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

LAW ALERT

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

EMPLOYER NOT VICARIOUSLY LIABLE FOR EMPLOYEE'S AFTER-WORK ACCIDENT DURING AWAY-FROM-HOME ASSIGNMENT

Engler v. Gulf Interstate Engineering
(Ariz. Supreme Court, July 9, 2012)

Gray worked for employer Gulf, a Texas-based energy consulting company. In 2007, Gray worked on the design and construction of a natural gas compressor for Gulf in Los Algodones, Mexico. Gray lived in Houston and flew each week from Houston to San Diego, where he rented a car and drove to Yuma. He stayed in a hotel in Yuma and commuted each day to the worksite in Mexico. Gulf also reimbursed Gray's business expenses, including the cost of his lodging, rental cars, and meals; and Gulf paid Gray for his travel to and from the job site because his work required him to cross an international border each day, which often entailed significant delays, especially when returning to Yuma. Gulf considered Gray's work day to begin when he left the hotel in Yuma and to conclude when he returned to Yuma. During after-work hours, Gulf did not attempt to supervise Gray or control his activities. After work one day, Gray got into an accident and injured a motorcyclist when leaving a restaurant in Yuma after dinner.

The Supreme Court held that Gulf was not vicariously liable for the motorcyclist's injuries. Adopting the Restatement (Third) of Agency § 7.07, Gray was not acting in the course and scope of his employment when the accident occurred. Gulf did not exercise any control over Gray at the time of the accident. Gray was not serving his employer's interests in traveling to and from the restaurant during his off hours, and Gulf did not control where, when, or even if Gray chose to eat dinner. Once Gray returned to his hotel at the end of the work day, he was free to do as he wished. That he ate dinner with a work colleague after work hours did not transform the social occasion into a business activity.

In so holding, the court rejected Plaintiff's attempt to use worker's compensation principles to construe "scope of employment" broadly. While those principles might provide guidance, those standards do not apply because workers' compensation and tort law differ in purpose and scope. The court also rejected Plaintiff's argument that all of Gray's activities in Yuma were to serve his employer. Whether the employee was subject to the employer's control must be assessed at the time of the employee's tortious act. Finally, the court distinguished a previous court of appeals decision, McCloud v. Kimbro (App. 2010), because that case involved an administrative regulation providing that a DPS officer comes "within the course and scope of employment when driving a state-owned vehicle if driving 'to and from meals while on out-of-town travel.'" Importantly, however,

the court disagreed with any interpretation of McCloud II suggesting that employees generally are acting within the course and scope of their employment when "driving to a restaurant" while off duty during an extended out-of-town assignment simply because eating is incidental to a multiple day assignment.

TAKING A BUCCAL SWAB FROM A JUVENILE PRE-ADJUDICATION DOES NOT VIOLATE THE 4TH AMENDMENT, BUT SUBMITTING THE SAMPLE FOR DNA TESTING DOES, WITHOUT PROBABLE CAUSE

Mario W. v. Arizona
(Ariz. S. Ct. June 27, 2012)

A statute requires law enforcement to obtain a buccal sample from juveniles who are arrested for certain offenses. A DNA profile is then extracted from the sample. The information is entered into state and national databases. A juvenile not found delinquent may have the profile and sample expunged. Seven juveniles were charged with qualifying offenses and were ordered to submit a buccal sample for DNA testing. The trial court rejected Fourth Amendment objections. A divided court of appeals panel affirmed as to five juveniles for whom there was a probable cause finding, and reversed as to the remaining two juveniles for whom no probable cause determination had yet been made. The state and two juveniles petitioned for review.

The Supreme Court affirmed in part and reversed in part. The statute involves two separate intrusions on a juvenile's privacy: (1) the physical seizure of a buccal sample, and (2) extraction of the DNA profile. The two searches implicate different privacy interests. The seizure of buccal cells is a physical intrusion, but does not reveal intimate personal information about the individual. The later search of the sample reveals uniquely identifying information about individual genetics. Thus, a two-tiered approach is appropriate. The initial swab, which is a search or seizure under the Fourth Amendment, is justified by the possibility that "a juvenile is released pending adjudication and later fails to appear for trial without previously having submitted a buccal sample." This possibility creates an "exigency" because "the opportunity to obtain a DNA profile for identification purposes will have been lost." Thus, the swab is constitutional as to all seven juveniles because they were all arrested for a qualifying offense.

The second search presents a greater privacy concern because it involves the extraction (and subsequent publication to law enforcement nationwide) of thirteen genetic markers from the arrestee's DNA sample that create a DNA profile effectively unique to that individual. The court held that the state is unable to show a "governmental interest in obtaining the DNA profiles before trial [that] is sufficient to justify the second search." Thus, the DNA testing is unconstitutional as to all seven juveniles because none has been adjudicated delinquent. If an arrested juvenile on release fails to appear, "because the State already will have obtained a buccal sample . . . it may obtain a DNA profile from the sample once a juvenile fails to appear as required by law or court order."

NINTH CIRCUIT UPHOLDS SUMMARY JUDGMENT FOR TASER IN DEATH CASE

Rosa v. TASER
(Ninth Circuit Court of Appeals, July 10, 2012)

Rosa was under the influence of methamphetamine when he was tased almost a dozen times by several police officers trying to subdue him. After a long struggle, he was finally handcuffed, but almost immediately went into cardiac arrest caused by metabolic acidosis. Rosa did not survive.

Rosa's family and estate (collectively "Rosa") sued TASER under California strict product liability and negligence law. They alleged TASER had a duty to warn police officers that repeated exposure to TASER

products could result in fatal levels of metabolic acidosis. The trial court granted summary judgment for TASER on both the strict liability and negligence claims; Rosa appealed.

The court of appeals affirmed. Under California strict products liability law, a manufacturer has a duty to warn of particular risks that are known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture. The law does not require a manufacturer to warn of all possible risks, no matter how speculative, conjectural or tentative. Here, Rosa could only advance scientific articles speculating that electric shock devices could cause metabolic acidosis – but no articles pre-dating manufacture had confirmed this. Further, under California negligence principles, a manufacturer has a duty to warn of risks that are likely to be dangerous for the product's intended use. The court of appeals found very few circumstances under which this duty would be broader than that under strict liability. For example, a manufacturer could have a duty to disclose and warn of a risk it discovers after the manufacture of a product. A manufacturer could also be liable for failing to perform adequate testing. Lastly, a manufacturer could have a duty to warn those who, although using another's product, might rely on warnings supplied by the manufacturer- i.e., a name brand pharmaceutical company should know that users of generics will rely on warnings supplied by the name brand. Rosa did not provide evidence of any of the above.

COURT OF APPEALS DEFERS TO BOARD'S DECISION TO TERMINATE EMPLOYEE, NOT TO THE HEARING OFFICER'S NON-BINDING REPORT AFTER EVIDENTIARY HEARING

Blancarte v. Ariz. Dep't of Transp. (Arizona Court of Appeals, Division One, July 31, 2012)

Plaintiff Blancarte was an ADOT customer service representative. ADOT dismissed her for cause after finding that she (1) behaved rudely and unprofessionally toward Native American customers; (2) improperly and without authority deleted tribal exemption codes from ADOT records for vehicles owned by Native Americans, or failed to enter the codes when required; and (3) told her supervisor that "as a private citizen" she could turn people in for failing to comply with motor vehicle laws regardless of ADOT procedures. Blancarte also accused a customer of committing fraud with no evidence to support her accusation.

Blancarte appealed her dismissal. A hearing officer appointed by the Board held an evidentiary hearing, then issued a Report stating that Blancarte had been rude and intentionally deleted tribal exemption codes, but that dismissal was grossly disproportionate to the offenses in light of mitigating factors. While finding cause for discipline, the Report recommended the Board reinstate Blancarte with back pay and impose a lesser sanction. After a hearing, the Board rejected the findings of mitigating factors, denied Blancarte's appeal, and upheld ADOT's dismissal decision. Blancarte appealed the Board's decision to the superior court. The court found that the record supported the hearing officer's Report and "affirmed" that "decision," concluding that ADOT's termination decision was arbitrary, capricious, and an abuse of discretion. The court ordered ADOT to impose the lesser sanction recommended in the Report.

ADOT and the Board appealed to the court of appeals, which reversed. The trial court erred in "affirming" the Report because the Board, not the hearing officer, decides the initial appeal. The Report was not a final Board action subject to superior court review or to which court deference was owed. See A.R.S. § 41-785; AAC R2-5.1-103(R). On the merits, the court of appeals found substantial evidence to support the Board's determination that dismissal was not disproportionate to Blancarte's offenses, and no evidence that the dismissal was arbitrary, capricious, or contrary to law. Thus, the Board did not abuse its discretion in affirming ADOT's decision to terminate Blancarte.

LENGTH OF DETENTION CAN TURN CONSTITUTIONAL DETENTION SUPPORTED BY REASONABLE SUSPICION INTO DE FACTO ARREST UNSUPPORTED BY PROBABLE CAUSE

Arizona v. Boteo-Flores
(Arizona Supreme Court, July 3, 2012)

Police officers went to an apartment complex and saw a black truck matching the description of a stolen vehicle. The officers observed a maroon car with one driver come up acting suspiciously, looking up and down the street with binoculars. The maroon car drove off and returned with three individuals and headed to the back of the complex. Several minutes later, the Defendant walked down the driveway to the edge of the street and looked up and down it several times. A few minutes later, the driver of the maroon car drove out of the complex in the truck. The maroon car drove away. As the driver of the truck approached the street, he shouted at Defendant, but Defendant did not respond. Officers pursued the truck, which was later found abandoned. One officer approached the Defendant, hand-cuffed him, and frisked him for weapons. The officer gave Defendant his Miranda rights and began questioning him. Shortly thereafter, the officers called an auto theft detective to help with the investigation. While waiting for the detective, the Defendant was left in handcuffs, standing by a police car for 30 minutes. The detective, who had arrived, again advised Defendant of his Miranda rights and questioned him. Defendant was arrested for theft of a means of transportation based on admissions he made during the interview. He moved to suppress, arguing that the detention was not supported by reasonable suspicion, or alternatively, that the initial detention was a de facto arrest unsupported by probable cause. The trial court denied the motion. Defendant was found guilty and sentenced to 1.75 years in prison. The court of appeals affirmed.

The Arizona Supreme Court reversed, holding that although the initial stop was valid based on reasonable suspicion, the subsequent detention became a de facto arrest unsupported by probable cause. Based on the totality of the circumstances, the Defendant's continued detention for 30 to 45 minutes was not reasonable when there was no probable cause to arrest. [The State conceded that police officers did not have probable cause to arrest Defendant until the confession.] While cautioning that there was no definitive timeline for when an initial Terry stop becomes an arrest, here Defendant posed no threat to security, and there was no need to wait for a specialized investigator to conduct the questioning. The absence of evidence that the officers acted diligently in investigating Defendant's connection to the stolen vehicle, and their ongoing use of handcuffs without a safety threat or flight risk, transformed the valid stop into a de facto arrest unsupported by probable cause. The matter was remanded for determination of the suppression issue.

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.

Contact Eileen via telephone 602.263.4430 or egilbride@jshfirm.com.

Jones, Skelton & Hochuli, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, AZ 85012

Law Alert