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LAW ALERT

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

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"NO LIABILITY" CLAUSE DOES NOT PRECLUDE RECOVERY FOR ADDITIONAL COSTS IN CONSTRUCTION CASE

***Technology Construction, Inc. v. City of Kingman* (Ct. Appeals, Div. One, June 12, 2012)**

Plaintiff entered into a construction contract with the City. The City did not give Plaintiff notices to proceed with construction until after the date the projects were scheduled to begin under the contract. Plaintiff submitted a notice of claim to the City, claiming that the City's delay caused increased costs and required changes in the work and adjustments to the contract. The City refused to pay.

Plaintiff sued for breach of contract and violation of the prompt payment act. The trial court entered judgment for Plaintiff. The City appealed, arguing that the "no liability clause" in the contract prevented Plaintiff from obtaining additional money in spite of the delay damages and changed conditions clauses in the contract. The City also argued that Plaintiff's breach of contract claim consisted entirely of higher material costs which were not in the contemplation of the parties when they made the contract.

The court of appeals affirmed, holding that the "no liability clause" did not insulate the City from liability when the trial court had found the City responsible for significant delay. Interpreting the no liability clause to be limited to the original scope of work set forth in the bid documents gives meaning and effect to the other provisions of the contract providing for the payment of additional compensation for changed scope of work, delay, changes made by City and changed conditions. Similarly, the fact that the contract was a fixed price contract did not prevent judgment against the City for the increased costs and change orders. Plaintiff's delay damages were foreseeable, and therefore recoverable under A.R.S. § 34-221(F).

PUNITIVE DAMAGE AWARD UNCONSTITUTIONALLY EXCESSIVE

***Nardelli v. Metro. Group Prop. & Cas. Ins. Co.* (Ct. Appeals, Div. One, May 1, 2012)**

Nardelli purchased a new car which was stolen about a year later. The car eventually was found in Mexico with a heavily damaged interior and ruined engine. Nardelli's insurer, Metlife, performed an initial repair appraisal and estimated the damage could be repaired for $815. As it turned out, the appraiser never even checked under the hood. Eventually the car was taken to the dealership and a thorough inspection was made, which revealed damages approaching 75% of the actual cash value of the car. Nardelli and Metlife battled over whether the car should be totaled, and eventually Metlife sent Nardelli and his lien holder a check for much less than the repairs would cost. Metlife then allegedly told Nardelli to take his car and do whatever he wanted. Metlife made it clear to Nardelli that they were not going to consider totaling his car.

Evidence at trial showed that at the time of Nardelli's loss, Metlife had an internal policy of trying to generate a company-wide profit of $155 million, giving seminars for claims handlers on how to reduce payouts on claims. Handlers did not have specific numerical goals, but were expected to contribute to the $155 million target. Metlife stressed that if the auto and home division did not meet their earnings goal, those divisions would likely be put up for sale. Metlife did not take steps to ensure that such claims handlers continued to comply with their full duty of good faith to its insureds. Evidence also showed that the Nardellis' handlers did not inform them of pertinent policy provisions, and did not give equal consideration to other alternatives, such as totaling the vehicle or investigating a salvage title.

The Nardellis succeeded on their bad faith claims and were awarded $155,000 compensatory and $55 million punitive damages. The trial court reduced the punitive damages award to $620,000 – resulting in a punitive/compensatory ratio to 4:1. On appeal, in addition to arguing against any punitive damages, Metlife argued the that the punitive award should be no more than 1:1 punitive to compensatory. Nardelli argued that the court should not have reduced the punitive award at all.

The court of appeals reduced the punitive damage award to a 1:1 ratio. The Constitution's Due Process Clause requires the court to analyze the evidence for (1) the degree of reprehensibility of defendant's conduct ; (2) the disparity between actual potential harm suffered by plaintiff and punitive damages award; and (3) the difference between punitive damages awarded and civil penalties authorized in comparable cases. In this case, the jury's 355:1 ratio was unfounded, and the reprehensibility of the conduct was so low that even a ratio of 4:1 was too high.

FAMILY PURPOSE DOCTRINE DOES NOT INCLUDE ROMANTIC RELATIONSHIP

Alosi v. Hewitt,
(Ct. Appeals, Division One, May 3, 2012).

Plaintiff (husband) sued a driver who collided with him, the driver's employer company, and the related company that owned the car she was driving. Husband moved to amend the complaint to add Defendant under the family purpose doctrine, because Defendant was romantically involved with driver and owned both the company employing driver and the company owning the car she was driving. Plaintiff also argued Defendant was liable on a theory of respondeat superior because he owned both companies. The court denied the amendment and granted Defendant summary judgment on the vicarious liability claim.

The court of appeals affirmed. First, the family purpose doctrine does not extend to the boyfriend-girlfriend relationship. The doctrine applies in the parent-child relationship based on a desire to protect the public from accidents caused by inexperienced and financially insecure drivers. Application in boyfriend-girlfriend context would create a broad and impermissible source of vicarious liability. Second, respondeat superior does not apply based only on the romantic relationship between the company owner and the driver employee. The company owner was not the driver's supervisor and the record failed to show that the owner had control or the right to control the physical conduct of his girlfriend. The fact that Defendant owned the company employing driver, owned the company owning the car and was engaged in a romantic relationship with the driver employee was insufficient, without more, to support liability under respondeat superior.

PLAINTIFF MUST MAKE PRIMA FACIE SHOWING THAT PUNITIVE DAMAGES ARE AWARDABLE BEFORE DISCOVERY ON DEFENDANT'S FINANCES ARE ALLOWED

Arpaio v. Figueroa
(Ct. Appeals, Division Two, April 30, 2012)

Plaintiff alleged that her mother, a diabetic, died as a result of spending three days in a Maricopa county jail without insulin or treatment for complications caused by the lack of insulin. Plaintiff sought compensatory and punitive damages against the individual Defendants. At a pretrial hearing, Plaintiff pointed out that she asserted a claim for punitive damages, and that while she was not entitled to see Defendants' financial statements at that point, the production of that information at a later date might lead to a delay. In response, the court ordered the Defendants to gather their financial information and provide it to their attorneys so it would be available if it determined Plaintiff had made the requisite prima facie showing for punitive damages. Two days later, Defendants requested a protective order with respect to their personal financial information. The court denied that motion, believing he did not have authority to issue such an order. Defendants filed a special action.

The court of appeals held the trial court abused its discretion by ordering Defendants to produce their financial information in the absence of a finding that Plaintiff had made a prima facie showing on the issue of punitive damages. The policy reasons for requiring a prima facie showing include the need to protect the defendant from an unwarranted invasion of privacy and harassment where the plaintiff has merely asserted a punitive damages claim. While the trial court's order did not require Defendants to disclose the information to Plaintiff, it nevertheless required Defendants to find, compile, and provide their counsel with their financial information, which could be viewed as more harassing and burdensome to Defendants than any subsequent disclosure. The court said a trial court should determine, as soon as reasonably possible – at a discovery hearing or pretrial conference – whether a party has made a prima facie showing (through discovery, evidentiary means or an offer of proof) that punitive damages will be in the case. If the prima facie showing is made, then the plaintiff is permitted to discover the defendant's financial condition.

Finally, the trial court erred in believing it lacked authority to issue a pretrial protective order. Ariz. R. Civ. P. 26(c)(1).

FOREIGN COMPANY THAT USES U.S. DISTRIBUTOR TO TARGET ARIZONA CUSTOMERS IS SUBJECT TO ARIZONA JURISDICTION

Van Heesewyk v. Jabiru Aircraft Pty, Ltd.
(Ct. Appeals, Division Two, April 24, 2012)

Decedent died when the airplane he was piloting crashed in Arizona. Decedent assembled the airplane from a kit sold by a distributor located in Tennessee who contracted with Jabiru, an Australian company. Decedent purchased the kit through a retailer in Arizona and built the airplane in a hanger located in Arizona. After successfully flying the plane for three months, the plane crashed when the propeller assembly detached. Decedent's estate sued Jabiru, among others. Jabiru moved to dismiss based on lack of personal jurisdiction. The trial court dismissed Jabiru.

The court of appeals reversed. Jabiru had sufficient minimum contacts with Arizona such that maintenance of the suit would not offend traditional notions of fair play and substantial justice. Jabiru used North American distributors to target Arizona customers; Jabiru had consistent sales of its products within the state; and Jabiru had an agreement requiring the North American distributors use their "best efforts to actively promote sales and service" in Arizona. Furthermore, the claims "arose out of" Jabiru's contacts with the state because there was a nexus between Jabiru's acts and Decedent's death. Finally, the exercise of jurisdiction was reasonable under the circumstances considering Arizona's interest in adjudicating the dispute, and plaintiff's interest in obtaining effective and convenient relief.

COURT DECIDES WHO OWNS MONEY FOUND WITHIN WALLS OF HOME

***Grande v. Jennings* (Ct. Appeals, Division One, May 31, 2012).**

Grande was the personal representative of her father's estate. Grande knew her father liked hiding valuables around his property, and after he died, she searched the home for hidden valuables. She found gold, stocks, bonds, and cash throughout the home. Grande sold the home to Jennings "as is."

Jennings began renovations, and her contractor discovered $500,000 in cash hidden in the walls. The contractor took the funds, but Jennings found out and sued the contractor. Grande then found out, and immediately sued in probate court to recover the money for the estate. Ultimately, Grande won summary judgment. Jennings appealed.

The court of appeals affirmed. A finder of lost property, abandoned property, or a treasure trove has the right to possess the property against everyone but the rightful owner. But a finder of "mislaid" property must turn the property over to the premises owner, who is under a duty to safeguard the property for the true owner. Here the court deemed the property mislaid, as Jennings failed to prove the money was abandoned. Further, entering into an "as is" sale, when neither party knows of the hidden money, does not turn the hidden money into abandoned property, especially when Grande asserted a right to the money immediately upon discovering its existence.

BROAD INDEMNITY LANGUAGE IN CONTRACT COVERS ALL LIABILITY, INCLUDING THAT SUBJECT TO A COVENANT NOT TO EXECUTE

***Flood Control District v. Paloma Inv. Ltd. Partnership* (Ct. Appeals, Division One, May 31, 2012).**

The Flood Control District undertook a flood control project in the floodplain of the Gila River from 91st Avenue to the Gillespie Dam. The project involved clearing sections of the river bed owned by the Gillespie Dam Owners. The Dam Owners granted the District a free easement over 26.8 acres of their land in exchange for the District's agreement to construct and maintain flood control measures and to indemnify the Dam Owners. The indemnity agreement said the District would indemnify the Dam Owners from "any and all liability" arising out of the District's use or occupancy of the easement, except for the Dam Owners' intentional acts or omissions.

In 1993, the Gila River flooded and the Gillespie Dam breached, causing extensive downstream flood damage to various farmers' homes. The farmers sued the Dam Owners and the District. The District filed a separate declaratory judgment action to establish that the indemnity clause did not apply to the farmers' claims against the Dam Owners. The Dam Owners counterclaimed seeking compensation pursuant to the indemnity clause. The cases were consolidated.

At trial, the jury found that the District did not cause the dam to fail, but that it was 10% at fault for the farmers' damage, and that the Dam Owners were 80% at fault. The Dam Owners and farmers executed a Damron/Morris agreement whereby the Dam Owners agreed to pay $3.3 million to the farmers, consented to a $14.75 million judgment, and permitted the farmers to join in the Dam Owners' indemnity action. The farmers agreed not to execute on the judgment against the Dam Owners beyond $3.3 million. The court later held that the indemnity agreement obligated the District to indemnify the Dam Owners for $14.75 million, the full amount of the stipulated judgment, despite a jury determination that the farmers' damage was only $5.36 million.

The District appealed the court's determination of the scope of the indemnity agreement, and the validity of the notice of claim as to the Dam Owners' indemnity claim, which was served after judgment had been entered against the Dam Owners. The Dam Owners cross-appealed the award to them of expert fees pursuant to their Rule 68 offer of judgment, which excluded expert fees for "project management" and "expert coordination" tasks, as opposed to time spent preparing to testify, and testifying.

The court of appeals held that (1) where a contract to indemnify against "all liability" is clear and unambiguous, it covers all liability, including liability subject to a covenant not to execute; (2) the Dam Owners' notice of claim regarding indemnity was proper because it was served within 180 days of the judgment rendered against them; and (3) expert fees pursuant to an offer of judgment are appropriate only for fees that have a rational nexus to the presentation of evidence at trial.

AFTER APPELLATE REVERSAL OF A NEW TRIAL ORDER, PREJUDGMENT INTEREST EXTENDS TO THE DATE OF THE JUDGMENT AFTER APPEAL; IT DOES NOT END WITH ENTRY OF THE ORIGINAL JUDGMENT

Metzler v. BCI Coca-Cola Bottling Co. of L.A. Inc., (Ct. Appeals, Division Two, May 11, 2012).

Plaintiff made a Rule 68 offer of judgment that Defendant rejected. The jury later awarded Plaintiff damages in excess of her offer of judgment. The trial court awarded prejudgment interest from the date of Plaintiff's offer to the entry of judgment. Defendant moved for a new trial. The trial court granted a new trial on liability only, and vacated the judgment for Plaintiff. Defendant appealed, and the court reversed the new trial order, ordering the judgment reinstated. When Plaintiff moved for judgment on the mandate, the trial court entered a judgment, but terminated the Rule 68 prejudgment interest as of the entry of the initial judgment.

The court of appeals reversed. A vacated judgment is not a "more favorable judgment" than the offer. Nor is a vacated judgment a "judgment" for prejudgment interest purposes. Therefore a vacated judgment is not a "judgment" for purposes of Rule 68(g). Therefore, prejudgment interest extended to the judgment entered after appeal. This interpretation is consistent with the settlement-promoting purpose of Rule 68. Protracted litigation, including the possibility of a new trial or reversal on appeal, is an inherent risk a party takes when rejecting a Rule 68 offer of judgment. The possibility of sanctions throughout extended litigation only increases the incentive to settle early.

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Law Alert

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