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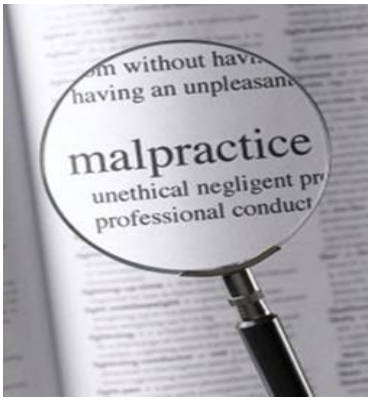
Plaintiff's Personal Injury & Wrongful Death Practice Group Newsletter

Featured Article: Medical Malpractice Explained



It has been estimated that medical negligence is the third leading cause of death in the United States, right behind heart disease and cancer. Current estimates place annual deaths from medical mistakes in the neighborhood of between just over 200,000 and a little over 400,000 people. Insurance companies and doctors have lobbied hard to get states, like Arizona, to pass laws that make it very hard to sue health care providers for their negligence. That is in part why medical malpractice is an extremely technical field of law.

It helps to know just what is medical malpractice. It occurs when patients are harmed by the actions of health care professionals in the course of their duties. In order to win a case for medical malpractice, you have to prove:

a) that the health care professional made an unreasonable mistake that other professionals in their same practice area, and in the same situation, would not make;
b) that the injury caused by the health care professional's error would not have occurred had the patient received different treatment;
c) that there were damages as a result of the health care professional's negligence;
d) the extent of the damages caused by the negligence. A mere mistake, especially one covered by a consent form, even with a resulting injury, is not usually enough to win the lawsuit, or even file one.

In Arizona, state law requires plaintiffs' experts in medical malpractice suits to have the same medical specialty as the defendant health care provider. A.R.S. § 12-2604 requires plaintiffs' standard of care expert be certified in the same specialty as the defendant and spend a majority of his clinical practice in the same specialty or subspecialty as the defendant.

It is important to know that the Arizona statute of limitations for medical malpractice lawsuits is two years from the event (A.R.S. § 12-542). If you don't file within two years of the event, you may not be able to do so, unless your case meets an "exception" to the rule. One exception is the discovery rule, which states that if the malpractice itself wasn't discovered until a later date then the victim has two years from the time the malpractice is discovered or had a reasonable expectation that he or she may have had a legitimate medical malpractice claim. There are other issues that can result in lawsuits, particularly those that fall under the heading of failure to diagnose or misdiagnose injuries and illnesses.

There are essentially two types of damages awarded in medical malpractice cases, economic damages and non-economic damages. Economic damages seek to compensate the victim for medical expenses they incurred, loss of income, and the loss of the ability to earn income as a result of the medical malpractice injury. Non-economic damages address the fact that a dollar value cannot be assessed for all injuries, but offer a dollar value to help compensate for pain, suffering, grief, and mental distress.

Current Matter Updates

Inferior Vena Cava Blood Filter Litigation

Our attorneys continue to play a major role in the litigation against the manufacturers of IVC filters, which have been linked to dozens of deaths and hundreds of serious injuries. In the litigation against C.R. Bard which is centralized in the District of Arizona, co-lead counsel Bob Boatman along with Paul Stoller recently took the deposition of Bard Peripheral Vascular CEO and President Jim Beasley. Mark O'Connor is part of the team in *Austin v. Bard*, a Florida case expected to be the first of the current cases to go to trial. We also are involved in the litigation against IVC filter manufacturers Cook Medical, Cordis Corporation, and B. Braun Medical.

Haeger v. Goodyear

G&K's lawsuit against Goodyear Tire over its fraudulent misconduct in a federal lawsuit over a 2003 motor home crash continues to move towards trial in March 2017. In the underlying case, the federal court found that Goodyear had engaged in a conspiracy to hide adverse testing results proving the tire in question was defective, and fined Goodyear and its attorneys $2.75 million as a sanction, the highest sanctions for discovery misconduct ever imposed by a federal judge. Kevin Neal, Patrick McGroder, Shannon Clark and Lincoln Combs are currently taking depositions of Goodyear executives and other key witnesses preparing the case for a six-week jury trial.

Clayton, et al . v. Banner, et al.

In August 2016, Banner Health announced that it had suffered a data breach in which cyber criminals used Banner's point-of-sale systems to access its information systems, including those that included the personally identifying information (PII) and protected health information (PHI) of patients, members, customers and healthcare providers. Banner claimed that the breach affected the information of approximately 3.7 million individuals. Paul Stoller and Lincoln Combs represent several plaintiffs as putative class representatives against Banner arising out of that breach and for its failure to protect the PII and PHI of the class.

Health Net Litigation

Kevin Neal and John Flynn have filed suit in Arizona and California on behalf of several behavioral health centers. The suit is for damages caused by breach of contract and bad faith by Health Net for improperly withholding payment of tens of millions of dollars in claims for drug and alcohol addiction services provided by treatment centers. As required by federal law, the Health Net policies are required to provide coverage for mental health and addiction treatment. The lawsuits seek reimbursement from Health Net as well as other damages caused by the actions of the insurance company.

Meet the Attorney: Kevin Neal

Kevin practices in the area of Plaintiff's Personal Injury & Wrongful Death, with an emphasis on medical malpractice, aviation law, and product liability. As a trial lawyer with nearly 30 years of experience, he has handled cases for clients in some of the largest lawsuits litigated in Arizona.

Not enough insurance? Don't Forget the Family Purpose Doctrine

We've all been there. New car wreck case. Huge damages. Clear liability. Great case! Then the other shoe drops: Minimal insurance.

Most of the time the best you can do for your client in this situation is trim or waive your fee and strike a great deal on liens. But every once in a while, there's a little-known and seldom-used tool that may allow you to dramatically enhance your client's recovery: the Family Purpose Doctrine.

The Family Purpose Doctrine "subjects the owner of a vehicle to vicarious liability when the owner provides an automobile for general use by members of the family . . . and when the vehicle is so used by a family member." Dan B. Dobbs, The Law of Torts § 340 at 935 (2001); *Young v. Beck,* 224 Ariz. 408, 410, ¶ 8, 231 P.3d at 924 ("[Under the doctrine,] a head of household who furnishes or maintains a vehicle for the use, pleasure, and convenience of a family is liable for the negligence of family members who have used the general authority to drive the vehicle while it is used for family purposes."); *Brown v. Stogsdill*, 140 Ariz. 485, 487, 682 P.2d 1152, 1154 (App. 1994). The Arizona Supreme Court has confirmed the ongoing vitality of this doctrine, which imposes vicarious liability for the acts of a child who uses a vehicle with permission to the parents who helped procure the vehicle for the child. *See Young v. Beck*, 251 P.3d 380 (2011). Liability under the family purpose doctrine arises (1) when there is a head of the family, (2) who maintains or furnishes a vehicle for the general use, pleasure, and convenience of the family, and (3) a family member uses the vehicle with the family head's express or implied permission for a family purpose. *Young,* 251 P.3d at ¶ 28.

What's particularly helpful about this doctrine is that Arizona courts have not set an age boundary on when someone is considered a family member subject to the control of a head of household. So any time a driver lives with parents or in a home paid for (even in part) by parents, there's a chance the Family Purpose Doctrine may apply. In the last few years, Gallagher & Kennedy has wielded this tool to great effect, securing an additional $5,000,000 in coverage in one case involving a 29 year old hit-and-run driver who lived in an apartment paid for by his parents and $200,000 of additional insurance in a case against a 40 year old driver living in his father's home.

The law on this doctrine is evolving but for now it is an effective way of maximizing recovery in many personal injury cases. But be careful: the Family Purpose Doctrine is based on principles of agency, so a release of the agent (child) will release claims against the principal (the parents). Before settling a motor vehicle case with insufficient limits, consider requiring the insured to execute an affidavit not only affirming that he or she has no meaningful assets or other insurance, but also that he or she was not living in a home provided or financed in any way by his or her parents.

Industry Update

Premier Physicians Group, PLLC v. Navarro, 746 Ariz. Adv. Rep. 29 (August 30, 2016) (J. Bolick)

Plaintiff recorded a lien for some $12,000 in medical services provided to Mandy Gipson for injuries arising out of an automobile accident caused by defendant Kimberley Navarro. The lien was recorded within 30 days of when services were *last* provided Gipson. Navarro's insurer settled Gipson's personal injury claim but did not honor the lien. This suit was brought to collect on the lien. The trial court dismissed the Complaint as untimely finding the lien only valid if perfected within 30 days of the *first* services provided. The Arizona Court of Appeals reversed, holding the lien was perfected as to services provided within 30 days of the lien being filed even though filed more than 30 days after the first services were provided. The Arizona Supreme Court vacated the court of appeals decision.

A.R.S. §33-932(A) requires providers to record their liens within thirty days after first providing services.

Health care services provided in connection with accidents can be of indefinite duration. Recording a lien within thirty days of providing initial services places insurers and other parties on notice that any settlements are subject to a lien. At the same time, the non-hospital provider will have a lien for charges incurred for the entire service duration. Hospitals, by contrast, typically provide services within a discrete and identifiable time frame, thus making it sensible to allow them to record a lien within thirty days after a patient's discharge.