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LAW ALERT

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This Law Alert is a periodic review of recent court decisions. We provide this information as a courtesy to our clients and contacts in the community. You are receiving this because you have elected to receive emails from JSH. All of our newsletters are archived on our website. You may review the actual opinions by clicking on the case links below. For further information regarding items in this newsletter, please contact Jennifer Anderson at 602.263.7375 or janderson@jshfirm.com.

A Public Entity Waives a Notice of Claim Defense by Failing to Seek Prompt Judicial Resolution; a Plaintiff May Demonstrate Breach of the Standard of Care by Showing a Defendant Has Departed from Rules of Its Own Making

Ponce v. Parker Fire Dist.
(Arizona Ct. Appeals, Div. One, March 27, 2014)

On August 16, 2009, a fire began on the property next door to plaintiff and reached his house. Firefighters from the Parker Fire District (PFD) used a thermal imaging camera on the exterior of the plaintiff's house to check for hot spots, but did not use the camera on the house's interior. On August 21, the plaintiff's house was almost completely destroyed by fire.

The plaintiff submitted a notice of claim to PFD on March 5, 2010. In August 2010, the plaintiff sued PFD alleging negligence for failing to extinguish the fire and allowing it to rekindle. In answering the complaint, PFD asserted as an affirmative defense that the plaintiff had failed to file a timely notice of claim. In January 2012, PFD moved for summary judgment on the ground that the notice of claim was filed 196 days after the second fire and therefore was untimely under the 180-day limit imposed by A.R.S. § 12-821.01. PFD further argued that the plaintiff had not disclosed an expert witness on the standard of care for firefighters and therefore could not prove PFD was negligent.

On appeal from the trial court's grant of summary judgment, the court of appeals reversed. First, the court held that PFD waived the notice of claim defense by actively litigating the merits of the case for more than a year and failing to seek prompt judicial resolution of the defense.

Second, the court concluded that summary judgment was not appropriate based on the plaintiff's failure to identify a firefighting expert. The PFD Fire Chief, whose expertise PFD did not dispute, testified that standard operating procedure for thermal imaging cameras was to use it on everything possible. The court cited cases outside of Arizona for the proposition that a plaintiff may demonstrate breach of an appropriate standard of case by showing a defendant has departed from rules of its own making. Even though the Fire Chief also testified that PFD followed department procedures, his statements at least raised a question of fact precluding summary judgment.

The Ponce case has potentially far-reaching implications for businesses and entities that adopt policies and procedures to benefit their clients, patients, or the public. Plaintiffs may cite Ponce for the proposition that these policies and procedures can be evidence of the standard of care even in the absence of expert testimony establishing this.

Charter Schools Do Not Owe a Duty of Care to Students Traveling to and From School

Monroe v. Basis School, Inc.
(Arizona Ct. Appeals, Div. Two, February 10, 2014)

A student filed a negligence action against a charter school for injuries she received when she was struck by a truck at an intersection crosswalk while riding her bicycle home from school. The intersection was located approximately one block from the school and was equipped with marked crosswalks and traffic lights. The student claimed the school had been negligent in failing to post a crossing guard at the intersection. The trial court granted summary judgment to the school, finding it owed no common law or statutory duty to the student.

The court of appeals affirmed, holding that the school did not owe the student a duty of care to protect her from an unreasonable risk of harm while traveling to and from school. The school lacked the special, student-school relationship from which a duty might otherwise arise because the school no longer had custody of the student when she suffered her injury. The school did not assume a duty because it did not voluntarily undertake to provide protection at the intersection by, for example, establishing a marked crosswalk or providing a crossing guard. The school's mere proximity to a busy intersection did not give rise to a duty.

Nor did the school have a statutory duty. The court of appeals rejected the student's attempt to base a duty on the Arizona Department of Transportation's manual entitled Traffic Safety for School Area Guidelines, holding the guidelines were not "rules" or "regulations" with which charter schools must comply for purposes of A.R.S. § 15–183(E)(1). Finally, the court of appeals held public policy did not support recognition of a duty of care under the circumstances.

Court of Appeals Exercises Jurisdiction Over Appeal from Superior Court's Decision Upholding Police Sergeant Termination and Affirms Termination

Stant v. City of Maricopa Emp. Merit Bd.
(Arizona Ct. Appeals, Div. Two,
February, 25, 2014)

The Chief of the City of Maricopa Police Department terminated a police sergeant for refusing to cooperate with an internal affairs investigation of a police officer whom the sergeant directly supervised. The sergeant refused to answer questions when he was interviewed about his knowledge of the officer's actions. This violated a department operations order requiring an officer who is a witness to misconduct to cooperate with the administrative investigation.

The sergeant appealed his termination to the City of Maricopa Employee Merit Board. After conducting an evidentiary hearing, the board concluded the sergeant had violated department policy. The board also concluded the termination was appropriate and done in good faith for cause. The city upheld the termination, and the sergeant sought review in the Maricopa County Superior Court by seeking a writ of certiorari pursuant to A.R.S. § 38-1004. The superior court determined that the record supported the termination. The sergeant filed a timely notice of appeal to the Arizona Court of Appeals.

The court of appeals first examined its jurisdiction over the appeal. The court held it had jurisdiction under A.R.S. § 12-2007, which allows an appeal from a superior court's judgment under Arizona's general certiorari statutes. The court also had jurisdiction because the proceeding was one "permitted by law to be appealed from the superior court" under A.R.S. § 12-120.21(A)(1).

On the merits, the court of appeals applied the standard of review required by the governing rule, which was whether the department's action was taken

"in good faith for cause" under Maricopa Personnel Policy § 2.3.5(a). The court held the evidence supported a conclusion that the department's action was taken "in good faith for cause," giving deference to the department's reasonable interpretation of its own regulations. Among other reasons, the sergeant testified that he was familiar with the department order and knew he had a duty to cooperate with investigations during his interview.

Public Entities Are Statutorily Immune from Liability for Felonies Committed by Public Employees Unless the Entity Had Actual Knowledge of the Employee's Propensity for the Crime

Tucson Unified Sch. Dist. v. Borek
(Arizona Ct. Appeals, Div. Two, March 11, 2014)

The parents of a developmentally challenged girl sued the Tucson Unified School District ("TUSD") and its employee alleging that the employee had sexually abused their daughter at a TUSD school. The parents claimed TUSD was vicariously liable for the employee's conduct and had been negligent in investigating his employment background before hiring him.

TUSD moved for summary judgment, arguing that A.R.S. § 12-820.05(B) immunized public entities from vicarious liability for criminal felonies committed by their employees "unless the public entity knew of the public employee's propensity for that action." The trial court denied the summary judgment motion, holding that TUSD "should have known under the circumstances" that the employee's previous conduct indicated a propensity for sexual abuse.

TUSD filed a special action, arguing that the immunity statute's propensity exception applies only when a public entity has actual knowledge of the employee's propensity, not merely constructive knowledge, and that there was no evidence TUSD had such knowledge. The court of appeals accepted jurisdiction and granted relief, holding that the statute means exactly what it says—that immunity applies unless the public entity actually knew of the employee's propensity for the crime. Because there was no evidence that TUSD had actual knowledge, the immunity provided in A.R.S. § 12-820.05(B) applied to the parents' claims.

Store that Acquires Easement for Arrival and Departure of Invitees Owes Duty of Care to Invitee Who Is Injured While Using Easement for the Same Purpose

Timmons v. Ross Dress for Less, Inc.
(Arizona Ct. Appeals, Div. Two, March 21, 2014)

While leaving the defendant store, the plaintiff was injured when she fell on a curb or step that connected the parking lot and elevated area in front of the store. The store did not own or lease the parking lot or curbs but held a non-exclusive easement across both that allowed invitees to access the store. The property owner agreed to maintain the easement area. The plaintiff sued the store and the property owner alleging they were negligent in failing to keep the premises reasonably safe.

The court of appeals reversed the trial court's grant of summary judgment to the store. It found that the store acquired and used the easement for the arrival and departure of invitees to and from its retail premises. The store therefore had a duty to act reasonably in providing for the safety of invitees to the extent they used the easement for purposes of arriving and departing. The plaintiff maintained she was injured while departing from the store. Because the plaintiff was using the easement for the same purpose that the store acquired it, the court of appeals concluded her injury occurred within the scope of the store's duty to invitees.

The court rejected the store's argument that it had no control over the area where the plaintiff was injured and therefore could have no duty toward her. The court found that to the extent the plaintiff needed to

demonstrate the store's control over the easement, she had done so by showing that the store agreed to pay for maintenance of the easement area, part of the insurance, and any property taxes for it. The court separately held that the trial court abused its discretion in not permitting the plaintiff to amend her complaint to allege that the store had control over the design and construction of the area where she fell and was liable for negligent construction.

An Appraiser Owes No Duty of Care to a Seller if the Appraiser Does Not Intend the Seller to Receive and Rely Upon the Appraisal

Southwest Non-Profit Housing Corp. v. Novak (Arizona Ct. Appeals, Div. Two, March 31, 2014)

In this consolidated appeal, the three defendants performed appraisals in connection with the sale of three residential properties. In all three cases, the appraisals were appreciably lower than the properties' contracted sales price, leading the buyers to cancel the sales because their lenders would not fund the purchase loans. The seller of all three properties sued the appraisers for negligent misrepresentation in performing the appraisals. The appraisers were either dismissed or granted summary judgment on the ground they could not be liable for negligent misrepresentation under Restatement (Second) of Torts § 552.

The court of appeals affirmed in all three cases. Under Restatement § 552, an appraiser may be liable for negligent misrepresentation if the appraisal is intended to reach and influence a third party, even if the appraiser does not know the third party's specific identity. But an appraiser is not liable to everyone who might foreseeably receive and rely upon an appraisal. In this case, the sales agreements were entered into before the appraisals were commissioned. There was no evidence the appraisers intended for the seller to receive and rely upon their appraisals. The appraisers therefore owed no duty of care to the seller.

The court also found that even if the appraisers owed the seller a duty, there was no evidence the seller relied on the appraisals as was required to establish liability. The court therefore affirmed the trial courts' dismissal of claims against one appraiser and grant of summary judgment to the other two.

ABOUT THE EDITOR

Jennifer Anderson, Associate with Jones, Skelton & Hochuli, handles appeals and post-trial proceedings in cases before federal and state courts concerning a wide range of issues, including governmental liability, employment, insurance defense, and commercial law. Ms. Anderson also handles complex motion work at the trial level and assists trial counsel in preserving the record for appeal. She has represented clients in numerous trial court hearings, appellate oral arguments, and mediations.

Ms. Anderson joined JSH in 2012 with significant experience as an appellate attorney in private practice. She served as a judicial clerk for the Honorable Johnnie B. Rawlinson of the Ninth Circuit Court of Appeals. Ms. Anderson taught legal research, writing, and appellate advocacy at the William S. Boyd School of Law, University of Nevada, Las Vegas.

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