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LAW ALERT

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MED MAL STANDARD OF CARE STATUTE APPLIES TO CASES BROUGHT UNDER THE ADULT PROTECTIVE SERVICES ACT

Cornerstone Hospital of Southeast Arizona v. Marner
(Ct. Appeals, Div. Two, December 7, 2012)

An estate sued multiple defendants, including Cornerstone, under the Adult Protective Services Act (APSA), alleging the decedent was deprived of proper nursing and medical services. The estate filed the certification required by A.R.S. § 12-2603 confirming that " . . .expert opinion testimony may be necessary to provide standard of care or liability for the claims in this case." The estate also filed the affidavit of its designated expert, Joyce Black, and attached her CV. Black was the estate's only standard-of-care witness. Cornerstone moved to preclude certain testimony by Black on the ground that she was not qualified under either A.R.S. § 12-2604 or Rule 702. The court granted Cornerstone's motion as to Black's proposed testimony regarding hospital administration, but rejected it as to other areas on which Black was expected to testify. The court held that A.R.S. § 12-2604 does not apply to claims asserted under APSA, but that Black was nevertheless qualified under Rule 702. Cornerstone challenged this ruling by special action.

The court of appeals held that A.R.S. § 12-2604 does apply to APSA cases alleging negligence. Had the legislature intended to limit the application of § 12-2604, it would have done expressly precluded APSA actions from its ambit. Because a claim under APSA may include allegations of medical negligence, A.R.S. §

12-2604 sets the requirements for those experts that provide standard-of-care testimony in an APSA action.

SURVIVING MOTHER MAY RECOVER UIM BENEFITS FOR WRONGFUL DEATH OF SON

State Farm Mutual Automobile Insurance Co. v. White
(Ct. Appeals, Division One, January 3, 2013)

Plaintiff White sought underinsured motorist benefits under the decedent's grandparents' State Farm policy for her son's death, which occurred while he was a passenger in a rental vehicle driven by his grandmother. The son was an "insured" under the policy. Plaintiff White, however, did not live with the grandparents and therefore was not considered a "relative" under the policy's definition of "insured." State Farm argued that only the decedent, not his mother, was entitled to underinsured motorist benefits.

A.R.S. § 20-259.03 provides: "Notwithstanding any other law, in the case of the death of an insured who is covered under the uninsured and underinsured motorist coverages of a motor vehicle liability policy, recovery for wrongful death is limited to any party who is qualified to bring a wrongful death action pursuant to § 12-612 and who is also a surviving insured under the same coverages of the policy."

State Farm conceded that if A.R.S. § 20-259.03 did not exist, the mother would be entitled to recover underinsured motorist benefits under the policy because she was a "statutory" beneficiary under Arizona's wrongful death statute (A.R.S. § 12-612), and the policy allowed benefits to a "person entitled to recover damages because of bodily injury to an insured." State Farm maintained, however, that the legislature intended A.R.S. § 20-259.03 to prohibit the mother's recovery since she was not a "surviving insured" under the policy. State Farm contended only named insureds and their spouses would qualify as "surviving insureds" under the statute.

The court of appeals disagreed. The plain language of § 20-259.03 allows an insurer to pay wrongful death UIM benefits to any eligible claimants that the insurer has chosen to define as "a surviving insured under the same coverages of the policy." State Farm's definition of an "insured" included persons entitled to recover damages because of bodily injury. Thus, the mother was an "insured" under State Farm's policy and could receive UIM benefits for her son's wrongful death.

State Farm also argued that public policy prevented Plaintiff White from receiving UIM benefits because she had temporarily relinquished custody of her son to the grandparents. The court determined that fact could be considered by the trier of fact in determining the amount of damages, but that her status as a non-custodial parent did not bar her recovery of UIM benefits for the wrongful death of her son.

IN DETERMINING ATTORNEYS' FEES AFTER APPEAL OF ARBITRATION AWARD, COURT COMPARES AWARD TO JUDGMENT BEFORE ANY RULE 68 DEDUCTION

Bradshaw v. Jasso-Barajas
(Ct. Appeals, Div. One, January 8, 2013)

This case arose from a car accident. Defendant served plaintiff with a $9,501 offer of judgment, which included taxable costs. Plaintiff rejected the offer. The case proceeded to compulsory arbitration where plaintiff was awarded $12,000 plus $374.10 in taxable costs. Defendant appealed the arbitration award and a jury awarded plaintiff damages totaling $8,604. The court added taxable costs of $946.10.

Rule 77(f) states that the trial court must compare the arbitration award to the judgment entered on appeal and, if the difference between the two is 23% or less, sanctions may be awarded, including attorneys' fees necessitated by the appeal. Rule

68(g) states that when a party rejects an offer of judgment, and then fails to obtain a more favorable result at trial, that party must be sanctioned to cover the offering party's expert witness fees and double taxable costs occurring after making the offer.

To determine who owed what to whom, the trial court first compared the arbitration award to the jury verdict (plus taxable costs) pursuant to Rule 77(f). The difference was less then 23% (it was 22.9%), and so ordered defendant to pay plaintiff $8,784 in attorneys' fees as a sanction. The court then addressed the offer of judgment and awarded defendant $572 in Rule 68(g) sanctions because the jury verdict plus costs was less than the offer.

Defendant challenged the attorneys' fees sanction, arguing that the trial court erred in addressing Rule 77 prior to Rule 68 because the offer of judgment was made prior to both the arbitration award and the verdict on appeal. Under defendant's proposed formulation, the difference between the verdict and the arbitration award would have been more than 23% and defendant would not have been ordered to pay attorneys' fees.

The Court of Appeals rejected defendant's argument and upheld the trial court's formulation and decision. The trial court's formulation comported with Rule 68(g) itself, which provides for consideration of Rule 77 before Rule 68(g).

COURT ADDRESSES ISSUES IN DRAM SHOP/PREMISES LIABILITY CASE

McMurtry, et al. v. Weatherford Hotel Inc., et al. (Ct. Appeals, Div. One, January 10, 2013)

Decedent got drunk at the Weatherford Hotel bar. She was cut off and escorted back to her room. The window in decedent's room was approximately 3 feet wide, 40 inches tall, and had no locks. Outside the window, a balcony wrapped around the hotel, but extended only partially across the bottom of the window, leaving a 12 inch gap. Decedent crawled through the window and fell through the gap to her death.

The court first held that Plaintiff's expert was qualified under Rule 702 to testify on both the premises and dram shop theories of liability. His testimony flowed from his "years of experience in the hospitality industry dealing with safety and liability issues in public accommodations." On the premises liability claim, as to whether the danger was "open and obvious," the court found genuine issues of material fact on whether the Hotel could reasonably anticipate the harm, given the 12 inch gap, signs in the hotel inviting guests to smoke "on the balcony," and the absence of window locks. The Court further held that whether the Decedent trespassed onto the balcony was a jury question. Guests were invited at check-in to smoke on the balcony; the signage in decedent's room invited guests to smoke on the balcony; and the Hotel was aware of instances in which guests had sat on window ledges to smoke.

On the dram shop claim, the court held that whether the Hotel exercised reasonable care in escorting Decedent to her room—given the presence of the potentially hazardous window configuration—was an issue of material fact. A juror might conclude that the accident was foreseeable.

Finally the court reversed the trial court's denial of an adverse inference instruction. Hotel staff had deleted the bar's surveillance footage, which would have shown the accident. The Hotel argued that the log prepared by the staff based on the footage was sufficient, and that the deletion of the footage was an inadvertent mistake. The Court disagreed, holding that an adverse inference instruction was warranted. The Court reasoned that the moment staff learned of the accident, they should have anticipated a lawsuit and preserved the evidence. Consequently, the Court vacated the denial of an adverse inference instruction and ordered that it be reconsidered on remand.

DEFAULTED PARTY HAS NO RIGHT TO A HEARING BEFORE ENTRY OF JUDGMENT IN LIQUIDATED DAMAGES CASE

Searchtoppers.com v. Trustcash LLC (Arizona Ct. Appeals, Div. One, December 20, 2012)

Searchtoppers.com sued Trustcash alleging that Trustcash failed to make 38 monthly payments for internet marketing services. Searchtoppers sought to recover the past due contractual payments, totaling $95,000 plus interest. Trustcash failed to answer. Searchtoppers filed for default, Trustcash still did not respond, and the default became effective. Searchtoppers asked the court to enter judgment without a hearing because the damages were liquidated. The court granted the motion and entered judgment in favor of Searchtoppers in the amount of $102,500 plus interest. After judgment was entered, Trustcash moved to vacate the default judgment, which the court denied. Trustcash appealed.

The court of appeals affirmed. First, it rejected Trustcash's argument that it demonstrated good cause to vacate the judgment pursuant to Rule 60(c). Trustcash's statutory agent and president thought he had forwarded the complaint to counsel, but actually failed to do so, and never followed up. Mere carelessness is not sufficient reason to set aside a default judgment. Second, under the language of Rule 55(b)(1), Trustcash was not entitled to a hearing on the amount of the judgment. Trustcash had been defaulted and the claim was for a sum certain or for a sum which could by computation be made certain (i.e., was liquidated).

THE ABSENCE OF FACT ALLEGATIONS IN NON-PARTY AT FAULT NOTICE IS NOT FATAL IF DEFENDANT'S DISCLOSURE STATEMENTS REVEAL FACTUAL BASIS FOR NON-PARTY AT FAULT.

Bowen Productions, Inc. v. Superior Ct. (Ct. Appeals, Division One, January 24, 2013)

"E&S" was the subcontractor for the design and installation of a sound system for a planetarium. E&S in turn contracted with defendant Bowen and an E&S subsidiary named Spitz to work on the project. E&S installed the dome and Bowen installed the audio system. E&S sued Bowen alleging that Bowen's installers damaged the dome. Bowen's initial disclosure statement listed an expert witness and attached his report attributing fault to Spitz. Bowen then named Spitz a non-party at fault, but did not go into the facts underlying that designation. Bowen's supplemental disclosure statements identified additional expert witnesses and reports against Spitz. The trial court struck E&S's non-party at fault notice for failing to present facts supporting Spitz's fault. The court of appeals reversed, holding the notice valid as a matter of law. The nonparty at fault notice must be read together with a party's timely disclosures, and a notice may be considered sufficient when the disclosures reveal the factual basis for the nonparty's alleged fault. The Court cautioned, however, that a party cannot salvage a defective notice by serving a last-minute disclosure: "If the timing of disclosure prevents meaningful notice for long enough to cause prejudice, the court retains jurisdiction to strike a notice of nonparty at fault."

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ABOUT THE EDITOR

Ms. Eileen Dennis GilBride heads up Jones, Skelton & Hochuli's appellate department and concentrates her practice on federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage.

Substantive areas of her appeals have included constitutional, contracts, torts, insurance coverage and defense, employment, municipal and school defense, civil rights, prisoner cases, professional malpractice, Indian law, legislative, administrative, personal injury, wrongful death, divorce, child custody and support, property rights and trusts.

Eileen has spoken at many seminars, is a former Judge Pro Tempore, is a past Chair of the State Bar Appellate Practice Section, a past Chair of the Arizona Supreme Court Committee on Examinations and is recognized as one of The Best Lawyers in America® in the area of appellate law.

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