Jones, Skelton & Hochuli

Reporter

FALL 2014 ISSUE

Photo Taken by Bill Schrank in Oak Creek Canyon, north of Sedona, Arizona

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Register Now for Free CLE and CE JSH Annual Seminar
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MESSAGE FROM THE EDITOR

EDITOR: Lori Voepel EMAIL: lvoepel@jshfirm.com BIO: jshfirm.com/lorilvoepel

Welcome to the Fall Edition of the JSH Reporter!

After a successful re-launch of the JSH Reporter over the Summer, we are thrilled to publish our Fall Edition. If you are a new reader of the JSH Reporter, welcome! We have designed this publication to provide information about changes in the law and how these affect a variety of industries, as well as to provide updates on what is happening within our firm.

In this issue, you'll find articles on family educational rights, implied waiver of the attorney-client privilege, changes in anti-deficiency protection, the right to attorney fee awards, and tips on how to improve your mediation success. Additionally, you'll find appellate highlights, cases of note, recent JSH accomplishments and upcoming firm events.

If you haven't already registered for our upcoming firm seminar, don't delay! On November 5th, JSH will host a free full-day educational seminar for our clients and potential clients at the Phoenix Convention Center. The morning half will focus solely on governmental liability issues. In the afternoon, the firm will kick off its annual seminar titled: "It's All Fun And Games Until Someone Gets Hurt." You won't want to miss our entertaining and educational new twist on an old favorite, the Hollywood Squares, which we have dubbed the "JSH Squares." The seminar will qualify for 3 hours of CLE in Arizona and CE credit in 30 states. The day will be packed with useful information, networking and fun, and will end with a networking cocktail reception.

We always appreciate your thoughts and feedback on this publication. What do you want to read about? What interests you? Share your ideas with me at lvoepel@jshfirm.com.

Keep an eye out for the Winter issue of the JSH Reporter to be published in January 2015. In the meantime, have a safe and happy holiday season, and hopefully we will see you at one or both of our seminars on November 5th.

Lori Voepel
Partner and *JSH Reporter* Editor

During Lori's 21 years of practice, she has handled over 250 state and federal appeals in virtually every area of law. She also provides appellate guidance to trial attorneys from the pleading through post-trial stages.

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JSH Reporter

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THE APPLICATION OF THE FAMILY EDUCATIONAL RIGHTS & PRIVACY ACT IN LITIGATION

AUTHOR: **Elizabeth Gilbert** EMAIL: **lgilbert@jshfirm.com** BIO: **jshfirm.com/elizabethagilbert**

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, applies to any educational institution or agency that receives federal funds. The Act requires these institutions to have a policy that allows students and their parents to have the right to inspect and review the education records of themselves or their children. Additionally, under the Act, the educational institution cannot release the educational records or personally identifiable information, other than directory information, of any student without the consent of either the student (if 18 or older) or the parent. The prohibitions against disclosure, however, are not absolute.

Education records are those records, files, documents and other materials containing information directly related to a student that are maintained by the institution or agency. 20 U.S.C. §1232g(a)(4)A). They do **not** include:

- Records of instructional, supervisory, and administrative personnel which are in the sole possession of the maker;
- Records maintained by a law enforcement unit of the institution
  that were created by the law enforcement unit for the purpose of law enforcement;
- Employment records of persons who are not students and related to the individual's capacity as an employee;
- Records of a student who is over 18 or attending an institution of postsecondary education, which are maintained by a physician, psychiatrist, psychologist and are made, maintained and used in connection with the provision of treatment to the student. 20 U.S.C. §1232g(a)(4)(B).

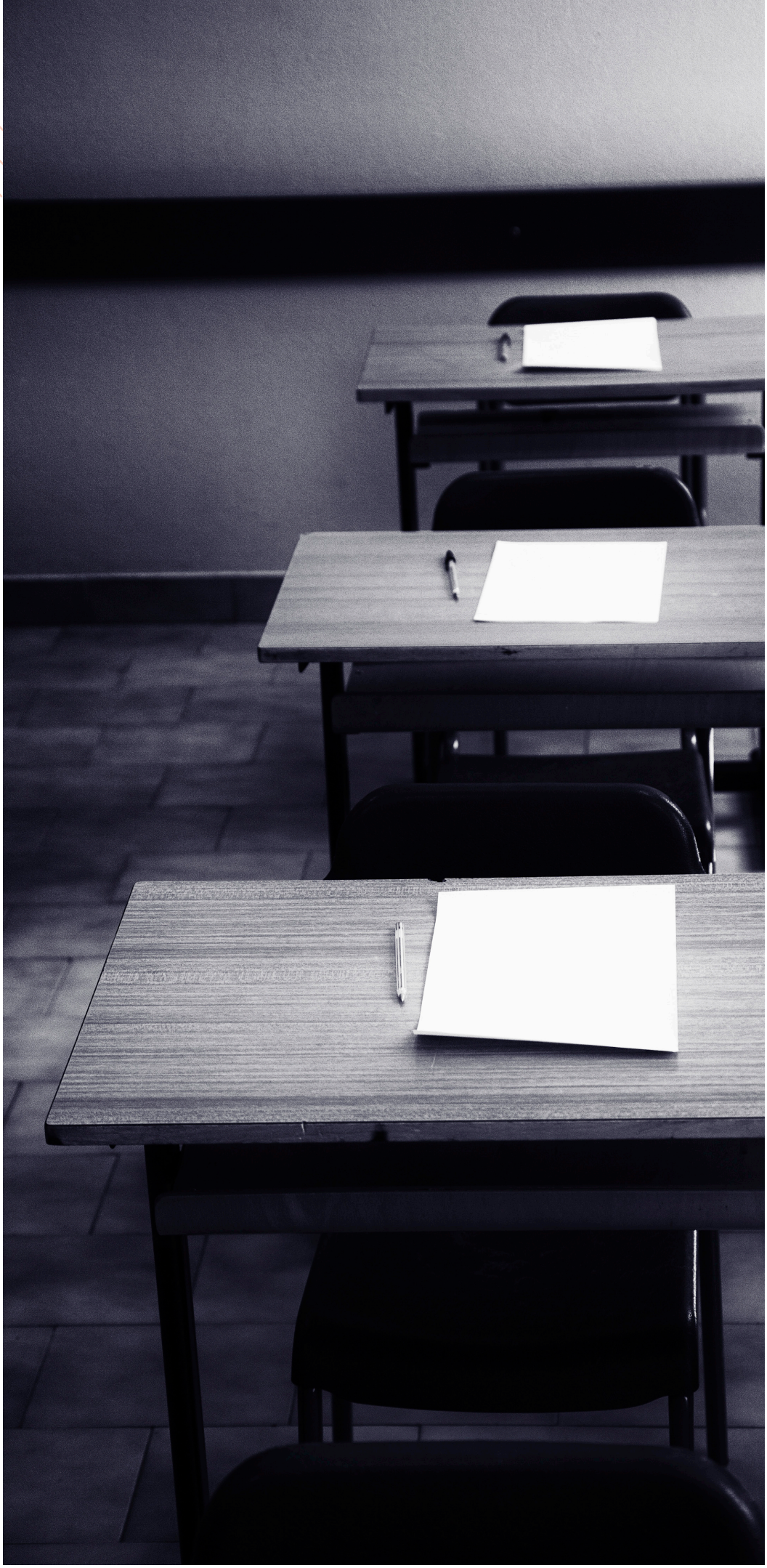
Educational institutions are not prohibited from disclosing certain personally identifiable information, called "directory information," so long as they give the students and parents notice that they will make directory information public and allow them to "opt out" of such disclosures. Directory information can be defined by each educational institution, but usually includes: student name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most previous educational agency or institution attended by the student. 20 U.S.C. §1232g(a)(5)(A).

In litigation involving educational institutions or agencies, the educational records or personally identifiable information of students may be sought through discovery. If a litigant requests any type of student records or information, the request should be analyzed as follows:

1. What type of information is being requested?
2. Does the institution disclose "directory information" without consent? If so, has the student opted out of disclosure?
3. If the request is for records, are the requested records education records? If so, has the student/parent consented to the disclosure?
4. Is there a subpoena or a court order?

If the request is for student names, addresses, or other types of personally identifiable information, review the educational institution/agency student handbook to determine whether the institution has indicated that it will disclose "directory information" without consent. If so, identify what information the institution has listed as "directory information." Once this information has been identified, the educational institution will need to determine if the affected student has opted out of the automatic disclosure. If the student/parent has not opted out, the directory information can be disclosed without notice to the student/parent. If the student/parent has opted out, then the information can only be disclosed with consent or a court order.

If the request is for records, you must determine whether the requested records meet the definition of education records. If the requested records are not education records, i.e. law enforcement or employment records, then the records can be disclosed without notice to the student/parent. If the records are education records, then they can only be disclosed with the consent of the student/parent or a court order.



"FERPA IMPOSES LIMITATIONS ON THE DISCLOSURE OF STUDENT RECORDS AND INFORMATION BY EDUCATIONAL INSTITUTIONS, EVEN IN THE MIDST OF LITIGATION. THE LIMITATIONS, HOWEVER, ARE NOT ABSOLUTE."

If a subpoena or court order is issued for the records or information, the educational institution/agency must give notice to the student/parent **prior to** complying with the subpoena or court order. This notice provides the student/parent the opportunity to lodge an objection to the subpoena or court order.

EXAMPLE: Plaintiff submits a Request for Production to Defendant community college district requesting the schedules, grades and transcripts of all students enrolled in two specific college courses. The records are relevant pursuant to the Rules of Civil Procedure. How should the Defendant respond?

Defendant should, initially, object to producing the requested records as follows:

> **Objection.** The information requested meets the definition of education records as defined by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g. Specifically, education records are records maintained by the educational institution containing information directly related to a student. The definition of education records is intended to be broad in scope. *United States v. Miami University*, 91 F.Supp.2d 1132, 1149 (S.D. Ohio 2000), *affirmed* 294 F.3d 797 (6th Cir.2002).
>
> [Defendant] is precluded, pursuant to FERPA, from releasing education records of any of its students without the consent of the student or a lawfully served subpoena or order of the court; this is an affirmative obligation of the educational institution. *Id.* In the event [Defendant] is lawfully served with a subpoena or an order of the court, prior to complying with the subpoena/order, [Defendant] must notify any affected student/parent of the issuance of the order or subpoena.

Defendant should then consider entering a stipulation for an order to disclose the records subject to a protective order, which would restrict further disclosure of the records and limit the use of the records to the instant litigation. The order should include a time period for the educational institution to notify the student/parent and give them time to lodge an objection before the records are disclosed.

FERPA imposes limitations on the disclosure of student records and information by educational institutions, even in the midst of litigation. The limitations, however, are not absolute. A thorough analysis of the type of information sought to be disclosed, combined with a proactive plan, will allow for the disclosure of relevant information while still protecting the privacy of the students.

ABOUT THE AUTHOR LIZ GILBERT

Liz focuses her practice on civil litigation and governmental entity defense. She has been practicing law for 16 years. Prior to joining JSH, Liz worked for the Maricopa County Attorney's Office in the Special Crimes and Gang Bureaus prosecuting large, high-profile gang/criminal syndicate cases, including investigations involving joint state and federal task forces. Contact Liz at 602.263.1710 or lgilbert@jshfirm.com.

JSH RESOURCE ALERT! Spoliation of Evidence Compendium of Law

USLAW recently released its 2014 Spoliation of Evidence Compendium of Law. USLAW regularly produces new compendiums and updates providing a multi-state resource that permits users to easily access state common and statutory law. Compendiums are easily sourced on a state-by-state basis and are developed by the member firms of USLAW.

In 1984, California was the first state to recognize the tort of spoliation. The majority of jurisdictions that have subsequently examined the issue, however, have declined to create or recognize such a tort. Only Alabama, Alaska, Florida, Indiana, Kansas, Louisiana, Montana, New Mexico, Ohio, and West Virginia have explicitly recognized some form of an independent tort action for spoliation. California overruled its precedent and declined to recognize either first-party or third-party claims for spoliation.

The majority of states that have examined this issue have opted to remedy spoliation of evidence, and the resulting damage to a party's case or defense, through sanctions or by giving adverse inference instructions to juries. Sanctions can include the dismissal of claims or defenses, preclusion of evidence, and the granting of summary judgment for the innocent party. The USLAW Spoliation of Evidence Compendium is a compendium of decisions for those states that have examined the issue of spoliation.

View Compendium: http://www.uslaw.org/files/Compendiums2014/Spoliation/USLAW_2014_Spoliation_of_Evidence_Compendium_of_Law.pdf

ANNOUNCING THE 2014 JSH ANNUAL SEMINAR

IT'S ALL FUN AND GAMES UNTIL SOMEONE GETS HURT

11.5.14 - PHOENIX CONV CENTER - JSHSEMINAR.COM

Please join us on November 5th for our annual update on Arizona law. The seminar offers 3 hours of CLE and CE in many states and is free for our clients and potential clients. You won't want to miss our entertaining and educational new twist on the old favorite, Hollywood Squares...which we have dubbed as "The JSH Squares."

This program will benefit insurance, commercial and business professionals and governmental entities. Among those who will find the program valuable are: Claims Adjusters, Supervisors and Managers, Government Employees, Risk Managers, Contractors, Employers, Executives and General Counsel.

Seating is limited, so don't wait...register today!
More information and Registration available online at:

www.jshseminar.com

THE JSH SQUARES

SESSION DESCRIPTIONS

EMERGING TRENDS: AN OVERVIEW OF NEW CASE LAW AND DEVELOPMENTS

This session will include a comprehensive update of cases and emerging trends/developments relevant to all claim handlers presented in an interactive game format. Our lawyers will provide a brief overview of important cases from a variety of practice areas, including: Appeals, Uninsured/Underinsured Motorist Coverage, Transportation, General Liability, Bad Faith/ Coverage, Employment, Criminal Law, Traffic Laws, Medical Liens, Construction and Medical Malpractice.

HOW TO AVOID THE HOT SEAT: GOOD CLAIMS HANDLING IN ARIZONA

While even a perfect file can result in a bad faith suit, the JSH lawyers in this session will discuss the building blocks of a reasonable investigation to successfully avoid the various pitfalls that can lead to accusations of bad faith. You will learn proper investigative techniques, proactive steps to avoid claims of delay, how to properly document your file and understanding your duties to the insured. The panel members will also discuss their experiences and mistakes they have seen made by claims personnel, including what not to do and what not to write in the file, and what can be considered evidence of an unreasonable investigation.

TAKING THE BITE OUT OF DAMAGES: RECOVERABILITY, LEGAL DEFENSES, AND CURRENT TRENDS

After investigating the underlying facts, you deem the claim to be valid. Depending on liability defenses and cost of litigation, you might want to make an offer of settlement. While your employer obviously wants to avoid a bad faith claim, no one wants to award a claimant with a windfall. Balancing the interests of the insurer and the claimant requires you to know the reasonable value of a claim. But, it is not as simple as looking at what has been paid in the past on similar claims. Before you show the claimant the money, you need to know answers to questions such as what categories of damages are recoverable for this type of claim, whether there are any underlying legal defenses, and just who is entitled to the money.

DEFENDING THE QUESTIONABLE TRAUMATIC BRAIN INJURY CLAIM: INCLUDING A LIVE NEUROLOGICAL INDEPENDENT MEDICAL EXAMINATION BY DR. STROBL

Dr. Fritz Strobl of AZMN Neurology joins us this year to provide a guided tour of a comprehensive neurological independent medical examination. During this session, you will watch a live mock IME and explore the critical aspects of the IME process, which includes the exam, records review, intake interview, testing, report writing and, ultimately testifying.

APPELLATE HIGHLIGHTS

AUTHOR: Jon Barnes EMAIL: jbarnes@jshfirm.com BIO: jshfirm.com/jonathanpbarnes

Following is a list of the recent Appellate Cases we believe are of interest to our diverse group of clients. If you would like any additional information on the cases below, please feel free to contact any of the lawyers in our Appellate Department.

August 28, 2014

Felipe v. Theme Tech Corporation

(Arizona Court of Appeals)

Court defines "Independent Expert" for One-Expert-Per-Side Rule to mean a retained expert who is not a fact witness.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/CV%2013-0393.pdf

August 20, 2014

State of Arizona v. Gilstrap

(AZ Supreme Court)

Adopting the "possession" test in Arizona for searching the purse of a person not named in a premises search warrant.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2014/CR130379PR.pdf

August 12, 2014

Arellano v. Primerica Life Insurance Co.

(Arizona Court of Appeals)

Holding that the punitive damage award is unconstitutionally excessive in this bad faith case and finding that a 4:1, rather than a 13:1, compensatory to punitive damages ratio is appropriate.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1CA-CV%2013-0011.pdf

featured **case**

MAY 20, 2014

Beaver v. Am. Family Mut. Ins. Co.

(AZ Court of Appeals)

Arizona's Uninsured/Underinsured Motorist Act, A.R.S. § 20-259.01, allows an insurance company to restrict who is covered as an insured under the policy and, thus, who is entitled to uninsured/underinsured motorist coverage.

More Information: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV%2013-0407.pdf

July 23, 2014

Gallardo v. Arizona

(Arizona Court of Appeals)

A statute applicable only to counties with populations greater than 3 million is a "special law" in violation of the Arizona Constitution.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV%2014-0272.pdf

July 22, 2014

Wilks v. Manobianco

(Arizona Court of Appeals)

Compliance with A.R.S. § 20-259.01(B), which requires insurers to offer uninsured and underinsured motorist coverage to their insureds, did not bar professional negligence claim against insurance agent for failure to procure underinsured motorist insurance.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV%2013-0216%20OP.docx

July 22, 2014

State ex rel. Darwin v. Arnett

(Arizona Court of Appeals)

Defendant cannot assert res judicata to bar a subsequent claim when the defendant's misrepresentation prevented the claim from being asserted in the prior proceeding.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV%2013-0420.pdf

July 15, 2014

Midtown Med. Grp., Inc. v. Farmers Ins. Grp.

(Arizona Court of Appeals)

Hospital could enforce its perfected medical liens for treatment of motor vehicle accident victims against tortfeasors' insurer, notwithstanding that insurer had issued joint-payee settlement checks to victims, where hospital had never been paid or otherwise compromised or released its liens.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1CA-CV13-0276%20-%20OP.pdf

June 12, 2014

M-11 Ltd. Partnership v. Gommard

(Arizona Court of Appeals)

Under rule governing relief from judgment due to a clerical error, the superior court has jurisdiction to determine if a clerical error exists in the record, to correct any such error, and then to determine if jurisdiction exists.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/CV%2013-0582.pdf

JSH RESOURCE ALERT! Law and Case Alerts

The *JSH Law and Case Alerts* are periodic publications that provide reviews of recent court decisions. In order to provide these *Alerts* to our clients in a more timely manner, we have recently changed how our *Alerts* are distributed. Rather than saving them all for a singular monthly distribution, we are now publishing *Law and Case Alerts* individually, within 48 hours of the case's original publication date. These are sent to our clients via email, posted to our website and distributed via social media. To be added to our email distribution list, please send an email to marketing@jshfirm.com. Archives of past *Law Alerts* are available at www.jshfirm.com/publications and www.jshfirm.com/casesofnote.

June 10, 2014

Sysco Arizona, Inc. v. Hoskins

(Arizona Court of Appeals)

Recording an unsigned minute entry does not create a valid judgment lien under Arizona's judgment lien statute.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV13-0487.pdf

May 27, 2014

Mirchandani v. BMO Harris Bank, N.A.

(Arizona Court of Appeals)

The doctrine of compulsory counterclaims does not bar a claim against a non-party to an earlier lawsuit.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/CV%2012-0675.pdf

ABOUT THE AUTHOR JON BARNES

Jon Barnes clerked for Judge Orozco at the Arizona Court of Appeals before joining the firm. He currently focuses his practice on state and federal appeals.

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ARIZONA COURT OF APPEALS EXPANDS, THEN NARROWS, ANTI-DEFICIENCY PROTECTION

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Like many states, Arizona protects homeowners from the "double whammy" of losing their homes to foreclosure and then facing liability for the balance owed on their mortgage loans. A.R.S. § 33-814(g) provides that "If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness."

When the real estate market was appreciating, foreclosures were rare and there were relatively few cases interpreting Arizona's anti-deficiency statute. In recent years, however, as home values plummeted and many homeowners found themselves "underwater," the interpretation of the statute has become increasingly important. Over the past few years, the Arizona Court of Appeals has clarified when anti-deficiency protection is, and is not, available.

As quoted above, the statute provides that for anti-deficiency protection to apply, the property must be "utilized" for a residence. Lenders historically argued that property was not "utilized" for a residence until and unless the home was completed and the borrower actually resided in it. Borrowers, conversely, argued that the mere intent to reside in a home was sufficient to trigger protection, and that even if actual occupancy was required, temporary occupancy—even for a single night—was enough. Incredibly, many borrowers who elected to walk away from construction loans while their homes were still under construction, filmed themselves "living" (often with a cot and a hotplate) in the incomplete structures before defaulting on their loans. In *M&I Marshall & Isley Bank v. Mueller*, 228 Ariz. 478, 268 P.3d 1135 (App. 2011), the Arizona Court of Appeals held that the Arizona anti-deficiency statute protects borrowers who start, but do not complete, construction of a single-family home before defaulting on their loan. In other words, the Court held that "utilized" for, as used in the statute, includes "intent to utilize."

Earlier this year, however, the Arizona Court of Appeals took back some of the anti-deficiency protection it appeared to provide in *Mueller*. In *BMO Harris Bank v. Wildwood*, 234 Ariz. 100, 317 P.3d 641 (App. 2014), the property at issue was a vacant lot upon which the borrower intended to build his residence. The borrower argued that, under *Mueller*, the mere intent to utilize the property as a residence was sufficient to trigger anti-deficiency protection. The lender argued, conversely, that where construction had not yet begun, the borrower's intent to build and occupy is irrelevant. The Court agreed with the lender, holding that an owner of vacant land on which construction has not yet begun is not entitled to anti-deficiency protection. The ruling affected thousands of developers/speculators who borrowed money to buy land and build "spec" homes for resale. Under *Wildwood*, borrowers' stated intent to ultimately occupy the homes when construction was completed does not trigger statutory protection if construction has not started. But what if construction had just begun when the default occurred?

Although concurring opinions are usually not particularly important from a precedential standpoint, the concurring opinion in *Wildwood* may provide some insight into where the Arizona Court of Appeals may head in the future with regard to the anti-deficiency statute. Specifically, Judge Donn Kessler states in his concurring opinion that the critical question is not whether construction has started, but rather whether the borrower truly intends to complete construction and use the property as a residence. Judge Kessler's concurring opinion can be interpreted as "borrower friendly" in that, under his view, a borrower who has not started construction would still be entitled to protection if the buyer could convince the judge or jury that he or she intended to build and occupy. It could also be interpreted as "lender friendly," however, in that Judge Kessler seems to suggest a retreat from the *Mueller* holding that protection is available once construction starts. Under Judge Kessler's interpretation of the statute, a borrower who has started construction, but who cannot convince the trier of fact that he or she intended to use the completed structure as a residence, would be denied protection. Such an interpretation, if adopted by a majority of the court, would undercut the statutory protection for developers and speculators that *Wildwood* created.

The borrowers in *Wildwood* filed a Petition for Review with the Arizona Supreme Court, which, as of the time of this printing, had not yet decided whether to hear the case. Given, however, that the Supreme Court refused to review the *Mueller* decision a few years ago, a review of the *Wildwood* decision appears unlikely.

ABOUT THE AUTHOR BOB BERK

Bob's practice focuses on commercial/contract litigation, professional liability defense and coverage litigation. He is listed as a Best Lawyer in America for product liability defense and is AV rated. Bob received his law degree from Arizona State University. Contact Bob at 602.263.1781 or rberk@jshfirm.com.

> "UNDER *WILDWOOD*, BORROWERS' STATED INTENT TO ULTIMATELY OCCUPY THE HOMES WHEN CONSTRUCTION WAS COMPLETED DOES NOT TRIGGER STATUTORY PROTECTION IF CONSTRUCTION HAS NOT STARTED."

JSH FIRM ANNOUNCEMENTS

14 JSH Lawyers Selected as *Best Lawyers In America* 2015

Congratulations to the fourteen lawyers from JSH that were recently selected by their peers for inclusion in The Best Lawyers in America© 2015.

Robert R. Berk
Product Liability Litigation - Defendants
Stephen A. Bullington
Medical Malpractice Law - Defendants
Gregory L. Folger
Workers' Compensation Law - Employers
Eileen Dennis GilBride
Appellate Practice
Edward G. Hochuli
Personal Injury Litigation - Defendants
William D. Holm
Insurance Law
William R. Jones, Jr.
Medical Malpractice Law - Defendants
Personal Injury Litigation - Defendants
Gordon Lewis
Education Law
Employment Law - Management
Litigation - Labor and Employment
Michael A. Ludwig
Construction Law
John T. Masterson
Personal Injury Litigation - Defendants
A. Melvin McDonald
Criminal Defense: Non-White-Collar
Donald L. Myles, Jr.
Insurance Law
J. Russell Skelton
Medical Malpractice Law – Defendants
Workers' Compensation Law – Employers
Georgia A. Staton
Employment Law – Management

JSH Listed as One of the Top 10 Largest Law Firms in Arizona and Interviews Highest Ranking Woman, Georgia Staton *(As originally published by AZCentral)*

Founded in 1983, Jones, Skelton & Hochuli has quickly grown to be one of the largest law firms in Arizona. With 73 attorneys and 189 employees, Jones Skelton & Hochuli was listed as the seventh largest law firm in Arizona by AZCentral. As the highest-ranking woman at Jones, Skelton & Hochuli, Georgia Staton was chosen to give an interview for "Who's Who in Business" where she discussed why she chose to practice law in Arizona, as well as what being an attorney means to her. Over the years, many things have lured people to Arizona: sunshine, dry heat, natural beauty. But for Georgia A. Staton, the state offered a different appeal.

"Back in the early 1970s, Arizona was a hotbed of land fraud," says Staton, who began practicing law in 1974 as a criminal prosecutor with the Wichita, Kan., district attorney's office. "I came out here because there was widespread fraud that was being vigorously addressed by a new attorney general. I thought this would be a great place to be a prosecutor if you were interested in prosecuting fraud."

Shortly after Staton moved to Arizona, Attorney General Bruce Babbitt hired her as part of a special prosecutions division. There, she handled many types of cases, including land fraud and fraud against seniors. Now a trial lawyer and partner with Jones, Skelton & Hochuli, Staton has been involved in many high-profile cases, including the notorious murder of The Arizona Republic journalist Don Bolles. "A few years after Bolles was murdered, I ended up defending the City of Phoenix in a lawsuit brought by (suspect) Max Dunlop against the police department," Staton explains. "I represented the city and its officers in that civil lawsuit."

In 1984, Staton joined her current law firm, where she specializes in defending governmental entities in Arizona. One case might see her defending a police department on an excessive force case or a school district on a wrongful termination case. "I handle employment cases, discrimination cases, civil rights cases, conditions of confinement in jail cases," Staton says. "It's a huge range in terms of the claims that are made against governmental entities. I handle them all."

Even though Staton has been a practicing attorney for four decades, she has not lost sight of what it means to be a lawyer. "I would like for people to understand that being an attorney is a great honor," she says. "It's a privilege to represent others. I have their livelihoods in my hands. Sometimes I have all of their finances in my hands. "The amount of trust people place in me as a lawyer is great. Being an attorney is a special profession. I know there are lawyer jokes out there and that's fine—until you need a lawyer. When you need a lawyer and your lawyer is representing you, that relationship is close and it's personal. I think most people don't understand that."

WHAT'S HAPPENING AROUND THE FIRM ?

Stay up to date at jshfirm.com

JSH Welcomes Two New Associates to the Firm

Justin Ackerman

Justin Ackerman joins JSH as an Associate in our Appellate Department, after serving as a judicial clerk to Judge Michael Brown at the Arizona Court of Appeals (Division One). During law school, Mr. Ackerman sought out a variety of externships in order to build a solid foundation for an appellate practice, including externing on the Ninth Circuit Court of Appeals, the Arizona Court of Appeals, the U.S. Attorney's Office, and the Arizona Attorney General's Office. Learn more about Justin by clicking here: www.jshfirm.com/justinmackerman.

Alejandro Pérez joins JSH as an Associate, where he focuses his practice on professional liability, bad faith and extra-contractual liability. Before joining JSH, Mr. Pérez served as a judicial clerk to Judge Patricia Orozco at the Arizona Court of Appeals (Division One). Mr. Pérez also devotes significant time working with professional law associations and non-profit organizations. Learn more about Alejandro by clicking here: www.jshfirm.com/alejandrop%c3%a9rez

Alejandro Pérez

Best Lawyers has selected Gordon Lewis as the 2015 "Lawyer of the Year" for Education Law in Phoenix

Best Lawyers has selected Gordon Lewis as the 2015 "Lawyer of the Year" for Education Law in Phoenix, Arizona. According to Best Lawyers, when an attorney is selected as "Lawyer of the Year," it "reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity."

Mr. Lewis is a Partner in the firm's Employment Practice Section. He has 19 years' experience in the area of labor and employment law. In his labor and employment practice, Mr. Lewis has advised public and private employers on employment policies and practices, and has defended public and private employers against claims alleging wrongful discharge, racial discrimination, sexual discrimination and harassment (including same-sex sexual harassment), age discrimination, disability discrimination, civil rights violations, Family and Medical leave Act issues, and wage and hour claims.

Mr. Lewis has represented public employers in due process termination hearings, and has assisted public employers in resolving claims relating to privacy rights, free speech, open meetings, public records, and employee due process. Mr. Lewis has drafted and reviewed employment agreements and has created policies for employers regarding sexual harassment, drug testing, medical leave and other employment issues.

Bill Schrank

Bill Schrank and Mike Halvorson Raise the Number of JSH AV Preeminent Rated JSH Lawyers to 30

Congratulations to both Mike Halvorson and Bill Schrank who have received an AV Preeminent Peer Review Rating 5.0 out of 5.0 from Martindale Hubbell. Martindale's Peer Review Ratings attest to a lawyer's legal ability and professional ethics and are based on the feedback and opinions of other lawyers. The ratings are based on the lawyer's legal knowledge, analytical capabilities, judgment, communication ability, and legal experience.

Mike Halvorson

Steve Leach Featured in article, "General Liability Insurance: Is 'Enough' Really Enough?" *(As originally published by In Business Magazine)*

Steve Leach is a partner with Phoenix-based Jones, Skelton & Hochuli, P.L.C. who has been practicing employment law for 15 years. He suggests businesses review their insurance policies with their brokers at least once a year, or when there are changes in operation, such as increasing or reducing the work force, reducing or eliminating employee benefits or if the company is contemplating a major merger or acquisition.

"Most of the time, I get called when the horse is already out of the barn," Leach says. "For example, if I'm asked to respond to an EEOC charge, we may be in a damage control scenario because improper employment action has already happened. More sophisticated clients engage me in the employment decision-making process to avoid or minimize the problem in the first place." Leach says businesses should be proactive with their risk management process and do an annual review of their policies and procedures. "Some lawyers will say that you don't have to have an employee handbook," he says. "If you do have one, make sure it is consistent with the law and that it's simple and is focused on protecting the employer's interests."

Jones, Skelton & Hochuli has also seen an increase in employment cases, and Leach attributes that to the downturn in the economy when people who lost their jobs tried to recover money through litigation. "No one wants to accept they were a bad employee," he says. Leach also emphasizes that business owners make sure they understand their policy limits, stating that oftentimes, his clients' policy limits are too small. "Don't be afraid to contact your lawyer or broker before making an employment decision. For a few hundred bucks, you could avoid thousands of dollars in damages and a nightmare that drags on forever in the courts."

JSH Creates New Position, Director of Paralegals and Litigation Technology

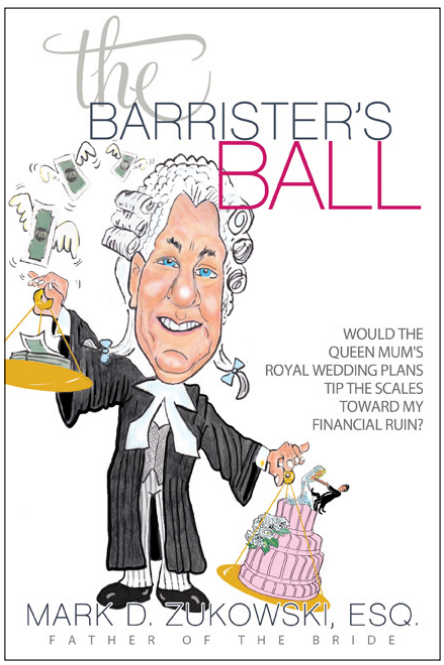
JSH has created a new position, Director of Paralegals and Litigation Technology, and has promoted Narinda Greene to serve in this unique role. Narinda has served as a paralegal at JSH for the past ten years. During her tenure at JSH, she has helped coach and train the firm's paralegal staff and continues to serve as a valuable resource to the firm's 34 paralegals. It is because of her hard work and dedication that JSH decided to create a new position at the firm. "We believe having this new position will add value to the paralegal team as well as the clients they serve, by creating a more efficient and streamlined team," says Jennifer Lovato, Firm Administrator. As the Director of Paralegals and Litigation Technology, Narinda will provide one-on-one training as well as develop group educational programs for the paralegal team. We are confident Narinda will continue to strive for success and serve as an excellent leader for the paralegals here at JSH.

The Barrister's Ball Book By: Mark Zukowski

Most people can relate to the trials and tribulations of planning and paying for a wedding. Mark Zukowski, a Partner at JSH, decided to share the experiences he had while planning and paying for his daughter's wedding in his book, "The Barrister's Ball."

"When my 'Princess' announced she was getting married, I knew I had to make a choice between agonizing over what this 'ball' would cost me (not to mention the DRAMA), or actually try and enjoy it. Since I always wanted to write a book, I decided on option two and this book became my therapy." – Mark Zukowski

Read more about how Mark survived his daughter's wedding by visiting his website: www.thebarristersball.com.



Whitney Harvey Appointed to YWCA Board of Directors

The Arizona YWCA Metropolitan Phoenix recently appointed Whitney Harvey to the Board of Directors. The Arizona YWCA Metropolitan Phoenix seeks to develop opportunities for women's growth in leadership. It offers several programs designed to allow participants the opportunity to connect with young female leaders and empower them through education focusing on issues facing woman and families in Arizona.

NOV 5th SEMINAR
Register Now for Free CLE and CE JSH Annual Seminar
SEE PAGE07

Don Myles Reelected Senior Director of FDCC

After holding its annual meeting, the Federation of Defense & Corporate Counsel elected its 2014-2015 Officers and Board Members, which included reelecting Don Myles as a Senior Director of the FDCC. In addition to serving as a Senior Director since 2012, Don is also on the Executive Committee of the FDCC.

Don has been a member of the FDCC since 1991, and has held several positions, including Vice President, Chairman of the Professional Liability Committee and Chairman of the Extra-Contractual Liability Committee. In 2013, the FDCC presented Don with the Joseph R. Olshan Award, which is given to a committee chair whose work has made the most outstanding contribution to the advancement of the FDCC's goals.

WHAT'S HAPPENING OUTSIDE OF THE FIRM? UPCOMING SPEAKING ENGAGEMENTS

Stay up to date at jshfirm.com

Ed Hochuli to be Keynote Speaker at TIDA's 22nd Annual Seminar

Ed Hochuli will be presenting at the Trucking Industry Defense Association's (TIDA) 22nd Annual Industry Seminar on October 22nd in Las Vegas. Ed's keynote speech is titled: "Managing a Crisis in Real-Time, a.k.a. the Story of My Life." Ed will shares keys to crisis management, including his tips and beliefs on how to prepare for crisis and how to deal with it when it hits, because one thing we all know – crisis will occur.

Don Myles to Co-Present at 2014 PLRB Large Loss Conference

Don Myles will be presenting, "Anatomy of a Real-Life Arson Defense Litigation" at the 2014 PLRB Large Loss Conference on October 29th in Scottsdale. The presentation will include:

- Claims handling when the evidence indicates that the cause of loss was arson, authorities have indicted the insured for arson, and then much later withdrew the indictment
- Identification of the elements of the bad faith defense when the insurer decides to pay the claim rather than continue to pursue an arson defense
- Expert testimony required at trial

Don Myles to Present at DRI's Fire Science and Litigation Seminar

Don Myles will be presenting "The Relationship and Effect of NFPA 921 and 1033 on the Fire and Legal Community" at the Defense Research Institute's Fire Science and Litigation seminar on November 6th in Scottsdale. From both the litigator's and firefighter's perspectives, Don and his co-presenter will be discussing the practical limitations and pitfalls of the "scientific method" expert, as compared with the "firefighter/practical experience" expert, when conducting a suspected arson fire investigation.

Whether a party has impliedly waived the attorney-client privilege poses a mixed question of law and fact. *Twin City Fire Insurance Co. v. Burke*, 204 Ariz. 251, 254, 63 P.3d 282, 285 (2003). In *State Farm v. Lee*, the Arizona Supreme Court adopted the following criteria, referred to as the *Hern* test, in determining whether the attorney-client privilege had been waived when a litigant's mental state was at issue:

> (1) [The] assertion of the privilege was a result of some affirmative act, such as filing suit [or raising an affirmative defense], by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

199 Ariz. 52, 56, 13 P.3d 1169, 1173 (2000) (quoting *Hern v. Rhay*, 68 F.R.D. 575, 581 (E.D. Wash. 1975)).[1]

Under the *Hern* test, when a litigant advances "a subjective and allegedly reasonable evaluation of the law ... that necessarily incorporates [the advice of counsel]," confidential attorney-client communications relevant to that evaluation are discoverable. *Id.* at 58, 13 P.3d at 1175; see also *Lee* at 62, 13 P.3d at 1179 (explaining that no waiver results unless the party asserting the privilege "has asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel.").

The Arizona Supreme Court emphasized in *Lee*, however, that merely filing an action or denying an allegation does not waive the privilege. *Id.* at 58, 62, 13 P.3d at 1175, 1179. Rather, the party claiming the privilege must affirmatively "interject the issue of advice of counsel into the litigation." *Id.* at 62, 13, P.3d at 1179. In addition, neither the "relevance or pragmatic importance alone [of the information sought] will support a finding that the attorney-client privilege has been waived." *See Twin City*, 204 Ariz. at 256, 63 P.3d at 287; see also *Lee*, 199 Ariz. at 58, 13 P.3d at 1175.

Recently, in *Empire W. Title Agency, L.L.C. v. Talamante ex rel. Cnty. of Maricopa*, 234 Ariz. 497, 323 P.3d 1148 (2014), in an opinion written by Justice Pelander, the Arizona Supreme Court vacated a decision of the Arizona Court of Appeals, Division One, which had found an implied waiver of the attorney-client privilege in a contract case. Reversing the Court of Appeals, the Supreme Court held that merely alleging the reasonableness of one's beliefs does not, in itself, waive the privilege; rather, the litigant must advance a subjective evaluation or understanding that incorporates the advice of counsel.

THE IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE UNDER *STATE FARM V. LEE*: A REFRESHER COURSE

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The facts leading up to the Court's decision in *Empire West* are as follows: In 2006, while pursuing the purchase of a vacant lot in Mesa, Jannett discovered a recorded Quit Claim Deed abandoning an access easement essential for developing the property. Empire West, acting as title agent for Fidelity National Title, allegedly informed Jannett that the Quit Claim Deed would not affect his claim to the easement. Jannett later decided not to complete the transaction and informed Empire that DOS Land Holdings would instead purchase the property.

On August 3, 2007, DOS's attorneys, Chester & Shein, sent Empire a closing instruction letter which attached a legal description of the property that included the access easement. In an email accompanying the closing instructions letter, Chester & Shein asked Empire to make sure that the legal description attached was the same legal description that would be attached to the conveyance deed. Under the closing instruction letter, Empire acknowledged that, by signing, it agreed to comply with the letter's terms. Empire signed and returned the closing instruction letter, and the transaction closed in August 2007. Contrary to the closing instruction letter's terms, however, the closing documents omitted the easement from the property's legal description. In 2008, DOS sued the owners of the adjacent property to establish its right to the easement. The case was dismissed as time barred, and DOS filed the instant lawsuit naming Fidelity and Empire as Defendants, alleging claims of bad faith against Fidelity and breach of contract and breach of the covenant of good faith and fair dealing against both Defendants.

Empire moved to compel DOS to disclose any attorney-client communications indicating whether it knew before close of escrow that the easement had been abandoned. The superior court denied the motion, finding that the matter could be litigated and decided without breaching the attorney-client privilege. Empire filed a Petition for Special Action in the Court of Appeals, arguing that DOS had impliedly waived the attorney-client privilege. In an unpublished decision, the Court of Appeals agreed, holding that "[b]y pleading a contract claim based on its 'reasonable belief', DOS put in issue all information in its possession at the time … bear[ing] on the reasonableness of its belief that Empire West agreed to provide coverage of the easement." *Empire West*, 323 P.3d at 1149. The Court of Appeals ordered DOS and Chester and Shein to provide all attorney-client communications for which the privilege was claimed for the superior court's in camera inspection and instructed that the superior court order the disclosure of communications found "relevant to the reasonableness of DOS's expectations of coverage."

On review, the Arizona Supreme Court found *Empire West* differed from *Lee*, though not for the reason advanced by the Court of Appeals. The Supreme Court found that *Lee* was an "unusual case" involving waiver of the attorney-client privilege when "the mental state of a litigant [was] at issue. *Empire West*, 323 P.3d at 1151. It further noted that in *Lee*, it had considered the waiver issue "only in light of the bad faith and fraud counts" in the plaintiffs' complaint." *Id.* (quoting *Lee*, 199 Ariz. at 55, 13 P.3d at 1172).

In contrast to State Farm's defense against the bad faith claims in *Lee*, the breach of contract claim in *Empire West* did not depend on DOS's mental state or subjective knowledge. And, unlike State Farm, DOS had not affirmatively put those matters at issue. The *Empire West* Court found that DOS simply alleged that Empire had breached the parties' contract by failing to comply with the closing instruction letter's terms. The Supreme Court found that DOS had done nothing to inject that issue into the litigation. Justice Pelander wrote that "merely pleading a claim, as we noted in *Lee*, does not waive the attorney-client privilege." *Id.*

Empire West found that the Arizona Court of Appeals had erred in ruling that DOS impliedly waived the privilege by pleading its "reasonable belief" in the breach of contract case. It further found that "[e]ven if DOS's state of mind were at issue, Empire had not demonstrated that denying it access to the requested communications would undermine its defense." *Id.* (citing *Twin City,* 204 Ariz. at 256-257, 63 P.3d at 287-288) (finding no implied waiver in part because "[t]he evaluation of Twin City's counsel is not vital to General Star's defense"). The *Empire West* court found that Empire had other means of obtaining

"[T]HE SUPREME COURT HELD THAT MERELY ALLEGING THE REASONABLENESS OF ONE'S BELIEFS DOES NOT, IN ITSELF, WAIVE THE PRIVILEGE; RATHER, THE LITIGANT MUST ADVANCE A SUBJECTIVE EVALUATION OR UNDERSTANDING THAT INCORPORATES THE ADVICE OF COUNSEL."

information about what DOS knew or should have known regarding the easement's purported abandonment.

Finally, the *Empire West* court held that the policy concern that motivated the court's decision in *Lee* was not implicated here. "Unlike State Farm, DOS has not 'thrust [its] lack of knowledge into the litigation' as a basis for its claim, while at the same time asserting the privilege so as to frustrate discovery of what it actually knew." *Empire West*, 323 P.3d at 1151 (quoting *Lee*, 199 Ariz. at 58-59, 13 P.3d at 1175-1176). *See also Ulibarri v. Superior Court in and for the County of Coconino (Gerstenberger)*, 184 Ariz. 382, 385, 909 P.2d 449, 452 (App. 1995).

Importantly, *Lee* makes clear that merely seeking the advice of counsel during the claims process is inadequate to support a waiver of the attorney-client privilege. *See also Accomazzo v. Kemp, ex rel. County of Maricopa*, 34 Ariz. 169, 319 P.3d 231, 234 (App. 2014) ("the bare assertion of a claim or defense does not necessarily place privileged communications at issue in the litigation, and the mere fact that privileged communications would be relevant to the issues before the court is of no consequence to the issue of waiver.").

Aside from *Lee*, a party seeking attorney-client privileged communications under an implied waiver theory will undoubtedly cite to the Arizona Court of Appeal's decision in *Mendoza v. McDonald's Corporation*, 222 Ariz. 139, 213 P.3d 288 (App. 2009). In *Mendoza*, a former employee of McDonald's brought an action against her former employer for breach of the covenant of good faith and fair dealing in administering her workers' compensation claim. *Id.* at 142, 213 P.3d at 291. On appeal, Mendoza argued that the superior court should have ordered McDonald's to produce attorney-client privileged materials from its claim file that had been redacted because of the implied waiver. *Id.* at 151, 213 P.3d at 300. The *Mendoza* court found there was an implied waiver of the attorney-client privilege, noting that McDonald's did not defend by arguing its subjective evaluation of the law was reasonable. *Id.* at 153, 213 P.3d at 302. But neither *Lee* nor *Mendoza* stand for the proposition that the privilege is waived merely because client and counsel confer or trade information for advice. *Lee* makes clear that counsel's evaluation of "an insurance company's reasonableness under the Statutes, the case law, and the policy language does not put counsel's advice to the claims managers at issue." *Id.* at 60, 13 P.3d at 1177.

[1] The Court in *Lee* also adopted the test set forth in *Restatement (Third) of the Law Governing Lawyers* § 80 (1) (2000), which states in relevant part:

> The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct.

199 Ariz. at 62, 13 P.3d at 1179. Although that test provided additional support for the Arizona Supreme Court's decision in *Lee*, it applies when a litigant's legal knowledge is at issue.

ABOUT THE AUTHOR BILL CARAVETTA

Bill frequently speaks at the local and national levels on issues relating to bad faith and insurance coverage. During his 16 years as an attorney, Bill has advised corporate risk managers on insurance coverage issues, indemnity agreements and risk transfer options through commercial contracts. Contact Bill at 602.263.7389 or wcaravetta@jshfirm.com.

JSH RESOURCE ALERT! Retail Compendium of Law

USLAW recently released the 2014 USLAW Retail Compendium of Law, a comprehensive resource that permits users to easily access common and state-specific liability issues. Along with the ownership and management of retail establishments, shopping and hospitality centers comes exposure to all sorts of liabilities. Written by USLAW member firms, the Retail Compendium takes advantage of local knowledge and experience in the jurisdictions across the country.

The USLAW Retail Compendium of Law is the eighth compendium resource available through USLAW.org. USLAW produces new compendiums and updates providing a multi-state resource that permits users to easily access state common and statutory law. Compendiums are easily sourced on a state-by-state basis and are developed by the member firms of USLAW. In addition to Retail, current compendiums include: Transportation, Construction Law, Nullum Tempus, Offers of Judgment, Spoliation of Evidence, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal.

View Compendium: http://www.uslaw.org/files/Compendiums2014/Retail/USLAW_Retail_Compendium_of_Law_2014.pdf

USLAW NETWORK, INC®

ANNOUNCING THE 2014 JSH GOVERNMENTAL LIABILITY SEMINAR

CURRENT ISSUES IN GOVERNMENTAL LIABILITY

11.5.14 - PHOENIX CONV CENTER - 9 AM - 12 PM

Please join us on November 5th for our annual CLE seminar, which is being offered free to our clients and potential clients. In the morning session, we will provide an update on current issues that affect our Governmental Liability clients.

In the afternoon, we encourage you to stay for our annual update on Arizona law. You won't want to miss our entertaining and educational new twist on the old favorite, Hollywood Squares...which we have dubbed as "The JSH Squares."

Seating is limited, so don't wait...register today!
More information and Registration available online at:
www.jshfirm.com

SESSION DESCRIPTIONS

GOVERNMENT EMPLOYEES AND THE FREEDOM TO TWEET, POST, LIKE, AND SHARE?

Social media communication is now pervasive among employees and can be problematic for employers...especially public employers. This session will explain employer rights and responsibilities in dealing with employee posts, comments, likes, follows, hashtags, and other social media activities. We will also explain the importance of social media policies and what they should contain.

Presented by: Michele Molinario and Gordon Lewis

"ARE YOU SMARTER THAN A CLAIMANT'S LAWYER?" LEARNING TO IDENTIFY THE ESSENTIAL ELEMENTS OF A VALID NOTICE OF CLAIM

This session will take you through the Notice of Claim basics, after which our guests will be invited to play "Are You Smarter Than A Claimant's Lawyer." Use audience response clickers to buzz in your answers on how to handle various notice of claim scenarios, and help our governmental entities and employees to be Smarter Than A Claimant's Lawyer.

Presented by: Jonathan Barnes and Eileen GilBride

SHINING A LIGHT ON THE PUBLIC'S "RIGHT TO KNOW": AN UPDATE ON PUBLIC RECORDS LAW

What does the pubic have a right to know? This session will teach you what constitutes a public record, whether every public record has to be disclosed and when those records have to be disclosed. Additional topics will include what you can charge for producing the records and ultimately what the ramifications are for improper withholding of records.

Presented by: Elizabeth Gilbert and John DiCaro

YOU THINK YOU KNOW WHAT JURIES ARE THINKING?....THINK AGAIN

This panel session with guest speaker Richard Jenson will demonstrate the difference between a Focus Jury and Mock Jury and how each helps shape an effective defense. The audience will learn how Focus Juries help defense counsel in the evaluation of a case, liability and damages and develop an effective trial theme. We will also discuss how jury consultants use focus juries to assist in mapping out an effective jury selection process.

Presented by: Georgia Staton, John Masterson, Phil Stanfield and Richard Jenson

CASES OF NOTE
TRIAL COURT DECISIONS

Fernandez v. City of Phoenix

September 15, 2014
Maricopa County Superior Court
Don Myles, Michele Molinario and Gaya Shanmuganatha

Don Myles, Michele Molinario, and Gaya Shanmuganatha, attorneys with Jones, Skelton & Hochuli in Arizona, recently obtained a win for the City of Phoenix at the Maricopa County Superior Court of Arizona. Plaintiffs, assignees of former Phoenix police officer Richard Chrisman, brought a declaratory action against the City of Phoenix to enforce an $8.5 Million dollar Morris type agreement.

Defendant Phoenix moved for summary judgment arguing that Plaintiffs' claims are barred by the statute of limitations, res judicata, collateral estoppel or judicial estoppel, and that the Phoenix City Codes either bars Plaintiff's claims or limits their damages to the costs of defense in the underlying Federal Court case. The Court agreed with Defendant that its obligations to Mr. Chrisman, and therefore Plaintiffs, cannot extend beyond the limits set by the Phoenix City Codes. The Court, therefore, granted Phoenix's Cross Motion for Summary Judgment and held that, if the jury finds that Phoenix wrongly denied Mr. Chrisman indemnity, Plaintiffs' are only entitled to recover reimbursement for reasonable fees and expenses and not the $8.5 Million dollar settlement.

Oscar Aguilar v. Werner Enterprises, Inc.

October 25, 2013
U.S. District Court, District of Arizona
Phil Stanfield and Jeremy Johnson

Phil Stanfield and Jeremy Johnson obtained one of Arizona's Top Defense Verdicts of 2013, which was featured in Arizona Attorney's Magazine in June 2014.

Phil Stanfield and Jeremy Johnson obtained a defense verdict on behalf of Werner Enterprises in a highly-contested wrongful death case in federal court. The decedent's Honda Accord suffered a front-passenger tire failure at approximately 8:00 PM on eastbound Interstate 10 in Phoenix, Arizona. She brought the car to a stop in the #3 travel lane of the freeway, then engaged the park brake and called her husband to inform him of the car problems. Werner's tractor trailer collided into the stopped car about a minute and a half after the car came to a rest, resulting in the woman's death.

At trial, Mr. Stanfield presented evidence showing that the decedent drove on the flat tire for a minimum of one full mile before bringing the car to a stop. He also argued that the decedent's failure to drive the car off the highway (where there was available shoulder along the road and she had passed at least one freeway exit), was the true cause of the accident. Plaintiff's counsel argued the tractor-trailer driver was at fault due to lack of attention and failure to avoid a stranded motorist. In closing argument, plaintiff's counsel asked the jury for a compensatory damage award of $20 million or more. The jury returned a defense verdict after deliberating for approximately three hours.

INHOUSE JSH EVENTS

Whether we're celebrating a birthday or a holiday, helping to raise money for worthy charities, or participating in community events, JSH employees always have something fun going on. The pictures below were taken at our Indoor Company Picnic. July in Phoenix isn't the most ideal time for an outdoor picnic, so we bring it inside! This year for the 4th of July, we celebrated with delicious BBQ food and a patriotic t-shirt contest. Congratulations to our patriotic t-shirt winners, Gwen Coon, Linda Mason and Cindy Miller!

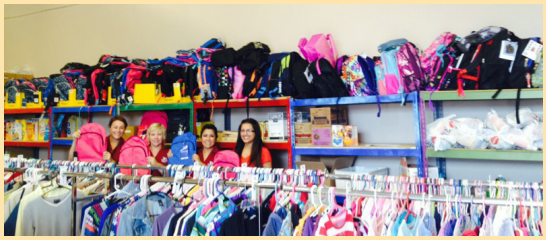
4th of July Indoor Firm Picnic

Backpack Drive for Children's First Academy

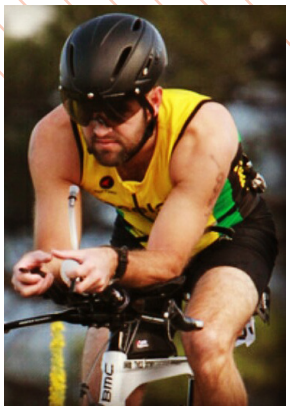
Was that a Christmas tree you may have seen in our 7th Floor lobby – in the middle of Summer? Yes it was! JSH kicked off its second annual backpack drive for Children's First Academy in July. Each ornament on the tree represented a boy or a girl and an age range. JSH employees and lawyers selected an ornament and stuffed a backpack with age appropriate supplies such as pencils, paper, notebooks, markers, rulers, etc.

The kids at Children's First Academy are near and dear to our hearts. They mainly live in shelters, or on the street. We do special things throughout the year for these kids, but this backpack drive is one of the most important. Our goal is to help keep these kids in school, and give them what they need to excel.

This year's Christmas in July Backpack Drive was so successful that we were able to donate enough backpacks and school supplies for all 300 Children's First Academy students!

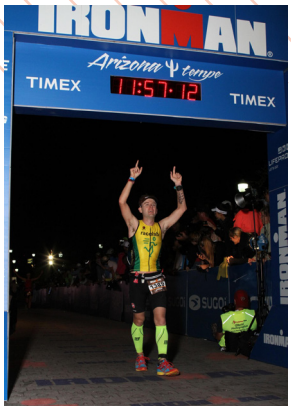


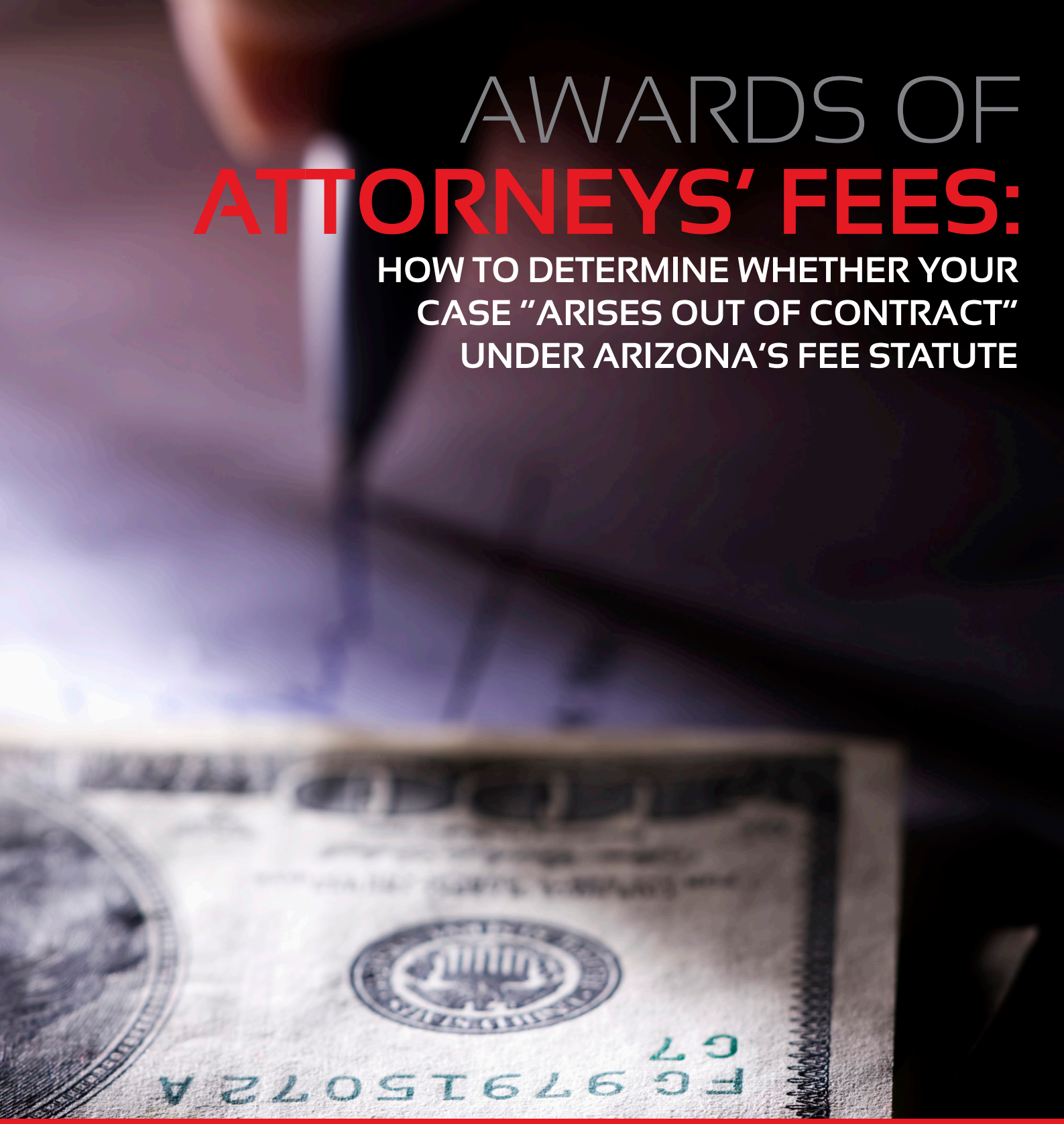
JSH's IronMEN



Coming up in November, JSH appellate associate Jon Barnes will compete alongside 3,000 other athletes in the Ironman Arizona triathlon. An Ironman triathlon is a grueling, all-day endurance event, consisting of a 2.4-mile open water swim, a 112-mile bike ride, and a full marathon (26.2-mile run). Jon will have until midnight to complete the 140.6-mile course, for which he has spent most of the year preparing. Everyone in the JSH family wishes Jon the best of luck! (Photo on left)

JSH associate Jason Kasting completed Ironman Arizona last November in 11 hours and 57 minutes (well before the 17-hour cutoff), and continued his journey this year by completing Ironman Mont-Tremblant in Quebec, Canada, one of the most mountainous and difficult courses on the circuit, in only 12 hours and 18 minutes. Jason will also run his eleventh marathon on November 2, 2014 in New York City. (Photo on right)





AWARDS OF ATTORNEYS' FEES:

HOW TO DETERMINE WHETHER YOUR CASE "ARISES OUT OF CONTRACT" UNDER ARIZONA'S FEE STATUTE

"[I]T IS VERY IMPORTANT TO PERFORM A FACT-BASED ANALYSIS OF YOUR CASE BEFORE MEDIATION OR TRIAL TO DETERMINE WHETHER THE COURT IS LIKELY TO AWARD ATTORNEY FEES TO THE PREVAILING PARTY."

AUTHOR: Jason Kasting EMAIL: jkasting@jshfirm.com BIO: jshfirm.com/jasonpkasting

Evaluating risk before mediation or trial often requires an assessment of whether the prevailing party will be awarded its attorneys' fees. Pursuant to A.R.S. § 12-341.01, attorney fees are only awarded when the action "arises out of a contract." However, it can be very difficult to determine whether the action arises out of contract, as opposed to a tort claim, for example. The distinction between contract and tort-based claims is often very murky and requires a factual analysis of the foundation of the dispute.

A.R.S. § 12-341.01(A) states that: "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Subsection (B) of the statute describes the purpose of subsection (A) by saying that an award of fees "should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense," and the amount of fees awarded "need not equal or relate to the attorney fees actually paid or contracted."

This statute is relatively straightforward, but the "arising out of a contract" determination can be difficult, especially when the case involves both contract and tort-based claims. For example, a professional malpractice case might have interwoven allegations that the professional breached a retainer agreement (a contract-based claim), and also acted in bad faith (a tort claim). So, how can you determine before mediation or trial whether a fee award is likely?

Arizona case law on this topic is varied and not entirely consistent but, in general, Arizona courts evaluate and analyze "the essence of the action" to ensure it has an appropriate contract-based foundation. *ASH, Inc. v. Mesa Unified School Dist. No. 4,* 138 Ariz. 190, 193, 673 P.2d 934, 937 (App. 1983). As used in A.R.S. § 12-341.01(A), the words "arising out of a contract" describe an action in which a contract was a *primary factor* in causing or defining the dispute, as opposed to a contract ancillary to the heart of the dispute. *Id.* From the defense perspective, an action can still arise out of contract, for purposes of an award of attorney fees, where the defendant proves the absence of an alleged contract between the parties. *Rudinsky v. Harris,* 231 Ariz. 95, 101, ¶ 27, 290 P.3d 1218, 1224 (App. 2012).

Where a case contains both contract and tort claims, the test to determine whether the action arises out of contract under A.R.S. § 12-341.01(A) is whether "the cause of action in tort could not exist but for the breach of the contract." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982).

In *Sparks*, plaintiffs alleged breach of an insurance contract and bad faith tort claims against an insurance carrier. Plaintiffs prevailed, and the trial court awarded reasonable attorney fees pursuant to A.R.S. § 12-341.01(A). The insurer appealed the fee award, arguing that because the bad faith tort claims dominated the case and the insurance contract itself was ancillary to the parties' dispute, the case arose out of tort rather than contract, making an award of fees improper. *Sparks,* 132 Ariz. at 542-43. The Arizona Supreme Court ultimately determined that bad faith cannot occur without the existence of an insurance contract, making this tort intrinsically related to the insurance contract. *Id.* at 544. Thus, it held, the tort of bad faith is one "arising out of a contract" under A.R.S. § 12-341.01(A). *Id.*

Courts have also seemingly gone the other way on this issue, illustrating the lack of a bright line rule. In *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.,* 198 Ariz. 10, 6 P.3d 315 (App. 2000), the owner of an airplane sued an aviation company for negligence and breach of contract after the company allegedly damaged the plane's engine while preparing for a flight. *Id.* at 12. The owner had a contract with the aviation company for various services, including pilot services, providing hangar space, and advising on necessary maintenance and repairs. *Id.*

The *Ramsey* plaintiff prevailed on the negligence claim but not on the contract claim. *Id.* at 12. The trial court nevertheless awarded attorneys' fees, concluding that the negligence claim arose out of the parties' services contract. *Id.* The Arizona Court of Appeals disagreed and held that the mere existence of a contract underlying the parties' relationship is not enough to support a fee award. *Id.* at 14. It determined that because the aviation company's alleged negligence in handling the plane caused the dispute, the case arose out of tort, not contract, making the fee award improper. *Id.* The Court of Appeals further clarified that where a contract does no more than place the parties into a relationship for which tort law imposes certain duties, the gravamen of any subsequent action for breach of that duty is tort, not contract, law, for which a fee award is unavailable *Id.*

Sparks and *Ramsey* teach us that Arizona courts will look to the fundamental essence of a case, rather than simply assuming that because a contract is involved, a fee award is appropriate. A more in-depth factual analysis is necessary to determine whether the foundation of the dispute truly arises out of contract.

Assuming a judge determines that a particular case arises out of contract, he or she has wide latitude regarding the amount of fees to award to the prevailing party, and a partial award of fees is permissible. *Berry v. 352 E. Virginia, L.L.C.,* 228 Ariz. 9, 14, ¶ 24, 261 P.3d 784, 789 (2011). Further, A.R.S. § 12-341.01(A) has been interpreted to authorize an award of fees to the successful party on appeal. *Wenk v. Horizon Moving & Storage Co.,* 131 Ariz. 131, 133, 639 P.2d 321, 323 (1982).

All of this demonstrates that it is very important to perform a fact-based analysis of your case before mediation or trial to determine whether the court is likely to award attorney fees to the prevailing party. The caselaw makes clear that even if there are contract-based arguments in the case, a fee award is by no means automatic. Attorneys' fees will only be awarded when the essence of the dispute is intrinsically linked to the contract at issue.

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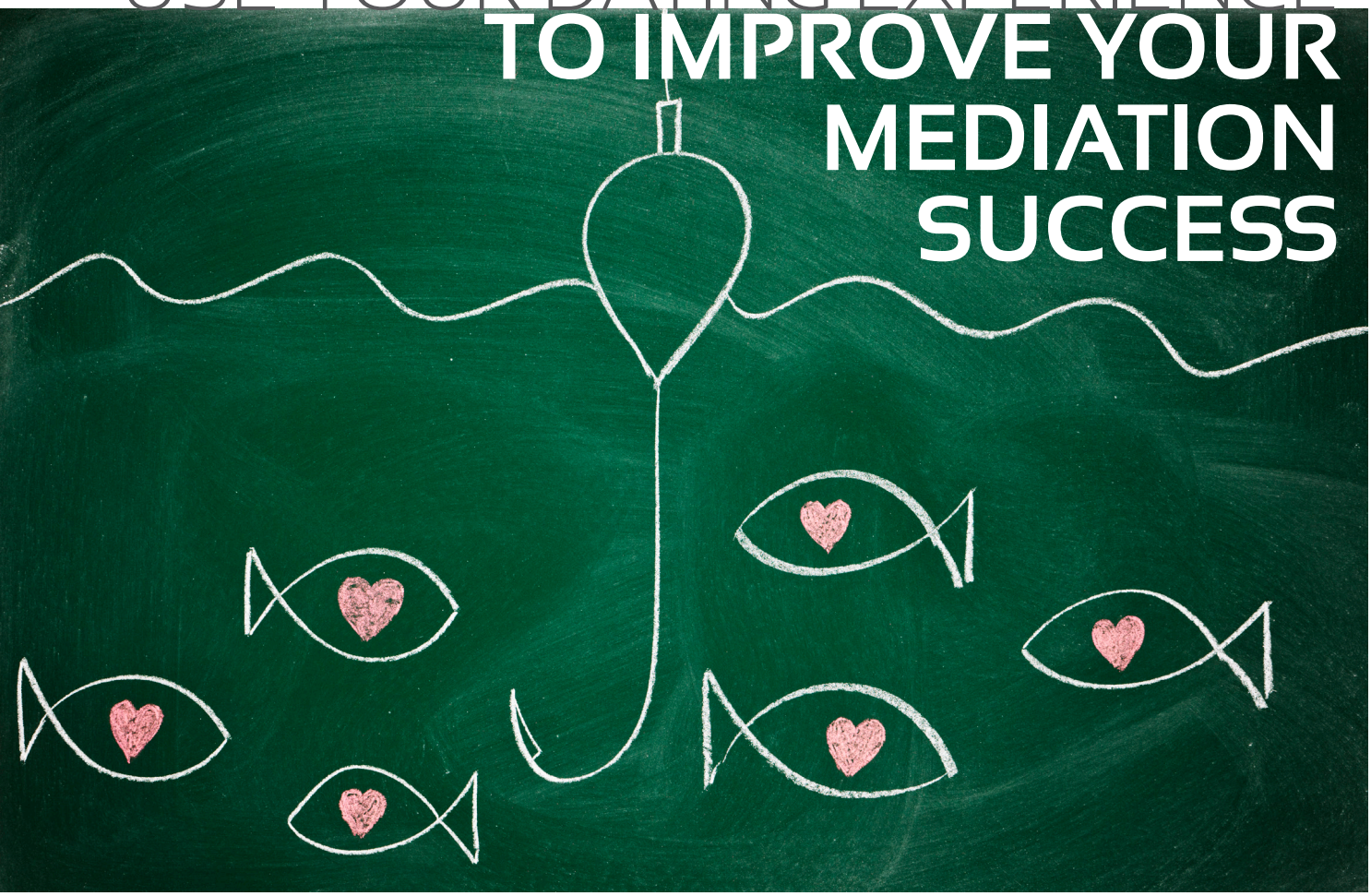
USE YOUR DATING EXPERIENCE TO IMPROVE YOUR MEDIATION SUCCESS



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What does success in mediation have to do with dating? PREPARATION. Remember what it was like when you used to go on first dates? How many were a disaster because you weren't prepared for the date? Ever try to impress a first date by going to a high-end steak house only to find out your date was a vegetarian? Or, how about taking a first date to the trendiest bar only to find out your date didn't drink? I think you get my point. Had you done a little preparation before your first dates, they may have had a more successful ending.

It may sound simple. It may even be obvious, but there is no better way to improve your mediation success than by the amount of preparation you put in to your mediation. How can you better prepare for your next mediation? If you are not familiar with the term, "convening conference" prior to mediation you are missing out on a great opportunity to improve your mediation success.

Experienced mediators have learned the hard way that there is a direct correlation between the amount of preparation that goes into a mediation and success in mediation. That is why good mediators have attorneys participate in a convening conference before mediation. If your go-to mediator does not request a convening conference, consider asking him or her to do so before your next mediation. You will be glad you did. Let me explain why.

I will bet most of you have experienced failure in mediation because some issue came up during the mediation that the parties and the mediator were not prepared to address. Did the right parties attend the mediation? Did one of the parties fail to disclose important new information until the day of the mediation? Did the parties do enough discovery to be able to properly evaluate the case for settlement? Did the parties pick the right mediator for the case? Did the claimant fail to determine prior to the mediation if liens could be compromised? The list of potential issues that can derail a mediation are endless. However, with the help of a good mediator and a convening conference prior to mediation, the specific issues in your case that can derail a successful mediation can usually be anticipated and resolved before the mediation.

Returning to my dating analogy and the earlier example of making the mistake of taking a first date to a high-end steak house only to find out your date was a vegetarian, the date likely would have had a better ending if you had just done a little preparation prior to the date and asked if your date enjoyed certain types of food. I am told there are nice vegetarian restaurants and I suspect they are probably cheaper than a high-end steak house, resulting in a win-win for both you and your date, and likely a better evening.

If you have never participated in a convening conference before, try it the next time you schedule a mediation.

The more familiar you become with this process the more likely your mediation success rate will improve.

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MOVIE REVIEW
GUARDIANS OF THE GALAXY

AUTHOR:
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Warning: spoiler alert to those who have not yet seen the movie!

Out of all the Marvel movies, Guardians of the Galaxy may very well be one of the best. Packed with action, comedy and even a little romance, this movie will take you on a galactic adventure!

The movie begins with a sad start for a character named Peter Quill (a.k.a. Star-Lord) whose mother dies when he is a child. Immediately following his mother's death, Quill runs to the parking lot of the hospital saddened and frustrated, only to be abducted by Yondu and his crew (talk about a bad day)! Yondu and his crew end up raising Quill. About 20 years later, Quill obtains an "infinity stone," which happens to holds amazing magic powers. He takes the stone to the planet Xandar in the Nova Empire to sell it. There, Quill gets into a fight with Gamora, Groot, and Rocket the Raccoon who also want the orb, which lands them all in prison. They all end up deciding to join forces and form the Guardians of the Galaxy team. Unfortunately, bad guy Ronan the Accuser wants to use the orb to destroy the planet Xandar. Ronan is quite powerful, so to defeat him, the Nova Empire (which had originally imprisoned the Guardians of the Galaxy team) unites with the Guardians.

In addition to an exciting plot, this movie also has great music, so it has something for everyone.
Take the family with you for this one and enjoy!!

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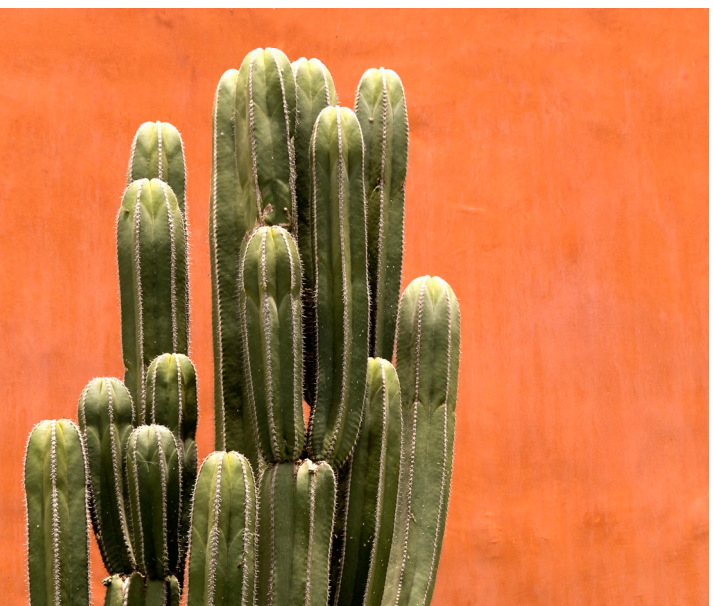

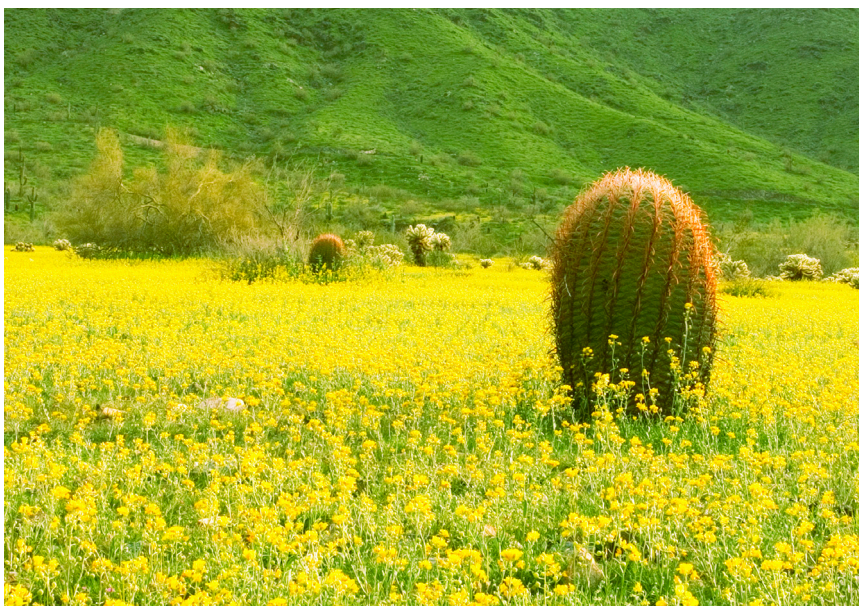

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