



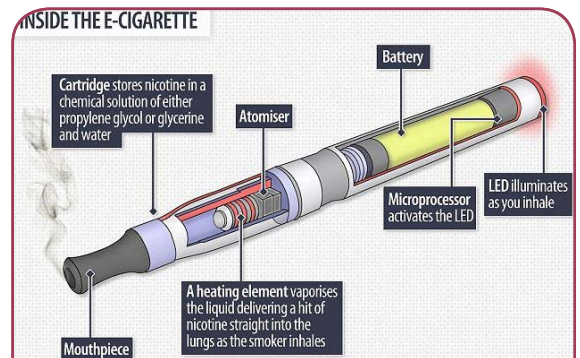
Beware of Exploding Electronic Cigarettes

— Dev Sethi

Electronic cigarettes are everywhere. From kiosks in the mall to convenience stores to stand alone vendors, the E-cigarette business is booming. Upwards of 10% of high school students raise their hands when asked if they have tried E-cigarettes, and it is estimated to be a 2.5 billion dollar business through 2015.

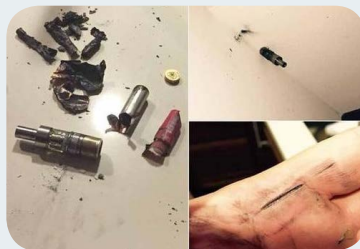
Putting aside the (still largely unknown) health risks of smoking the E-cigarette, we are seeing the very clear damage that comes when the product explodes. The typical E-cigarette has a lithium ion battery and charger with a USB connection. This set up powers the atomizer, which releases the nicotine and creates smoke vapor. These batteries are exploding and causing serious injuries and fires. The images are shocking -- we have seen burned faces and scarred tongues, and the explosion often sends shards of metal flying through the air.

One of the first product liability trials involving an exploding e cigarette recently wrapped up with a \$1.9 million verdict. In that case, a young woman was charging her new VapSigs E-Hookah through the USB port in her car. The battery exploded, and set her dress and the car interior on fire. She suffered second degree burns to her legs, buttocks, and hands. She also suffered puncture



An e-cigarette is a battery-powered device that converts liquid nicotine into a mist, or vapor, that the user inhales. In the picture above the atomizer is used to heat the liquid to its boiling point and that becomes vapor you can inhale.

wounds from the shrapnel. On the eve of trial the E-cigarette maker **admitted that its product was defective and dangerous** and that it did not adequately warn users of the hazard of the exploding battery. The trial went forward on the issue of damages only.



The images of the damage caused by the exploding batteries are shocking. The fires and shrapnel impacts are severe. Frankly, given the maker's admission that the product is defective, dangerous and susceptible to explode, you should think twice about having one around.





OVER TREATMENT CAN BE DANGEROUS TO YOUR HEALTH

— James Campbell

Doctors by their very nature want to help. They want to do *something* to improve their patients' condition. They got into the field of medicine largely because they wanted to make a difference. Due to their years of education, training, and practice, they have great confidence in their skills and have a fervent belief they can better their patient's lives through treatment.

Rarely, doctors are motivated to treat patients for money. A recent Department of Justice case alleges a Florida physician performed numerous excessive procedures to open leg veins and arteries – to the tune of \$18,000,000! Regardless of the motive, the reality is doctors are conditioned to treat patient's conditions with whatever tool they have in their toolbox. Surgeons want to do surgery. Internal medicine doctors want to treat with medicines. Cardiologist want to perform catheritization procedures and put in stents.

A recent study published in JAMA Internal Medicine sheds light on this very issue. The study was called, "**Mortality and Treatment Patterns among Patients Hospitalized with Acute Cardiovascular Conditions during Dates of National Cardiology Meetings.**" In this study, for ten years, the authors looked at the outcomes of patients who came to teaching hospitals with heart complaints during the time of national cardiology conferences. One would suspect that patients who came to hospitals needing heart care would do worse when these institutions best and brightest cardiologist were away.

Surprisingly, just the opposite was true. Amazingly, patients with life threatening conditions at teaching hospitals *did statistically better* when the more experienced cardiologists were out of town. The study also showed these same patients were less likely to receive heart procedures called catheritizations (which include stents) during these off times. The study postulated one reason the patients did better when the senior doctors were away

is that they tend to do more interventions, which carry risks of complications.

Other recent examples of documenting the trend of overtreatment are the **overtreatment of urinary tract infections in the elderly, and over medication of elderly patients**, who actually do better on fewer medications.

What can you do? First, ask your doctor what difference the test will make? If it is positive, does that mean a particular treatment will be required. Often, even a positive test will not mean more treatment. In that case, because your care is not going to change based on the outcome of a test, you should think long and hard about having the test.

Next, if treatment is going to occur, what will it improve your life and for how long? What are the side effects and risks of the test/procedure/medicine? Maybe the side effects and risks outweigh the benefits. Finally, ask about the track record of the hospital. **Recent data demonstrates that there are significant differences in hospital performance.**

Doctors, and patients too, are trained to think more treatment is better. But, with every procedure, test, or medication, there is a risk something can go wrong or lead to additional treatment, which can also go wrong. Patients and doctors alike need to be more aware that "Do No Harm" may mean doing nothing at all.



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CHINESE MADE EXPLODING HOVER BOARDS CREATE CHALLENGES TO FAIRLY COMPENSATING INJURED ARIZONA USERS

— James Campbell

It is all over the news that cheap, imported hover boards are dramatically catching fire. These hover boards have been purchased from Chinese manufacturers and resold in the U.S.A. Investigations point to defective batteries as the cause of these fires and recommend they not be charged overnight. These batteries are also manufactured in China.

UK Amazon is refunding the price of the hover boards for its customers. Because of the risk of fire, airlines refuse to check them. USPS will only ship them by ground.

What if you bought one of these hover boards from Amazon or Walmart, and your child was badly burned by one of these defective products? What if he had to undergo expensive and painful burn therapy? Could you recover the cost of the medical care?


Sadly, in Arizona, it will be more challenging to hold the wrongdoers responsible. Traditionally, when a person was injured by a defective product, they could receive fair compensation from any part of the chain of distribution. That is, they could recover from the retailer, wholesaler, or manufacturer. This was fair because it shifted the responsibility for defective products to the makers and sellers of defective products, who profit from their sale, and away from the innocent consumer.

In *State Farm v. Premier Manufacturing*, the Arizona Supreme Court changed this traditional rule and ruled each business in the chain of distribution could only be held responsible for their own fault. Specifically, a product manufacture was not responsible for using defective parts manufactured by another company. Because the defective component parts manufacture was out of business, the injured party was not fairly compensated for their loss.



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How does that play out in the hover board situation? The manufactures of the hover boards and defective batteries may be difficult to haul into an Arizona court because they are located in China and are hidden away behind multiple shell companies. The entities you could potentially get into an Arizona court, Sagway, Walmart or Amazon or other retailers, because of the change in Arizona law, may attempt to avoid responsibility for selling a defective product by pointing the finger at the dangerous product and battery manufacturers. While certainly not unsurmountable, there are added challenges to holding wrongdoers responsible for the injuries they caused by a defective product, like hover boards, that incorporate foreign components.



WHAT IS A MEDICAL LIEN?

— Matt Schmidt

When you are injured or sick, your health insurer will provide coverage for medical treatment pursuant to your insurance plan. When you are injured due to another person's negligence, bring a claim or lawsuit against that person and receive a settlement or judgment, however, some health insurers and providers will expect--and are legally entitled--to reimbursement for medical coverage they have provided. This is called a **medical lien**.

One line of thought says medical liens make sense. Because some of recovery money in a negligence claim includes damages for medical expenses, it is only fair that the portion recovered for medical expenses be given back to the people who actually paid them. Otherwise, you would receive what is known as double recovery.

Another line of thought says you are paying premiums for the benefit of having health coverage and should not have to reimburse your health insurer regardless of whether you were injured due to another person's negligence. Nevertheless, medical liens are legal, so it is important to know how they work in case you are injured and get involved in negligence claim:

1. *If you receive health coverage through AHCCCS or Medicare, they will have a medical lien against your recovery for the treatment they paid for. If you receive health coverage through your employer, many (but not all) employer plans will have a medical lien. Most private plans will not.*
2. *A medical lien is enforceable only if you end up receiving recovery. If you lose your claim or walk away from it, your insurer or health provider cannot collect on recovery you never received.*
3. *Insurers negotiate contracts with health providers so that they pay much lower rates (contract rates) than the actual fair market value of a treatment. For example, if the fair market value of a treatment is \$100, your insurer may only have to pay the provider \$40 to cover you for that treatment.*
4. *As a part of your damages in a negligence claim, you are entitled to the full fair market value of the treatment you received; the medical lien is only entitled to be reimbursed what they actually paid. In the example above, while you would be entitled \$100 for the treatment you received, your insurer would only be entitled \$40 of that.*
5. *If you went to a hospital, it might have what is called a balance bill lien. In some situations (but not all), hospitals are legally entitled to collect the difference between what your health insurer paid them (the contract rate) and the fair market value of the treatment is. In the example above, the hospital would place a balance bill lien against your recovery for \$60. In the mind of a plaintiff lawyer, balance bills are unjust; under some circumstances, a balance bill lien makes pursuing a negligence claim extremely difficult if not futile.*
6. *If you have no insurance and are unable to pay for treatment, some health providers will treat you "on a lien." This is not usually advisable, however, because the lien on your recovery will usually be the full fair market value of their services instead of any contract rate.*
7. *Most liens are negotiable, so it is important to have a lawyer who has a good grasp on lien laws and can navigate through them to get the best reduction possible.*

UPDATE for lawyers and judges: The Arizona Federal District Court recently held there is no such thing as a Medicare Set Aside requirement in personal injury settlements to cover future medical expenses.



PERFECTING THE MEDICAL LIEN ON INJURY CLAIMS

— Ted Schmidt

Both hospitals and your doctor may claim a lien on any recovery you make for an injury caused by someone else. See “What is a Lien?” on page 4. However, before the lien is valid it must be recorded timely with the county recorder in the county where the medical services were provided.

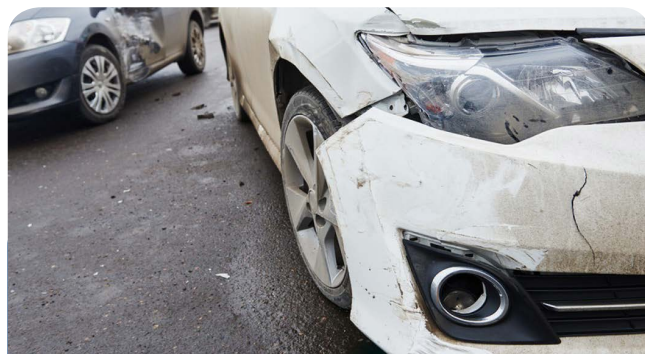
It has been understood for some time that hospitals can perfect their lien by filing the lien within 30 days of discharge from the hospital. But what about a physician wanting to perfect a lien for his or her services and what if those services are provided outside the hospital setting?

This was the question addressed by our Arizona Court of Appeals recently in Premier Physicians Group, PLLC v. Navarro, 722 Ariz. Adv. Rep. 17 (App. Div. I, October 1, 2015) (J. Norris)

In this case Premier Physicians Group treated a patient for injuries he suffered in a car accident with another driver named Navarro. On September 16, 2011, Premier recorded a health care lien for the cost of the services it had rendered to its patient. On March 28, 2013, Navarro’s automobile insurance carrier settled the patient’s injury claim and paid the settlement sum directly to the patient. When Navarro’s insurer settled the claim with the patient it did not satisfy the lien. The trial court ruled the lien was filed untimely. The Arizona Court of Appeals disagreed ruling:

The Law

“Arizona Revised Statutes (“A.R.S.”) section 33-932 (2014), a health care provider, other than a hospital, may perfect a medical lien if it records the lien “before or within thirty days after the patient has received any services relating to the injuries.” We hold this provision allows a non-hospital health care provider to perfect a lien retroactively for any services received by the provider’s patient within the 30 days preceding the provider’s recording of the lien and prospectively thereafter, assuming the provider complies with all other statutory lien formalities.”



Failing to look for and pay medical liens can be costly

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This case now makes it clear that healthcare providers other than a hospital have the same rights and follow the same rules as hospitals in assuring their lien for services rendered is perfected should a patient recover funds for an injury from another person or their insurance company. The lesson to be learned for patients, those who injure a patient and their insurance company is to always check with the health care providers or the county to determine if there are any liens out there and if so whether they were perfected timely before paying settlement funds or a judgment to an injured party. The failure to do so could mean the tortfeasor or his or her insurer may have to pay twice.



A PROPOSED RESTYLING OF THE ARIZONA RULES OF CIVIL PROCEDURE

— Dev Sethi



In early January, a Task Force appointed by Chief Justice Scott Bales submitted a rules change petition to the Arizona Supreme Court. Different than the typical petition, which typically addresses one discrete rule, this Petition proposes a top to bottom restyling of the Arizona Rules of Civil Procedure. This is the largest single rules change undertaking since the 1992 implementation of the Zlakert Rules.

17 lawyers from varying practice areas – public and private – serve on the Task Force, which divided the Rules into four groupings. I was assigned to Group 2, which took the lead on Rules 21-37, with some exceptions. The charge of the Task Force, as set out in the Court’s Administrative Order 2014-116 was:

“...to review the Arizona Rules of Civil Procedure to identify possible changes to conform to modern usage, to clarify and simplify language, and to avoid unintended variation from language in counterpart federal rules. These changes should promote access to the courts and the resolution of cases without unnecessary cost, delay, or complexity. The Task Force shall seek input from various interested persons and entities with a goal of submitting a rules petition by January 2016 with respect to any proposed rules changes.”

The majority of the proposed changes are stylistic – with the goal of making the rule easier to read, understand, and apply. A guiding principal was to draft a rule that was complete without having to refer to the comment. If the comment is essential to the rule, goes the thinking, it should be in the rule, itself.

There are some notable proposals that bear close evaluation. For example, a revised Rule 26(b)(1)(C) addresses the growing movement toward proportionality in discovery; a revised Rule 26(b)(4)(D) talks of “specially employed or retained experts” as opposed to “independent experts”, bringing the Rule in line with recent case law; a new Rule 26.1(B)(2) addresses electronically stored information; and there is an updated proposal for changing judges as a matter of right at Rule 42.2. One of the most cited Rules, 56(f), is being renumbered to 56(d), but it remains substantially similar. And the time for responding to discovery requests shrinks from 40 days to 30 days.

Prior to the filing of the Petition, a draft of the new proposals was sent to 30 bar organizations and emailed to the entire bar membership. Feedback was collected and the proposals further developed. The official comment period is currently open, and all Arizona practitioners are encouraged to review the draft and offer input. The deadline for comment will be set by the Supreme Court. The Task Force has suggested an April 15, 2016 deadline for the first round of comments. Those comments will be digested and an amended Petition filed in May. It is proposed that June 10 will be the deadline for a second round of comments.

For more information, visit the Task Force on the Arizona Civil Rules of Procedure’s website:
<http://bit.ly/ARCPTaskForce>

You can comment on the Supreme Court’s Rules Forum:
<http://www.azcourts.gov/Rules-Forum>



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Happenings

Mark Your Calendars – Free CLE The **Nakamura Judicial Workshop** will next be presented on **February 12, 2016** at the University of Arizona Rogers College of Law. This workshop provides a look into life as a judicial officer and the judicial merit selection process. It includes presentations by judges and merit selection commission members. It is open to all and is free. It also provides CLE credit. If you are interested in a judicial career, or are just curious about the process, you should attend.

For more information on both the AMBA Scholarship Banquet and the upcoming Nakamura Judicial Workshop, visit www.azminoritybar.org



Ted Schmidt

Ted Schmidt has just been selected by **Arizona Business Magazine** as one of the top 100 lawyers in all of Arizona. Ted has also been admitted pro hac vice to the Republic of Palau Bar Association and will be representing a young woman who was brutally assaulted by a prisoner on the island in a trial before the Palau Supreme Court next month. Ted was also recently reappointed as a Judge Pro Tem of the Pima County Superior Court.



Jim Campbell

Jim Campbell was a key presenter at an Arizona State Bar seminar on medical malpractice. Jim spoke on the topics of electronic medical records, selection and retention of medical experts, and system errors in medical negligence cases.

Jim Campbell was proud to coach St. Cyril's fifth grade boys basketball team. While no one likely will jump immediately to the NBA, many of the boys were first time basketball players who had some fun, learned some skills, and won a few games along the way.



Dev Sethi

The Arizona Minority Bar Association will recognize **Dev Sethi** as its Honoree at the 2016 AMBA Scholarship Banquet. The event will take place at Tucson's Stargate J.W. Marriott on Friday, March 4, 2016. AMBA works to support diversity in the legal profession – in law school, in practice, and on the bench. Dev has been active in AMBA since his time in law school, when Chris Nakamura got him involved. He has served as the President of the organization and now works to coordinate the Nakamura Judicial Workshop.



Matt Schmidt

Matt Schmidt is the President of the Old Pueblo Rugby Football Club, a nonprofit organization that promotes and provides a complete spectrum of rugby education for all types and ages of players and all types and forms of competition in various parts of the nation. OPRFC features men (Lions), women (Lightning) and U-19 (Lions) squads. The U-19 squad has won the State Championship twice in the last three seasons and hopes to do it again this year. Matt was instrumental in securing fields within Pima County for the Club to practice. KSS wishes OPRFC the best of luck in their upcoming season.



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We are dedicated to providing the strongest representation for our clients in a wide range of cases involving serious injury or death. We are grateful for the opportunity to work with referring lawyers from Arizona and around the country. We appreciate the trust those lawyers have in allowing us to assist their clients. We welcome the chance to talk. If you have a case to discuss or simply want to know more about us, please give us a call.

Are you interested in our thinking? If you would like to be added or removed from our mailing list for the KSS newsletter, please contact Irma Almazan 520.545.1666 or ialmazan@kss-law.com.

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