deliberated for 35 minutes before returning a unanimous defense verdict.

Douglas Glasson Obtains Defense Verdict on Appeal from $46,602 Arbitration Award

Douglas Glasson of Curl & Glasson successfully obtains defense verdict on appeal of a $46,602 arbitration award. Plaintiff, a 47 year old bus driver, who was in the course and scope of her employment, was involved in a motor vehicle accident when the Defendant allegedly made an unsafe lane change in front of Plaintiff, resulting in the subject accident. Defendant argued that Plaintiff was comparatively negligent for failing to down shift

and brake harder to avoid the accident and disputed causation and damages. Plaintiff alleged she jammed her right foot into the brake pedal as hard as she could, which caused her body to turn to the right in an unnatural position, and caused her to sustain multiple soft tissue injuries on the right side of her body. Plaintiff also alleged she sustained cervical, thoracic, and lumbar soft tissue injuries plus an injury to the right ankle.

During closing arguments, Plaintiff's counsel asked jury to award Plaintiff $50,000. Mr. Glasson argued the accident was minor and Plaintiff was not injured. In the alternate, Mr. Glasson argued that, if Plaintiff was injured, she sustained only a minor strain and sprain, which should have resolved within one or two months. After deliberating for a little over an hour, the jury found in favor of the defendant.

Jeremy Johnson and Ed Hochuli Obtain Defense Verdict Saving Client $3.75 Million

Jeremy Johnson and Ed Hochuli of Jones, Skelton & Hochuli obtained a defense verdict in a construction job site injury case. Plaintiff, a 58-year-old welder, alleged that he fell through an unprotected hole in the floor (where a staircase was to be installed) in a large worksite in Flagstaff. Mr. Johnson and Mr. Hochuli represented the general contractor for the project. Defendant Wallace Steel Services was contracted to erect and install the steel staircases and Defendant Arizona Bridge & Iron was hired by Defendant Wallace Steel Services to provide the labor necessary for the erection and installation of the steel staircases. Plaintiff was employed by non-party, Yavapai Mechanical, which was to install furnaces and air conditioning units, as well as running the ductwork through the walls.

Plaintiff alleged that the general contractor failed to appropriately discover and correct dangerous conditions at the worksite and failed to hire safe subcontractors. Plaintiff also alleged that Defendant Arizona Bridge & Iron's employee had removed the safety railings from the stairwell while Plaintiff was working in the area prior to the fall, and that the employee forgot to replace the railing when he completed his work. Defendant general contractor denied liability, advancing the defense that Plaintiff was an experienced construction worker, who had worked at the jobsite for several months prior to the fall. Defendants alleged that Plaintiff could not prove that he had not simply fallen down the stairs or, in the alternative, that Plaintiff was carrying trash at the time of his fall, was inattentive, and walked right through the danger tape.

Plaintiff alleged he sustained permanent injuries to his head, right eye, and his feet. Plaintiff also alleged he has continuing bleeds in his brain, plus blood in his right eye, which interferes with his sight, as a result of a skull fracture. Additionally, Plaintiff sustained multiple fractures to his feet and toes. Plaintiff also alleged that, as a result of his injuries, he is unable to perform his occupational duties. Plaintiff claimed severe and permanent injuries and a total economic loss exceeding $3 million and made a claim for punitive damages. Defendants argued that Plaintiff's complaints had resolved within days after his fall, and any ongoing complaints were related to his preexisting condition. Defendants called a neurosurgeon and an orthopod.

The court granted the Defendants' Motion for Judgment as a matter of law, on the issue of punitive damages. Plaintiff's spouse made claim for loss of consortium. In closing, Plaintiffs requested that the jury award $3.75 million. Defendants asked for a defense verdict. The jury was out for approximately two hours and found in favor of the Defendants.

Court of Appeals Affirms Dismissal Based on Failure to Comply With Arizona Notice of Claim Statute in *Austin, et al. v. the Peoria Unified School District*

Arizona Court of Appeals recently upheld the Trial Court's dismissal of the case based on a failure to comply with the Arizona Notice of Claim Statute in *Austin, v. Peoria Unified School District.* Peoria Unified School District was represented by Michael Hensley, Erik Stone and Jonathan Barnes of Jones, Skelton & Hochuli.

This case arose out of an accident between a PUSD school bus and two other vehicles in April of 2012. The driver and passenger in one of the vehicles alleged severe injuries as a result of the accident, which, as they claimed, was caused by the negligence of the school bus driver. Before a lawsuit can be filed against a public entity in Arizona, such as a school district, a notice of claim ("NOC") must be filed with the Chief Executive Officer of the entity. In cases where the CEO is a board, such as a county's board of supervisors or a school district's governing board, the NOC must be filed with the entire governing board. In

Let's Hear It For The Defense *(continued)*

October of 2012, the Claimants' attorney mailed notices of claim (one for each claimant) to the PUSD Administration Center, one PUSD Board Member, and PUSD's attorney, Michael Hensley.

The claims were denied and a lawsuit was subsequently filed in April of 2013. PUSD's attorneys at Jones, Skelton and Hochuli moved to dismiss the case arguing the Notice of Claim Statute had been violated, such that a lawsuit could not be initiated, because the Notice of Claim was not filed with all members of the PUSD Governing Board. The Trial Court agreed. Plaintiffs appealed, but the Arizona Court of Appeals affirmed the Trial Court's decision in favor of the Firm's client, holding that the NOC must be filed with all members of the PUSD Governing Board. The case was dismissed and PUSD was awarded its costs.

William Holm, William Schrank and Erik Stone Obtain Unanimous Defense Verdict in Civil Assault Trial

William Holm, William Schrank and Erik Stone, attorneys at Jones, Skelton & Hochuli, obtained a unanimous defense verdict in favor of their client in a highly contested 3-week civil assault trial involving an altercation at the Phoenix Coyotes vs. Calgary Flames hockey game on Valentine's Day, 2009.

The Defendants attended the game with their wives or significant other, where they cheered for the Calgary Flames. After Plaintiff noticed the Defendants were cheering for the visiting team, he began harassing the Defendants and their partners. Plaintiff's harassment continued throughout the game and became increasingly more obscene and vulgar. In particular, Plaintiff started directing his obscene gestures at one of the Defendant's wife who had ignored him. In response, Defendant made a "cut-it-out" hand gesture toward the Plaintiff. According to the Plaintiff, the hand gesture infuriated him, so he decided to confront the Defendants who were seated 25 feet to Plaintiff's right and two rows down. As Plaintiff approached Defendants, he invited them to a fight and threatened to kill them. Plaintiff then spit on Defendant's wife who was seated two rows away.

Fearing for their safety and the safety of others (there were several women and children nearby), the Defendants struck the Plaintiff three times as he continued to threaten them. The Defendants argued they acted reasonably under the circumstances and blamed Plaintiff for starting the altercation. Defendants also claimed the Arena was negligent for failing to enforce the NHL fan code of conduct (Plaintiff should have been ejected earlier in the game). Last, Defendants argued Plaintiff was intoxicated, assumed the risk of injury, and was a bully. Plaintiff was the aggressor, not Defendants.

Plaintiff declined treatment, but continued to harass the Defendants even after he was restrained. The next day Plaintiff sought treatment claiming he suffered a fractured skull, concussion, traumatic brain injury, permanent brain injury, migraine headaches, TMJ, 50% sensorineural hearing loss in the right ear, and several more health-related complications. Plaintiff further claimed he spent the next two years recovering from his injuries, and that the brain injury, tinnitus, and hearing loss were permanent.

Plaintiff's counsel asked the jury to award Plaintiff $3.14 million. Defendants argued Plaintiff started the fight and was therefore 100% responsible for any and all injuries. In the alternative, Defendants argued Plaintiff was at least 70% at fault, Defendants were each 10% at fault, and Jobing.com Arena was 10% at fault for not ejecting the Plaintiff earlier in the game. The jury deliberated for approximately 1 hour and 15 minutes before returning a unanimous verdict for Defendants.

Cristy Chait Obtains Defense Verdict in Wrongful Death Medical Malpractice Case

Cristy Chait, a Partner with Jones, Skelton & Hochuli, recently obtained a defense verdict in favor of her client in a wrongful death medical malpractice action. Plaintiffs, Kristine and Dalton Stafford, alleged the emergency room physician fell below the standard of care when she discharged their son Jesse Stafford after observation in the emergency department at St. Joseph's Hospital for approximately 11 hours following a methadone drug overdose. Jesse Stafford was discharged and sent home with Kristine Stafford. He was found deceased approximately 24 hours following discharge.

ER physician denied liability, indicating Jesse Stafford was ambulatory, had normal vital signs, participated in a mental health

examination, and was answering questions and cooperating with hospital staff appropriately. Defendants argued that Mr. Stafford's death was not caused by the physician's actions or care in the emergency department. Plaintiffs asked the jury for $1.2 million. The jury deliberated for approximately 2 hours and returned a Defense Verdict in favor of the physician and her group Empower Emergency Physicians.

Don Myles, Michele Molinario & Amelia Esber Obtained Summary Judgment in 42 U.S.C. § 1983 Civil Rights Action Against City of Yuma

Don Myles, Michele Molinario & Amelia Esber, attorneys at Jones, Skelton & Hochuli, prevailed by summary judgment in a 42 U.S.C. § 1983 civil rights action against the City of Yuma. The U.S. District Court for the District of Arizona found that there was no liability on the part of City of Yuma because the arresting officer did indeed have probable cause to arrest the plaintiff, Rodney Chelius. The net effect of this victory was to save the City of Yuma over $1.5 Million in potential damages and reiterate the Yuma Police Department's authority under the Constitution to arrest suspects when there is probable cause that a crime has been committed.

The case stemmed from the September 2012 arrest of the plaintiff Rodney Chelius by Yuma Police Department officers. Although Chelius' arrest did indeed lead to a charge, the criminal case was eventually dismissed due to lack of cooperation by the alleged victim. Chelius in turn sued the City of Yuma and the arresting officer alleging false arrest and imprisonment, and malicious prosecution.

The central issue to the Motion for Summary Judgment concerned whether the officer's arrest was predicated on sufficient probable cause. In the state of Arizona, probable cause exists to make an arrest when the arresting officer has reasonably trustworthy information that would lead a reasonable person to believe that a criminal offense had been committed. Judge Douglas L. Rayes noted, "Arizona law permits an officer to arrest a person if the officer has probable cause to believe that domestic violence has been committed by that person, regardless of whether the offense is a felony or misdemeanor and of whether the offense was committed in the officer's presence." In summary, Judge Rayes agreed with the position of the defense, that sufficient probable cause existed that Chelius was guilty of some crime.

Don Myles, Chelsey Golightly and Sean Moore Secured Summary Judgment for Insurer

Don Myles, Chelsey Golightly and Sean Moore attorneys at Jones, Skelton & Hochuli, recently secured summary judgment in Federal Court for one of the Firm's clients, AGCS Marine Insurance, a division of Allianz USA ("AGCS"). Specifically, the United States District Court for the District of Arizona dismissed the Plaintiff's claims for breach of contract, breach of covenant of good faith and fair dealing, and punitive damages.

This case arose out of the alleged theft of amusement gaming machines from various small businesses in the Dallas/Fort Worth area. Plaintiff, owner of the amusement machines and an Arizona resident, used Craigslist to hire several persons to run the daily operations of its business in Texas. After some time, Plaintiff noticed a substantial decrease in its profits and sent a representative to Texas to investigate these changes.

After visiting the small businesses and a nearby storage unit, Plaintiff's representative discovered that all but a few of the machines were missing. The various small business owners told Plaintiff's representative that the persons hired from Craigslist removed the machines. The Craigslist hires were also the only persons with keys to the storage unit. There were no signs of forced entry. Two months later, Plaintiff made a claim under its AGCS insurance policy claiming the machines were stolen. The policy, however, contained an exclusion for property lost or damaged as the result of the dishonest or criminal acts by anyone to whom the property had been entrusted. While AGCS was investigating the claim, and before a coverage determination was made, Plaintiff filed this lawsuit.

After minimal discovery, Plaintiff filed a motion for summary judgment claiming the above-referenced exclusion did not apply and AGCS' investigation was inadequate. Plaintiff argued that the persons hired from Craigslist were not entrusted with the equipment, and there was no admissible evidence that they stole the machines. In response, AGCS filed its own motion for summary judgment and argued that because the exclusion clearly applied, Plaintiff was not entitled

to coverage under the policy. AGCS also provided evidence that it contacted Plaintiff within 24-hours of the initial claim and that it performed a reasonable and adequate investigation regarding the alleged theft. Without hearing oral argument, the Court agreed with AGCS and granted its motion for summary judgment. Plaintiff's motion was denied, and the case was subsequently dismissed with prejudice.

Michael Hensley and John Lierman Obtain Summary Judgment in an Interference with Contract Case

Michael Hensley and John Lierman, attorneys with Jones, Skelton & Hochuli, recently obtained summary judgment on all claims in Mohave County Superior Court, for client Sunquest Solar, Inc., a solar contractor, which had been sued by a competitor for interference with contract and abuse of process. The case arose out of communications by employees of Sunquest Solar to the Arizona Registrar of Contractors, alleging that Bullhead Solar, Inc., was engaging in contracting without a license.

The Registrar of Contractors issued cease and desist orders to Bullhead Solar, and, on the basis of the Registrar's investigation, the authorities in Mohave County brought criminal charges against Bullhead Solar. Several of Bullhead Solar's customers made other contractor arrangements either due to the cease and desist orders, or upon learning of the criminal charges. Bullhead Solar brought suit against Sunquest Solar in July 2013, alleging that the actions of Sunquest Solar amounted to interference with contract and abuse of process. Sunquest Solar's attorneys at Jones, Skelton & Hochuli filed a motion for summary judgment, arguing that all Sunquest Solar's communications to the Registrar of Contractors were speech protected by the Petition Clause of the First Amendment, which guarantees the right of the people to petition the government for redress of grievances. In addition, the motion argued that abuse of process can only occur through use of judicial processes, not through communications with government agencies. Therefore, it was the Mohave County Attorney that employed judicial process against Bullhead Solar when he brought charges, and the actions of the county attorney could not be attributed to Sunquest Solar. The court agreed.

The motion for summary judgment also argued that a claim for interference with contract requires evidence that the defendant induced a breach of contract. In this case, all the evidence indicated that Sunquest Solar merely communicated concerns to the Registrar of Contractors, and that it was subsequent government action that had prompted Bullhead Solar's customers to re-consider doing business with Bullhead Solar. As with the abuse of process claim, actions of government agencies could not be attributed to Sunquest Solar. The court agreed, and granted summary judgment on all claims and the costs of litigation to Sunquest Solar.

Louis Horowitz obtains successful result from Court of Appeals upholding Summary Judgment

Louis Horowitz of Lorber Greenfield & Polito, LLP, recently obtained a successful ruling from the Court of Appeals. Plaintiffs were owners of commercial condominium units and the condominium association. Plaintiffs brought multiple claims against the builder, seller/developer, and design professionals. Plaintiffs settled with many parties and continued to pursue the builder, with claims based in negligence and based on assigned contract rights from the developer. The Condominium Association was added as a Plaintiff later. The Defendant builder moved for summary judgment on all claims. Plaintiffs withdrew the contract-based claims and continued to pursue negligence and negligent misrepresentation claims, arguing that tolling of limitations periods applied based on the discovery rule and other arguments. Summary judgment was granted on all claims asserted by all Plaintiffs. Plaintiffs appealed and the Court of Appeals upheld the original Summary Judgment. The Court rejected Plaintiffs' various arguments for tolling. Plaintiffs had produced affidavits stating they did not have knowledge of Defendant's negligence until they received their expert reports, the Court ruled these general denials did not raise a specific question of fact as required to defeat summary judgment.

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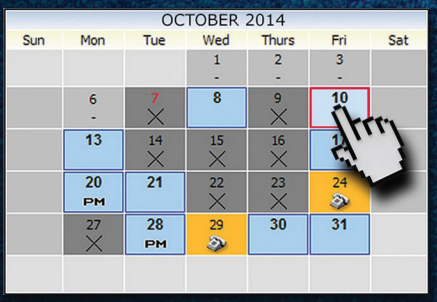

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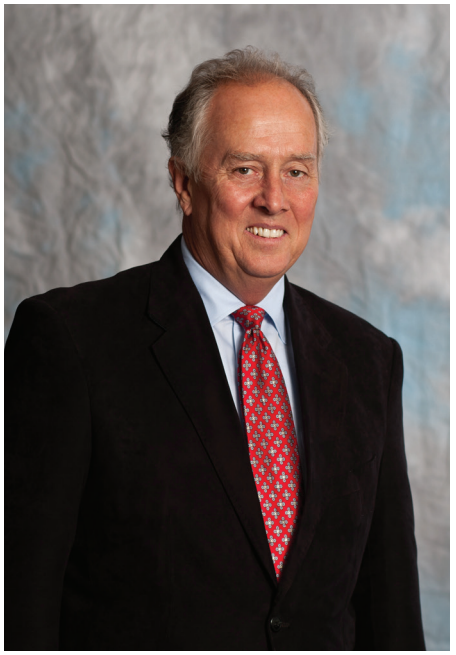
Ben Thomas Distinguished Service Award Honoree

By Barry M. Markson, Esq.



Ben Thomas, Esq.

The Arizona Association of Defense Counsel is honored to present its Distinguished Service Award to Ben Thomas. The award will be presented at the Past President's Fall Kickoff on September 24, 2015 at the Phoenix Country Club. Here is some insight into this year's honoree.

Ben Thomas is a partner with the law firm of Thomas, Markson, Rubin & Kelly. He has practiced law for over 40 years in Phoenix, emphasizing civil litigation including insurance and premises liability law. Ben has been a member of ABOTA since 2003, and has been named a Southwest Super Lawyer. Ben previously served with the Arizona Association of Defense Counsel, and planned the organization's annual meeting and retreat for many years.

Ben began practicing law in 1974 after serving as a law clerk for the Honorable Jack Ogg on the Arizona Court of Appeals. He then joined O'Conner & Cavanagh where he worked for six years with some incredible attorneys. In 1981, Ben joined with Paul Holloway to form Holloway & Thomas and went on to serve as Managing Partner of his firm for over 30 years.

Q: What do you enjoy most about the practice of law?

A: I always enjoyed the business and marketing aspect of the practice. My father was a businessman, and I always admired him growing up. Marketing came naturally to me, and I always enjoyed meeting potential new clients, convincing them that we could help, and then following through with great legal work and service. I sometimes wonder how big the firm would be if we still had every client.

Q: What are the biggest changes you have seen in the practice of law?

A: It is much more of a numbers game today. There used to be a deeper relationship between insurance companies and their insureds, and between attorneys and the insurance companies. Now, insurance companies are more concerned with budgets, completing forms and statistics. There is more centralization with many companies which results in less personal contact between attorneys and adjusters.
There is also less contact with the Courthouse, Judges and other attorneys. Everything is about efficiency now, which often results in greater convenience. The Courts are much more likely to have a conference by telephone rather than meeting in person. Email and technology also allow lawyers to be more efficient, but it reduces direct communicate with each other.

In the 1970s, the Court instituted the Fast Track program, which originally resulted in courtrooms and hallways packed with attorneys until their cases were called. I still remember older attorneys being upset with Judge Sandra Day O'Conner because she did not want to hear any grief or excuses from the attorneys appearing before her. However, she was always very professional and courteous with younger lawyers. Judges sought to raise the level of practice from lawyers managing cases to the Court managing them.

Q: What direction do you see the profession moving over the next 10 years or so?

A: I met 12 or 14 years ago with a law firm management company representative who told me that legal services were going to be more of a commodity than a professional service. Unfortunately, this prediction seems to have

Ben Thomas Award Honoree *(continued)*

become true, and I see more of that occurring over the next 10 years. Many clients view lawyers as a commodity rather than valuing the individual attorney's advice and service.

Q: What is the most important lesson that you have learned about practicing law?

A: I believe the vast majority of lawyers really want to do a good job and get the best result for their clients. This is contrary to what much of the public thinks about lawyers and the profession.

Q: What is your best advice to young lawyers about how to practice law the right way?

A: I always tell young lawyers to spend the first five years of their practice learning and experiencing as much as possible. This builds confidence, makes you more independent and self-assured. Young lawyers are often more concerned about their income in the short term and when they will make partner as opposed to building a strong foundation in their personal development as an attorney.

I also tell young lawyers to go back and read the Rules of Civil Procedure. This is especially helpful during the first five years of practice. I taught Civil Procedure at a local paralegal school just six months or so after I joined O'Conner & Cavanagh. My wife, Carolyn, was pregnant with our daughter Libby, and the firm's health insurance did not cover pregnancies. I needed the extra money to help with the expense, and I learned the value of really knowing the Rules of Civil Procedure well as a teacher.

Q: If you were not a lawyer, what would you be and why?

A: I always wanted to be a professional golfer, but I would not have earned a nickel. Most likely I would be in a business involving direct customer interaction like marketing or retail. To be honest, I never even thought of what I would do if I was not an attorney. My father's good friend was a lawyer, as is my older brother who still practices in Rolla, Missouri. My brother is a pretty smart guy, so I figured if it was good enough for him, it would be good for me, too.

Q: What do you do when you are not lawyering?

A: I spend a lot of time with my two grandsons (ages 5 and 7) and in fact, I am taking them swimming this afternoon. I also enjoy golf, reading and traveling. I like to spend as much time in San Diego, as possible, especially during the summer.

Q: What attributes do you believe a successful lawyer must have?

A: Integrity, a strong work ethic and legal ability. Also a desire to go to the end of the earth to achieve the best result for your client. A gift for gab does not hurt, either.

Q: You have practiced for 41 years. What do you believe has kept you going?

A: Phoenix is a very good city to practice law. Over the course of my career, there has been a lot of growth in the local population, which resulted in the opportunity for growth professionally. My father was worried about me when I went out on my own in 1981 with two young children. I started with very little then, but I told my dad that it was hard to fail in Phoenix. There were so many people moving into town all the time and the growth was great. Also, Ronald Reagan became President then and the entire economy turned around.

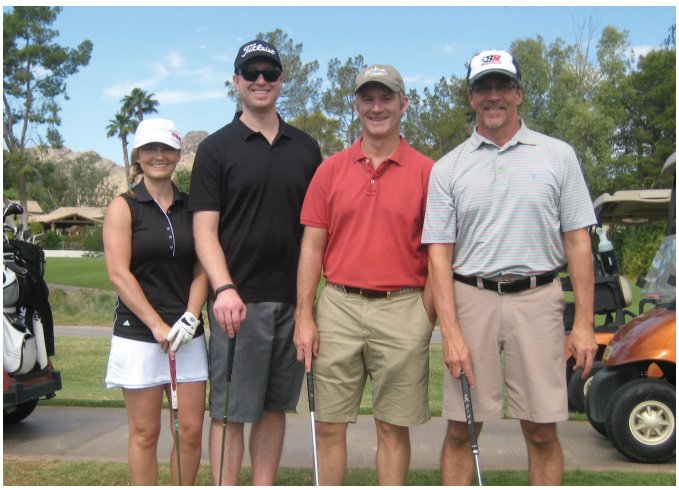
Q: Would you do it all over again?

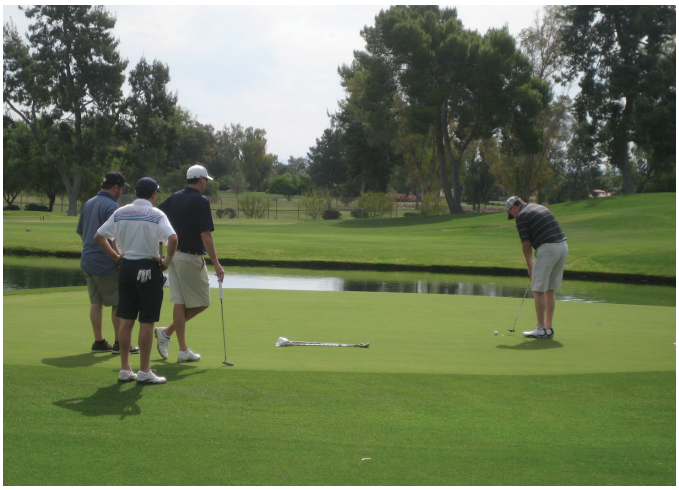
A: Absolutely. I enjoyed teaching and mentoring young lawyers, and I am always happy to hear from attorneys who used to work with us who say they received a good legal education, exposure and training when they practiced here. I wish I had done even more of that, and been a better mentor to more young lawyers. It was difficult than balancing that with growing and managing a law firm. Back then, we did not have voicemail or email, so associates would line-up outside my door to ask questions. I would have liked to do more of that.

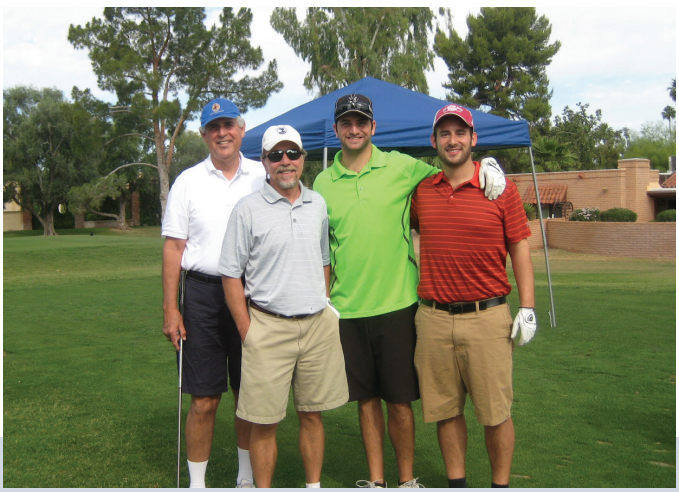
This is just a small glimpse into the long career of Ben Thomas and his commitment to the practice of law. The Arizona Associate of Defense Counsel invites all members to join us at the Fall Past President's Reception to honor his achievements and present him with the Distinguished Service Award.

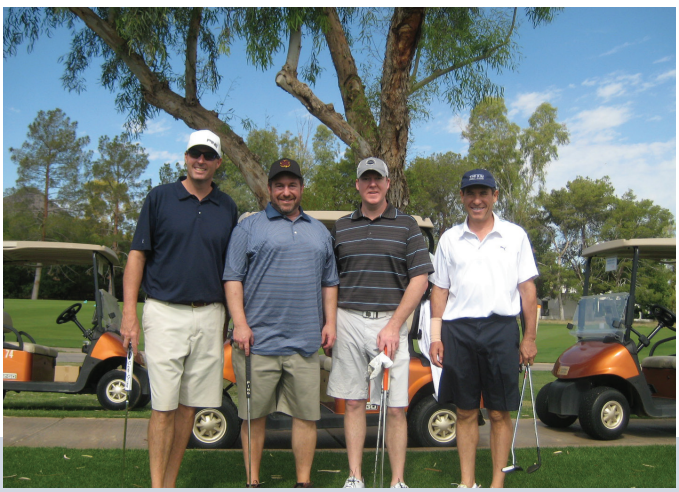
20th Annual Barry Fish Memorial Golf Tournament

The AADC held its 20th Annual Barry Fish Memorial Golf Tournament this past spring at the Camelback Golf Club. AADC raised $9,075.25 for the ALS Association Arizona Chapter. Thank you to all who donated, sponsored and participated in the tournament! Mark your calendars for next year's tournament on April 30, 2016.









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