JS&H | LAW ALERT

A PUBLICATION OF JONES, SKELTON & HOCHULI, P.L.C. | MAY 25, 2011

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.

POLICE OFFICER NEED NOT FORMALLY ANNOUNCE A PERSON IS UNDER ARREST FOR THE PERSON TO BE CONVICTED OF RESISTING ARREST

State v. Barker (Ct. Appeals, Div. One, April 21, 2011)

An officer approached Defendant Barker and a woman arguing in the roadway. The officer smelled alcohol on Barker's breath, and believed he had probable cause to arrest Barker for disorderly conduct. After Barker refused to turn around and be placed in handcuffs, the officer reached with one hand to get Barker to turn around. Barker pulled away. The officer attempted to restrain Barker again, but Barker broke free. Eventually another officer arrived and tried to tase Barker. A third officer arrived and Barker was finally handcuffed. Barker was charged with multiple felonies, including one count of resisting arrest. He was ultimately convicted of resisting arrest. He appealed.

The court of appeals affirmed. Under A.R.S. § 13-2508(A), a person resists arrest by using physical force to attempt to prevent a police officer from effecting an arrest. Effecting an arrest means making or bringing about an arrest. Barker argued the officer did not "effect an arrest" because he did not formally announce that Barker was under arrest before attempting to restrain him. But no Arizona authority requires police officers to formally announce that a person is "under arrest" before he can be convicted of resisting arrest. The court also rejected Barker's argument that the officer's initial plan to merely detain Barker for questioning precluded the officers from deciding shortly thereafter to effect Barker's arrest. A reasonable jury could find the officers' actions sufficient to "effect an arrest."

LONG TERM COMMERCIAL CONTRACT DOES NOT CREATE A FIDUCIARY RELATIONSHIP; ECONOMIC LOSS RULE APPLIES

Cook v. Orkin Exterminating Co., Inc. (Ct. Appeals, Div. One, May 19, 2011)

Cook purchased a new home in 1987 and almost immediately had termite problems. Cook contracted with Orkin for termite control, and Orkin treated the home many times between 1989 and 2007. The termites returned each time. Cook sued, seeking a variety of contract and tort remedies, alleging that Orkin had failed to fulfill its promise to get rid of the termites. One of the claims was for breach of fiduciary duty. Orkin moved for summary judgment on this and the tort claims, arguing no fiduciary duty existed and the tort claims were barred by the economic loss rule. The court agreed and dismissed those claims. Cook appealed.

The court of appeals affirmed dismissal of the fiduciary duty claim, because commercial transactions do not create fiduciary relationships unless there is an express agreement otherwise. A party's mere trust in the other's expertise does not give rise to such a relationship. Fiduciary relationships are characterized by intimacy, disclosure of secrets, or entrusting of power. The court also affirmed on the economic loss rule. Cook's losses were only economic, including repair costs. As such, Cook was limited to contract remedies.

ADOPTED CHILD CANNOT BRING WRONGFUL DEATH CLAIM FOR DEATH OF BIOLOGICAL FATHER

Edonna v. Heckman (Ct. Appeals, Div. One, May 3, 2011)

Plaintiff's biological parents, Edward and Donna, divorced when Plaintiff was 9 years old. Donna remarried. Stepfather adopted Plaintiff when he was 13. Years later, Edward was killed in an accident. Plaintiff sued for the wrongful death of his biological father.

The court of appeals held that Plaintiff lacked standing to bring the wrongful death suit. A.R.S. § 8-117 expresses the legislature's intent that upon adoption, the relationship between the child and his biological parents is completely severed and all legal consequences (including the right to bring a wrongful death action) cease to exist. Further, A.R.S. § 14-2114, which allows adopted persons to inherit, does not apply to wrongful death claims. The right to bring a wrongful death action does not depend on the right to inherit-it is a personal right to be compensated for one's own loss.

MEDICAL EXPERT TESTIFYING AGAINST A BOARD-CERTIFIED SPECIALIST NEED NOT BE BOARD-CERTIFIED AT THE TIME OF THE UNDERLYING TREATMENT

Awsienko v. Cohen (Ct. Appeals, Div. One, May 12, 2011)

Awsienko suffered a cardiac arrest and died. Dr. Cohen, board-certified in internal medicine and nephrology, treated Awsienko. Dr. Hoelzinger, board-certified in cardiovascular disease and interventional cardiology, also treated him. The family sued Drs. Cohen and Hoelzinger, disclosing Dr. Wilson as their expert, who was not board certified at the time of the incident. Defendants moved for summary judgment, arguing that Dr. Wilson did not meet the requirements of A.R.S. § 12-2604(A)(1) and was not board certified in the same specialty as Dr. Hoelzinger. The trial court granted summary judgment.

The court of appeals affirmed for Dr. Hoelzinger but reversed summary judgment for Dr. Cohen. Dr. Wilson did not meet the requirements of A.R.S. § 12-2604 because he was not board certified in the same specialties as Dr. Hoelzinger, and he did not offer any testimony that Dr. Hoelzinger violated the standard of care. As to Dr. Cohen, however, A.R.S. §12-2604 does not require that the expert be board certified at the time of the occurrence. The Legislature attached this temporal requirement to the specialization language, but chose not to include the same language as to board certification.

SERVICE OF NOTICE OF CLAIM ON COUNTY WAS NOT EFFECTIVE AS TO THE STATE

Slaughter v. Maricopa County (Ct. Appeals, Div. One, May 5, 2011)

Plaintiff served a notice of claim on her employer, Maricopa County, alleging sex and age discrimination and hostile work environment. Later, when Plaintiff amended her complaint to name the State of Arizona as a defendant, the State moved to dismiss on the basis that Plaintiff had failed to serve it with a notice of claim. Dismissal was granted and affirmed. Arizona law requires service upon the State through the attorney general, and Plaintiff had not served the notice on the attorney general. Further, the court rejected Plaintiff's argument that the County was the State's agent so that service of the notice of claim on the County was effective service on the State. Plaintiff failed to present any evidence of such agency. In addition Plaintiff had done nothing to prosecute her claims beyond filing the complaint, and thus the lower court properly dismissed for failure to prosecute.

CONTRACTOR'S LACK OF LICENSE IS AN AFFIRMATIVE DEFENSE SUBJECT TO WAIVER IN ARBITRATION PROCEEDINGS

Smith v. Pinnamaneni (Ct. Appeals, Div. One, April 28, 2011)

Pioneer contracted with W Inc. to build a home. Pinnamaneni, its managing member, signed the contract for Pioneer. The contract contained an arbitration clause, which W invoked when a dispute arose. Pinnamaneni, however, did not appear at the arbitration, and the

arbitrator issued an award to W against Pioneer and Pinnamaneni.

Shortly before the arbitration, Pinnamaneni discovered that W was not licensed when the parties signed the contract. Pinnamaneni opposed confirmation of the arbitration award, citing the licensure statute. W argued that Pioneer/Pinnamaneni waived the licensing argument by failing to appear at arbitration. The superior court agreed and confirmed the award.

The court of appeals affirmed, holding that a contractor's lack of licensure is an affirmative defense subject to waiver. The contractor's contracts are not void, but voidable. Further, the only objections to confirmation of an arbitration award are those listed in A.R.S. § 12-1512.

CONTRACTOR MAY ASSERT BREACH OF IMPLIED WARRANTY AGAINST ARCHITECT

North Peak Construction, Inc. v. Architecture Plus, Ltd. (Ct. Appeals, Div. One, April 26, 2011)

The owners of a lot in Scottsdale hired Architect to create plans for a house that would take advantage of the "extraordinary view" of the city. Although ownership of the lot changed during the design phase, at all times the contract referenced the importance of taking advantage of the city view. The new lot owners contracted with North Peak to build the home. After construction started, North Peak discovered that Architect's plans aligned the home so it faced a water tank rather than the city. As a result, North Peak demolished the work already performed and rebuilt the home, which cost an additional $165,000.

North Peak sued Architect for breach of implied warranty, alleging Architect designed and oriented the home without maximizing the view of the city as expressly required. The trial court dismissed, concluding that the implied warranty claim was essentially a claim for attorneys' fees; and the claim for breach of an implied warranty against a design professional is a tort claim, not a contract claim, so fees were not recoverable.

The court of appeals reversed. Arizona law allows claims for breach of an implied warranty against a design professional, regardless of the lack of privity between North Peak and the Architect. Design professionals impliedly warrant that they have exercised their skills with care and diligence and in a reasonable, non-negligent manner; and here, Architect caused North Peak significant extra costs as a result of flawed plans. However, though the action "sounds in contract" and not in tort, A.R.S. § 12-341.01(A) applies only to claims arising out of implied-in-fact contracts, not implied-in-law contracts. Because the implied warranty is created (implied) by law, § 12-431.01(A) does not apply. North Peak could not seek attorneys' fees under the statute.

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

Law Alert