

What's New in Appeals? Appellate Law in Arizona 2020

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Overview of Presentation

- ▶ Recent opinions from the Arizona Court of Appeals and Arizona Supreme Court
- ▶ Rule changes from 2019-2020
- ▶ Changes on the appellate courts

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Shepherd v. Costco Wholesale Corp. 246 Ariz. 470 (App. April 30, 2019)

- ▶ Division One – Judges Perkins (author), Winthrop, and Thompson (dissent in part and concur in part)
- ▶ Negligence claim can be brought even if duty of care did not arise under HIPAA and allegations that Costco had failed to cancel an erectile dysfunction prescription despite multiple requests and opportunities to do so and an employee joked with Plaintiff's ex-wife about the prescription were sufficient to withstand a Motion to Dismiss.
- ▶ Trial court correctly dismissed breach of fiduciary duty, fraud, negligent misrepresentations, intentional infliction of emotional distress, intrusion upon seclusion, and false light claims.

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Shepherd v. Costco Wholesale Corp. cont.

- ▶ Court also held the Complaint alleged sufficient facts to avoid dismissal based on A.R.S. § 12-2296 immunity because may be able to prove Costco did not act in good faith.
- ▶ Court holds that HIPAA does not pre-empt state-law negligence claims for wrongful disclosure of medical information and it may inform the standard of care.
- ▶ Court also allowed punitive damages claim to move forward because Plaintiff alleged Costco "rewards its pharmacy employees through a system of incentives for pharmacy sales, which system contributed to the failure of [Costco] to cancel the prescription as requested twice by Plaintiff."
 - ▶ Judge Thompson dissented re: punitive damages, stating Plaintiff had failed to sufficiently allege Costco acted with evil intent.

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Shepherd v. Costco Wholesale Corp. cont.

- ▶ The Arizona Supreme Court has granted review in this case. It rephrased the issues presented for review as follows:
 - ▶ 1. Does A.R.S. § 12-2296 immunize Costco from plaintiff's negligence claim?
 - ▶ 2. Does HIPAA inform the standard of care for negligent disclosure of medical information?
- ▶ Oral Argument is set for April 14, 2020 at 9:30 a.m.

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JTF Aviation Holdings Inc. v. *CliftonLarsonAllen LLP* 247 Ariz. 78 (App. July 2, 2019)

- ▶ Division One – Judges Perkins (author), Johnsen, and Brown
- ▶ The issue in this case is whether Arizona should adopt the closely-related-party doctrine, which “requires application of contractual obligations to non-signatories that are entangled with the contract.”
- ▶ The doctrine has been adopted by several federal courts, but not in Arizona.
- ▶ The Court of Appeals held that Arizona would adopt the doctrine in appropriate circumstances—“non-signatory transaction participants may benefit from and be bound by contract terms when the non-signatories are ‘closely related’ to a signatory or the dispute.”

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JTF Aviation Holdings Inc. v. CliftonLarsonAllen LLP cont.

- ▶ The Court of Appeals discussed its previous decision in *Sierra Tucson, Inc. v. Bergin*, 239 Ariz. 507 (App. 2016), where it declined to adopt the closely-related-party doctrine, and affirmed that the doctrine was not applicable to the circumstances present in that case.
- ▶ The Court held “the founder, president, and sole shareholder of JTF [Aviation Holdings Inc.]” was bound by an engagement letter entered into by JTF and CliftonLarsonAllen LLP, and specifically bound by the contractual provision providing a 24-month limitation period to bring a legal proceeding.
- ▶ Arizona Supreme Court granted review of this Opinion.
 - ▶ Oral Argument is set for March 26, 2020 at 9:30 a.m.

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Heritage Village II Homeowners Ass’n v. Norman 246 Ariz. 567 (App. May 21, 2019)

- ▶ Division One – Judges Morse (author), Thompson, and Swann
- ▶ The Court held that two individuals, who filed a motion to intervene (the “Movants”) did not seek to intervene in an untimely manner and the availability of a separate cause of action does not create a per se prohibition to intervention of right.
- ▶ Timeliness hinges on two issues: (1) the stage at which the action has progressed before intervention is sought and (2) whether the applicant was in a position to seek intervention at an earlier stage of the proceedings.
- ▶ Further, “[w]hen proposed interveners meet the minimal burden of showing that disposition of the action may impair or impede their ability to protect their interest, then the availability of an alternative forum, by itself, does not preclude intervention.”

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Dignity Health v. Farmers Ins. Co. of Ariz. 247 Ariz. 39 (App. June 11, 2019)

- ▶ Division One – Judges Thumma (author), Cattani, and Beene
- ▶ Under A.R.S. § 33-391, a healthcare provider may obtain a lien to secure payment of customary services provided to an injured person. Health insurance and underinsured and uninsured motorist coverage is excepted from the lien statute.
- ▶ The Court held that because medpay coverage is not health insurance for purpose of the lien statute, those payments are subject to the health care provider lien.

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In re Sky Harbor Hotel Properties, LLC 246 Ariz. 531 (June 25, 2019)

- ▶ Arizona Supreme Court
- ▶ The Bankruptcy Court certified three questions to the Arizona Supreme Court:
 - ▶ 1. Does a manager of an Arizona limited liability company ("LLC") owe common law fiduciary duties to the company?
 - ▶ Answer: Yes.
 - ▶ 2. Does a member of an Arizona LLC owe common law fiduciary duties to the company?
 - ▶ Answer: Yes, provided that member is an agent of the LLC.
 - ▶ 3. Can an Arizona LLC's operating agreement lawfully limit or eliminate those fiduciary duties?
 - ▶ Answer: Yes, but the operating agreement may not eliminate the implied contractual duty of good faith and fair dealing.

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Decisions Interpreting Rules of Civil Procedure

- ▶ A court must conduct the analysis under Rule 5.4 to determine whether a stranger to an action may be granted access to sealed information. *Center for Auto Safety v. Goodyear Tire & Rubber Co.*, 247 Ariz. 567 (App. Nov. 26, 2019).
- ▶ A notice of nonparty at fault may be filed even if defendant cannot identify the nonparty because Rule 26(b)(5) cannot be read to “undermine a defendant’s statutory right to be assessed no more than its proportionate share of fault.” *State v. Mahoney in and for County of Maricopa*, 246 Ariz. 493 (App. May 16, 2019)
- ▶ A party may remove a trial judge under Rule 42.1(e) if they secure a new evidentiary hearing in a special action and they have not previously exercised their right to a change of judge. *Coffee v. Ryan-Touhill in and for County of Maricopa*, 247 Ariz. 68 (App. June 20, 2019).

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Decisions Relating to Civil Rules of Appellate Procedure

- ▶ Rule 7(a)(6), Ariz. R. Civ. App. P., affords the superior court discretion to set a supersedeas bond to cover an estimate of attorney’s fees and costs that may be incurred in an appeal, provided a basis to award such fees and costs is authorized. Further, in an appeal from a judgment of garnishment, A.R.S. § 12-1580(E) authorizes appellate award of attorney’s fees. *Kellin v. Lynch*, 247 Ariz. 393(App. Sept. 10, 2019).
- ▶ The trial court erred in granting party’s request to file a delayed appeal when there was no showing of due diligence or extraordinary circumstances. *Chung v. Choulet*, 2020 WL 428362 (App. Jan. 28, 2020).

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Attorneys' Fees

- ▶ The Court of Appeals affirmed the trial court's *sua sponte* reduction of cost and fees when defendants did not appear in the case, stating: "[W]hen enforcing contract that provides for reasonable attorney fees and costs, a trial court retains broad discretion to evaluate the reasonableness of requested attorney fees and costs when the non-prevailing party has not appeared, even if the prevailing party has filed affidavits and fee applications in accordance with China Doll." *Tucson Estates Property Owners Ass'n v. Jenkins*, 247 Ariz. 475 (App. Nov. 12, 2019).
- ▶ The Court of Appeals affirmed fee award under A.R.S. § 12-341.01 based on contingent fee agreement, concluding fee agreement between Plaintiff and their counsel constituted a genuine financial obligation to compensate counsel because it required Plaintiffs, if successful in the suit, to petition the court for an award of attorney fees and costs under the fee-shifting statute and to surrender those fees and costs to counsel. *Fields v. Elected Officials Retirement Plan*, 2020 WL 581489 (App. Feb. 6, 2020)

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Decisions interpreting Rules of Evidence

- ▶ The Court of Appeals held a Facebook message was not a business record under Rule 803(6) or self-authenticating under Rule 902(11). The court broadly stated "social media communications, when offered to prove the truth of what the user said, fall outside the scope of Rule 803(6), and thus are not self-authenticating under Rule 902(11) when offered for that purpose." *State v. Griffith*, 247 Ariz. 361 (App. Aug. 13, 2019).
 - ▶ Such a statement could be offered as a statement against a party opponent under Rule 801(d)(2), if sufficient evidence to demonstrate message was authored by party opponent. Search logs were also admissible under Rule 801(d)(2) because sufficient evidence party opponent authored the searches.
- ▶ "[A] jointly constructed recorded recollection—e.g., one person makes an oral statement, another writes it down—may be admitted under [the hearsay exception for recorded recollections] if each person involved in creating the record testifies to performing his or her role accurately." Thus, it was proper to allow officer to testify about serial number of a stolen rifle that had been provided by the victim to the officer. *State v. Giannotta*, 2019 WL 7177081 (App. Dec. 26, 2019)

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Recent Rule Amendments

- ▶ Rule 26(b)(4), Ariz. R. Civ. P. amended with effective date of January 2019
 - ▶ Draft reports are completely protected from disclosure.
 - ▶ Communications between party's attorney and expert witness are protected, except to the extent the communications:
 - ▶ Relate to compensation for the expert's study or testimony;
 - ▶ Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed;
 - ▶ Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.
 - ▶ Can discover date attorney provided facts or data to expert.

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Recent Rule Amendments cont.

- ▶ Rule 5.4, Ariz. R. Civ. P., was amended effective January 1, 2020 to include case-initiating documents and the procedure to follow when filing under seal.
 - ▶ Rule 26(c) was amended to provide that an order to file a document under seal must comply with Rule 5.4.
- ▶ Experimental Rule 8.1, Ariz. R. Civ. P., has been permanently adopted as of January 1, 2019.
 - ▶ This rule governs the assignment and management of commercial cases.

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Court of Appeals – Division One

- ▶ Chief Judge Peter Swann; Vice Chief Judge Kent Cattani
- ▶ Newest Judges:
 - ▶ Judge Gass – September 2019
 - ▶ Judge D. Steven Williams – November 2019
- ▶ Always be sure to check the website
 - ▶ Policies: <https://www.azcourts.gov/coa1/FilerInformation/Policies>
 - ▶ Electronic Filing Tips: <https://www.azcourts.gov/coa1/Filer-Information/Electronic-Filing-Tips>

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Court of Appeals – Division Two

- ▶ Chief Judge Garye Vasquez; Vice Chief Judge Christopher Staring
- ▶ Newest Judge
 - ▶ Judge Sean Brearcliffe – September 2017
- ▶ Helpful information on Court's website:
 - ▶ Policies: <https://www.appeals2.az.gov/courtPolicies.cfm>
 - ▶ Organizational Chart: <https://www.appeals2.az.gov/2019OrganizationalOrder.pdf>

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Arizona Supreme Court

- ▶ Chief Justice Robert Brutinel; Vice Chief Justice Ann Timmer
- ▶ Most recent additions:
 - ▶ Justice William Montgomery – September 2019
 - ▶ Justice James Beene – June 2019
- ▶ Helpful tips on website:
 - ▶ Cases before the court: <https://www.azcourts.gov/clerkofcourt/AgendasandCasesbeforetheCourt.aspx>
 - ▶ Clerk of Court Home page: <https://www.azcourts.gov/clerkofcourt/>

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Questions?

- ▶ Feel free to contact me with any appellate questions:
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