

## MEDICAL MALPRACTICE CASES: THE § 12-2603(F) OPPORTUNITY TO CURE A DEFICIENT PRELIMINARY AFFIDAVIT DOES NOT APPLY TO SUMMARY JUDGMENT MOTIONS

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*Rasor v. Northwest Hospital*

Arizona Supreme Court, October 18, 2017

The Arizona Supreme Court today clarified that the opportunity to cure a defective preliminary affidavit set forth in A.R.S. § 12-2603(F) does not require giving a plaintiff the chance to substitute his deficient expert at the summary judgment stage. In *Rasor*, the plaintiff provided a preliminary expert affidavit from a wound care nurse to give standard of care testimony against an ICU nurse. After the expert disclosure deadline, defendant deposed the nurse. Plaintiff filed a pre-emptive motion to qualify the nurse as an expert, or alternatively to substitute the nurse if the court thought she was not qualified. Defendant moved for summary judgment, arguing that the nurse was not qualified. The trial court granted summary judgment for defendant.

On appeal, the court of appeals found the nurse not qualified, but ruled, citing *Preston v. Amadei*, that the trial court should have given plaintiff an opportunity to cure the deficiency. The Supreme Court reversed, holding that the § 12-2603(F) "opportunity to cure" does not automatically entitle a plaintiff the chance to substitute a new expert at the summary judgment stage; that remedy is limited to challenges to preliminary affidavits. The Court disapproved *Preston v. Amadei* and *Sanchez v. Old Pueblo Anesthesia* to the extent they suggest otherwise. Allowing the § 12-2603(F) automatic substitution-of-expert provision to carry beyond the preliminary and discovery phases, said the Court, would protract the litigation and defeat the overall purposes of § 12-2603.

Nor is a defendant required to first challenge a preliminary affidavit before filing a summary judgment motion. If a defendant moves for summary judgment based on a deficiency in the expert's qualifications, the plaintiff must seek Rule 56(d) relief, explaining what specific evidence he needs, why he could not have obtained it earlier, and how he intends to get it. The court can consider the plaintiff's good faith (or lack thereof) in proposing the initial expert, and why the defendant waited to challenge the expert's qualifications. The court can then either deny the relief, or defer consideration of the summary judgment motion and allow plaintiff more time to obtain the evidence, or enter some other order. This process, said the Court, provides fairness to the plaintiff while serving the statutory purpose of ensuring efficient litigation and potentially meritorious claims.

The Court also held that the wound care nurse was not qualified to testify against the ICU nurse, because she had not spent the majority of the preceding year working as an ICU nurse.

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