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LAW ALERT

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TATTOOING IS EXPRESSIVE SPEECH PROTECTED BY THE FIRST AMENDMENT

Coleman v. City of Mesa
(Ariz. Supreme Court, September 7, 2012)

Plaintiffs wanted to open a tattoo parlor in the City of Mesa. The Mesa City Code requires tattoo parlors to obtain a Council Use Permit to operate in the city. Mesa City Council denied Plaintiffs' request because the proposed use was "not appropriate for the location or in the best interest of the neighborhood." Plaintiffs sued the City for First Amendment, due process, and equal protection violations. The trial court dismissed the suit, reasoning that the Council's decision "was a reasonable and rational regulation of land use."

The Arizona Supreme Court reversed, holding that Plaintiffs' complaint stated a claim. The court rejected the City's argument that in denying the permit it was merely applying a general zoning law that incidentally affected speech-related activities. The ordinance effectively prohibited certain uses—including tattoo parlors—unless the Council issued a permit, which was entirely discretionary. And tattooing, including the business of tattooing, is a purely expressive activity protected by the federal and Arizona constitutions. While there is a split of authority on this issue, the court adopted the Ninth Circuit's approach in Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010).

Given the foregoing, Plaintiffs' complaint sufficiently stated a claim. They alleged that the City's approval criteria did not sufficiently guide or limit the Council's discretion, and that the City's denial was arbitrary and without any legitimate government purpose. Other tattoo parlors had been allowed to operate in Mesa, but the Council denied Plaintiffs' request based on "perceptions, stereotypes and prejudice" rather than any facts that Plaintiffs' business would harm the community. The court did not comment on the merits of Plaintiffs' claim – i.e., whether Mesa's ordinance, the permit process, or the City's refusal of Plaintiffs' permit were in fact reasonable or survived constitutional scrutiny.

MEDICAL EXPERT'S QUALIFICATIONS MUST MATCH ONLY THOSE OF THE DEFENDANT'S SPECIALTY RELATING TO THE INCIDENT

Lo v. Lee, et al.
(Ct. Appeals, Division Two, September 20, 2012)

Lo is a board-certified ophthalmologist. He claimed a subspecialty in oculoplastic surgery. Plaintiff sued Lo, claiming he negligently performed a "laser facial skin treatment" on her. Lo moved for summary judgment and to disqualify Plaintiff's standard of care expert, Dr. James Chao, a board-certified plastic surgeon. Lo argued that Chao was not qualified to testify because he was not a board-certified ophthalmologist. The trial court denied Lo's motions, reasoning that, aside from his board certification in ophthalmology, Lo was also a specialist in cosmetic plastic surgery, and the procedure Lo performed fell into that specialty. Lo sought special action review.

The court of appeals granted jurisdiction but denied relief. It held that A.R.S. § 12-2604 requires only that a testifying expert share the defendant's *relevant* specialty. While "specialty" is undefined in the statute, a testifying expert need not share every one of a defendant's specialties. This meets the purpose of Ariz. R. Evid. 702, which requires the expert to have requisite knowledge to "help the trier of fact to understand the evidence or to determine a fact in issue." Finally, requiring a testifying expert to share every one of the defendant's specialties would abrogate "the right of action to recover damages for injuries," in violation of the Arizona Constitution.

ATTORNEYS' FEE AWARD CANNOT BE BASED ON FACIALLY UNREASONABLE CONTINGENCY AGREEMENT

Geller v. Lesk
(Ct. Appeals, Division One, September 25, 2012)

Generally, a court will enforce a contractual provision providing that a party will recover attorney's fees. The court, however, retains discretion to limit the award to a reasonable amount. Once the requesting party makes a prima facie showing that its fees are reasonable, the burden shifts to the other party to demonstrate the amount is clearly excessive. If excessive, the court has the discretion to reduce the attorney's fees to a reasonable level.

Here, the contracting parties agreed to pay attorney's fees expended in collecting on a note, but they did not agree to a specific amount. The lender requested its contingency fee of 25% of the promissory note, which would have resulted in an award of $175,098.73 for approximately 100 hours of work, or about $1,750 per hour. Such an award is not reasonable and was not supported by billing logs or other evidence. The fee award was vacated and remanded to the trial court for a determination of a reasonable amount.

AN UNSIGNED REAL ESTATE AGREEMENT IS NOT ENFORCEABLE

Young v. Rose
(Ct. Appeals, Division One, September 25, 2012)

A real estate agent may sue to recover compensation under a real estate employment agreement only if there is a written agreement that complies with both A.R.S. §§ 44-101(7) and 32-2151.02(A). By enacting Section 32-2151.02(A), the legislature codified case law imposing specific legal requirements on real estate professionals' contracts beyond those contained within the general statute of frauds. However, the matter was remanded back to the superior court to give the parties the opportunity to submit affidavits or other evidence relevant to an electronic signature issue.

NEW LAW CHANGES PUBLIC INSURANCE REQUIREMENTS FOR RENTAL COMPANIES

On November 1, 2012, a new law will change the legal responsibilities of vehicle rental companies when their renters are involved in accidents. In its present form, A.R.S. 28-2166 requires rental companies to procure minimum liability insurance, or be self insured, in the amount of $15,000 for any one person injured or killed and $30,000 for any number more than one injured or killed in any one accident. This liability coverage must also provide at least $10,000 for property damage. The statute is clear that this public liability insurance/self insurance is primary coverage to any other available insurance coverage for damages caused by a renter. The amended A.R.S. 28-2166 retains the original coverage limits, but makes several important changes to this law.

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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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