

Arizona Civil Verdicts 2006

This year's largest Arizona verdicts offered fascinating, and sometimes appalling, tales of humanity. A mentally retarded man who died in a restraint chair at a Maricopa County jail. Bounty hunters, authorized to fly armed, who were arrested when their flight landed. Farm owners whose properties were flooded when a dam breached in a record rainfall. And employers fighting back against former employees for lost profits and reputation.

In 2006, juries in Arizona turned in 30 verdicts over \$1 million. A title insurance company that formerly employed a group who left to start a competing business took the top recovery of \$41.5 million, according to a survey of reported verdicts.¹ Another commercial dispute as well as two medical malpractice cases were also among the highest 2006 Arizona verdicts. The others included personal injury, wrongful death, eminent domain and condemnation, and product liability cases.

Nationally, for the second year in a row, the country's largest verdicts to plaintiffs fell dramatically. This year's nationally highest verdict was for \$216.7 million in a Florida medical malpractice suit. By anyone's measure that was a high figure, yet it was nationally the smallest top verdict since 1993. Arizona's top verdicts were somewhat less than last year's, although still comparable to 2005.

Here are 2006's ten largest Arizona recoveries.

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The Top 10 Arizona Verdicts in 2006

1

\$41,500,000 *Security Title Agency, Inc. v. First American Title Insurance Company, dba The Talon Group, Linda Pope and Thomas Pope*, Maricopa County Superior Court

Linda Pope worked at Security Title Agency for 17 years, most of that time as a branch manager. In 2002, competitor First American Title Insurance developed a plan to create The Talon Group. It began to recruit Linda Pope and prepare office space for 40 employees. As a result of her plan to leave, Security Title terminated Pope, after which she and 37 other employees went to work as The Talon Group. Security Title alleged that Pope recruited co-workers, copied files, disclosed confidential information and breached her fiduciary duty, and that First American knew of this and encouraged her. Defendants claimed she was an at-will employee and that it was common in the industry for a company to recruit this way and customers to follow. Security Title alleged millions in lost business.

The jury awarded \$6.3 million in compensatory damages, plus \$35.2 million in punitive damages. This was the largest punitive award of the year in Arizona. First American was found 96.83 percent at fault, and Linda Pope was found 3.17 percent at fault.

2

\$15,000,000 *Bruce Austin v. Kenneth Howard and Little Bear Transport, Inc.*, United States District Court for the District of Arizona (Tucson)

On Christmas Eve 2002, tow truck driver Bruce Austin was called to assist at a fatal accident. He was in a median strip of Interstate 10 when a tractor-trailer driven by

Arizona Civil Verdicts 2006

Kenneth Howard at about 70 m.p.h. went out of control and veered into the median, hitting Austin and severing his right leg. Austin also lost his left thumb, broke several ribs and fractured his left shoulder. Howard was caught by police making changes in his logbook while he sat in his truck at the scene and admitted that he was driving longer than allowed because he was trying to get home for Christmas. Little Bear Transport was alleged to be negligent in its hiring, supervision and business practices. Both Howard and Little Bear Transport admitted liability but asserted that \$1 million was adequate compensation. The jury awarded \$5 million in compensatory damages against both defendants, plus \$10 million in punitive damages against Howard.



\$10,000,009 *Carol Agster and Charles Agster v. Maricopa County, Maricopa County Correctional Health Services, Maricopa County Sheriff's Office et al.,*³ United States District Court for the District of Arizona

Charles Agster III was a 33-year-old mentally disabled man. When he became high on methamphetamines, his family tried to take him to a hospital. They stopped at a convenience store, where he was arrested after he became fearful and paranoid and refused to leave. He was taken to the Madison Street Jail. A jail nurse, Betty Lewis, ordered him strapped into a restraint chair, which is angled so that the person in it sits at a backward slant. His legs were strapped to the bottom of the chair, and then five jail guards pushed him forward so they could strap his arms down. They held him in that position, which may have cut off his air supply, for 1 minute and 47 seconds. He drifted in and out of consciousness and was barely breathing. Lewis delayed CPR or other resuscitative measures while she tried various stimuli tests. Agster went into a vegetative state and died three days later. Plaintiffs presented evidence that six separate documents were back-dated, altered or created to cover up how he died. Defendants asserted Agster's death was his fault for using meth, and/or was the fault of his parents for their decision-making.

On the federal civil rights claims, the jury awarded \$6 million and nine dollars, apportioning fault as follows: 65 percent to the Maricopa County Sheriff's office, 30 percent to the Maricopa County Department of Correctional Health Services, 2 percent to Maricopa County, and 3 percent to Betty Lewis. The jury also made \$1 awards against each of the jailers.

The jury awarded \$2 million on the state law claims, which included \$1 million to each of his parents, apportioning fault as follows: 10 percent to Charles Agster III, 30 percent to his parents Carol and/or Charles Agster, 10 percent to the unidentified "drug supplier," 22.5 percent to the Sheriff's Office, 20 percent to the Department of Correctional Health Services, 1 percent to Maricopa County, and 6.5 percent to Betty Lewis. The jury also separately awarded \$2 million in punitive damages against Betty Lewis.

For a more detailed account of the detention and the case, see Jana Bommersbach's excellent article, *Sheriff Joe Just Cost Us Another \$9 Million*, PHOENIX MAG., Aug. 2006, at 141.



\$9,000,000 *Thomas Hudgins and Leroy Devore v. Southwest Airlines, Inc.,* Maricopa County Superior Court

Exactly two years before 9/11, plaintiff "bail bond agents," on their way to arrest a fugitive, flew from Baltimore to Phoenix on Southwest Airlines. They had arranged to "fly armed," meaning that they lawfully took their guns on the plane with them. They presented the required identification, Southwest's employees signed their forms, and they properly went through security. They identified themselves as working for "H&D Enterprises," but a Southwest employee misread this as "HUD" and believed they were law enforcement. On approach, the pilot radioed that they did not have authorization. After the plane landed, they were taken to a holding cell by police and incarcerated for three days. Federal criminal charges and civil sanctions by the FAA were filed against them, all later dropped. Southwest's investigation concluded its employees were at fault for giving the authorization. Before suit was filed, Southwest said it would not release its investigation to plaintiffs unless they signed a release of liability. Each of the two men was awarded \$500,000 in compensatory damages and \$4 million in punitive damages.



\$6,325,582 *Marlyn Nutraceuticals, Inc. v. World Nutrition, Inc., Patrick Buehl and William Wong,* United States District Court for the District of Arizona

Plaintiff Marlyn Nutraceuticals, dba Naturally Vitamins, is an Arizona distributor of an enzyme product called Wobenzym. World Nutrition introduced a competing enzyme product called Vitalzym. With the endorsement of William Wong, a former employee of plaintiff, World Nutrition claimed that Vitalzym was three times faster and required smaller doses. Wong also incorrectly claimed to consumers that Wobenzym was quarantined due to government concerns about mad cow disease. In addition, Marlyn Nutraceuticals claimed that Patrick Buehl, its former employee, took its customer list and used it for direct mailing as vice president of sales and marketing at World Nutrition. World Nutrition contended its claims were mere puffing and that the customer list was not confidential. The jury awarded Marlyn Nutraceuticals \$2.3 million on its Lanham Act claim, \$25,575 in lost sales, plus \$3 million in punitive damages against World Nutrition. The jury also awarded nominal compensatory damages, plus an additional \$500,000 punitive damages, against both Buehl and Wong.

Arizona Civil Verdicts 2006

6

\$5,825,000 *Kevin Routon v. Jeffrey Zuhl*, Maricopa County Superior Court

This was the largest medical malpractice verdict in Arizona in 2006. Plaintiff went to his primary care doctor Ethan Kennedy with multiple complaints of arthralgia and chest symptoms. He was first diagnosed with pneumonia. Three months later, an X-ray report was received that revealed lung cavities and the possibility of Wegener's granulomatosis, an autoimmune disorder that affects the lungs and kidneys. He was referred to pulmonologist Zuhl, who diagnosed him with Valley Fever. Granulomatosis was confirmed nine months after the first visit, by which time he had suffered kidney damage and needed a kidney transplant. Two years later, he was diagnosed with polyomavirus, which may cause multiple tumors and limits the life of the kidney. Plaintiff was found 28 percent at fault and Zuhl was found 72 percent at fault.

7

\$5,358,473 *A Tumbling-T Ranches et al.³ v. Maricopa County Flood Control District*, Maricopa County Superior Court

In 1993, a major flood of the Gila River caused a 150-foot breach in the Gillespie Dam. Plaintiffs were owners of farms located along the Gila River and alleged that they sustained damage to real property, personal property, diminution in property value, damage to their businesses, lost income, and loss of use of their properties. They also alleged that construction of an upstream clearing and pilot channel project caused sediment transfer from above to below the dam and greatly decreased the carrying capacity of the river and increased the risk to their properties from future floods. Plaintiffs alleged negligence in the design, construction, maintenance, ownership and control of the dam, and also made claims for inverse eminent domain. Liability was established in 2004 against the defendant dam owners, Maricopa County Flood Control District, and two nonparties. This was the damages phase of the trial, and was solely tried against the Flood Control District. Each of the plaintiffs received awards ranging from \$51,218 to \$1,548,595, for a cumulative total of \$5,358,473.

8

\$5,000,000 *Jeremy Ritchie, William Ritchie, Darlene Ritchie and Korbin Underwood v. Emergency Chiropractic, P.C., James and Susan Howe, Scott and Terri Krasner, Scott Krasner, P.C., Judith Solomon and Judith Solomon, P.L.C.*, Maricopa County Superior Court

Jeremy Ritchie injured his neck while working as a janitor and lifting a heavy trash bag. He was examined by Stanley Robinson at a Healthsouth occupational medicine clinic, where Robinson did not recognize the symptoms of a cervical spinal cord compression

and did not order an MRI. Ritchie's symptoms persisted throughout his treatment by various chiropractors at Emergency Chiropractic, including James Howe, and by occupational medicine physician Scott Krasner, who saw him for an IME. Both Howe and Krasner also failed to recognize the signs or order an MRI. The compression went untreated until Ritchie was seen by neurologist Judith Solomon eight months after the injury. Solomon ordered the MRI, which led to surgery, but permanent spinal cord damage had already occurred and prescription narcotics were required for pain. Co-defendants initially named Solomon as a nonparty for her alleged failure to properly monitor Ritchie's pain and use of medication, and plaintiff then added claims against her based on those allegations. Ritchie died of an accidental overdose of oxycodone. Defendants contended that Ritchie abused medications and had significant preexisting changes that would have caused the same condition. The jury awarded his father and mother each \$1 million and his son \$3 million. Solomon and her company obtained a defense verdict. The jury found Emergency Chiropractic 37 percent at fault, Krasner and Howe each 28.5 percent at fault, and Robinson 6 percent at fault.

9

\$4,600,000 *State of Arizona and Mary Peters v. American Support Foundation, Inc. et al.⁴*, Maricopa County Superior Court

The state of Arizona brought this condemnation action. Arizona sought possession of defendants' 3.31-acre parcel for a Santan Freeway interchange in Chandler at the junction of I-10 and State Route 202. The property included a 58,000 square foot office and warehouse building with frontage on I-10. Arizona claimed that the property's value was only \$3.55 million, and defendants claimed that just compensation was \$6 million. The jury engaged in a complex series of discussions on various indicators of value, and as a compromise verdict awarded \$4.6 million as the fair market value of the property taken.

10

\$4,000,000 *Nancy Hartman and George Hartman v. Michelin North America, Inc.*, Maricopa County Superior Court

Robert Hartman, 35 years old, was killed when a tire on his pickup truck sustained a tread/belt detachment and his truck crossed a median and hit a bus. Plaintiffs, his wife and father, alleged that the tire was defectively manufactured and had a crack in the inner liner that led to its degradation and detachment. Plaintiffs also alleged that nonparty Ron's Tires, which sold the used tire, should have seen the crack and not sold the tire. Michelin argued that the tire was improperly repaired by Ron's Tires and that the tire had no defect. The jury awarded \$4 million to Nancy Hartman and zero to his father. Ron's Tires was found 50 percent at fault.

Arizona Civil Verdicts 2006

Averages and Medians By Venue

Like last year, a few large verdicts blow the averages higher, so we'll take a look at the medians as well. To calculate an average, we add up all the numbers, then divide by how many numbers there are. To calculate the median, we place the numbers in value order and find the middle number, where exactly half of the numbers are higher and half are lower. Both the average and the median verdicts are analyzed for each venue below and are summarized in the chart below.

2006 Reported Arizona Verdict Averages vs. Medians

COURT	AVERAGE \$	MEDIAN \$
STATEWIDE	\$775,947	\$50,000
USDC	3,463,227	512,500
MARICOPA	991,054	70,879
NAVAJO	554,983	554,983
SANTA CRUZ	207,187	250,000
YAVAPAI	203,548	203,548
PIMA	128,383	25,000
COCONINO	120,780	35,000
GILA	93,334	20,000
LA PAZ	81,000	81,000
GRAHAM	75,493	75,493
COCHISE	74,608	10,000
MOHAVE	35,667	27,000
YUMA	20,874	20,000
PINAL	8,446	8,446

The statewide average verdict⁵ in 2006 was \$775,947, but the statewide median was remarkably lower, at \$50,000. The U.S. District Court for the District of Arizona reported the highest average verdict, of \$3,463,227. As it has for the past three years, the federal court reported few verdicts overall (only 16 this year), but when rendered they tend to be much larger than in all other Arizona venues. The federal court had the second-, third- and fifth-highest verdicts for the year. Its median verdict of \$512,500 was less than 15 percent of this court's average.

Maricopa County reported the second-highest average verdict of \$991,054. Maricopa County rendered nearly 60 percent of all the verdicts in the state. Except for the three from federal court, Maricopa County produced all the rest of the top verdicts, including the number-one verdict of the year of \$41.5 million (*see*

Security Title Agency, Inc. v. First American Title Insurance Company et al., above). There were also many smaller verdicts, making Maricopa County's median verdict only \$70,879.

Navajo County had two plaintiff's verdicts and no defense verdicts, reversing its trend from recent years. Its average and median were both \$554,983, the third-highest. Next in line was Santa Cruz County, with an average verdict of \$207,187 but which actually had a higher median of \$250,000. Yavapai County's average and median were next-highest, at \$203,548.

Pima County's verdicts were markedly lower than in recent years. Its average verdict was \$128,383, with a median of \$25,000. The average verdict for Coconino County was \$120,780, and its median was \$35,000. Next was Gila County, with an average of \$93,334 and median of \$20,000. It was followed by La Paz County, with an average and median of \$81,000, and then Graham County, with an average and median of \$75,493. Cochise County followed with an average of \$74,608 and a median of \$10,000.

Toward the lower end, Mohave County had an average of \$35,667 and a median of \$27,000. Yuma County had an average of \$20,874 and a median of \$20,000. Finally, Pinal County reported the lowest average and median verdict in the state of \$8,446. No civil verdicts were reported in Apache or Greenlee Counties. The average by venue is highlighted in the chart on page 16.

Federal Versus State Court

Arizona plaintiffs in 2006 statistically prevailed more often than in recent years. Statewide, plaintiffs prevailed in 62 percent of the cases and defendants in only 38 percent. This was a more dramatic difference than in recent years.

Federal court again statistically proved more favorable to defendants than state court when it came to verdicts. In the United States District Court for the District of Arizona in 2006, defendants prevailed in 50 percent of the reported verdicts. But as noted above, when plaintiffs prevailed in this court, they achieved some of the largest verdicts of the year.

Punitive Awards

Punitive damages were rare, awarded in only 11 cases. When imposed, however, they were generally a considerable amount. The punitive awards ranged from a low of \$50,000 to a staggering high of \$35.2 million. In some of the largest instances, the punitive award accounted for most of the verdict. In one case, the punitive element was 88 percent of the total award. Many of the punitive awards were appealed.

Medical Malpractice Trends

Kay Cooper's intriguing and informative article in the February 2007 issue of *Arizona Attorney* analyzed how fewer medical malpractice cases have been filed in recent years and some of the reasons why. At the opposite (verdict) end, what has happened?

During the past three years, 111 medical malpractice cases have gone to verdict in Arizona. Of that total, defendants have won 80 percent, and plaintiffs have won 20 percent.

However, when plaintiffs prevail, these types of cases can gen-

Arizona Civil Verdicts 2006

erate large awards. Eleven medical malpractice cases in that time period had verdicts of \$1 million or more, including four that were \$5 million or more. Thus although it appears that liability may be a difficult hurdle for our juries in these cases, once established, they will award sizeable damages.

Commercial Verdict Average and Median Higher Than Personal Injury

In 2006, Arizona commercial verdicts were again higher than personal injury verdicts in their averages and medians. The average commercial verdict was \$1,181,411, with a median of \$190,000. Such business or commercial cases included breach of contract, breach of fiduciary duty, fraud, takings and property damage.

The average personal injury verdict was \$574,584, and its median was \$31,311. These individual injury cases included bodily injury and wrongful death matters. In terms of volume, there were more than twice as many bodily injury verdicts as there were commercial verdicts.

Significant Defense Verdicts

The defense verdicts highlighted here are those in which the claimed damages were high, and this analysis focuses on the case in each category with the largest claimed damages. Here are a few of the year's significant Arizona defense verdicts:

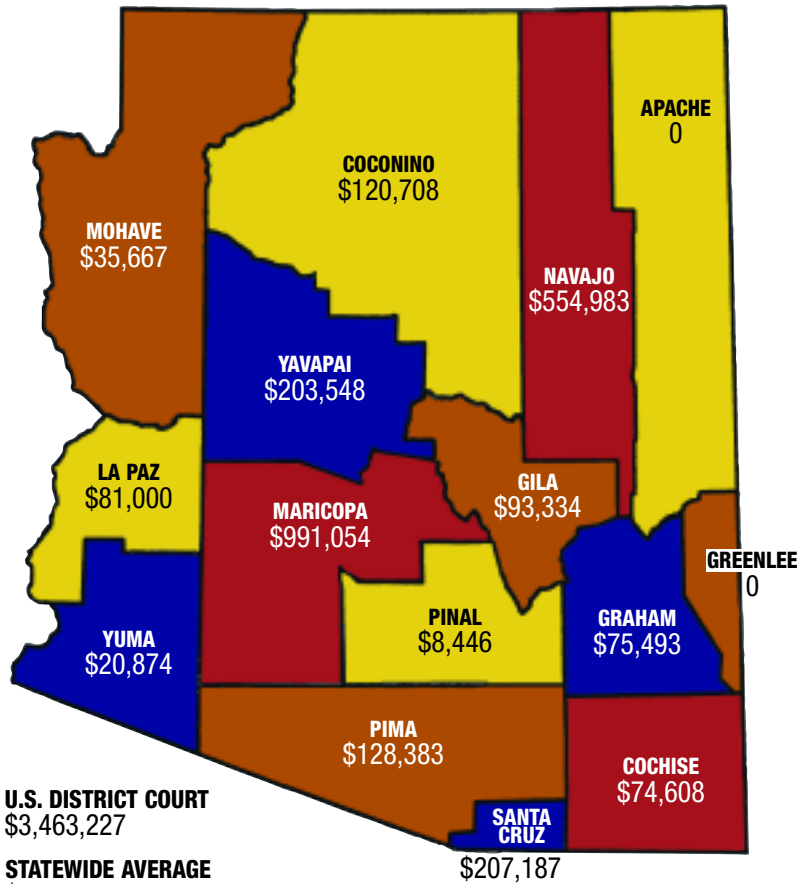
A *Victor Dement, Barbara Edwards, and Karen Evans v. State of Arizona*, Gila County Superior Court

Victor Dement was a passenger in a vehicle that was involved in a violent crash. He was paralyzed as a result of the collision. By his own admission, he was not wearing a seat belt. He alleged that the State of Arizona failed to extend a culvert headwall as required by law. He asked the jury to award \$15 million. Arizona maintained that the driver of the vehicle he was in was at fault.

B *Jeff Brethauer v. General Motors Corporation*, Maricopa County Superior Court

In this product liability case, Jeff Brethauer was driving a 1998 Chevrolet pickup truck on I-17 in a heavy rainstorm. The truck hydroplaned, ran off the highway and hit a steep embankment. Brethauer was ejected and sustained paralyzing injuries. He alleged that he was wearing his seat belt but that it "inertially released" in the collision, and he also alleged that the side window's tempered glass allowed him to be ejected. He asked the jury to award \$12 million. GM demonstrated that he was not wearing the seat belt, and that the alternative laminated glass design was

2006 Reported Arizona Verdict Averages By Venue



not safer and would not have prevented his ejection.

C *Carina Henry, Mark Henry, and Jane Klugman v. Robert Takacs*, Maricopa County Superior Court

In this medical malpractice case, Carina Henry alleged that Robert Takacs, a radiologist, failed to diagnose her condition of volvulus, in which the bowel becomes twisted and causes obstruction. Plaintiffs alleged that as a her result surgery was delayed, which caused septic shock, bowel death, acute respiratory distress syndrome, a stroke and residual brain damage. Plaintiffs asked the jury to award \$10 million. Takacs argued that the signs of volvulus are extremely rare and subtle, and that the condition was not conspicuous on the CT scan.

D *Kelley Rollings, Donald Rollings, and Bacon Industries, Inc. v. City of Tucson*, Pima County Superior Court

Plaintiff landowners alleged water has leaked for several years, and continues to do so, from Tucson's water mains in a historic downtown neighborhood. Plaintiffs asked for \$5.7 million for damage to their properties and block walls. Defendants argued that its water mains were not leaking and that the cause of the damage was landscaping and a certain type of plastering on the walls.

Arizona Civil Verdicts 2006

E *Nichola Tavilla Donna Tavilla, Katherine Tavilla, Britney Tavilla, and Alyssa Tavilla v. Employers Mutual Casualty Insurance Company*, Maricopa County Superior Court

This was a bad faith action in which the Tavilla family's kitchen sink pipe fractured, causing water damage to their home. They alleged that Employers Mutual's adjuster refused to assist them and that the delay led to mold in their home. Plaintiffs asked the jury to award \$3.2 million, most of it in punitive damages. Employers Mutual paid most of their claim and defended that no significant mold was found.

F *Frank Hadley, Sr., Frank Hadley, Jr., Teresa Arias, and Dora Romero v. Bar U7 Farms Inc. and City of Mesa*, Maricopa County Superior Court

Plaintiffs were motorists traveling by Bar U7 Farms when blowing dust reduced their visibility and caused multiple collisions. They sustained various injuries including a shattered knee, fractured tibia/fibula, closed head injury, and fractured ribs. They alleged that Bar U7 Farms negligent tilled and leveled the field without watering it or taking precautions to keep loose soil from blowing onto the highway. Plaintiffs collectively asked for \$3.1 million. Defendants claimed that they were unable to water the field and that watering it would not have prevented dust.

G *Franklin Adakai v. Salt River Project Agricultural Improvement and Power District*, United States District Court

Franklin Adakai alleged that SRP disciplined and discriminated against him because he is a Navajo and then terminated his employment in retaliation for his complaints about the alleged discrimination. He had an EEOC determination in his favor. He alleged that he developed emotional trauma and a major depressive disorder. He asked for compensatory and punitive damages plus \$1 million in lost wages. SRP claimed that he had poor work performance, caused disharmony and disruption in the workplace, and was insubordinate.

H *Brooke Baker v. New Wave Entertainment, L.L.C. dba The Sanctuary, and Celerino Lomas*, Maricopa County Superior Court


Brooke Baker, a nightclub hostess, alleged that her co-worker Celerino Lomas placed a "date rape" drug in her drink and then sexually assaulted her. She also alleged that Lomas, as New Wave's agent, served her alcohol even though she was not 21. She alleged emotional trauma and aggravation of PTSD, bipolar and generalized anxiety disorders. She asked the jury to award an unspecified amount in compensatory and punitive damages. New Wave defended that Baker and Lomas were not acting as employees when they drank alcohol after hours and had sex. Lomas denied giving Baker a "date rape" drug and argued that the sex was consensual. The jury found that no date rape occurred, finding for both Lomas and New Wave.

Conclusion

Just for fun, a little trivia about Arizona verdicts over the past three years:

- The month for the most plaintiff's verdicts: **April**
- The month for the most defense verdicts: **February**
- The day of the week on which the most verdicts were rendered: I know all my fellow trial lawyers would bet on Friday, but it was actually **Thursday**. Maybe we like early weekends in this lovely state.

This is the third year for this annual article. I intend to keep writing it as long as you enjoy reading it. I hope and believe that it's not only interesting to look back at what happened, but that it also helps us to give a more educated analysis of Arizona venues and trends.

Thank you for sending your positive feedback. I'm also grateful to Snell & Wilmer L.L.P. for its support and encouragement. Please feel free to contact me any time for more details about the verdicts. See you next year. 

endnotes

1. This article analyzes 368 civil verdicts reported to date from the Superior Courts of Arizona and the United States District Court for the District of Arizona in 2006. Although the great majority were jury verdicts, some were bench trials. This article does not analyze or include cases that settled before or during trial, mistrials, cases tried only on liability or comparative fault issues, judgments as a matter of law, criminal cases or cases not yet reported. The judgments analyzed do not include costs, fees or reductions that may have been established later. The parties named are the ones involved in the case when it went to verdict. This article makes no comment on the merits of the claims or defenses, or the lawyering abilities of those involved, in these cases.
2. Other named defendants were the jailers Michael Wilkins (no relation to the author), Kristine Kemper, Amanda Garrison, Laura Sodeman, Leah Compton, Katherina Brokschmidt, Eric Nulph, Baruch Reusch and Susan Fisher.
3. Other named plaintiffs were Russell Badley Farms, Inc., Delmar John and Jean John dba Delmar John Farms, Rosemary Edwards, Wood Brother Farms, John Fornes, Shelley Fornes, PJ Farms Ltd Partnership, Roy Pierpoint, Ella Pierpoint, Pierpoint Farms, Inc., and Gila River Farms, Inc.
4. Other named defendants who held property interests were RCH Investment Co. LLC, Selwyn Jacobson, Janke Jacobson, Camelback Community Bank, Honeywell International, Inc., State of Arizona Department of Revenue, Maricopa County Treasurer and Maricopa County.
5. Average verdicts and median verdicts are computed from all plaintiffs' verdicts in the particular venue. Defense verdicts and reductions for comparative negligence or nonparty fault are deliberately not factored into the analyses of averages and medians.