JONES, SKELTON & HOCHULI, P.L.C.

LAW ALERT

A PUBLICATION OF JONES, SKELTON & HOCHULI, P.L.C. | APRIL 2012

Do you prefer email? If you would prefer to receive your copy of the Law Alert electronically, please let us know. Simply send an email with the following information to publications@jshfirm.com: (1) First and Last Name; (2) Company Name; (3) Email Address; (4) Reference "Law Alert" in the subject line. Once your request has been received, we will send all future issues to you electronically.

For further information regarding items in this newsletter or for a copy of any case featured, please contact Eileen Dennis GilBride at (602) 263-1787 or EGilBride@jshfirm.com.

DISPUTES OVER UM CLAIMS ARISE OUT OF CONTRACT, ALLOWING A COURT TO AWARD ATTORNEYS' FEES

Assyia v. State Farm
(Ct. Appeals, Div. One, March 22, 2012)

An uninsured motorist (UM) injured Plaintiff Assyia, a passenger in a vehicle. State Farm insured both Assyia and her host driver. After the accident, Assyia fell, causing additional injuries. Assyia demanded the host driver's $100,000 UM policy limits, plus her own UM policy limits of $50,000. State Farm paid the host driver's $100,000 UM policy limits, but determined that her claim was only worth another $2,000, so paid only that amount from her own policy. Assyia sued State Farm for breach of contract, alleging it failed to adequately compensate her under the policy. She sought the balance of her UM limits, as well as costs and attorneys' fees. State Farm argued that Assyia was not entitled to fees because her action sounded in tort, rather than contract.

After filing her lawsuit, Assyia amended her disclosure statement to assert that her injuries from the subsequent fall were causally related to the automobile accident, and re-characterized previously-disclosed medical records from the fall as being related to the automobile accident. State Farm re-evaluated Assyia's claim and tendered the $48,000 balance of her UM coverage.

The parties agreed to submit the question of Assyia's entitlement to fees, costs, and offer of judgment sanctions to the trial court. The court ruled that Assyia was the successful party to a dispute arising out of contract, and awarded her attorneys' fees and costs under A.R.S. § 12-341.01(A), which allows the award of fees to the prevailing party in a case arising out of contract. (The court denied Rule 68 sanctions). State Farm appealed.

The court of appeals affirmed, holding that the dispute over the value of a UM claim arises out of contract, and not tort. State Farm had argued that the dispute arose out of tort, because the purpose of UM coverage is to place the victim's insurer in the shoes of the tortfeasor, and the UM insurer is the functional equivalent of a liability carrier for the uninsured motorist. The court of appeals disagreed. It applied a "but for" test, reasoning that Assyia would not have had a claim against her insurer but for the contract between them. It therefore found that the UM tort was simply the event that triggered State Farm's duty under the contract, and so the dispute between Assyia and State Farm arose out of contract.

The court upheld the fee award against State Farm even though it had ultimately paid Assyia her full UM amount. The court said it was immaterial whether State Farm had actually breached its contract; as long as Plaintiff was the "successful party," Plaintiff may be awarded fees. The relevant question is whether the underlying lawsuit is a contested

action arising out of a contract, not whether State Farm in fact breached the insurance contract. And a "contested action" is one in which a defendant appears and generally defends against plaintiff's claims and demands. Here, State Farm appeared in the lawsuit and denied liability in its answer. Even after it paid the UM balance, the parties continued to dispute whether an award of attorneys' fees was appropriate.

The court also rejected State Farm's attempt to limit the fee award on the ground that such an award would cause its payments to exceed Assyia's $50,000 UM policy limit. Though there is a policy against awarding plaintiffs a windfall, fees are merely a reimbursement, and the total award may therefore exceed UM policy limits.

The court finally rejected State Farm's argument that Assyia could not be the prevailing party without a judgment or adjudication in her favor. Assyia was the successful party because she received a monetary judgment in a contested proceeding.

WITNESSES IN GRAND JURY PROCEEDING ARE ABSOLUTELY IMMUNE FROM § 1983 LIABILITY

Rehberg v. Paulk
(U.S. Supreme Court, April 2, 2012)

The chief investigator for a D.A.'s office testified at three separate grand jury proceedings, with each resulting in an indictment of petitioner that was ultimately dismissed. After dismissal of the third indictment, petitioner sued the investigator under § 1983, alleging that he conspired to, and did, present false testimony.

The U.S. Supreme Court held that the investigator was absolutely immune for his grand jury testimony. The reason trial witnesses are absolutely immune is to encourage witnesses to come forward with critical evidence without fear of retaliation. The same rationale applies to grand jury witnesses.

The court rejected petitioner's argument to distinguish law enforcement witnesses from lay witnesses. In fact, officers testify with such frequency that immunity is especially important to their availability as witnesses. Officers are subject to employment-related sanctions for giving false testimony, such as loss of their jobs. The court also held that an officer who testifies at a grand jury proceeding is not a "complaining witness" in the traditional sense of that term, which refers to "a party who procured an arrest and initiated a criminal prosecution." Finally, the interest in keeping grand jury proceedings secret overrides any risk of perjury that results from providing witnesses immunity. Although grand jury witnesses are not subject to cross examination, typically the witness will testify again at trial, where cross examination is available to deter perjury.

PARTY THAT DOES NOT HOLD A PRIVILEGE HAS NO STANDING TO CONTEST DECISION TO ADMIT PRIVILEGED TESTIMONY

D'Amico v. Structural I Company
(Ct. Appeals, Division One, April 3, 2012)

Business owners nearing retirement were seeing a psychologist about their personal and business matters. At the counselor's suggestion, the owners hired D'Amico as a consultant and then negotiated an agreement to bring D'Amico on as CEO. The owners discharged D'Amico less than 3 years into a 5 year contract. D'Amico sued owners for breach of contract, alleging the company withheld wages in bad faith and fired her without cause. The company filed a series of counterclaims. The jury determined that the company breached the contract by terminating D'Amico without cause and withheld over $500,000 in wages in bad faith, but that D'Amico breached her fiduciary duty to the company. Both parties appealed.

On appeal, the company argued, among other things, that the court should have excluded privileged testimony by the psychologist concerning her personal counseling sessions with the owners. The court of appeals rejected this argument, because the privilege was held by the owners, not the com-

pany. The owners were not parties to the suit. The company, therefore, lacked standing to complaint about the admission of the psychologist's testimony.

D'Amico argued that the trial court abused its discretion by refusing to treble her damages. The court rejected this argument as well. A.R.S. § 23-352 prevents an employer from withholding or diverting any portion of an employee's wages unless…[t]here is a reasonable good faith dispute as to the amount of wages due. But under A.R.S. 23-355(A) an award of treble damages is not mandatory.

DETAINEE WHO WAS ARRESTED FOR MINOR OFFENSE MAY BE STRIP SEARCHED WITHOUT INDIVIDUALIZED SUSPICION OF CONTRABAND

Florence v. Bd. of Chosen Freeholders (U.S. Supreme Court, April 2, 2012)

Petitioner was arrested during a traffic stop on an outstanding bench warrant for failure to appear at a fine-related hearing. He was briefly held at two county detention centers. At both facilities, Petitioner was subjected to an intake strip search. Petitioner sued alleging violations of his Fourth and Fourteenth Amendment rights.

The Supreme Court held, 5-4, that strip searches during detainee intake did not violate the Fourth Amendment. Correctional facilities have a strong interest in keeping their employees and inmates safe and their facilities orderly. Strip searches allow officials to discover and deter contraband. Facilities also have substantial discretion to resolve problems associated with safety and deterrence. A general strip search policy adequately and effectively protects the facility's safety interest and does not violate the Fourth Amendment.

Arrestees held for minor offenses are not exempt from general strip searches. Current charges and past criminal history cannot adequately determine whether or not an arrestee possesses contraband. Minor offenders may possess contraband. Therefore, they can be strip searched as part of a jail's general search policy. An exception might exist, however, for arrestees who are not entering the general population and will not have substantial contact with other inmates.

Two justices concurred, discussing the potential for additional exceptions and limiting the holding to the current facts and noting that not all arrestee strip searches are reasonable.

Four justices dissented, reasoning that strip searches for arrestees held for minor offenses are unreasonable unless the official has reasonable suspicion that the arrestee possesses contraband.