

ARIZONA SUPREME COURT ADDRESSES CLAIMS AGAINST MEDICAL INSTITUTIONS

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Windhurst v. Corizon

Arizona Supreme Court

October 11th, 2023

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The Arizona Supreme Court today held that A.R.S. § 12-2604, the statute requiring plaintiffs to submit preliminary expert affidavits in medical malpractice cases, does not apply to independent claims against a medical institution. The statute does apply to claims for vicarious liability against a medical institution, alleging that the institution is responsible for a medical practitioner's conduct. Opinion, ¶ 2.

In this case, plaintiff did not allege that the entity's policies were inadequate, or that the hospital failed to maintain safe facilities and equipment, failed to select and retain competent physicians, or failed to supervise its employees. Instead, plaintiff broadly alleged that "classes of providers failed to exercise appropriate care." The trial court granted the institution partial summary judgment because plaintiff had not specifically identified the individual health-care-provider employees and agents who were allegedly negligent, or provided expert testimony as to how each of those employees and agents fell below the applicable standard of care or caused injury.

The Supreme Court reversed, holding that plaintiff had brought an independent institutional claim; and that "when it is unclear which provider breached the standard of care, an expert on institutional standards of care may address an alleged breach by establishing that a class of providers failed to exercise appropriate care." Opinion, ¶ 23.

Plaintiff's institutional expert in this case had concluded generally that "actions and inactions by Clinicians" breached the "applicable community standards of care." Opinion, ¶ 37. [Plaintiff's expert defined "clinicians" as "physicians, physician assistants, and nurse practitioners."] Using the passive voice to avoid identifying particular practitioners, he also opined to things such as, "it was an error to not aggressively evaluate Mr. Windhurst for sources of infection"; "the initial assessment fell below the community standard"; "care for his catheter was mismanaged, no urology consult was sought, medication plan was not followed-up; and clinicians failed to appreciate the severity of his illness." The Court's opinion did not mention these opinions; but instead noted other allegations that "provided the requisite specificity to establish that Corizon had fallen below its standard of care by failing to remove obstacles to the clinicians' ability to perform their work." Also, said the Court, "evidence that an entire class of providers failed to exercise appropriate care suggests an institutional failure." *Id.*, ¶ 23. As examples of such institutional opinions, the Court noted the expert's conclusion that the facility did not "provide or arrange for the provision of physician services 24 hours a day, in case of an emergency," *Id.*, ¶ 28; that it improperly maintained medical records, which the expert described as a "structural flaw," *Id.* ¶ 31; and that the clinicians appeared to "have been working in an environment that systematically limited their individual ability to provide a level of care that Mr. Windhurst required." *Id.*, ¶ 32.

The Court declined to rule on the second question presented—whether a registered nurse is qualified to opine on the cause of death under Evidence Rule 702. Because the trial court had not ruled on the issue, the Court remanded the issue back to the superior court to be determined there in the first instance.

In light of the *Windhurst* decision, defense counsel will need to watch for plaintiffs who try to convert an individual medical malpractice claim into an independent claim against an entity (and thereby avoid the requirements of A.R.S. §§ 12-2603 and -2604) by simply using broad terms, like "classes of clinicians," and using the passive voice to avoid identifying any particular health care professional who was allegedly negligent. Entity claims truly need to implicate alleged systemic violations, and not simply alleged individual practitioner breaches

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[Eileen GilBride](#) focuses her practice on representing clients in federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. Eileen has handled over 500 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions. Substantive areas of her appeals include constitutional, contracts, torts, insurance coverage and defense, employment, municipal and school defense, civil rights, prisoner cases, professional malpractice, Indian law, legislative, administrative, personal injury, wrongful death, divorce, child custody and support, property rights and trusts.

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