ARIZONA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses (Past and Future)

In Arizona, damages in a tort case aim to "fairly and adequately compensate a person for personal injuries." *Myers v. Rollette*, 103 Ariz. 225, 231, 439 P.2d 497, 503, (1968). Arizona permits recovery for "actual damages, expenses for past and prospective medical care, past and prospective pain and suffering, lost earnings, and diminished earning capacity." *Wendelken v. Super Court*, 137 Ariz. 455, 458 671 P.2d 896, 899 (1983) (citing *Standard Oil Co. v. Shields*, 58 Ariz. 239, 246-247, 119 P.2d 116, 119 (1941); *Allen v. Devereaux*, 5 Ariz. App. 323, 325, 426 P.2d 659, 661 (1967)). Medical expenses, whether past or future, may be calculated with reasonable certainty. *Standard Oil Co.*, 58 Ariz. at 246, 119 P.2d at 119; *Allen*, 5 Ariz. App. at 325, 426 P.2d at 661.

To recover future medical expenses, the plaintiff must provide evidence that such future damages are reasonably certain. *Griffen v. Stevenson*, 1 Ariz. App. 311, 312, 402 P.2d 432, 433 (1965) (finding doctor's testimony that "if" plaintiff's condition continued, the doctor would "consider" plaintiff for surgery was not reasonably certain enough to award future medical expenses). The evidence must be definite as to the reasonableness, duration, and amount of treatment and cost. *Compare Hirsh v. Manley*, 81 Ariz. 94, 103, 300 P.2d 588, 594 (1956) (finding doctor's mere testimony that plaintiff's condition could require future medical treatment without addressing the frequency or length of time necessary for such treatment as too indefinite to award future medical expenses) *with Valley Nat'l Bank v. Haney*, 27

Ariz. App. 692, 694, 558 P.2d 720, 722 (Div. 1 1976) (finding jury could reasonably infer cost of future medical expenses from evidence of expert testimony that plaintiff's epilepsy required indefinite future medical treatment, a schedule of costs for treatment over a four-year period leading up to trial, and a jury instruction regarding plaintiff's life expectancy). However, permanency of the condition alone is insufficient evidence to determine an award for future medical expenses. *Henderson v. Breesman*, 77 Ariz. 256, 259, 269 P.2d 1059, 1061-1062 (1954). The jury cannot "speculate or guess" when awarding future medical expenses, but rather must rely on at least some data to justify such an award. *Id.* While evidence of the definiteness of the duration, amount and cost of treatment must be introduced to justify an award for future medical expenses, the plaintiff is not required to prove they will actually undergo such treatment. *Besch v. Triplett*, 23 Ariz. App. 301, 303, 532 P.2d 876, 878 (Div. 1 1975) (applying a "totality" approach when considering the likelihood of undergoing future medical treatment).

B. Collateral Source Rule and Exceptions

Arizona allows plaintiffs broad use of the collateral source rule. *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 199, 207, 129 P.3d 487, 488, 496 (Ct. App. Div. 2 2006) (applying the collateral source rule to a slip and fall personal injury action). *See also Taylor v. S. Pac. Transp. Co.*, 130 Ariz. 516, 519-520, 637 P2.d 726, 729-730 (1981) (applying the collateral source rule to evidence of remarriage in a wrongful death action). The collateral source rule prevents the jury from considering evidence that the plaintiff received payments or benefits from sources other than the tortfeasor when determining that tortfeasor's liability. *Taylor*, 130 Ariz. at 519, 637 P.2d at 729. The rationale for the collateral source rule is that a tortfeasor should not be permitted a windfall simply because the plaintiff might have contracted for reimbursement through a third party, such as insurance. *Id.* Unless the state legislature or Supreme Court expressly limits the applicability of the collateral source rule, plaintiffs may use it to bar defendants from introducing evidence that the plaintiff has otherwise been made whole. *Lopez*, 212 Ariz. at 208, 129 P.3d at 497.

By statute, Arizona does not permit a plaintiff to use the collateral source rule in medical malpractice actions. *See* A.R.S. § 12-565(A) (2009). *See also Eastin v. Broomfield*, 116 Ariz. 576, 583-

585, 570 P.2d 744, 751-753 (1977) (upholding the constitutionality of A.R.S. § 12-565(A)). In a medical malpractice action in Arizona, the defendant may submit evidence of any amount or benefit plaintiff receives, and the jury may consider the evidence to offset any amounts or benefits the plaintiff received. A.R.S. § 12-565(A) (2009). *See also Eastin*, 116 Ariz. at 585, 570 P.2d at 753. Subsequently, if the defendant decides to submit such evidence, the plaintiff may submit evidence of insurance, that recovery will be subject to a lien, or that the party providing the collateral benefit has a statutory right of recovery or right of subrogation. A.R.S. § 12-565(A) (2009). The purpose of the statute is to prevent inequitable windfall recoveries and reveal the true extent of the plaintiff's loss. *Eastin*, 116 Ariz. at 585, 570 P.2d at 753. While A.R.S. § 12-565(A) allows the admission of such evidence, there is no guarantee that the jury will necessarily use that evidence in deciding an award of damages. *Id.*

C. Treatment of Write-downs and Write-offs

1. Medicare, Medicaid, & Private Insurance

In Arizona, plaintiffs are "entitled to claim and recover the full amount of . . . reasonable medical expenses" that they are charged, "without any reduction for the amounts apparently written off by . . . healthcare providers pursuant to contractually agreed-upon rates with . . . medical insurance carriers." *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 207, 129 P.3d 487, 496 (Ct. App. Div. 2 2006). *But see In re Denton*, 190 Ariz. 152, 156, 945 P.2d 1283, 1287 (1997) (interpreting a state elder abuse statute as allowing pain and suffering damages in a survival action in part "[b]ecause incapacitated or vulnerable adults generally have Medicare, Medicaid coverage, or other insurance, they may not recover for medical expenses[]"). In *Lopez*, the Arizona Court of Appeals, Division 2 followed the majority view and the state's broad application of the collateral source rule by allowing a party to seek and recover the amount of their medical expenses actually charged and not limiting the party to any written-off amount. *Lopez*, 212 Ariz. at 207, 129 P.3d at 496. In allowing parties to do so, the *Lopez* court did not distinguish between Medicare, Medicaid, or insurance write-offs. *See id.* The plaintiff in *Lopez* obtained write-offs through her insurance carriers. *Id.* However, the *Lopez* court, in support of reaching its decision, cited

several cases from other jurisdictions where the write-offs came from Medicare or Medicaid. *See id.* at 206-207, 129 P.3d at 495-496. The *Lopez* court approvingly acknowledged that:

[F]or purposes of the collateral source rule, no rational distinction exists between payments made by an insurance carrier on behalf of an injured plaintiff, a healthcare provider's acceptance of reduced payments from health maintenance organizations (HMOs) and government payors, or a provider's write-off or portions of billed charges to patients pursuant to contractual relationships with HMOs or government payors. *Id.* at 206, 129 P.3d at 495 (citations omitted). This approach maintains the purpose of the collateral source rule, and prevents the tortfeasor from benefitting from the victim's planning and preparedness. *See id.* at 207, 129 P.3d at 496. Finally, the *Lopez* court noted that if the state legislature desired to limit the collateral source rule's application to such write-offs, the legislature would have done so. *Id.* at 208, 129 P.3d at 497. *Cf.* A.R.S. § 12-565 (2009).

While a party may recover medical expenses actually charged, that party may not necessarily keep the damages that they are awarded. The Arizona Health Care Cost Containment System ("AHCCCS"), the state's Medicaid program, provides "hospitalization and medical care coverage" to certain eligible persons (*e.g.*, low income individuals). *See* A.R.S. § 36-2901.01(A) (2009); A.R.S. § 36-2903(A) (2009). Under § 36-2915(A), AHCCCS is entitled to a lien [F]or the charge for hospital or medical care and treatment of an injured person for which [AHCCCS] is responsible, on any and all claims of liability or indemnity for damages accruing to the person to whom hospital or medical service is rendered, or to the legal representation of such person, on account of injuries giving rise to such claims and which necessitated such hospital or medical care and treatment. A.R.S. § 36-2915(A) (2009). Thus, while a defendant in medical malpractice cases may submit evidence showing that the plaintiff received payments or benefits through collateral sources, such as a write-off or write-down of medical expenses by AHCCCS, the plaintiff may counter that evidence by showing that the plaintiff will be subject to an AHCCCS lien on their recovery. *See* A.R.S. § 12-565(A) (2009). The jury may then award medical expenses after considering the evidence, but the jury is not required to give either submission presumptive weight.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

In civil actions, the physician-patient privilege prevents a physician or surgeon from revealing communications the physician or surgeon had with the patient regarding the patient's physical or mental disease or disorder without the consent of the patient. A.R.S. § 12-2235. The patient is the holder of the privilege. *Duquette v. Superior Court*, 161 Ariz. 269, 272, 778 P.2d 634, 637 (Ct. App. Div. 1 1989). The patient may waive the privilege by either voluntarily testifying as a witness regarding the privileged communications, A.R.S. § 12-2236, or by placing the medical condition at issue through a claim or affirmative defense. *See Bain v. Superior Court*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986). As to the latter implied waiver, the scope of the waiver extends only to that condition the patient voluntarily placed at issue through the claim or affirmative defense. *See Danielson v. Superior Court*, 157 Ariz. 41, 43, 754 P.2d 1145, 1147 (Ct. App. Div. 1 1987). When there is implied waiver of the physician-patient privilege, the holder of the privilege waives only the right to object to the discovery of medical information applicable to the claim or affirmative defense through the formal methods of discovery as promulgated by the Arizona Rules of Civil Procedure. *Duquette*, 161 Ariz. at 272, 778 P.2d at 637.

For medical malpractice actions, Arizona case law expressly prohibits counsel from engaging in non-consensual *ex parte* communication with non-party treating physicians. *See Duquette*, 161 Ariz. at 270, 778 P.2d at 635. In *Duquette*, defense counsel interviewed over a dozen of plaintiff's treating physicians without the plaintiff's consent. *Id.* Defendant then submitted a witness list that included those physicians. *Id.* Plaintiff filed a motion to bar the physicians' testimony and to disqualify defense counsel. *Id.* The trial court barred the physicians from testifying unless the plaintiff offered the physicians as witnesses first. *Id.* However, the trial court did not disqualify defense counsel. *Id.*

After reviewing the arguments in favor of and against *ex parte* communications, including briefs filed by *amicus curiae*, the Arizona Court of Appeals, Division I, concluded that the dangers of *ex parte* communications with non-party treating physicians outweighed the potential benefits of such informal procedures. *Id.* at 271-277, 778 P.2d at 636-642. While the Court acknowledged the potential benefits of

ex parte communications with non-party treating physicians – *e.g.*, lower expense, greater ease in scheduling, potentially greater candor on the part of the physician witness, efficiently eliminating non-essential witnesses – it expressed great concern that *ex parte* communications "would be destructive of both the confidential and fiduciary natures of the physician-patient relationship." *Id.* at 274-275, 778 P.2d at 639-640. Additionally, the Court worried that a physician's involvement in an *ex parte* interview could subject that physician to professional discipline or tort liability. *Id.* at 276, 778 P.2d at 641. Finally, the Court considered the practical issues *ex parte* communications raised with regards to the scope of waiver of the physician-patient privilege. *Id.* at 276-277, 778 P.2d at 641-642. The Court believed an adversarial setting better resolved any potential disputes over the scope of waiver than an *ex parte* setting. *Id.* at 277, 778 P.2d at 642. Thus, the court held that non-consensual *ex parte* communications with non-party treating physicians in medical malpractice actions were prohibited. *Id.*

Outside the context of medical malpractice actions, Arizona does not provide clear statutory or case law regarding the acceptability of ex parte communications with non-party treating physicians. For example, a 1999 Arizona ethics opinion addressed the propriety of defense counsel's *ex parte* communications with plaintiff's treating physician in a workers' compensation case. Arizona Ethics Opinion No. 99-03 (April 1999). After acknowledging the lack of Arizona authority addressing the issue, the opinion analyzed whether such *ex parte* communications would violate Arizona Ethics Rule 4.4. *Id.* Ethics Rule 4.4 provided that an attorney shall not "use methods of obtaining evidence that violate the legal rights" of a third person. Arizona Ethics Rule 4.4.

After reviewing *Duquette* and authority from other jurisdictions, the opinion determined that because the rationale articulated in *Duquette* was applicable in workers' compensation cases, there was no "compelling reason" to differentiate between those cases and medical malpractice cases as to *ex parte* communications with treating physicians. Arizona Ethics Opinion No. 99-03 (April 1999). Additionally, allowing *ex parte* communications may lead to violations of Ethical Rule 4.4. *Id.* Thus, the opinion concluded that "the proper ethical approach in Arizona should prohibit *ex parte* interviews between

defense counsel and plaintiff's treating physicians" unless the plaintiff "expressly and unconditionally authorizes it." *Id.*

B. Interaction of Waiver of Physician-Patient Privilege and HIPAA

Arizona authority does not address the scope of waiver of the physician-patient privilege in relation to the Health Insurance Portability and Accountability Act (HIPAA). However, the balance of authority regarding this issue suggests that HIPAA does not permit attorneys to engage in *ex parte* communications with non-party treating physicians. *See* Daniel M. Roche, Comment, *Don't Ask, Don't Tell: HIPAA's Effect on Informal Discovery in Products Liability and Personal Injury Cases*, 2006 B.Y.U. L. Rev.1075, 1083-1091 (2006) (discussing various state and federal cases addressing the issue). In practice, concerns for violating HIPAA are so prevalent that medical providers will not provide information or participate in *ex parte* communications with counsel without a HIPAA compliant release. *See* Alvin O. Boucher, *Implied Waiver of Physician and Psychotherapist-Patient Privilege in North Dakota Medical Malpractice and Personal Injury Litigation*, 83 N.D. L. Rev. 855, 881-82 (2007).

Additionally, under HIPAA's preemption provisions, state law will preempt any of HIPAA's standards, requirements, or implementation specifications when a "provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under [HIPAA]." 45 C.F.R. 160.203(b) (2009). Such language suggests that state privilege laws can preempt HIPAA and provide even greater protection. *See* Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 Temp. L. Rev. 505, 534 (Fall 2004). Considering the great protection Arizona accords its state physician-patient privilege and its attempts to protect the privilege from potential violation in *ex parte* communications, *see, e.g.*, *Duquette*, 161 Ariz. at 270, 778 P.2d at 635, Arizona's physician-patient privilege likely provides more stringent protections than HIPAA and thus would preempt HIPAA as to the scope of that privilege. *See* 45 C.F.R. 160.203(b) (2009).

C. Authorization of Ex Parte Physician Communication by Plaintiff

Arizona authority does not address the scope of waiver of the physician-patient privilege should the patient-plaintiff authorize defendant's counsel to engage in *ex parte* communications with their treating physician. Arizona statutorily provides that a patient may waive the physician-patient privilege by "offer[ing] himself as a witness and voluntarily testif[ying] with reference to the communications" made between the physician and patient. A.R.S. § 12-2236 (2009). A patient may also impliedly waive the physician-patient privilege through "a course of conduct inconsistent with observance of the privilege." *See Bain v. Superior Court*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986). However, the only situation in which Arizona has found an implied waiver of the physician-patient privilege is when the patient places their specific medical condition at issue by asserting a claim or affirmative defense. *See id.*

While the patient arguably waives the physician-patient privilege by consenting to the *ex parte* communication, this view is unlikely to prevail in Arizona. First, the explicit language of A.R.S § 12-2236 requires that the patient offer "himself as a witness," to waive the privilege, not their physician. A.R.S. § 12-2236 (2009). Second, Arizona has only recognized implied waiver of the privilege when the patient puts their medical condition at issue by raising a claim or affirmative defense based on that medical condition. *See Bain*, 148 Ariz. at 334, 714 P.2d at 827. Additionally, even if the patient impliedly waives the privilege, "the holder of the privilege waives *only* his right to object to discovery of pertinent medical information which is sought through the formal methods of discovery authorized by the applicable Rules of Civil Procedure." *Duquette*, 161 Ariz. at 272, 778 P.2d at 637 (emphasis in original). Thus, Arizona law strongly suggests that consenting to defense counsel's *ex parte* communications with a patient's treating physician would not waive the physician-patient privilege, and even if there was an implied waiver, the scope of the waiver would only extend to the right to object to discovery of medical information sought through state discovery rules.

D. Authorization of Ex Parte Physician Communication by Courts

Arizona authority does not address the scope of waiver of the physician-patient privilege in instances where the court authorizes *ex parte* communication with non-party treating physicians.

E. Local Practice Pointers

Most likely, an opponent will not consent to an *ex parte* communication with their client's treating physician. As a result, if a defense attorney in Arizona desires to communicate with the plaintiff's non-party treating physician, that attorney should either provide the physician with a signed release of medical information authorization or subpoena the physician for a deposition. *See* Guidelines for Cooperation Between the Physicians and Attorneys in Maricopa County, Arizona 5 (1990).

When scheduling the deposition, be sure to limit the topic of the conversation to the appropriate subject matter. In *Styles v. Ceranski*, defense counsel's paralegal contacted an employee of plaintiff's treating physician regarding the scheduling of that employee's deposition. 185 Ariz. 448, 453, 916 P.2d 1164, 1169 (Ct. App. Div. 1 1996). During that contact, the paralegal briefly discussed the employee's "usual practice" of taking a patient's history: specifically, that the employee only recorded information that the patient volunteered. *Id.* At the employee's deposition, the employee could not recall whether the plaintiff mentioned that she was "borderline diabetic." *Id.* This resulted in the employee's "usual practice" testimony becoming a necessary foundation for the admission of this fact into the plaintiff's medical history. *Id.* The Arizona Court of Appeals, Division One, affirmed the trial court's decision that the conversation "went beyond the permissible scope of scheduling a deposition, touched upon substantive testimony, and should be excluded as a sanction for violating *Duquette*." *Id.* Thus, to avoid the loss of potentially useful evidence and the possibility of sanctions, non-consensual *ex parte* communications should either be avoided or strictly limited to the scope of the authorized communication. *See id.*

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

A. Requirements to Obtain Testimony of Non-party Treating Physician

Generally, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Ariz. R. Civ. P. 26(b)(1)(A). Absent a signed release of medical information authorization, parties seeking the testimony of non-party treating physicians subpoena those physicians' deposition. *See* Guidelines for Cooperation Between the

Physicians and Attorneys in Maricopa County, Arizona 5 (1990). *See also Duquette*, 161 Ariz. at 273-274, 778 P.2d at 638-639 ("[A] ban on *ex parte* communications [in medical malpractice actions] . . . merely limits the methods of contact . . . to those methods authorized by our Rules of Civil Procedure."). Any expert a party identifies to testify at trial may be deposed. Ariz. R. Civ. P. 26(b)(4)(A). A party may also depose an expert "retained or specially employed by another party in anticipation of litigation or preparation for trial" who is not expected to testify at trial. Ariz. R. Civ. P. 26(b)(4)(B).

In an effort to provide parties a "reasonable opportunity to prepare for trial or settlement" and reduce litigation costs, Arizona requires that parties to litigation submit initial disclosures within forty (40) days after the filing of a responsive pleading, unless a party agreement or Court intervention provides otherwise. *See* Ariz. R. Civ. P. 26.1(b)(1); *Bryan v. Riddel*, 178 Ariz. 472, 476, n.5, 875 P.2d 131, 135 (1994). In the initial disclosures, the parties shall disclose the names, addresses, and telephone numbers of any potential witnesses for trial and the names and addresses of any potential expert witnesses for trial. Ariz. R. Civ. P. 26.1(a)(3), (a)(6). Parties must also disclose names and addresses of all persons that party believes "may have knowledge or information relevant to . . . the action" and the names and addresses of all persons who provided any statement regarding the issues in the action. Ariz. R. Civ. P. 26.1(a)(4), (a)(5). Parties have a continuing duty to supplement their initial disclosures "whenever new or different information is discovered or revealed." Ariz. R. Civ. P. 26.1(b)(2).

For medical malpractice claims, each party may only call one standard-of-care expert. Ariz. R. Civ. P. 26(b)(4)(D). The defendant may also testify on that defendant's standard-of-care. *Id.* Thus, the defendant can potentially have two experts addressing the standard-of-care as to an issue (the defendant and the defendant's expert), and the court need not provide the plaintiff with the opportunity to present another standard-of-care expert on the issue. *Id.*

To qualify as an expert witness at trial, the physician must be a licensed health professional in Arizona or another state. A.R.S. § 12-2604(A) (2009). In addition to being licensed, the health professional witness must satisfy at least one of the following three qualifications:

(1) The health professional "is or claims to be a specialist, [and] specializes at the time of the occurrence . . . in the same specialty." A.R.S. § 12-2604(A)(1) (2009).

(2) For at least the year prior to the occurrence, the health professional devoted the majority of their professional time to either (or both) the "active clinical practice of the same health profession" and specialty as the defendant or (and) the health professional instructed students in an "accredited health professional school or accredited residency or clinical research program in the same health profession" and specialty as the defendant. A.R.S. § 12-2604(A)(2)(a)-(b) (2009).

(3) When the defendant is a general practitioner, the health professional must have, for at least the year prior to the occurrence, devoted the majority of their professional time to either (or both) the "[a]ctive clinical practice as a general practitioner[]" or (and) the "[i]nstruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant." A.R.S. § 12-2604(A)(3)(a)-(b) (2009).

Additionally, in medical malpractice cases, the plaintiff shall notify the court to set a comprehensive pretrial conference. Ariz. R. Civ. P. 16(c). At the pretrial conference, the court and parties shall outline a schedule for disclosing standard of care and causation expert witnesses. Ariz. R. Civ. P. 16(c)(2). The court and parties shall also determine the sequence and dates of disclosure for all other expert and non-expert witnesses. Ariz. R. Civ. P. 16(c)(3). The date for such disclosure of all these witnesses must be at least 45 days prior to the finalization of discovery. *Id.* Any witnesses not disclosed will be precluded from testifying at trial unless the party failing to disclose shows sufficiently extraordinary circumstances for failure to disclose. *Id.*

B. Witness Fee Requirement and Limits

1. Statutes and Rules of Civil Procedure

Under Arizona Rule of Civil Procedure 26(b)(4)(C)(i), the party seeking to depose an opponent's expert witness must pay the expert "a reasonable fee for time spent in responding to discovery." If a party seeks an opposing party's expert not expected to testify at trial, that party must also pay the opposing

party "a fair portion of the fees and expenses reasonably incurred by the [opposing] party in obtaining facts and opinions from the expert." Ariz. R. Civ. P. 26(b)(4)(C)(ii).

For a party to claim its costs after judgment, that party must file and serve a statement of costs within ten days after the judgment on the opposing party. Ariz. R. Civ. P. 54(f)(1); *see also* A.R.S. § 12-346(A) (2009). The opposing party must file any objections to the statement of costs within five days after receiving it. Ariz. R. Civ. P. 54(f)(1); *see also* A.R.S. § 12-346(B) (2009). Taxable costs in superior court include witness fees and deposition costs. A.R.S § 12-332(A)(1)-(2) (2009). For medical malpractice claims, witness fees under A.R.S § 12-332(A)(1) include reasonable expert witness fees for testifying at trial. Ariz. R. Civ. P. 54(f)(2). Additionally, any material witness testifying in a civil trial shall be paid twelve dollars per day for their attendance, including any time necessary for the expert to leave their residence and attend the trial. A.R.S. § 12-303 (2009).

If a party rejects an opposing party's offer of judgment and later obtains a judgment less favorable than the opposing party's offer, that party must pay the opposing party's "reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332" as a sanction for rejecting the opposing party's offer of judgment. Ariz. R. Civ. P. 68(g).

2. Case Law

In Arizona, a victorious party may recover the costs of taking the opposing party's expert depositions. *See, e.g., Johnston v. Univ. Hosp.*, 149 Ariz. 422, 425, 719 P.2d 308, 311 (Ct. App. Div. 1 1986); *Rabe v. Cut and Curl of Plaza 75, Inc.*, 148 Ariz. 552, 555, 715 P.2d 1240, 1243 (Ct. App. Div. 2 1986). In *Johnston*, the Arizona Court of Appeals affirmed the trial court's award of expert witness fees to the prevailing plaintiff for deposing defendant's three doctors. *Johnston*, 149 Ariz. at 426, 719 P.2d at 312. The *Johnston* court stated that because Arizona Rule of Civil Procedure 26(b)(4) "expressly requires the party seeking discovery from an opposing party's expert to pay that expert a reasonable fee for the time spent in responding to the discovery deposition[,] those fees are certainly costs of taking that deposition." *Id.* at 425, 719 P.2d at 311. Thus, when a party pays expert witness fees pursuant to Rule 26(b)(4)(c), those fees count as "costs of taking depositions" under A.R.S. § 12-332(A)(2). *Id.*

However, a victorious party may not recover the costs of taking their *own* experts' depositions. *See Schritter v. State Farm Mut. Auto. Ins. Co.*, 201 Ariz. 391, 391, 36 P.3d 739, 739 (2001). In *Schritter*, the plaintiff deposed her own treating physicians as experts and used those deposition transcripts in lieu of trial testimony. *Id.* After the jury ruled in the plaintiff's favor, the trial court awarded the plaintiff costs, which included plaintiff's experts' fees for the taking of their depositions. *Id.* The Court of Appeals affirmed. *Id.* at 392, 36 P.3d at 740.

The Supreme Court of Arizona observed that had the plaintiff's expert witnesses testified at trial, they could only recover witness fees pursuant to A.R.S. § 12-303, which provides material witnesses testifying at a civil trial twelve dollars a day for their attendance. *Id.* The Court then distinguished *Johnston*, stating that the rationale for the two situations differed. *Id.* at 393, 36 P.3d at 741. Because the plaintiff in *Schritter* did not take her experts' depositions for discovery purposes, the fee apportionment rationale of Rule 26(b)(4)(C) was inapplicable. *Id.* Additionally, the plaintiff's experts did not "spend time that otherwise would have been unnecessary" which reasoning applied to Rule 26(b)(4)(C) situations. *Id.* Thus, because the considerations behind Rule 26(b)(4)(C) did not apply to awarding a plaintiff their expert witness fees for the taking of their depositions, such fees were not a "cost of taking depositions," and A.R.S. § 12-303 limited the plaintiff's recovery of costs. *Id.* at 393-394, 36 P.3d at 741-742.

As to witness fees for testifying at trial, a victorious party in a medical malpractice action may only recover those fees "incurred for an expert witness's actual attendance at trial to testify." *Foster v. Weir*, 212 Ariz. 193, 195, 129 P.3d 482, 484 (Ct. App. Div. 2 2006); *see also* A.R.S. § 12-303 (2009). Under Arizona Rule of Civil Procedure 54(f)(2), which only applies to medical malpractice cases, witness fees under A.R.S. § 12-332(A)(1) include reasonable fees a party pays to their expert witnesses for trial testimony. According to the *Foster* court, the language of Rule 54(f), read in conjunction with § 12-332, "suggests that expert witness fees are only taxable as costs to the extent they represent time actually spent testifying or being available for testimony at trial." 212 Ariz. at 196, 129 P.3d at 485. Thus, "additional

expenses incurred to retain and prepare an expert witness for trial are not recoverable" under Rule 54(f)(2). *Id.* at 195, 129 P.3d at 484.

If a party rejects an opposing party's offer of judgment and later obtains a judgment less favorable than the opposing party's offer, that party must pay the opposing party's "reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332" as a sanction for rejecting the opposing party's offer of judgment. Ariz. R. Civ. P. 68(g). Under Rule 68(g), Arizona does not limit reasonable expert witness fees to those fees incurred pursuant to A.R.S. § 12-303, but rather, the fees include an experts' time reviewing other depositions, communication with attorneys, preparation for testimony at trial, and other pretrial activities. *Levy v. Alfaro*, 215 Ariz. 443, 444-445, 160 P.3d 1201, 1202-1203 (Ct. App. Div. 1 2007). Looking at the plain language of Rule 68(d) (now Rule 68(g)), the *Levy* court stated that the expert witness fees need only be reasonable and incurred after a party made the offer. *Id.* at 445, 160 P.3d at 1203. Otherwise, the "purpose of the provision . . . would be lost if it was limited" to the costs under A.R.S. § 12-303. *See id.* Thus, a sanction under Rule 68(g) "includes *all* 'reasonable expert witness fees' incurred after the offer of judgment was made." *Id.* (emphasis added).

C. Local Custom and Practice

When a plaintiff files a medical malpractice claim, the plaintiff shall certify in a written statement whether expert opinion testimony will be necessary to prove the defendant's standard of care or liability. A.R.S. § 12-2602(A) (2009). If the plaintiff certifies that expert opinion testimony will be necessary, the plaintiff shall serve preliminary expert opinion affidavits with the initial disclosures required by Rule 26.1. *Id.* § 12-2602(B). Those affidavits shall contain the "expert's qualifications to express an opinion on the [defendant's] standard of care or liability for the claim[,]" the "factual basis for each claim[,]" the defendant's "acts, errors or omissions" the expert believes violated the standard of care, and how those acts, errors or omissions "caused or contributed to the damages or other relief" the plaintiff seeks. *Id.* § 12-2602(B)(1)-(4).

If the plaintiff certifies that expert opinion testimony is not necessary and the defendant disputes plaintiff's certification in good faith, the defendant may motion the court requiring the plaintiff to "obtain

and serve a preliminary expert opinion affidavit." *Id.* § 12-2602(D). The motion must identify the claim defendant believes requires expert testimony, the prima facie elements of the claim, and the legal or factual basis of defendant's argument that expert opinion testimony will be necessary to establish the standard of care or liability as to the claim. *Id.* § 12-2602(D)(1)-(4). The plaintiff may respond to the motion. *Id.* § 12-2602(E). The court will then determine whether plaintiff must obtain and serve a preliminary expert opinion affidavit. *Id.* In either scenario, if the plaintiff fails to file and serve a preliminary expert opinion affidavit, the court "shall dismiss the claim against the [defendant] without prejudice[.]" *Id.* § 12-2602(F). A similar process is required where the defendant designates nonparties at fault. *See* A.R.S. § 12-2603(A)-(F) (2009).