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ARIZONA

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JUNE 2012

The background of the cover features a blue-tinted image of the Arizona state flag waving on a flagpole. The flag has a purple field with a gold star and rays, and a yellow and red striped field. Faint, large-scale legal symbols like a scale of justice, a gavel, and a book are visible in the background.

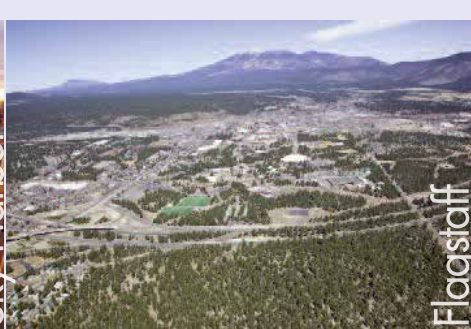
Top 10 Civil Verdicts



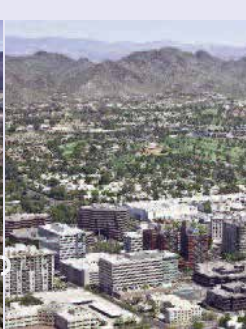
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Sky Harbor



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BY KELLY WILKINS MACHENRY

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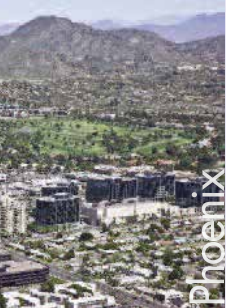
The best trial lawyers know how to tell their clients' stories in a meaningful, enthralling way. It's interesting to read about the strategies behind a big win, but it's at times more intriguing to read the real-life stories that make up cases. Jurors reach their verdicts through their own internal stories (*see* excellent Q&A with jury consultant Dr. Dru Sherrod on page 28). All of the verdicts you're about to read about¹ are stories from a vital part of someone's career, livelihood, health—or even life.

The “Top 10” Arizona verdicts were markedly lower this past year than in recent years. That reversed a recent upward trend. The top verdicts in 2011 were lower than they have been since 2004. There were only two verdicts of more than \$10 million. There were 15 verdicts over \$1 million.

A Tempe, Arizona manufacturer of computer-chip inspection systems sued for patent infringement and claimed the top verdict of \$15.475 million.² Also among the highest Arizona verdicts were actions by doctors who sued a patient for complaints she made about them on a website, an injury case brought by a man who fell off a roof on a volunteer construction site, and investors who sued property developers with whom they invested.

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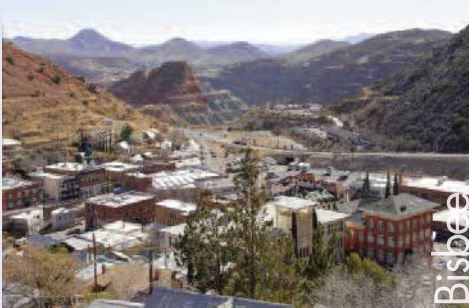




Phoenix



Sedona



Bisbee



Tucson

ARIZONA'S WILVERDICTS 2011

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One day in very early 2011 inflicted a terrible loss on Arizona's legal community. On January 8, 2011, a deranged man shot 18 people and killed six of them in a Tucson-area shopping center where United States Representative Gabrielle Giffords hosted a neighborhood event. Giffords was shot in the head and survived. The Chief Judge for the United States District for the District of Arizona, John Roll, was assassinated.

Judge Roll presided over many civil verdicts in his 20 years on the federal bench. One was the high-profile case of *Vicente v. Barnett* in 2009. The lawsuit brought by 16 undocumented immigrants from Mexico against Arizona rancher Roger Barnett

charged that the immigrants were assaulted, threatened and held at gunpoint by Barnett and members of his family. After Judge Roll's ruling allowed the suit to proceed, he became the subject of hundreds of complaining phone calls and death threats. He declined to press charges against those who made threats after they were identified, and he conducted the trial in February 2009. We honor Judge Roll's central part in justice in Arizona verdicts.

Nationally, the largest award in 2011 was for \$150.37 billion in a wrongful death case, the biggest verdict in U.S. history.³ That was in a Texas case to the parents of a child who was tied to a tree, doused with gasoline and set on fire. Large individual recoveries

THE TOP 10 LARGEST ARI

1 **\$15,475,482**
Integrated Technology Corp. and Nevada Integrated Technology Corp. v. Rudolph Technologies, Inc.,⁸ United States District Court for the District of Arizona, 06-02182

This was a patent infringement case, and those kinds of cases have generated some of the biggest verdicts nationwide the past few years. Both companies involved in this suit make probe card inspection systems, which are used to test integrated circuits ("chips") while they are being manufactured. Integrated Technology claimed that it held a patent on one particular system and that Rudolph Technologies made and sold a system that was the equivalent of the one it had patented. Integrated Technology claimed that as a result, it lost profits during the years 2001 through 2011. Rudolph Technologies defended that Integrated Technology had narrowed the scope of its patent while obtaining it, that the companies' products had substantial differences and thus were not equivalent, and that the jury did not have a sufficient basis to find lost profits. The jury agreed that Rudolph Technologies' products did not literally infringe the patent. The jury found that the infringing device was the equivalent of the claimed invention. The jury awarded Integrated Technology \$15,475,482 in lost-profit damages. This was the fourth-to-last Arizona verdict given out in 2011, handed down on December 20.

2 **\$12,000,000**
Desert Palm Surgical Group PLC, Albert Carlotti and Michelle Cabret-Carlotti v. Sherry Petta, Maricopa County Superior Court, CV2008-010464

Here's a cautionary tale for this age of social media. Sherry Petta was a patient of Desert Palm Surgical Group and Dr. Albert Carlotti and Michelle Cabret-Carlotti. In 2007, Petta had a nose job, skin resurfacing and other cosmetic treatments. She had problems with healing and developed a skin infection, and she started a website devoted to complaining about the treatment she received. Petta also claimed the surgeons intentionally shortened and curved her nose upward against her wishes. After a judge ordered Petta to take down the website, she did so, but then she filed a complaint with the Arizona Medical Board and with other state officials, posted comments on doctor review websites and other blogs, and spoke out at public meetings. In the various forums, she accused the surgeons of falsifying or altering medical records, evidence and witness tampering, perjury, abusing narcotics, and assault and battery. The Carlottis asserted that Petta's non-healing was because she was receiving treatments from other doctors and using unauthorized products such as liquid nitrogen. The Carlottis sued for defamation, portraying them in a false light, and invasion of privacy. They claimed financial loss-

es due to a steep drop in the number of their patients, as well as humiliation and emotional distress. Petta defended that she was expressing her opinions under the First Amendment, that the information was true and/or her opinion, and that she was defending her own reputation. The jury awarded \$11 million in compensatory damages plus \$1 million in punitive damages, the largest punitive award of the year in Arizona.

3 **\$5,945,000**
Ronald Day and Heather Day v. Amor Ministries and Central Christian Church,⁹ Maricopa County Superior Court, CV2008-028673

This was a personal injury case that came out of a volunteer construction site accident. In November 2006, Ronald Day was part of a volunteer group from his church, Central Christian Church. They were helping to build a church roof in Rocky Point, Mexico. Amor Ministries constructs houses and churches in Mexico and provides such volunteer groups with designs, safety guidelines and training. Day stepped on a rafter board that could not support his weight, and it broke. He fell to the concrete floor below, landing on his head and back. He fractured multiple spinal vertebrae, requiring spinal fusion surgery, and had lasting cognitive and psychiatric impairments including loss of taste, smell

between \$482 million and \$89 million were also handed down in Maryland, Virginia, Nevada, Michigan, Illinois and West Virginia.⁴

Intellectual property verdicts nearly tripled among the top 100 cases compared to 2010, due in part to a \$2.3 billion verdict.⁵ Other areas that had substantial increases in large verdicts on the national level were medical malpractice, toxic torts and fraud cases. Notable decreases in number and scale were seen in product liability and motor vehicle verdicts.

As it does every year, this article focuses on what the Arizona juries did in the following cases. Please see the **endnotes** for any

notable post-verdict activity or appeals, as occurred in many of the cases as of the time we went to press.⁶ The case numbers are also listed with the case name, and online dockets are available if you want to look at the post-trial lawyering in more depth or see who the lawyers were.⁷

This article does not analyze or include cases that settled before or during trial, mistrials, stipulated judgments, judgments as a matter of law, or criminal cases. The verdicts as summarized do not include costs, fees or reductions that may have been established later. The focus is on how the Arizona juries decided these cases, and what they awarded.

ARIZONA VERDICTS IN 2011

and hearing. The Days lost the business they had been running since 1993 due to his inability to work. Day argued that he did not receive any training in roof construction or safety, and that Amor Ministries and Central Christian Church knew or should have known the boards would not support the weight of an adult. Amor and Central Christian defended that the condition was open and obvious and that Day had framing construction experience. The jury awarded \$4,695,000 to Ronald Day and \$1,250,000 to his wife Heather Day. The jury found Central Christian Church 80 percent at fault, Amor Ministries 15 percent at fault, and Day 5 percent at fault.

4 **\$4,415,000**
Richard Goodman et al. v. Barness Papas Investments LLC et al.,¹⁰ Maricopa County Superior Court, CV2009-018049

This case was brought by investors in shopping center deals who alleged fraud, misconduct, mismanagement and improper self-dealing. The investors, including plaintiffs Richard and Cecelia Goodman, claimed that Ron Barness and Alex Papas told them their money would go toward buying Greenfield Plaza Shopping Center in Mesa for \$8 million from an owner who had mismanaged the property. In fact, a few months earlier, Barness and Papas had

bought the shopping center themselves for \$4 million and were effectively selling it to themselves for twice that. They did not disclose their interest. They charged the investors monthly payments as though the loan was for \$3.2 million more than they actually took, and they pocketed the difference. The investors alleged Barness and Papas similarly overcharged for a second shopping center in New Mexico. Barness and Papas and their companies defended that the investors concocted their claims after they lost money on their investment. The jury found for the investors on all counts of securities fraud, fraud and fraudulent nondisclosure, consumer fraud, breach of fiduciary duty, and conspiracy. The jury awarded a total of \$4,415,000 in compensatory damages to the investor group and declined to award punitive damages.

5 **\$4,203,546**
Phoenix Van Buren Partners LLC v. Smith Moulding Wholesale Inc., Maricopa County Superior Court, CV2009-037646

This was a breach of lease case against a company that appears to have been a casualty of the recession. Phoenix Van Buren Partners leased an industrial property to Smith Moulding Wholesale on a 10-year lease that started in 2006. Smith Moulding was a lumber and millwork company that

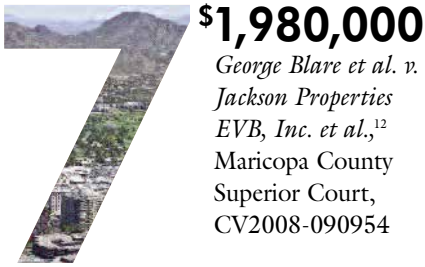
allegedly suffered a catastrophic loss of sales and income as a result of the recession. It ended its operations and left the property in August 2009. Phoenix Van Buren Partners claimed breach of contract for the default and sued to recover the unpaid rent.

Smith Moulding defended that the roof leaked and that it was never completely fixed, and that thus it was constructively evicted. Smith Moulding also argued that Phoenix Van Buren Partners failed to mitigate its damages. The jury awarded \$4,203,546 to Phoenix Van Buren Partners.

6 **\$3,250,000**
Frances Spitzer et al. v. Logix Transportation, Inc. and Larry Hoepner,¹¹ Pima County Superior Court, C2009-6310

On June 5, 2008, Larry Hoepner was driving a tractor-trailer in Oklahoma for his employer, Logix Transportation. As he approached a construction zone, he hit another stopped vehicle that in turn hit a stopped SUV that held the Spitzer family. Frances Spitzer was driving and passengers were her husband Darrell Spitzer, brother Kenneth Spitzer, sister-in-law Elaine Spitzer and sister-in-law Doris Spitzer Estes. The Spitzers alleged the truck was traveling 72 mph at impact, though Hoepner and his company argued it was

only 55 mph. The force of the collision pushed the Spitzer SUV off the road and down an embankment. All five occupants sustained back injuries, three of which required surgeries, and they also had other leg, chest and shoulder injuries. Logix Transportation and Hoepner admitted fault. The jury awarded \$1,500,000 to Frances Spitzer, \$1,000,000 to Darrell Spitzer, \$400,000 to Kenneth Spitzer, \$200,000 to Doris Spitzer Estes, and \$150,000 to Elaine Spitzer.



\$1,980,000

George Blare et al. v. Jackson Properties EVB, Inc. et al.,¹² Maricopa County Superior Court, CV2008-090954

This was a second “Top 10” verdict brought by a group of investors against a property developer. Investors in the Estrella Vista subdivision in Buckeye, Arizona bought promissory notes and deeds of trust on residential lots in subdivisions owned by Jackson Properties. The investors claimed that Jackson Properties failed to make quarterly payments due on the properties, causing their default. They also claimed the Jacksons fraudulently induced the purchase of the securities. The property development project came to a standstill in 2008. The investors received unopposed judgments on their breach of contract claims against Jackson Properties, and the common law fraud claims were dismissed. The securities fraud claim remained and went to the jury. The jury awarded 11 sets of investors amounts ranging from \$435,000 to \$30,000, and the total of the awards was \$1,980,000.



\$1,845,000

InMotion Simulation LLC and Mark Barry et al. v. Research Applications, Inc., Richard Childress and Greg Clark et al.,¹³ Maricopa County Superior Court, CV2009-007404

InMotion Simulation and its owner Mark Barry design and build motion simulators that create the effect of being in a moving

vehicle. Research Applications had a prototype motion simulator for use with computer games. Robert Childress was the President of Research Applications and Greg Clark was its Vice President. In 2007, the two companies discussed forming a joint venture and worked together on a project known as the BlueTiger simulator. The BlueTiger is a one-person seated simulator for racing and flying games, and it moves and replicates dynamic forces. A few months after the companies’ discussion, Research Applications began manufacturing and selling BlueTiger simulators. InMotion alleged that Research Applications failed to pay it for its efforts on the project and breached their contract. Barry also alleged that Childress and Clark agreed to a partnership in which Barry had a 50 percent ownership interest in the BlueTiger venture, and based upon that deal Barry and his company provided their expertise and assistance. Research Applications defended that other people did much of the work and that Barry exaggerated his claims about what he did for the project. Research Applications claimed it did not need Barry’s assistance to complete the simulator and that it had hired him only as a consultant. The jury found in favor of InMotion and Barry on claims of breach of contract, breach of fiduciary duty, misappropriation of trade secrets, and unjust enrichment, for a total award of \$1,845,000.



\$1,808,904

City of Tempe v. Commonwealth Capital Corp.,¹⁴ United States District Court for the District of Arizona, 09-00274

There have been significant awards on counterclaims in recent years, and this was another example of a case where the defendant prevailed on the main claim made against it, plus received a major award on its counterclaim. Tempe, Arizona was on the leading edge of U.S. cities to set up a citywide Wi-Fi network. Tempe contracted with non-party MobilePro for the project, and when the system went live in February 2006 it was the largest municipal Wi-Fi network in the country. A licensing agree-

ment allowed MobilePro to install Wi-Fi antennas on Tempe’s streetlight poles, in exchange for MobilePro providing Tempe free Wi-Fi instead of rent for use of the poles. MobilePro later sold the system to Gobility Inc., which abandoned the network in December 2007. Part of the agreement was that if Gobility abandoned the system, Tempe would then own all of the Wi-Fi antennas on the street poles. Thus, Tempe then tried to assert its ownership. Commonwealth Capital Corporation stepped in and informed Tempe that it had bought about two-thirds of the antennas and was trying to sell the system to a new provider. Tempe said that Commonwealth Capital needed to provide free Wi-Fi or pay rent. Commonwealth Capital insisted it did not owe rent and wanted nearly \$1 million for its part of the system. Commonwealth Capital sued Tempe for the return of the antennas (a claim it later dismissed), and Tempe counterclaimed for the rent due. Commonwealth Capital defended that it had recovered only about half of the money it paid for the antennas, and that the fair market rental rate was only about \$5,000. The case was tried to a judge and an advisory jury. The jury awarded Tempe rent of \$450 for each of the 667 antennas (plus \$2 per antenna for electricity) for six months, totaling \$1,808,904. Unusually, the jury wrote on its verdict slip a special request to the judge asking that Tempe also be awarded ownership of the Wi-Fi equipment, and the judge accepted the jury’s advisory verdict in all respects.



\$1,777,918

Valley Aviation Services, LLP v. City of Glendale,¹⁵ Maricopa County Superior Court, CV2009-013582

Valley Aviation Services was the operator of an airport hangar at the Glendale municipal airport. Valley Aviation alleged that Glendale unfairly ordered it to lower its

rents and enforced stricter airport rules than it did on other hangar owners. It accused Glendale of trying to force it out of business.

Glendale defended that Valley Aviation alienated its own tenants by evicting them and for hangar renovations and raising rents, and that it conducted the same activities in its hangars as others. The jury awarded \$1,777,918.

Plaintiffs Won 61 Percent of the Trials

Statewide, plaintiffs prevailed in 61 percent of the trials, and defendants prevailed in 39 percent. In the past eight years, this statistical chance of prevailing in any given case has remained in a close statistical range. Plaintiffs' statistical percentage of prevailing has ranged from 56 percent to 66 percent in the past five years.

In every one of the last eight years, federal court has been distinctly more statistically favorable to defendants than state court on verdicts. In 2011, it was even more so. In the United States District Court for the District of Arizona in 2011, civil defendants prevailed in 82 percent of the reported verdicts. There were nine defense verdicts and only two plaintiffs' verdicts. In 2011, that was statistically a dramatic 21 percentage points better for defendants when we compare it to verdicts given only in state court.

Venue Comparison

Now that we've looked at the statistical odds of a win, how do jury awards vary by county? Once a jury decides to award money, how much did it give in 2011 on average? Averages and medians of plaintiffs' verdicts in each venue are as follows. To calculate an average for a particular county, we add up all the plaintiffs' verdict totals where

damages were awarded, then divide by how many plaintiffs' verdicts there were in that county. To calculate the median in a venue, we place the plaintiffs' verdicts in value order and find the middle number, where exactly half of those verdicts are higher and half are lower.

an to report here. Of the verdicts in federal court, plaintiffs prevailed in 18 percent, whereas defendants prevailed in 82 percent.

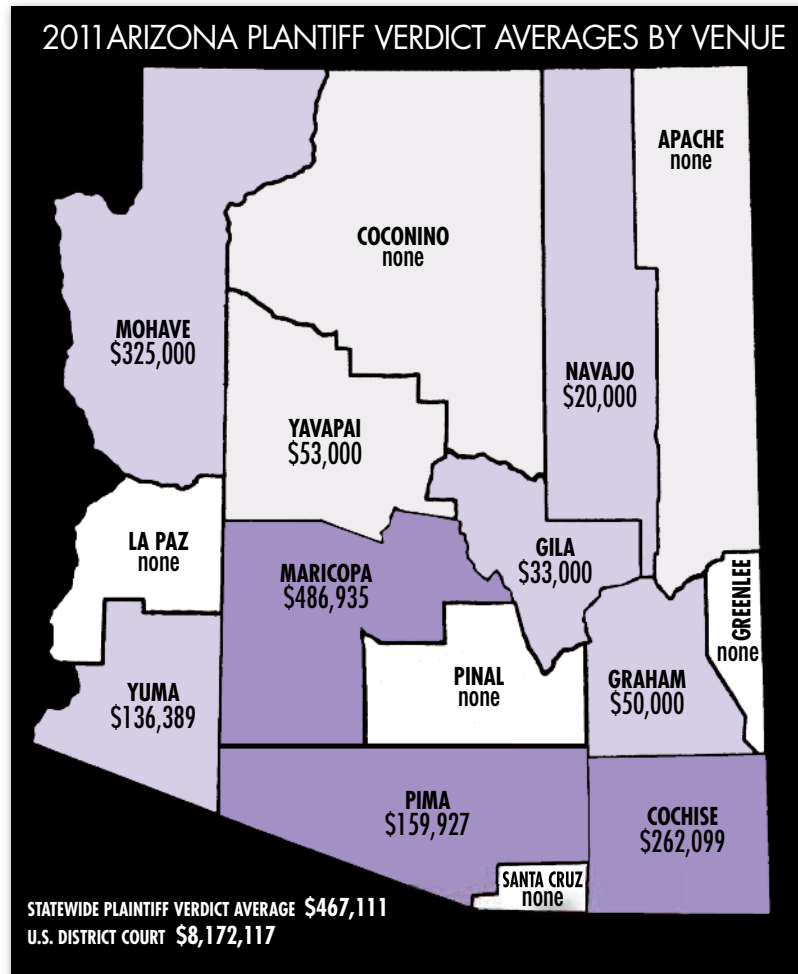
Sixty percent of all Arizona verdicts came from Maricopa County, which is home to Phoenix and is the fourth-largest trial court in the nation.¹⁷ The average of all its plaintiffs' verdicts was \$486,935. That is less than 20 percent of the average of its plaintiffs' verdicts in 2010. Maricopa County's median plaintiff's verdict was \$51,450. Plaintiffs won 65 percent of the verdicts in Maricopa County, whereas defendants won 35 percent of the verdicts there.

Mohave County had one plaintiff's verdict that was higher than usual for there, at \$325,000. It also had one defense verdict, so it was an even 50/50 split on the win statistics. Cochise County reported two plaintiffs' verdicts, with an average and median of \$262,099. Plaintiffs prevailed in 66 percent of the verdicts there, and defendants prevailed in 33 percent.

Arizona's second-largest city is Tucson, and Pima County that encompasses it produced the second-highest volume of verdicts. Pima County's verdict averages have been in flux over the past few years. The average of its plaintiffs' verdicts in 2011 was among the lowest since we've been tracking them, at \$159,927. Its plaintiff verdict median has generally remained around \$50,000, but this year it was a little more than half that, at \$29,268. Plaintiffs won 69 percent of the verdicts; defendants won 31 percent.

Yuma County in the southwestern part of the state had three plaintiffs' verdicts that averaged \$136,389, with a median of \$20,000. It had an equal number of defense verdicts, so this county also was 50/50 on the win statistics.

Only one plaintiff's verdict was reported out of several counties. Those included



The statewide average plaintiff's verdict¹⁶ in 2011 was \$467,111. That was about 25 percent of 2010's statewide average. It was also the lowest plaintiff's average in the eight years we've been tracking verdicts. The statewide median in 2011 was \$37,500, also the lowest median in eight years.

The United States District Court for the District of Arizona court reported only two civil verdicts in 2011, many fewer than usual. It included the Number-1 verdict (see *Integrated Technology v. Rudolph Technologies*, above), and the other was in six figures. The average between those two plaintiffs' verdicts was \$8,172,117, though this is obviously based on limited data for this particular year. There is no true medi-

Yavapai County, at \$53,000. Yavapai County also had three defense verdicts, so plaintiffs won 25 percent here and defendants won 75 percent. Graham County had only one plaintiff's verdict of \$50,000, and one defense verdict, for a 50/50 split. Gila County had one plaintiff's verdict of \$33,000 and two defense verdicts; thus, plaintiffs won 33 percent of the verdicts in Gila County and defendants won 66 percent. Navajo County was the last county with one plaintiff's verdict, that one of \$20,000, and it had one defense verdict as well for another 50/50 split.

No plaintiffs' verdicts were reported out of Apache or Coconino Counties, and each of those had one defense verdict; defendants thus won 100 percent there. It was the first time in the past eight years that no plaintiff's verdict was reported out of Coconino County, which covers the Flagstaff area.

No verdicts for either side were reported out of Pinal, Santa Cruz, La Paz or Greenlee Counties. That was somewhat unusual for Pinal, which in some years has reported some of the highest verdicts. Greenlee County still has not reported a single civil verdict in the past eight years.

Steeper Decline in Number of Verdicts

The number of Arizona cases that are tried all the way to verdict has been on a generally declining trend since 2008.

We first commented on this development in the article about 2008's verdicts. From 2004 through 2007, the reported number of Arizona civil cases taken to verdict¹⁸ stayed within a rather close range (305 to 368). In 2008, it dropped by 10 percent to 20 percent. The next year it went back up some, but in 2010 it declined again, to 288. In 2011, the number of verdicts was way down, to 254. That's about 20 percent to 30 percent fewer verdicts than just a few short years ago.

What's driving this? It sure doesn't seem to be fewer case filings. In Maricopa County

alone, since fiscal year 2007, the number of new civil cases filed has actually increased by 35 percent.¹⁹ The number of verdicts didn't vary during the course of 2011, because both plaintiffs' verdicts and defense verdicts were split exactly down the middle—50 percent of each occurred during the first six months of 2011. Both business and injury trials seem equally reduced in quantity, as do cases at lower and higher levels of claimed damages. Perhaps it's a lingering effect of the recession. Perhaps it's due to more common or more successful alternative dispute resolution. Whatever the reason, this is now an observable multi-year trend.

Punitive Awards

Punitive damages were awarded in only four cases in 2011. That marked the fewest times that punitive awards were given in the past eight years, and was quite a switch from two years ago when Arizona had its biggest number of punitive awards.

Punitive awards tend to be given in Arizona generally only when there are aggravating or extreme facts. The largest in 2011 was in the Number-2 verdict involving alleged defamation. (*See Desert Surgical Group v. Petta, supra.*) The other cases from 2011 included one alleging exploitation of an elderly woman, in which neighbors

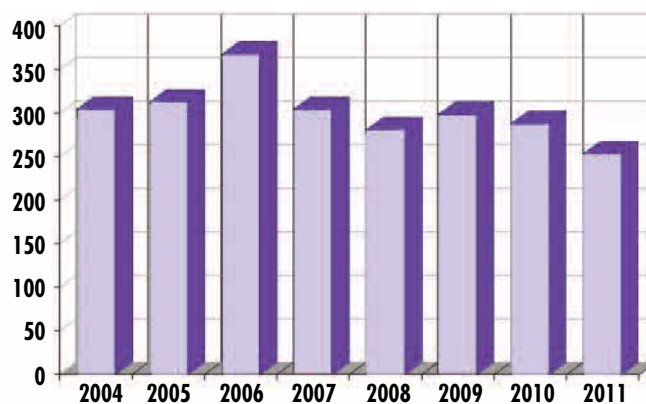
mer employer. A passenger in a car that was rear-ended by a street sweeper as it was speeding and changing lanes was awarded \$90,000 in punitive damages.

Business and Personal Injury Verdicts

The average business plaintiff's verdict was \$953,577 (less than 25 percent of the previous year), with a median of \$143,950. Such cases included breach of contract, breach of fiduciary duty, fraud, insurance bad faith, professional malpractice, and property damage. Of all of the business cases tried in 2011, plaintiffs won 69 percent of them (more than the overall statistical percentage) and defendants won 31 percent.

The average plaintiff's personal injury verdict was \$188,535 (less than half of the previous year), and its median was \$20,000. The cases in this category had one or more person who was physically injured. They included motor vehicle accident injury, product liability, medical malpractice, excessive force, and wrongful death cases. These kinds of cases made up about 40 percent of all the cases tried to verdict. Of all of the personal injury cases tried in 2011, plaintiffs won 58 percent of them and defendants won 42 percent, close to the overall percentage.

DECLINE IN NUMBER OF VERDICTS



Significant Defense Verdicts

In the interest of equal time and coverage, we highlight some noteworthy defense verdicts below. These are from a variety of different types of cases in which the claimed damages at trial were high. Here are a few of the year's significant Arizona defense verdicts:

A *Melody Bullock v. Teufel Management, LLC*,²⁰ Maricopa County

Superior Court, CV2008-092955
Melody Bullock was a cashier who was driving home when she was hit broadside by non-party Eliodoro Lopez Gamez. Ninety minutes after the crash, Gamez's blood alcohol concentration was 0.242, and he was arrested for extreme DUI.

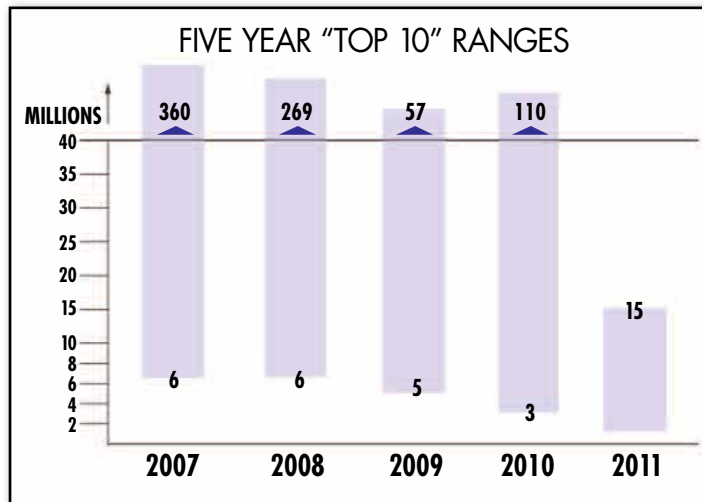
depleted her bank accounts and got title to her home, which they then sold for profit; \$100,000 in punitive damages was awarded. In a job harassment and retaliation case, a woman who alleged she was subjected to pornographic drawings was awarded punitive damages of \$868,750 against her for-

Bullock sustained a fractured left wrist and developed infections that resulted in the amputation of three fingers. She alleged that Gamez was over-served at the restaurant and sports bar Native New Yorker, which was owned by Teufel Management. Bullock asked the jury to award \$40 million. Teufel Management defended that Gamez did not drink any alcohol at its restaurant.

B *Raymond Greenwood et al. v. Mepamsa and Camping World, Inc.*,²¹ Apache County Superior Court, CV2008-087

On December 10, 2007, the Greenwood family was severely burned when a flash fire erupted as Raymond Greenwood attempted to start a propane-fueled catalytic heater. The heater was manufactured by Mepamsa and sold by Camping World, Inc. The Greenwoods claimed that it did not have an inlet filter in its propane supply line upstream from a safety control valve. They also claimed that soil or sediment got into the heater and caused the safety valve to stay open, resulting in a propane leak. Raymond and Tasha Greenwood had third-degree burns over much of their body, were hospitalized for weeks and had multiple surgeries. The daughters had second-degree burns to their faces. The Greenwoods told the jury that their damages were probably more than \$15 million for the family. Mepamsa and Camping World denied that the heater was defective and showed that the fire was caused by the improper installation of a pressure regulator by non-party Amerigas three days before the fire. The pressure regulator became contaminated with moisture that froze and caused it to malfunction. The heater had worked properly for the 14 months before the fire.

C *United States of America ex rel. Masoud Samandi v. Materials and Electrochemical Research Corp.*,²² United States District Court for the District of Arizona, 05-00124
The United States of America sued Materials and Electrochemical Research Corporation (“MER”) and its principals on



fraud, False Claims and other theories. MER designed and made high-technology products for federal agencies. The government claimed that MER falsified documents to get government contracts through small-business research grants and that MER did not have required backup private funding in place if its products were commercialized. The government also attacked the MER professionals, contending that some of them did not have the qualifications stated in their resumes. The government made a pretrial demand of \$15 million. MER denied any wrongdoing, defended that all documents and resumes were true and that MER had its backup funding in place. MER also defended that the government got a good product from MER, never complained about MER’s product, and sustained no loss because the government got the product for which it contracted and paid.

D *Judith Neuharth v. Aqua Speed, Inc. dba International Hot Boat Association*,²³ Maricopa County Superior Court, CV2006-012065

Michael Neuharth was driving a drag boat in a race at Firebird Lake. He had just crossed the finish line at more than 170 miles an hour when one of the boat’s stabilizing platforms lifted and the boat nosedived and rolled over about five times. He died immediately of severe head injuries. The Neuharth family claimed that the race sponsor, International Hotboat Association, started the race in spite of high winds and rough water. They asked the jury to award \$10 million for Neuharth’s death. International Hotboat Association defend-

ed that Neuharth was able to determine whether the course was safe for his run, and that he had signed release forms and assumed the risk of the race.

E *Leesa Irwin v. Cooper Tire & Rubber Co. and Discount Tire Co., Inc.*, Pima County Superior Court, C2008-8135

In this product liability case, Leesa Irwin was a passenger in a 2001 Ford Explorer Sport that Salvatore Celi was driving on Interstate 8. The SUV had a tire on its left rear that was manufactured by Cooper Tire and sold by Discount Tire. Irwin alleged that the tire failed and caused the SUV to roll over multiple times. Irwin claimed that the tire had two design defects and multiple manufacturing defects. Irwin sustained a closed-head injury, brain damage, a degloving injury to her leg, and a nerve injury that resulted in loss of use of her right arm and hand. She asked the jury to award \$10 million. Cooper Tire and Discount Tire demonstrated that the tire was not defective and that it failed because of earlier road hazard damage. They also defended that Celi was driving 80 to 85 mph, that he steered excessively after the tire failure, and he thus failed to control the vehicle.

F *Janie Torrio v. Joseph Abdo and Daniel Randall*,²⁴ Gila County Superior Court, CV20070149

Francie Luz, age 67, underwent surgery to remove material from the inside of her carotid artery, developed hypertension and then died of a stroke. Her family claimed she developed hyperperfusion syndrome of the brain (hypertension and doubling of blood flow to the brain), causing her death by stroke. The family claimed the surgeon Joseph Abdo and the nurse anesthetist Daniel Randall mismanaged her blood pressure and that the stroke occurred post-operatively. They asked the jury to award up to \$6 million to her six children. Abdo and Randall defended that they managed her blood pressure properly and met the standard of care, that this was a known risk of the surgery, and that the stroke occurred

during the surgery after an instrument being held by another nurse slipped and severed the carotid artery.

G *Van Houston Holdings and Van Talley v. City of Safford and Ronald Green*, Graham County Superior Court, CV2008-131²⁵

This was a suit for defamation. Van Talley, the former mayor of Safford, Arizona, was a consultant for a property developer that was proposing to build Safford Commerce Park. Talley contended that interference by the current mayor, Ron Green, caused the project's failure. Talley claimed that Green had a personal vendetta against him and defamed Talley through comments and a political cartoon. Talley asked for \$2.6 million, the amount he claimed in lost profits. Green defended that he did not do or say anything that kept the Safford Commerce Park project from being built and that he did not defame Talley. The city of Safford defended that the project was not viable as proposed, that tenants had not committed within the developer's time frame, and there was no intentional delay toward the project.

H *Bertha Remato v. City of Phoenix and Robert Saucedo*, United States District Court, 09-2027

This was a civil rights and wrongful death shooting case. On December 19, 2008, 17-year-old Gonzalo Cordova and three friends drove to a convenience store for a "beer run," i.e., to shoplift beer. They were stopped by Phoenix police in the parking lot, and Cordova attempted to drive away. Officer Robert Saucedo shot at the car twice, and the bullets went through a side window, ricocheted, and hit Cordova in the arm and the back. Cordova's mother Bertha Remato claimed excessive force and assault, arguing that Saucedo was not in immediate danger when he fired and that the second shot was unreasonable. Phoenix and Saucedo defended that Saucedo was justified in using deadly force because he reasonably believed his life was in danger when Cordova drove his vehicle toward him, and that the amount of force was appropriate.

Trends

This is the eighth year for this article and we've reviewed and reported on about 2,350 verdicts. Here are some more obser-

vations on Arizona verdict trends.

Arizona had peak verdicts in 2007 and 2008, and they have leveled off and declined in the years that have followed. Punitive damages have remained rare throughout and are generally awarded only when there are aggravating facts. The statistical chance of prevailing as a plaintiff in any given case that goes to the jury has ranged from 53 to 66 percent each year, and the eight-year average chance of winning as a plaintiff was 59 percent. The average verdict in commercial cases spiked in 2007 and 2008 up in the \$7 million to \$9 million range, but the medians have stayed in a much closer range of \$75,000 to \$250,000. The median personal injury verdict has been in the \$20,000 to \$30,000 range since 2006.

Some more trivia about Arizona verdicts over the past eight years:

- The largest overall verdict was in 2007, for \$360 million. This was also the largest business verdict.
- The largest personal injury verdict was in 2008 for \$43.112 million, in a product liability case.
- There were 30 verdicts of more than \$10 million in the eight years between 2004 and 2011. Of those, 21 were business verdicts and 9 were personal injury verdicts.
- The largest punitive award was \$155 million, handed down in 2009. That was also the year for the highest quantity of punitive awards. The fewest punitive awards were in 2011.
- The highest percentage of defense verdicts (47 percent) was in 2005.
- Four of 2011's highest 12 verdicts were handed down in December, including the Number-1 and -2 verdicts of 2011.

Where Are They Now?

After the drama of a major verdict such as those above, what happens next? Very often the post-verdict developments are not nearly as exciting, except on noteworthy legal issues to those of us who like doing appeals. Many of the significant verdicts for either side are appealed, some are paid, and most are ultimately settled. This is not a comprehensive history of all the recent verdicts, but here are a few of our past years' notable verdicts that had key developments in 2011:

Jose Rincon Sr. and Adriana Rincon v. City of Tucson and Glenda Rumsey, Court of Appeals of Arizona, No. 2 CA-CV 2010-0150. This was the Number-4 verdict in 2010 and the largest individual judgment awarded against the city of Tucson. It was a road design case involving a drunk driver who struck and killed a teenager on his bike. Post-trial, the trial court ordered the judgment reduced to \$12 million. In 2011, the Arizona Court of Appeals found that a jury instruction on damages and the admission of other-incident evidence was appropriate. The appeals court found reversible error in the admission of testimony by the Rincon parents about whom they believed was "at fault" or "responsible" for their son's death, and remanded the case for a new trial.

Bard Peripheral Vascular, Inc. and David Goldfarb v. W.L. Gore & Associates, Inc., United States Court of Appeals for the Federal Circuit, 2010-1510. This is one of the longest patent cases to continue to be litigated, and it relates to a prosthetic vascular surgical graft first developed in 1974. It was the Number-2 jury verdict in 2007 at \$185 million. Double damages, interest and attorneys' fees were later awarded and a royalty rate was set. After final judgment was entered in Arizona federal district court in 2010 for approximately \$660 million, Gore again appealed. The United States Court of Appeals for the Federal Circuit affirmed the judgment in 2011, opening its opinion with, "This has been a long and arduous journey for the parties in this litigation, but this should be the final curtain of the saga." Gore has petitioned for review to the United States Supreme Court.


Oracle USA, Inc. et al. v. SAP AG et al., United States District Court for the Northern District of California, 07-1658. This was the Number-1 verdict nationally in 2010 for \$1.3 billion for copyright infringement. The California jury awarded what was believed to be the largest amount ever for software piracy. The district court judge later threw out the verdict, ruling that the penalty was "contrary to the weight of the evidence, and was grossly excessive." A retrial is set for June 2012. This was the second year in a row that the largest national verdict was set aside.

Conclusion

This past year I had the chance to ride along with a professional test driver as he demonstrated extreme spins and turns. His suggestion to keep from getting dizzy was simple. He pointed ahead, saying, "Keep looking ahead to where you're heading, to

where you want to go." It really works. It keeps your focus ahead and stops you from getting distracted by the chaos around you. It also stuck in my head as a good mantra for life in general. Keep looking ahead to where you want to go.

Please feel free to contact me any time

for more details about the verdicts or to report significant ones that happen in the future. You're also invited to browse my firm's website (swlaw.com/attorneys/kelly_machenry) where you can find more of my publications and other good things. See you next year. 

endnotes

- Acknowledgments and thanks to:
 - My partners and colleagues at Snell & Wilmer L.L.P., who regularly inspire me. Pam Ritchey, Karen Kowing and Koren Lyons contributed helpful background research.
 - My family, for everything. To River who exemplifies endurance, Sam who teaches the power of observation, and Sky who shows the meaning of perseverance.
 - This article is dedicated to my friend Brian Martinuzzi, who reminds you all to work less and live more.
 - Finally, the readers of this article and ARIZONA ATTORNEY editor Tim Eigo, for your positive comments and the encouragement to keep writing it for eight years, and to Karen Holub at *Arizona Attorney* for the always-terrific artwork and graphics.
- This article analyzes 254 civil verdicts reported from the Superior Courts of Arizona and the United States District Court for the District of Arizona for the 2011 calendar year. Although the great majority were jury verdicts, some were bench trials tried to a judge. The parties named are the ones who were active in the case when it went to verdict.
- Amanda Bronstad, *Sometimes, a Verdict Simply Expresses Outrage*, NAT'L L.J., Mar. 12, 2012, at 11.
- Susan Bocamazo, *Top Ten Jury Verdicts of 2011*, LAWYERSUSA, Jan. 17, 2012.
- Bronstad, *supra* note 3, at 11-12.
- This article makes no comment on the merits of the claims or defenses in these cases, or the parties or specific lawyers involved. Significant post-verdict developments are in these endnotes. Because the focus of this article is on the verdicts, not all of the post-verdict activity is reported here.
- PACER.gov for the federal system; superiorcourt.maricopa.gov for Maricopa County; agave.cosc.pima.gov for Pima County; and apps.supremecourt.az.gov for the other counties.
- Summary judgment was granted to Integrated Technologies before trial with respect to infringement by one of the products at issue, during a time that Rudolph was represented by predecessor counsel. Rudolph Technologies, Inc. has filed a motion for a new trial, which is pending. Post-verdict, the U.S. Patent and Trademark Office reversed itself and granted a reexamination request with respect to the validity of the patent, and Rudolph Technologies moved for a stay of additional proceedings in the trial court.
- Defendants filed motions for a new trial, which were denied. Their appeal is pending.
- Other plaintiffs were Cecilia Goodman, City National Bank, and Wortrich Family Trust. Other defendants were Ron Barness, Alex Papakyriakou, Greenfield Plaza Investors, L.L.C., Taylor Ranch Retail Investors, LLC, ALRO Investors, LLC, Barness Investment Limited Partnership and Retail Brokers, Inc., Daron Barness, and Roxanne Papakyriakou. Defendants filed an appeal that is pending.
- Other plaintiffs were the other passengers Darrell Spitzer, Doris Spitzer Estes, Kenneth Spitzer and Elaine Spitzer. The driver in the first vehicle died, and Hoepner reportedly pleaded no contest to negligent homicide.
- Other plaintiffs were William and Doris Felcyn (awarded \$435,000), Robert and Joanne Kembel (awarded \$405,000), Larry and Mary Ann LaRock (awarded \$390,000), Carol Johnson (awarded \$315,000), Edna Blare (awarded \$195,000 with her husband George Blare), Robert Leonard (awarded \$165,000), Edward Enzmann (awarded \$90,000), Anthony and Jean Scimeca (\$45,000), Carolyn Ennis (awarded \$30,000), Ronald and Lillian Faragher (awarded \$30,000), and David Miller (awarded \$30,000). Other defendants were Randall Jackson and Melodie Jackson. Defendants filed a motion for a new trial, which was denied.
- Another plaintiff was Sarah Barry. Other defendants were Blue Tiger, LLC, Arlene Childress and D.J. Sydney Clark.
- Commonwealth Capital filed a motion for a new trial and other associated relief, which was denied. Commonwealth Capital has filed an appeal that is pending.
- Glendale filed a motion for remittitur and/or a new trial, which was denied.
- Average verdicts and median verdicts are computed from all plaintiffs' verdicts in the particular venue. Defense verdicts and reductions for comparative negligence or non-party fault are deliberately not factored into the analyses of averages and medians for the reasons noted above. If we did include defense verdicts into that analysis, the average of all civil verdicts statewide in 2011 (both plaintiffs' and defense verdicts) was \$288,021. I disagree the latter is a better methodology either for this article or in general. If a lawyer is analyzing a particular venue for purposes of case valuation or risk assessment, the more helpful analysis is the question, What is a jury there going to tend to award once it finds liability? If you include all the zero-dollar defense verdicts, it throws off that analysis completely.
- JUDICIAL BRANCH OF ARIZONA IN MARICOPA COUNTY, ANNUAL REPORT SUPERIOR AND JUSTICE COURTS, at 4 (FY2011).
- This data is from the reported verdicts as noted in endnote 2, from the Superior Courts and federal court. It does not factor in small claims or Justice Court trials, which are not reported in the same way.
- JUDICIAL BRANCH, *supra* note 17, at 8.
- Another plaintiff was her husband David Bullock. Other defendants were Marcus Teufel and Cindy Teufel.
- Other plaintiffs were Tasha Greenwood, Marita Greenwood and Arizona Greenwood. Plaintiffs filed a motion for a new trial that was denied and have filed an appeal that is pending.
- Other defendants were MER's founders James Withers and Raouf Loutfy, and their wives Helga Withers and Elia Loutfy. "Ex rel." is an abbreviation of "ex relatione" meaning "on behalf of," a legal phrase used when the government brings a case upon the request of a private person who has some interest in the matter. Plaintiff's motion for a new trial was denied. Plaintiff filed an appeal to the Ninth Circuit, and defendants filed a cross-appeal regarding certain pretrial rulings. Those appeals were later dismissed.
- Other plaintiffs were his adult daughters Rachel Neuharth and Janice Peterson, and his mother Marlene Neuharth. Another defendant was Charlie Fegan, president of the association.
- Other defendants were Joseph Abdo, M.D., P.C. and Sweet Dreams Anesthesia.
- Another plaintiff was Anne Talley, and another defendant was Tomi Green. Plaintiffs filed a motion for a new trial, which was denied.