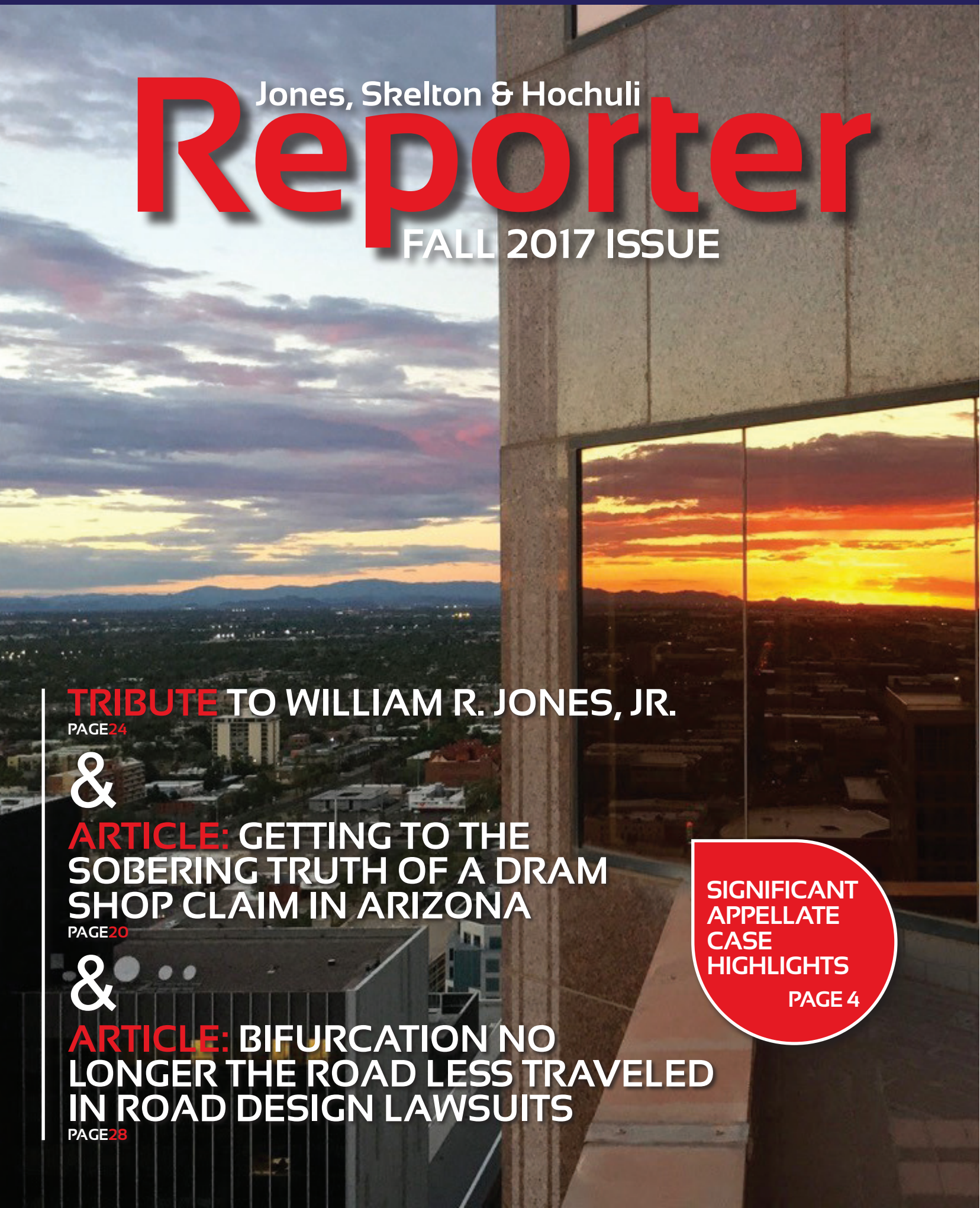
articles • case law • resources • events • appellate highlights • announcements

Jones, Skelton & Hochuli

Reporter

FALL 2017 ISSUE



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MESSAGE FROM THE EDITOR

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Welcome to the Fall 2017 Edition of the JSH Reporter!

It has been over one year since our last issue, and we are pleased to share several resources with you, including important case summaries, law updates, attorney-authored articles, and firm news and events.

In our April 2016 issue, we announced the firm's move from midtown to downtown Phoenix. Over the past 15 months, we have enjoyed growing into our new space in Two Renaissance Square, where we occupy floors 24 - 27. When weather permits, we take advantage of the city views from our 27th floor patios and host events for local Bar organizations, trade groups, client gatherings and in-house receptions. Our building, Renaissance Square, recently began extensive renovations in all common areas, including the lobbies, elevator banks and retail spaces. We are eager to see renovations when completed! In the meantime, you may encounter minor construction in the lobby if you visit our office in the next few months.

Over the past year, we have welcomed six new attorneys and promoted four associates to partnership. Of the six new attorneys, one is a recent law school graduates who worked as law clerks at the firm. You can read more about them on pages 26 and 35.

Although 2017 has been a year of growth and achievement, we are all deeply saddened by the loss of our founding partner, mentor and dear friend, Bill Jones. On page 24 and 25 of this issue, we share and reminisce on just a few of Mr. Jones' many achievements. On behalf of the more than 200 employees at JSH, we are proud to continue providing exceptional legal services in Mr. Jones' honor.

Next year, the firm will celebrate its 35th anniversary. As we look to the future, we are pleased to announce that our website is being completely redesigned to offer visitors cleaner, quicker and easier access to the information and resources you need. Our next issue of The JSH Reporter will showcase our new website and promote our anniversary, but you can also check out the new site when it launches later this year.

Lori Voepel
Partner and *JSH Reporter* Editor

We want to hear from you! As we continue producing resources such as this publication, we invite you to share your thoughts and ideas at lvoepel@JSHfirm.com.

During Lori's 24 years of practice, she has handled nearly 300 state and federal appeals in virtually every area of law. She also provides appellate guidance to trial attorneys in all stages of litigation, from the pleading through post-trial stages. Contact Lori at 602.263.7312 or lvoepel@jshfirm.com.

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APPELLATE HIGHLIGHTS

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We hope you find the following appellate case highlights valuable. For additional information on the cases summarized below, please visit the publications section on our website or contact any of the lawyers in our Appellate Department.

June 20, 2016

Utah v. Strieff

(U. S. Supreme Court)

Officer's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the drug-related evidence seized during search incident to arrest.

June 21, 2016

Special Fund Division v. Industrial Commission of Arizona

(Arizona Court of Appeals, Division 1)

Outpatient treatment that worker's compensation claimant received for preexisting psychiatric disabilities constituted treatment "in" a recognized medical or mental institution under Arizona's apportionment statute.

July 18, 2016

Cramer v. Starr

(Arizona Supreme Court)

In a move away from the "original tortfeasor rule," the court held that the driver's liability for a rear-end collision was several only, so jury was required to apportion fault between driver and non-party physician who negligently performed post-accident surgery.

July 18, 2016

Klesla et al. v. Wittenberg

(Arizona Court of Appeals, Division 1)

Plaintiffs seeking a judgment on an arbitrator's award were not entitled to a judgment for attorney fees because the arbitrator failed to make a timely award for fees before losing jurisdiction.

August 30, 2016

Premier Physicians v. Navarro

(Arizona Supreme Court)

A.R.S. § 33-932(A) requires non-hospital health care providers to record their liens within thirty days after first providing services.

August 23, 2016

Santorii v. MaritnezRusso

(Arizona Court of Appeals, Division 1)

Arizona's real estate statutes do not establish an employer-employee relationship between real estate brokers and agents, nor do they create a non-delegable duty by the broker to supervise an agent's driving.

Handled by JSH Appellate Counsel

September 20, 2016

Quiroz v. Alcoa

(Arizona Court of Appeals, Division 1)

Employer owed no duty of care to the child of an employee who contracted mesothelioma from asbestos brought home on the employee's work clothes.

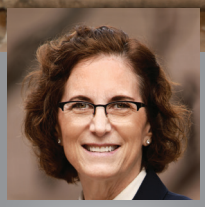
September 29, 2016

Sobieski v. American Standard Insurance

(Arizona Court of Appeals, Division 1)

Although insurer's inaction and goal of profitability did not warrant punitive damages, evidence that adjuster interviewed only one of five known accident witnesses and failed to look at police report before denying coverage supported bad faith verdict.

JSH APPELLATE TEAM



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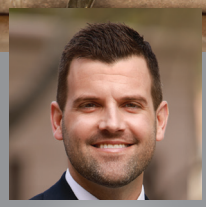

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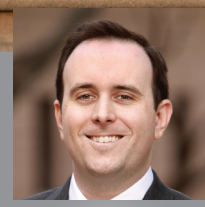

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October 25, 2016

Franklin v. Clemett

(Arizona Court of Appeals, Division 1)

Defendant in hockey crowd fight was allowed to use the statutory affirmative defense of intoxication, which is not unconstitutionally vague and does not conflict with the Arizona Constitution or comparative fault law.

November 3, 2016

Johnson v. Almida Land & Cattle

(Arizona Court of Appeals, Division 1)

As a matter of law and not foreseeability, a permit holder operating on federal land owes a duty of care to members of the public who are injured by the permit holder's improvements on the land.

November 4, 2016

Armani v. Northwestern Mutual

(Ninth Circuit Court of Appeals)

An employee who is unable to sit for more than four hours is not able to perform "sedentary" work for purposes of long-term disability benefits.

December 20, 2016

Villasenor v. Evans

(Arizona Court of Appeals, Division 1)

The court affirmed summary judgment for city councilman due to Plaintiff's failure to serve him with a notice of claim, confirming that the notice of claim statute applies to elected officials.

January 3, 2017

Coulter v. Thornton, LLP

(Arizona Court of Appeals, Division 1)

Consistent with the discovery rule, determining the accrual date for accountant malpractice claims is a fact-based inquiry that turns on when a party knew or reasonably should have known of facts establishing a basis for the claim.

March 30, 2017

Acri v. Arizona

(Arizona Court of Appeals, Division 1)

The State did not owe a duty to residents of Yarnell and surrounding areas in negligence case arising from damage caused by the Yarnell Hill Fire.

April 20, 2017

Wagner v. Arizona

(Arizona Court of Appeals, Division 1)

Employee of private contractor working in a state-owned prison was a statutory employee of the State and could not pursue a tort action against the State for her work-related injuries.

April 25, 2017

Dobson Bay Club v. La Sonrisa De Siena, LLC

(Arizona Supreme Court)

$1.4 million late fee assessed on a final loan balloon payment constitutes an unenforceable penalty because liquidated damages contract provisions are only enforceable if the pre-determined amount for damages seeks to compensate the non-breaching party rather than penalize the breaching party.

May 11, 2017

American Power Products, Inc. v. CSK Auto, Inc.

(Arizona Supreme Court)

A.R.S. § 12-341.01 applies for purposes of determining the successful party in a breach claim arising under a contract that does not itself define "prevailing party," but does incorporate Arizona law to determine the parties' rights and remedies.

May 30, 2017

County of Los Angeles v. Mendez

(U. S. Supreme Court)

If a seizure is reasonable, courts cannot create liability by looking back in time to assess whether a different Fourth Amendment violation might have been tied to the eventual use of force.

June 20, 2017

Delgado v. Manor Care of Tucson

(Arizona Supreme Court)

APSA claim requires proof that: (1) a vulnerable adult, (2) has suffered an injury, (3) caused by abuse, (4) from a caregiver.

July 13, 2017

Soto v. Sacco

(Arizona Supreme Court)

Rule 59(i)'s "specificity" requirement, which applies to orders granting new trials, is equally applicable to orders granting remittiturs or additurs.

Handled by JSH Appellate Counsel

ABOUT THE AUTHOR **JONATHAN BARNES**

Jon concentrates his practice on federal and state appeals in all types of civil litigation, including medical malpractice, governmental liability, employment, family law, and torts. He also assists trial counsel in preserving the record for appeal, preparing dispositive and post-trial motions, and crafting proposed final judgments.

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CASES OF NOTE:
TRIAL COURT DECISIONS

Sosa v. La Casa Del Mariachi, LLC

July 14, 2016
Maricopa County Superior Court
Michael Hensley & John Lierman


Mike Hensley and John Lierman recently obtained summary judgment on all claims in Maricopa County Superior Court for two police officers and a client restaurant, all of which had been sued for negligence after the Plaintiff was shot in the chest by another restaurant patron. The Plaintiff alleged that the restaurant and the two police officers, who were working at the restaurant as off-duty officers, were negligent in allowing the Plaintiff's assailant to have a gun inside the establishment. The Plaintiff argued that the restaurant's "no guns" policy, and its provision of security measures at the front entrance on the night in question, as well as an off-duty officer detail, constituted an undertaking to keep the premises free of guns, such that the presence of the gun alone was evidence of negligence.

The JSH attorneys moved for summary judgment, arguing that the two off-duty officers owed no duty to the Plaintiff as proprietors of land. Rather, they were independent contractors with duties set forth in standing orders of the Police Department, under which they were not responsible for security - only for law enforcement. Indeed, under the Fourth Amendment, the officers could not take part in any security measures, but were strictly limited to enforcement of the law, not affirmative provision of private security measures.

The same motion for summary judgment recognized that the restaurant had a duty of care to keep customers safe, but that the evidence of patdowns of male patrons and bag searches of female patrons on the night in question was prima facie evidence of reasonable measures for security to fulfill that duty. It was further argued that the reasonableness of a restaurant security plan is an issue beyond the knowledge of the layman, and the Plaintiff had no expert opinion to explain to the jury what more a reasonable restaurant owner should have done to secure the premises. The court found that the restaurant completed all security measures it had undertaken, and the Plaintiff had failed to offer any competent evidence that something more should have been done. The court therefore granted summary judgment on all claims and the costs of litigation to the Defendants.

Steven Lane v. State of Arizona, et al

January 11, 2017
Maricopa County Superior Court
John DiCaro & Justin Ackerman


John DiCaro and Justin Ackerman recently obtained summary judgment on a premises liability and fraudulent transfer lawsuit filed against Gavilan Peak, LLC. On November 4, 2013, Steven Lane was seriously injured from an unidentified explosive device while assisting acquaintances with removing a piece of property owned by Gavilan Peak, LLC. Unbeknownst to Gavilan Peak, the previous property owner used the site for explosives manufacturing and military and law enforcement training. In 1999, the federal and state governments made efforts to remediate the property due to safety concerns. After the state remediation was complete, the Governor's office announced that the remediation was a success and that "the hazardous materials are gone and the residents are safe." During the sale of the property, the former owner allegedly told a representative of Gavilan Peak that the property was entirely safe as a result of these remediation efforts.

Mr. Lane's lawsuit alleged that Gavilan Peak breached its duty of care because Gavilan Peak failed to warn him of the dangerous condition on the property. Gavilan Peak argued in part, that the undisputed knowledge of the Plaintiff's acquaintances that the property was dangerous released Gavilan Peak's duty to Mr. Lane, pursuant to Restatement (Second) of Torts § 358. In addition, given the utter lack of evidence regarding Mr. Lane's fraudulent transfer claim, Gavilan Peak argued it was entitled to summary judgment.

The Court agreed, adopting Gavilin Peak's argument, dismissing Mr. Lane's premises liability claims under Restatement § 358 and his fraudulent transfer claims for lack of evidence. After the Court's ruling, the parties stipulated that Plaintiff's remaining claim against Gavilan Peak involving "false light invasion of privacy" would be dismissed with prejudice. Plaintiff subsequently moved for a new trial on the premises liability and fraudulent transfer claims, which was denied.

Hennessy v. Apache County, et al

January 12, 2017
Apache County Superior Court
Michele Molinario

Michele Molinario successfully moved for dismissal in an unlawful arrest case against an Arizona County, and various County law enforcement officers. Prior to filing suit, the Plaintiff mailed a Notice of Claim pursuant to A.R.S. 12-821.01 to the Sheriff's Office's P.O. Box, instead of mailing it to the officers' home addresses or serving the officers in person. The legal question was whether service of a Notice of Claim by mail was valid at the officers' workplace.

The Superior Court Judge found that the Plaintiff did not properly serve the Notice of Claim upon the County officers in accordance with Rule 4(d), Ariz. R. Civ. P., which requires service upon an individual to be done personally, or by leaving a copy of the summons and complaint at the individual's residence. Further, service of a Notice of Claim is mandatory and the failure to do so in the appropriate manner resulted in the dismissal of the claims against the County officers.

Koch-Gulloty v. Taylor

January 25, 2017
Maricopa County Superior Court
Robert Berk

Bob Berk obtained a defense verdict in a legal malpractice case. The Plaintiff alleged that the defending attorneys committed malpractice while representing the Plaintiff in an underlying workers compensation case. The court granted Defendants' motion to split the case into a liability phase and a damage phase.

After an unsuccessful mediation, at which the Plaintiff demanded $1,900,000 and the Defendants offered $75,000, the liability phase of the trial took place. After a 5-day trial, the jury was out less than 10 minutes before returning a unanimous defense verdict on liability. As a result of the verdict, the damage trial was vacated.

Galano v. Tay

February 2, 2017
Maricopa County Superior Court
Stephen Bullington & Cory Tyszka

Steve Bullington and Cory Tyszka obtained a unanimous defense verdict in this case involving allegations of medical malpractice arising from a penile prosthesis exchange procedure. Plaintiffs alleged that Defendant was negligent in leaving a fragment of tubing from the removed prosthesis in the Plaintiff's groin area, causing Plaintiff to suffer an infection, additional surgeries, and loss of employment. Defendant maintained that he met the standard of care in removing the prosthesis and that Plaintiff's infection was not caused by the fragment. Plaintiff claimed $900,000 in damages due to pain and suffering, loss of consortium, lost wages, loss of enjoyment of life, medical bills and expenses. The case was tried in Maricopa County Superior Court before the Honorable Susan Brnovich. After an 8-day trial, the jury returned a unanimous defense verdict on February 2, 2017.

Pruitt v. Garcia

March 7, 2017
Sacramento County Superior Court of California
Michael Halvorson

Mike Halvorson successfully represented a Defendant in a potentially substantial verdict in a personal injury case. The Defendant was operating a tractor-trailer weighing approximately 75,000 pounds when it impacted the rear of Plaintiff's 1972 pick-up truck, which was stopped at a red light. Because Plaintiff's vehicle lacked a headrest, the back of Plaintiff's head smashed into the glass of his back window. Plaintiff, age 37 and a father of three, claimed this caused him to suffer a concussion, as well as severe head, neck, shoulder and arm injuries for which he treated with conservative care and epidural injections over the next two years. Plaintiff was ultimately diagnosed with a cervical disk herniation, and he subsequently underwent surgery that resulted in a fusion of his cervical spine at a total cost in excess of $118,000. Plaintiff also claimed to have suffered in excess of $40,000 in lost wages, as well as damages for future medical care and economic losses.

Specifically, although the surgery was deemed a success, Plaintiff continued to have ongoing pain and limitations, and his primary doctor opined that he could expect complications in the future as a result. Consequently, prior to trial, Plaintiff demanded Defendant's insurance policy limit of $1 million.

The case was filed in Sacramento, California, and Mike was asked to enter an appearance pro hac vice for purposes of trying the case. Shortly before trial, the Defendant admitted fault for the accident and filed a CCP §998 Offer for $250,000. Mike also filed several motions to limit Plaintiff's damages, which successfully resulted in the withdrawal of Plaintiff's past lost wage and future economic loss claims.

During the 8-day trial, the Defendant neither disputed that Plaintiff suffered from a herniated disk, nor that the surgery was unnecessary or unreasonable. Through cross-examinations of Plaintiff's orthopedic surgeon and biomechanical engineering/accident reconstruction expert, Mike argued that the circumstantial evidence more strongly suggested the herniation preexisted the accident, and the accident simply exacerbated Plaintiff's condition for a period of approximately four months. Defendant argued that Plaintiff was entitled to his medical expenses for the conservative care he received during these four months, along with compensation for his pain and suffering, which Mike suggested amounted to a total damage award of $40,777.19.

Plaintiff asked the jury to award a total of $1,432,318, which included his medical expenses, scar disfigurement, disability, and chronic pain and suffering. After two days of deliberation, the jury awarded Plaintiff $40,777.19. Because Defendant filed a CCP §998 Offer for $250,000, Defendant was able to recoup his $32,127.68 in costs leaving a net judgment amount of $8,649.51.

Gabriel Armendariz v. Manuel Padilla, et al

March 21, 2017
Arizona District Court
Donald Myles & Michele Molinario

Don Myles and Michele Molinario prevailed on summary judgment in a 42 U.S.C. § 1983 civil rights action for false arrest against a City of Yuma Police Sergeant. The case involved whether there was probable cause to arrest Plaintiff, a former border patrol agent. U.S. Border Patrol had revoked Plaintiff's enforcement authority and requested he return the government-issued property in his possession. City of Yuma police officers sought to assist border patrol in retrieving the government-issued firearm, badge and credentials, but Plaintiff refused and gave various conflicting statements about the location of the property. Plaintiff was then arrested for theft and false reporting. Plaintiff filed a Cross-Motion for Summary Judgment.

The central issue in the Motion for Summary Judgment was whether the Police Sergeant had probable cause to arrest Plaintiff for either theft or false reporting. District Court Judge Susan R. Bolton denied Plaintiff's Cross-Motion for Summary Judgment and found that there was probable cause to arrest for false reporting. Plaintiff's own testimony confirmed that law enforcement officers are trained to know the location of their service weapons and credentials. Based on this understanding, and Plaintiff's inconsistent statements about the whereabouts of the property, a reasonable officer would have sufficient grounds to believe that Plaintiff was knowingly providing false statements. As such, there was no genuine issue for trial. Alternatively, Judge Bolton found that the Police Sergeant was entitled to qualified immunity since it could be reasonably debated whether clearly established law was violated. Judgment was entered in favor of the Yuma Police Sergeant.

READ THE REPORTER ONLINE AT:

JSHFIRM.COM

Dunajski v. Mohave Mental Health Clinic

March 22, 2017
Mohave County Superior Court
Charles Callahan & Daniel King


Charlie Callahan and Dan King obtained a defense verdict for their client, Mohave Mental Health Clinic, a Kingman-area mental health clinic, after a 6-day jury trial.

The Clinic was sued by a Security Director of a nearby hospital. Plaintiff alleged that the Clinic negligently allowed an involuntarily committed mental health patient to escape from the facility. When the patient left the facility, he went to the nearby hospital and was confronted by Plaintiff. An altercation between Plaintiff and the patient ensued, and Plaintiff alleged that he sustained low back injuries in the altercation, which eventually resulted in a spinal fusion surgery.

Plaintiff claimed that he was permanently disabled as a result of his injuries and sought $162,000 in medical expenses, $300,000 in future medical expenses, $1,000,000 in future loss of earning capacity, and pain and suffering damages. The jury deliberated for two hours before returning a defense verdict.

Yolanda Erickson, et al. v. City Phoenix, et al

June 6, 2017
District Court of Arizona
John Masterson, Joseph Popolizio and Justin Ackerman



On July 28, 2013, Phoenix Police officers responded to a Phoenix Police dispatch involving a shirtless man (Miguel Ruiz) damaging an A/C unit located on the roof of his apartment. After police arrived, officers used a bucket crane and attempted to talk Ruiz down from the roof. Ruiz, stating that others were trying to kill him, ignored the officers' commands and refused to come down from the roof. After multiple attempts to convince him to come down from the roof, Ruiz began to scoot to the side of the roof, toward a second-floor landing outside the front door of an apartment unit. Officer Camarillo, one of the Phoenix Police officers on scene, positioned himself near the stairwell in case Ruiz jumped onto the landing. After Ruiz jumped nearly 10 feet to the second-floor landing, Officer Camarillo grabbed him, putting his arms around Ruiz's neck. Within a few seconds, other officers attempted to restrain Ruiz by his arms and legs. Another officer also tased Ruiz multiple times, but it had no effect on him. After more than four minutes of struggling to control Ruiz, Officer Camarillo applied a carotid hold to Ruiz. Officers were then able to subdue Ruiz and carry him down to EMS personnel, who determined that Ruiz was pulseless. Although EMS resuscitated Ruiz, he was taken off life support five days later due to an anoxic brain injury. It was later revealed that Ruiz had significant amounts of methamphetamine in his system.

Ruiz's mother, Yolanda Erickson, filed a Complaint against Officer Camarillo, on July 28, 2014. Ms. Erickson claimed that Officer Camarillo's conduct was negligent, grossly negligent, and that Officer Camarillo violated Ruiz's Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983. Attorneys John Masterson, Joe Popolizio and Justin Ackerman filed a partial motion to dismiss and motion for summary judgment, eliminating all but Ms. Erickson's claim for excessive force under the Fourth Amendment. JSH attorneys then proceeded to trial on the excessive force claim, which ultimately resulted in a complete defense verdict after the jury deliberated for less than one hour.

INDECENT EXPOSURE:
NEW DECISION CONFIRMS SUBCONTRACTORS' LIABILITY TO CD DAMAGES IS EXPANSIVE

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How broad is a "broad-form" indemnity provision in a construction contract? A recent decision by the Arizona Court of Appeals held that such a provision allows a developer great latitude in recovering monies paid for settlement, as well as its attorneys' fees and costs.

Amberwood Development v. Swann's Grading, 1-CA-CV15-0786, arose from a lawsuit by homeowners against Amberwood alleging, among other things, construction defects from soil movement. Amberwood arbitrated the dispute with some of the homeowners, resulting in a $1.75 million award, and it settled the claims of the remaining homeowners for another $723,000. Swann's Grading had provided a defense to Amberwood for the arbitration but did not indemnify Amberwood. This suit was Amberwood's effort to recover indemnity from Swanns for the arbitration award and settlement.

Like many construction contracts, Amberwood's subcontract contained a "broad form" indemnity provision, which required Swanns to defend and indemnify Amberwood "from any and all claims, damages or Attorney's fees...arising out of the acts or omissions of [Swanns]...with regard to the performance or omission of any of [Swanns] duties and obligations under the contract." At the bench trial, Amberwood presented expert testimony that because Swanns performed the rough and fine grading, the majority of the damages awarded "arose out of" its work. This evidence was unrebutted by Swanns' expert who only argued that Swanns' work did not cause any of the claimed damages. The trial judge agreed with Amberwood and found that 70.6 % of the litigation settlement and 72.7 % of the arbitration award were for issues that "arose out of" Swanns' work. The trial judge entered an award against Swanns to reimburse Amberwood those amounts. The award was upheld on appeal.

Amberwood made clear several important lessons for construction defect litigants and insurers. A broad-form indemnity provision is highly advantageous for developers and disadvantageous for subcontractors. To prevail, a developer is not required to prove that a subcontractor was negligent; it need only prove that the claims and damages sought by Plaintiffs "arose out of" the work performed by the subcontractor, even if other trades were perhaps partially responsible. Put another way, "fault" of the subcontractor is of little consequence. Once the developer prevails, it is entitled to recover that portion of indemnity and defense fees that are attributed to the subcontractor. The former is usually determined by the jury, the latter by the judge post-trial. And as made abundantly clear in *Amberwood*, this liability can include being held responsible for the full amount of damages, even where another trade is perhaps partially responsible. In CD cases, the attorneys' fees and expert costs (of the developer and Plaintiff) can be as sizable as the construction defect damages at issue.

In conclusion, broad-form indemnity provisions can now result in greater potential exposure to subcontractors than previously believed. Early analysis of a subcontractors' scope of work compared to claims alleged by Plaintiff should be done to assist in identifying early potential exposure.

ABOUT THE AUTHOR **MICHAEL LUDWIG**

As the leader of the firm's Construction Law Trial Group, Mike concentrates his practice on construction law, personal injury defense and professional liability defense. Mike co-authored the Arizona Construction Practice Manual published by the Arizona State Bar and was a member of the Executive Council for the State Bar's Construction Section.

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WEBSITES:
THE NEW FRONTIER FOR ACCESSIBILITY CLAIMS

AUTHOR: **David Potts** EMAIL: **dpotts@jshfirm.com** BIO: **jshfirm.com/DavidCPotts**

The number of cases alleging violations of Title III of the Americans With Disabilities Act has fallen dramatically in 2017. Under Title III of the ADA, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." Typically, this means that places of public accommodation must ensure that they are accessible by disabled individuals and comply with federal regulations that set the appropriate standards.

Over the past year, courts have come down hard against serial Plaintiffs bringing Title III claims. Advocates for Individuals with Disabilities-the organization that brought more than 1,000 lawsuits against Arizona businesses alleging violations of the ADA's parking regulations last year–has been largely thwarted, with all of their Arizona cases dismissed. The legislature amended the Arizonans With Disabilities Act to require that a business be given notice and 30 days to fix any violations before a lawsuit can be filed. And similar "tester" Plaintiffs have largely ceased to bring lawsuits in Arizona based on physical barriers to access.

The new frontier is the Internet. In the Ninth Circuit, the Internet is not itself a "place of public accommodation," so it is not automatically subject to Title III of the ADA. For example, in 2011, a federal court in San Jose rejected a Plaintiff's claim that Facebook was a "place of public accommodation" under the ADA. *See Young v. Facebook, Inc.,* 790 F. Supp. 2d 1110 (N.D. Cal. 2011). A similar claim against Netflix failed a year later. See *Cullen v. Netflix, Inc.,* 880 F. Supp. 2d 1017 (N.D. Cal. 2012). However, where there is a "nexus" between a website and a place of public accommodation, a website can be subject to the ADA. See, e.g., *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

As a result, where a website has that requisite "nexus" to a physical accommodation, Plaintiffs are beginning to bring Title III claims. Theresa Brooke, a serial Plaintiff who also brings lawsuits against hotels that lack pool lifts, brought eight new ADA Title III suits in Arizona in July 2017 alone, all alleging that out-of-state hotels violated the ADA.

> THE NUMBER OF WEBSITE-BASED ADA CLAIMS WILL ONLY CONTINUE TO INCREASE WITH TIME, AND TAKING THE TIME NOW TO ENSURE YOUR ORGANIZATION'S WEBSITE IS ACCESSIBLE AND ADA-COMPLIANT CAN SAVE YOUR ORGANIZATION THOUSANDS IN THE LONG RUN.

Under the ADA's implementing regulations, hotels must "[m]odify [their] policies, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms." 28 C.F.R. § 36.302(e)(1)(i). Ms. Brooke alleges that these hotels did not allow her to book an accessible room online, preventing her from reserving a room at those hotels.

Importantly, these claims can only be brought under the ADA, as the newly amended Arizonans With Disabilities Act expressly excludes websites from its definition of "public accommodations." The damages a Plaintiff can recover, then, are more limited without those potential state law penalties. Still, under the ADA, a Plaintiff can obtain injunctive relief and recover his or her attorney's fees if the claim is successful. And given how quickly and cheaply a Plaintiff can "test" whether a hotel's website is compliant, we can expect to see more and more of these claims as time goes on. Other website-based claims are sure to follow for the same reason: the very low cost of testing compliance.

As with prior Title III cases, plenty of defenses are available. If a Plaintiff is not likely to actually visit the accommodation in question, an entity can defend based on lack of standing, and if an entity remedies the alleged violation, it can defend based on mootness. In certain cases, an entity can even defend on the basis that there is no "nexus" to a physical place of public accommodation. But, as with prior Title III cases, actually presenting these defenses can be costly, especially because the entity may ultimately be on the hook for the Plaintiff's attorney's fees as well.

The best defense to these claims, ultimately, is preventing them in the first place. The number of website-based ADA claims will only continue to increase with time, and taking the time now to ensure your organization's website is accessible and ADA-compliant can save your organization thousands in the long run.

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ASSAULT AND BATTERY ENDORSEMENTS: IS IT REALLY LAST CALL ON BAR LIABILITY COVERAGE?

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One of the most common risks associated with operating a bar or a restaurant that serves alcohol are claims arising out of fights. Because of this, premiums for insurance that fully covers claims arising out of assault and battery can be quite high. Often times, smaller or newer businesses may opt for cheaper policies as a cost-saving measure, meaning they purchase a commercial general liability policy containing an endorsement outright excluding coverage, or providing only a small dollar sub-limit, for claims arising out of an "assault or battery." These Assault or Battery Endorsements are generally written so broadly that they even apply to claims alleging negligent hiring, training, and supervision of security staff alleged to have resulted in the injury. On top of all this, Plaintiffs' attorneys often try to find ways around these endorsements, meaning that one serious injury followed by a creatively-pled complaint could suddenly put the assets of the bar or restaurant at risk.

In 2010, the Arizona Court of Appeals examined and upheld such an endorsement as unambiguous, and thus, enforceable on its face. See *Tucker v. Scottsdale Indem. Co.*, No. 1 CA-CV 09-0732, 2010 WL 5313753, at *1 (Ariz. Ct. App. Dec. 21, 2010) (Briefed and argued by co-author Mike Hensley and the JSH appellate team as counsel for Scottsdale Indemnity). Further, the Court of Appeals found that the insured's reliance on the expertise of her agent to provide adequate insurance was insufficient to overcome summary judgment under the reasonable expectations doctrine. Id. Though Tucker was an unpublished memorandum decision, and thus not authoritative case law, it was one of the first Arizona cases to really examine assault and battery endorsements limiting or excluding coverage. As such, the ruling in Tucker gave insurance carriers a sense of certainty concerning the enforceability of assault and battery endorsements, even when broadly worded, and gave them a seemingly-firm legal basis for coverage denials or limitations based on such endorsements. It appears, however, that the certainty afforded by Tucker may be less certain, and that the decision might not be the "last call" on the enforceability of such endorsements.

> "A RECENT CASE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA MAY HAVE OPENED THE DOOR TO NEW ATTACKS ON THE VALIDITY OF ASSAULT AND BATTERY ENDORSEMENTS."

A recent case in the United States District Court for the District of Arizona may have opened the door to new attacks on the validity of assault and battery endorsements. In *Fall v. First Mercury Ins. Co.*, the District Court agreed with the Tucker court's conclusion concerning the ambiguity of an assault and battery endorsement, finding that the policy was not ambiguous despite not clearly defining "assault," "battery," and "arising out of." 225 F. Supp. 3d 842, 847 (D. Ariz. 2016). The Court emphasized that as long as an endorsement's language is clear, courts will be unwilling to create ambiguity to create coverage. The *Fall* Court also found, however, that under the facts alleged in that case, the insured bar had a reasonable expectation of coverage for a claim stemming from a "physical altercation between a patron and its bouncers who were trying to protect other patrons." Id. at 848. Under this analysis, evidence pertaining to reasonable expectations – such as prior negotiations, circumstances of the transaction, whether the terms are bizarre and oppressive or eviscerate the non-standard terms of the policy, or if the endorsement applies only in limited circumstances – is sufficient to show a dispute of material fact. The Plaintiffs in *Fall* presented evidence that the bar manager was a long-term bar owner who

always insisted on liability coverage for bar fights and the like, and the Court agreed this evidence was sufficient to prevent dismissal of the claim for coverage by summary judgment.

Although application of this doctrine requires more than the insured's "fervent hope," of coverage, the *Fall* opinion highlights the potential pitfall carriers may find themselves in if they rely solely on the limitations or exclusions from coverage provided by the assault and battery endorsement, without additional investigation. The lack of specific, authoritative case law on coverage combined with the potential for excess exposure can leave Defendants in a precarious situation, and more than happy to assign their rights against the carrier to an injured party. Practically speaking, in cases where the Plaintiff's primary injury was caused or related to any contact with other patrons or bar employees, confirming the existence of any sub-limits or exclusions is the first step in a carrier's coverage analysis, but it should not be the last step.

Based on the Court's analysis in *Fall*, instead of relying on the lack of ambiguity of an endorsement, a claims handler has to watch out for the reasonable expectations of coverage and should also investigate and review the underwriting of the policy, before denying coverage, to determine if the insureds discussed the costs and coverage options regarding assault and battery endorsements, or if they asked for and were promised coverage "for bar fights." In situations where the insured also has policies on other bars or restaurants, carriers should identify if those other policies contain similar endorsements, to avoid arguments that they expected the coverages in all of their policies to be equivalent, as was argued in *Fall*.

Moving forward, to ensure the validity of endorsements limiting or excluding coverage, carriers may want to consider requiring additional signatures for these endorsements, similar to the specific waiver that is required to turn down UM/UIM coverage in automobile policies. A signed waiver would allow carriers to continue to offer lower premiums to small or newer businesses without fear of a subsequent coverage and bad faith case based on the reasonable expectations of the insured.

Drawing attention to these endorsements also benefits the insureds themselves. On one hand, if an insured specifically waives coverage, or agrees to a limitation, then they at the very least were given notice concerning the parameters of their coverage, and ostensibly have the opportunity to preemptively prepare for accidents and claims that may not be covered. They could do this by saving for additional self-insurance, or by mandating additional security training and oversight on behalf of their employees in regard to bar fights. On the other hand, more risk-averse insureds may opt instead to spend the additional money in higher premiums for policies without exclusions or with higher sub-limits. Either way, fully informing insureds about the contents of their commercial liability policies from the start protects both the insureds and carriers in the long-run while also preventing further "after the fact" reasonable expectation attacks on assault and battery endorsements.

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JSH FIRM **ANNOUNCEMENTS**

Kenneth Moskow Elected to Board of Directors for National Kidney Foundation of Arizona

For the past 17 years, Ken Moskow has been a dedicated member of the National Kidney Foundation of Arizona. In August, he was elected to the Board of Directors for a three-year term.

The National Kidney Foundation of Arizona is the major voluntary health agency in Arizona seeking solutions for kidney and urinary tract diseases through education, prevention and treatment.

Gordon Lewis Receives Highest Honor in Girl Scouting

Earlier this year, the Arizona Cactus-Pine Council honored Gordon Lewis with the Thanks Badge, an award given to an adult Girl Scout member whose ongoing commitment, leadership and service have had an exceptional impact on the goals and mission of the entire Council. Gordon became involved in the Girl Scouts organization more than 15 years ago, when his two daughters were young members, and he became a lifetime member and member of the Board of Directors in 2008. JSH is proud to support Gordon's efforts and is a sponsor of this year's Badge Bash, a fundraiser designed for adults to experience what Girl Scouting offers to its members – opportunities to build courage, confidence and character.

Arizona Association of Defense Counsel Elects John Gregory Young Lawyers Division President

The Arizona Association of Defense Counsel's (AADC) Young Lawyers Division elected John Gregory to be the 2017/2018 Executive Board President. John previously served as Vice President and Treasurer for the Young Lawyers Division. "I am thrilled to lead the Young Lawyers Division in the coming term. Our Board prides itself on offering exceptional professional development opportunities to its members, and we look forward to expanding those opportunities in the coming year. From offering new networking opportunities to improving engagement within our existing professional networks, the YLD has lofty goals. We will continue providing members with CLEs relevant to their practice and giving back to our community with our charitable softball tournament, which raised more than $10,000 for last year. It's exciting to be on a Board with great leadership during such an important, transitional time for our profession," John said.

JSH Sponsors ASU Law Student for Its Annual Diversity Legal Writing Program

Each year, the firm proudly selects and sponsors a second-year law student from ASU to intern for the firm. As the 2017 Diversity Legal Writing Program Scholar, Ian R. King had the opportunity to clerk for JSH for the entire spring semester, during which he gained practical legal experience in a large, private law firm setting. The firm also provided Ian with a $4,000 scholarship.

JSH Attorneys Named to Leadership in Fiesta Bowl Organization

Steve Leach has been elected to a two-year term as the Fiesta Bowl Chairman of the Board. Steve first joined the Fiesta Bowl Organization as a volunteer in 2004, then became a Yellow Jacket Committee member in 2006. In 2011, Steve was elected to the Board of Directors. His dedication to the organization has earned him numerous recognitions, including Yellow Jacket Committee Rookie of the Year and Yellow Jacket Committee Chair, as well as Chair of the Board's Nominating and Governance Committee and member of the Executive Committee.

As Chairman of the Board of Directors, Steve will oversee the governance of the Board, helping to lead and promote the nonprofit organization and its extensive charitable giving efforts, statewide community events and two bowl games – the PlayStation® Fiesta Bowl and the Cactus Bowl.

"The Fiesta Bowl puts on the best bowl games in college football and provides Arizona a host of top flight events that produce significant economic impact and allow the bowl to make substantial contributions to charities all over the state. The organization is built on a family of incredibly passionate and dedicated volunteers. It is an extreme honor to have the opportunity to be part of the Fiesta Bowl leadership. I'm looking forward to the challenge," said Leach.

Chelsey Golightly is also a member of the Fiesta Bowl Committee, working with sponsors, volunteers, staff, and the Board of Directors to support the Fiesta Bowl games and other events. She serves as Co-Chair of Team Hospitality for the Cactus Bowl, Assistant Chair of Media Operations, and Assistant Chair for the Oasis Cactus Bowl Pregame Party. Chelsey is also the reigning George Leonard Rookie of the Year for the Fiesta Bowl Committee.

In the past five years, the Fiesta Bowl and its surrounding events has generated an estimated $1,000,000,000+ for the local economy, and an estimated $6,000,000+ has been raised and donated to non-profit organizations. More than 2,500 volunteers make up the organization, dedicating their time and talents to support the annual events.

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BRACKETING:
WHETHER A FAN OR FOE, IT IS IMPORTANT TO UNDERSTAND ITS ROLE IN MEDIATION

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Bracketing is a favorite tool used by mediators, and now more frequently by the parties, to facilitate settlement during mediation. Not familiar with bracketing? It is exactly what the word suggests. It is a tool used to summarize the process of negotiating the high and low of the zone in which settlement negotiations occur. Either party may, but most often the mediator will, propose a high and low settlement figure (ie, the bracket) within which the parties agree to continue settlement negotiations. Understanding how and when to use bracketing in mediation can enhance your mediation success.

A bracket can be proposed at any time during a mediation. I have witnessed mediators propose a bracket at the inception of the negotiation after receiving an initial demand and offer from the parties where the figures are so far from where the case can likely settle that neither side is willing to make another move or, if they do, the move is so small that it results in a reactive response of equal incremental movement until the dialogue ends in frustration and stalemate sets in.

Traditionally, bracketing was a tool used only by a mediator after the mediator had meaningful conversations with the parties and their representatives and developed a clear understanding of the claims and defenses, explored the parties wants and needs, and evaluated the risks of the case not settling. A seasoned mediator would then take the information developed during caucuses with the parties and apply his or her knowledge and experience to present the parties with the mediator's proposal for a bracket within which the parties continue negotiations in earnest.

More often, brackets are now proposed by one party or the mediator to "test the waters" as to where a case may ultimately settle. Here, the proposed bracket is not offered with the expectation that the bracket will be accepted by the party to whom the bracket has been proposed as springboard to further negotiations but is used to send a message as to where the proposing party might be willing to go to settle the case (typically the halfway point between the high and low bracket figures). Even if the party to whom the bracket is proposed rejects the offered bracket, it often results in the opposing party proposing a new bracket, which can be useful in evaluating where the opposing party may be willing to settle the case (again, typically the midway point between the high and low bracket figures).

It is not uncommon that once a bracket for further negotiations is proposed, the parties continue their negotiations with the exchange of further conditional brackets. Other times, where the proposed bracket is not perceived as a reasonable range within which to continue settlement negotiations, the use of bracketing is rejected and the parties are left to continue negotiations in a more traditional exchange of settlement demands and offers.

> AN IMPORTANT LESSON TO LEARN WHEN CONSIDERING A BRACKET PROPOSAL IN MEDIATION IS TO FIND THE "SWEET SPOT" THAT WILL ALLOW BOTH SIDES ROOM TO NEGOTIATE WITHIN A REASONABLE BUT NARROWED SETTLEMENT RANGE.

An important lesson to learn when considering a bracket proposal in mediation is to find the "sweet spot" that will allow both sides room to negotiate within a reasonable but narrowed settlement range. Setting the bracketed figures too far apart, as a practical matter, accomplishes nothing. Setting them too close or proposing a bracket too soon in the negotiation process can lead to apprehension and stall the negotiation process. Bracketing is best utilized after the parties have negotiated to the point where one side balks at negotiating further or both parties dig in because the settlement range is still perceived as being too far from the parties' comfort zone for settlement to allow for further meaningful negotiations. As the old adage goes, timing is everything in determining when to propose a bracket during a mediation.

Those who favor the use of bracketing during mediation see it as a useful tool to send a message as to where the proposing party is comfortable settling the case. Bracketing is also favored as a tool to gauge the other side's likely settlement range by eliciting a response to an initial bracket proposal. Bracketing is also favored by many as a means to more quickly narrow the settlement range resulting in a faster resolution of the case. Finally, and perhaps most important, bracketing is also a useful tool to jumpstart a stalled negotiation.

Opponents of bracketing argue its use eliminates the art of negotiation and results in poorer settlements. They claim that bracketing, particularly if used too early in the mediation process, results in greater compromise and, hence, poorer settlements. The reluctance to consider bracketing by some is based upon the fear that its use results in a party showing its true hand sooner in the negotiation process and before a party is able to determine the other side's likely settlement range.

Whether you fall in the category of fan or foe of bracketing, it is important to understand what bracketing is and how it is used, as its use has become commonplace in mediation. It is critical to recognize that once a bracket has been communicated to the other side, whether ultimately agreed to or not, assumptions and expectations are created. Even if the proposed bracket is quickly rejected, the numbers are never forgotten by the other side. Therefore, careful thought should be given before proposing or responding to a bracket in mediation because, whether intended or not, every bracket tends to anchor the proposing party and will also be interpreted as sending a message to the other side.

It takes experience to become proficient in the use of bracketing in mediation. However, once you master the art of bracketing you are likely to find that your mediation results improve.

ABOUT THE AUTHOR **MARK ZUKOWSKI**

Mark provides national and statewide mediation services in the areas of personal injury, construction, insurance, products liability, HOA, contracts and commercial matters. He has received extensive arbitration and mediation training through the American Arbitration Association (AAA) and the Strauss School of Dispute Resolution at Pepperdine University. Mark has served as a trial and settlement conference Judge Pro Tem for the Maricopa County Superior Court and as a Judge Pro Tem for the Arizona Court of Appeals.

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GETTING TO THE SOBERING TRUTH OF A **DRAM SHOP CLAIM IN ARIZONA**

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In Arizona, a liquor licensee (restaurant/bar/club) can be held civilly liable for injuries and deaths that are caused–wholly or partially–by the over-service of alcohol. This type of claim is referred to as a dram shop claim and can include injury or death to individuals who are harmed by the alcohol-impaired patron, as well as damages or injuries to the impaired patron himself. In other words, dram shop actions can be brought not only by innocent third-parties who are harmed by the impaired patron, but also by the impaired patron.

The purpose of this article is to offer insight and recommendations for investigating, evaluating and defending dram shop claims in Arizona. Although it is not our intention to discuss Arizona's substantive law on dram shop liability, it is important to understand its general framework to give context to our suggested strategies.

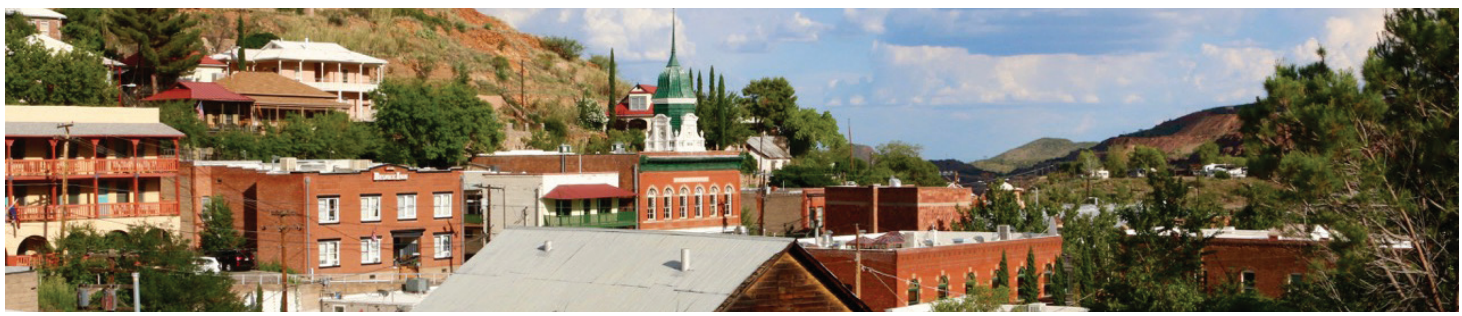
Legal Basis for Arizona Dram Shop Law

Arizona dram shop law is based on statutory and common law. A Plaintiff need not allege both or prevail on both. Prevailing on either one will impose liability. The statutory claim is a more difficult standard to meet and requires specific elements to be proven. Proving the statutory elements renders the bar negligent per se. But even if the statutory elements cannot be proven, a bar can still be liable under the less demanding common law standard. Consequently, defense of a dram shop case can't focus simply on defeating the elements of a statutory claim.

Statutory Duty: The statutory basis for dram shop liability is set forth in A.R.S. §4-244(14), and A.R.S. §4-311. A.R.S. §4-244(14) makes it unlawful for a licensee or other person to serve, sell, or furnish liquor to a *disorderly or obviously intoxicated person*, or for a licensee or employee of the licensee to permit or allow a *disorderly or obviously intoxicated person* to come into, or remain, on the premises, unless it is for no less than 30 minutes to allow for a non-intoxicated person to remove the person from the premises. "Obviously intoxicated" means that a person's "*physical faculties are substantially impaired* and the impairment is shown by *significantly uncoordinated physical action* or significant physical dysfunction that would have been obvious to a reasonable person." In short, a Plaintiff must not only prove a patron was obviously intoxicated, but also that the bar knew the patron was intoxicated and continued to serve the patron and/or allowed him to remain on the premises for over thirty minutes.

A.R.S. §4-311 states a licensee is liable for damages, injuries and death if: (1) the licensee sold alcohol to a patron who was *obviously intoxicated*; (2) the patron consumed the alcohol sold by the licensee and; (3) the consumption of alcohol was a proximate cause of the damages, injury or death. The statute defines "obviously intoxicated" as inebriated to such an extent that a person's *physical faculties* are *substantially impaired* and the impairment is shown by *significantly uncoordinated physical action* or significant physical dysfunction that would have been obvious to a reasonable person.

The statute also imposes liability for serving alcohol to a person not of legal drinking age, but that is not the focus of this article. A different liability criteria exists when under-age drinkers are involved.



Common Law Standard: The common law standard does not require that the patron be obviously intoxicated. Rather, a licensee can be held liable if, from other facts, it *should know* the patron is intoxicated, even in the absence of obvious signs of impairment. The classic example is serving a patron 4 drinks in 30 minutes, or multiple shots in a span of minutes. The bar *should know* the patron will be intoxicated from the rapid consumption of multiple drinks in a short time span. Bar owners and other licensed sellers of liquor in Arizona have a duty of care and may be held liable when/if they sell liquor to an intoxicated patron or customer under circumstances where the licensee or his employees knew, or *should have known*, that such conduct creates an unreasonable risk of harm to others who may be injured either on or off the premises.

Investigating the Insured Licensee

How a judge/jury/mediator perceives the merits of a dram shop action depends heavily upon not only the precipitating actions of the bar employees, but also on the bar's culture, reputation and alcohol-related incidents. Opposing counsel will make every effort to portray the liquor licensee in a bad light. Consequently, it is important to thoroughly investigate the licensee's business and operations by doing the following:

Covert inspection/surveillance: Often, when we are assigned a new case, we are complete strangers to the bar owner/manager. This allows us to make a personal covert visit to the establishment before we meet with management to discuss the claim. We get a "real life" picture of the culture, clientele, staffing, operations, property configuration and location of surveillance cameras. This allows us to be better prepared in asking key questions, and also alerts us when the insured may be telling us something inconsistent with our observations.

Personal Meeting with the Insured: This involves a formal meeting at the bar with all managers and employees on duty at the time in question. We educate them "collectively" about the claim and AZ law before we meet with them individually to discuss their knowledge and recollection of the particular events. This meeting allows us to evaluate the strength, weakness and effectiveness of their potential testimony, and what type of physical impression they will make. We also discuss the role the bar plays in the community such as sponsoring or hosting fund raising and charity events, and sponsoring sports teams.

Other Information to Obtain from the Insured: (1) Employee Work Shift Sheets; (2) Alcohol Service Training Certificates for all managers, bartenders, and servers; (3) Employee Handbook; (4) Bartender Manual; (5) Bar Incident Log Book; (6) Alcohol and food sales for the night in question; (7) Credit card receipts and cash sale records; (8) Photos of glassware used to serve drinks; (9) Surveillance Camera Footage; (10) Marketing and Promotional Materials; (11) Website, Facebook, Instagram and Twitter Posts.

Information to Obtain About the Insured from Other Sources: (1) Local police calls to the insured property in a 2-3 year period; (2) Crime Grid Activity Report for the square mile around the Insured's business; (3) Violations and Inspections from the State Liquor Licensing Agency; (4) Local court search for prior lawsuits and settlements.

What Role does the Intoxicated Patron Occupy?

Is the intoxicated patron a named Co-Defendant in the lawsuit? Sometimes, the intoxicated patron is not named as a Defendant in the lawsuit because he is remorseful about his conduct, and will "own" responsibility for his actions. On the other hand, if he makes an undesirable impression, opposing counsel will likely want him in the lawsuit to "tarnish" the bar.

Has the intoxicated patron reached a settlement with the Plaintiff, and if so, what are the terms? Is it a complete Release, or is it a Covenant not to Execute? Are there cooperation clauses in the settlement papers or supporting documents?

Is the Intoxicated Patron the Plaintiff who is Suing the Bar?

Is he charged criminally? Is the criminal case resolved or still pending? If resolved, what statements did he make during the criminal case, particularly in pre-sentencing? If criminal charges are still pending, it is unlikely he can be deposed and, if he is, he will refuse to answer most questions by claiming the Fifth Amendment privilege.

Does the intoxicated patron "own" his decisions and conduct, and express remorse? Or, is he angry at the bar and motivated to take the bar down with him? Is he trying to avoid responsibility and blaming the bar for his victimization?

Is the intoxicated patron a regular or frequent customer of the bar, or a one-time stranger? What bar employees know or are familiar with him? Has he been a problem patron before? Do any bar employees connect with him on social media?

Best Practices for Deposing the Intoxicated Patron

Whenever possible, the intoxicated patron should be the first person deposed. We want to know his version of the events, and whether he has his own agenda to serve in the context of the lawsuit. We want to quickly discover the role he occupies in this litigation.

From the onset, we should be candid about the civil lawsuit against the bar and explain to him why the bar can be (and is being) sued. If he is the remorseful type who "owns his conduct" he may give testimony favorable, or at least not prejudicial, to the bar.

If he has been criminally charged and/or convicted, we want to cross-examine him on the results of the charges, his plea, his statements and the terms of his sentence. A guilty plea is an admission that he is responsible for the harm he caused.

His past drinking practices and behavior are vital. Is he an experienced drinker who has developed a tolerance to alcohol, and who can mask signs of intoxication at relatively high blood alcohol levels? How often does he drink, where, and with whom? Which family members and friends have seen him intoxicated on other occasions? Is he a binge drinker? How many previous

> WHENEVER POSSIBLE, THE INTOXICATED PATRON SHOULD BE THE FIRST PERSON DEPOSED. WE WANT TO KNOW HIS VERSION OF THE EVENTS, AND WHETHER HE HAS HIS OWN AGENDA TO SERVE IN THE CONTEXT OF THE LAWSUIT.

times has he become intoxicated and driven a vehicle? How many times has he refused rides when intoxicated, and why? Did he ask for alternative transportation in this case and, if not, why not? In this case, did he attempt to hide his intoxication from bar employees?

What were the details of his presence in the insured's bar? What opportunity did he give bar employees to discover he was intoxicated? Who did he mingle and communicate with while at the bar? Did he make phone calls or send text messages?

Does he own and use a smart phone? Does he keep the GPS turned on? Is his smart phone still available for forensic download?

Best Practices for Deposing Other Witnesses

Potential witnesses in a dram shop lawsuit include other individuals who were at the bar (likely consuming alcohol themselves), bartenders and servers, individuals who saw the accident/fight or came upon it shortly afterward, law enforcement officers who investigated the accident/ incident, and family members and friends of the intoxicated patron. Although all of these individuals may have observed or interacted with either the injured party or the intoxicated patron, their recollection and testimony can be drastically different. They may have witnessed the intoxicated patron at different times and places in the hours leading up to the accident/incident. The purpose in deposing them is to piece together different time segments and perspectives.

When evaluating witnesses, it is important to find out: (1) what the witness observed, where and when; (2) how the witness knows the intoxicated person; (3) how long the witness observed the intoxicated person; (4) whether the witness was drinking that evening; and (5) the context in which the witness was interacting with the person (investigatory purposes, customer service purposes, or as a fellow patron who was simply in the same place at the same time.) These factors will also affect how the witness testifies and how to challenge the witness's testimony. For bar managers, bartenders, servers, and security personnel, it is also important to find out: (1) what they observed and the extent of their interaction with the intoxicated patron or injured individual; (2) the extent of their training on serving, cutting off, or interacting with intoxicated patrons; (3) their responsibilities on the night of the incident; (4) their previous experience with cutting off intoxicated patrons and what they do after cutting off alcohol service; and (5) what measures they take to remove the intoxicated patron from the premises and find alternative transportation for the patron.

Employees of the bar are key witnesses because they influence how a jury will perceive, embrace or reject a bar. Opposing counsel often tries to portray the bar as a place where servers/ bartenders will encourage patrons to drink more because by selling more drinks, patrons are happier, patrons will leave larger tips, and the bar and its employees reap more financial rewards. Sometimes opposing counsel will focus on the specials offered, arguing that the specials encourage patrons to drink to the point of intoxication/excess in order to get more business and make more money. Admittedly, while the bar may be successful when it sells more drinks, no establishment will be successful in the long run if patrons do not feel comfortable going there, or employees don't feel comfortable working there, because it is full of uncontrollable, messy, and recklessly intoxicated people.

Bartenders and servers will be questioned about how they determine a customer is "obviously intoxicated." Opposing counsel may ask them whether they "count drinks" or refer to the BAC chart, which gives an estimated BAC based on body weight and number of drinks. While DUI statutes rely on an individual's BAC level, dram shop statutes and claims do not identify a specific BAC for a person to be "obviously intoxicated." Instead, civil dram shop law focuses on behaviors and mannerisms of the intoxicated patron. Further, neither bartenders nor servers have the training or scientific means to test and determine a patron's specific BAC. Nor are they required to do so as part of their job.

Phone Records and Social Media

Discovering phone records and social media from the intoxicated patron or the injured party and, in some cases, employees, can be extremely useful (or detrimental) to a case. Phone records and social media posts can show whether the intoxicated individual made phone calls, sent text messages, checked in or posted to social media while he was drinking, telling his friends he was on his way to the bar, or that he was leaving. Employees may also discuss their place of employment, or promote the bar/ establishment on their own social media pages, and the bar/ establishment itself can have a certain "image" it portrays on its own Facebook, Instagram, Twitter feeds, or websites. Sometimes, bar employees are social media friends with the intoxicated patron. As a result, it is extremely important to be mindful of what is posted, sent, or said on social media and the Internet.

Defense Arguments

Without discussing details, there are a number of factual defenses that can be successfully advanced in a dram shop action. You should ask whether any of these apply to the facts of your case.

1. There is insufficient evidence the intoxicated patron was ever present or served at the insured's bar. There are no independent witnesses, camera footage, or receipts, but only the bare testimony of the intoxicated patron.
2. The intoxication/over-service occurred elsewhere, either before or after visiting the insured's bar.
3. The insured did not over-serve alcohol to the patron pursuant to documented sales records.
4. The patron did not display signs of obvious intoxication and did not consume a large number of drinks in a short period of time. The patron was an experienced drinker who was adept in masking his impairment. *Note: Displaying obvious signs of impairment to a trained police officer at an accident scene an hour after leaving the bar is not conclusive evidence that the patron displayed obvious signs of impairment to a bartender/server at the time the patron was served his last drink.*
5. Bartenders and servers are properly trained and experienced, and execute their jobs well.
6. There was little opportunity for the bar employees to observe obvious signs of intoxication even under ideal circumstances.
7. Under Arizona's comparative fault scheme, most of the fault should rest with the intoxicated patron who voluntarily chose to drink and drive.
8. If the intoxicated patron is the Plaintiff suing for damages, then A.R.S. §12-711 may apply. Under that statute, a jury can choose to disregard comparative fault principles and, instead, find completely against the Plaintiff if the Plaintiff was impaired and his impairment caused his injuries.

Should a Bifurcated Trial be Considered?

Arizona allows the court to order separate trials on the issues of liability and damages when the evidence and testimony to establish liability is separate and distinct from the evidence and testimony pertaining to damages, and where a Defendant may be unduly prejudiced by a single trial on both issues. This situation can arise where a drunk driver kills an innocent third party whose surviving family members then sue the liquor licensee for over-service of alcohol to the drunk driver. The family members have no knowledge or testimony to offer concerning the events that occurred in the bar relevant to the service of alcohol, and rarely have any testimony to offer about the crash. They simply have testimony to offer about their grief and loss of a loved one. The bar's liability for over-service of alcohol is dependent upon events that happened at the bar, and involve a different set of witnesses. We have been successful in convincing the court to order bifurcated trials so the jury is called upon to decide the dram shop liability of the bar before the jury hears any testimony about the grief, sorrow and anguish of the wrongful death Plaintiffs.

ABOUT THE AUTHOR **WILLIAM SCHRANK**

Bill's practice is devoted to defending corporations, businesses and other entities in tort litigation. His areas of practice include: defense of commercial transportation, trucking and motor coach/bus accidents; premise liability and security incidents; wrongful death torts; "Special Event" injuries; liquor and dram shop liability; and food, beverage and other product defects.

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IN MEMO

WILLIAM R. J

1939–2

With great sadness we report the passing of one of our founding partners, mentor and friend, W

Bill lived his life not only as the consummate gentleman and professional, but also dedicated to his belief in his shape, nourish, and grow the justice system for all citizens." As Bill once put it, "contributing back to the profess goes hand-in-hand with the privilege of being a member of this honorable profession."

In his 54-year career, Bill tried more than 250 civil jury cases, and helped write many of the statutes and rules th system, including Rule 26.1, addressing discovery, and A.R.S. § 12-2506, which abolished joint and several liabili Trial Advocates in May, 2011, Bill noted:

> When the final judgment of who we are and what we have accomplished is made, it will not be ba how we have fulfilled our obligation to others. We will not be judged on the number of billable ho on whether . . . we served others by discharging our duties as the trustees and guardians of our g
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> * * *
>
> When I look in the mirror, . . . I do not see a balance sheet. I see a man who, hopefully, can say th of the public trust bestowed upon him as a member of this honorable profession. I hope that I se professional and one who has given of himself so that this honorable profession has discharged as custodian of the justice system in the best possible way.

This is the man Bill was and the shining legacy he has left us. We are privileged that Bill spent untold hours trai by his loving family, wife Ellen, children Lisa and Rusty, four grandchildren, and cherished pup Cooper.

ORY OF

JONES, JR.

2017

illiam R. Jones, Jr., on May 7, 2017.

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ty. In his comments to the American Board of

ased on how many cases we have won, but rather
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at he has done his best to fulfill the obligation
e a person who is worthy of being called a true
its fiduciary responsibility to our fellow citizens

ning our young associates and mentoring countless lawyers. He will be greatly missed by everyone at JSH, and

CONGRATULATIONS TO
BRANDI BLAIR, DANIEL KING, ASHLEY VILLAVERDE HALVORSON AND DAVID STOUT FOR JOINING THE JSH PARTNERSHIP

Brandi C. Blair focuses her practice in the areas of Section 1983 defense, professional liability, wrongful death and personal injury defense. Brandi is an active member of firm leadership, serving on the Charity Committee and Recruiting Committee, where she also mentors new associates. Since 2013, she has been recognized by Southwest Super Lawyers as a Rising Star. Before pursuing her J.D. from the University of Arizona James E. Rogers College of Law, Brandi served as an Aerial Intelligence Specialist in the United States Army. She earned her Bachelor of Arts degree in both English Literature and Creative Writing, *summa cum laude*, *with Honors*, from the University of Arizona.

Daniel O. King is a third-generation Phoenician who practices in the areas of transportation law, bad faith, insurance coverage and general civil litigation. Dan is a member of the firm's Recruiting Committee and the Transportation Group's Rapid Response Team, a dedicated group of attorneys on-call to assist clients whenever there is a trucking/transportation accident or our clients require immediate counsel. Since 2013, he has been recognized by Southwest Super Lawyers as a Rising Star. Dan earned his J.D. from Santa Clara University and his B.S., *cum laude,* from St. Louis University. In 2013, Dan was accepted into and graduated from the Trial College, the flagship program of the Trial Practice Section of the Arizona College of Trial Advocacy.

Ashley Villaverde Halvorson practices in the areas of insurance coverage and bad faith, and wrongful death and personal injury defense. Ashley serves on the firm's Diversity Committee and manages the Diversity Legal Writing Program, an internship providing diverse law students the opportunity to gain experience in large firms. She is the Vice President of Los Abogados, Arizona's Hispanic Bar Association, and was honored as a 2017 Hispanic National Bar Association Top Lawyer Under 40. Ashley joined JSH immediately after earning her J.D. from the Arizona State University Sandra Day O'Connor College of Law. She also earned her B.A., *cum laude*, from Arizona State University.

David L. Stout, Jr. focuses his practice in the areas of commercial litigation, general civil litigation, wrongful death and personal injury defense, and trucking and transportation defense. In cases set for arbitration, Dave evaluates and conducts effective discovery, represents clients through the arbitration hearing, and navigates post-hearing issues. He is an active member of the Arizona Association of Defense Counsel and previously served on the Board of Directors for the Young Lawyers Division. Since 2013, Dave has been recognized by Southwest Super Lawyers as a Rising Star and he has earned a Martindale-Hubbell Peer Review Rating of 5.0 out of 5.0. He earned his J.D. from Southwestern University School of Law and his B.S. from the University of Arizona.

JSH GIVES BACK

JSH Sponsors 37th Annual Arizona Women Lawyers Association Convention

JSH proudly sponsored the Arizona Women Lawyers Association's ("AWLA") 37th Annual Convention. The theme was "Learning to Love Your Professional and Personal Life." Attendees identified and developed professional and personal goals and received instruction and advice on methods to eliminate challenges standing in the way of achieving goals; gained a greater understanding of how to achieve professional success by rising within the ranks of their current work environments or by choosing to change their work environment to better meet their professional and personal goals; and increase awareness of how the practice of law is changing and how to adapt to those changes

Back to School Clothing & School Supply Drive

For the past two years, the firm's Charity Committee has coordinated a donation drive for the 1st, 2nd and 3rd grade students at Desert View Elementary School in north central Phoenix. JSH employees purchased much-needed items, including socks, underwear and tennis shoes, as well as helped to stock the "lending closet" with gently-used clothing for students who need a second set of clothing at home or require a change of clothes mid-school day. Our employees donate a majority of the money by purchasing $5 Jeans Days coupons which allow them to wear jeans to work on certain days throughout the year.

First Annual Tour de Ren

JSH cycled for a cause this summer, namely for kids at Phoenix Children's Hospital! The First Annual "Tour de Ren" was hosted by our building management company, Hines. Our employees joined other Renaissance Square tenants for a day of cycling on stationary bikes in an effort to support initiatives to cure and treat Cerebral Palsy, among other diagnoses.

JSH Sponsors Arizona Association of Defense Counsel Softball Tournament for Southwest Human Development

The Young Lawyers Division of the Arizona Association of Defense Counsel (AADC) hosted its annual softball tournament to benefit Southwest Human Development. Southwest Human Development is Arizona's largest nonprofit organization dedicated to early childhood development, and its 900 staff members provide 40 innovative programs and services to 135,000 children and their families each year.

Approximately $11,000 was raised for Southwest Human Development through team donations, sponsors, and raffle ticket sales.

BIFURCATION NO LONGER THE ROAD LESS TRAVELED IN ROAD DESIGN LAWSUITS: INSIGHT ON S.B. 1025'S RECENT AMENDMENT TO A.R.S. § 12-820.03

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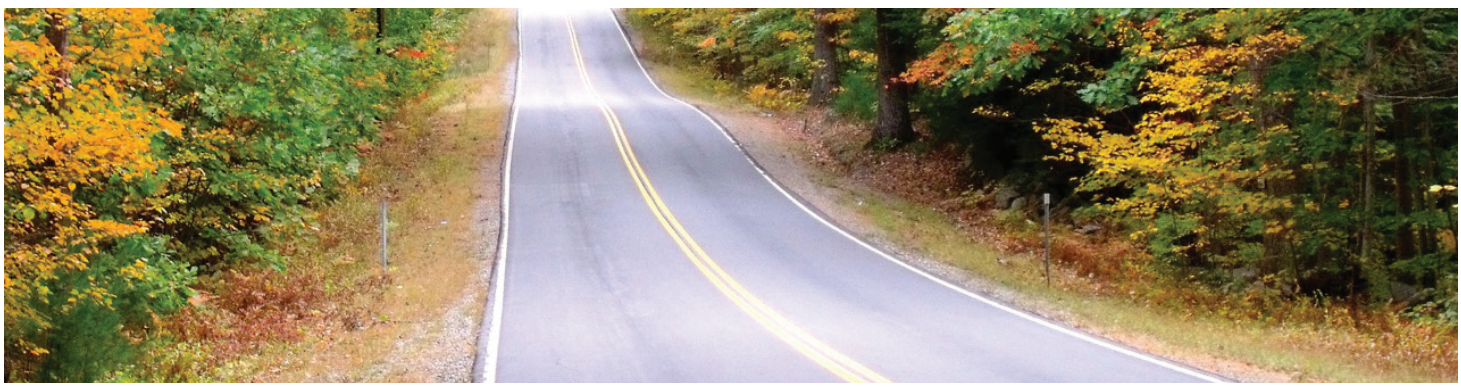
On May 2, 2017, Governor Ducey approved S.B. 1025, which amends the affirmative defense of A.R.S. § 12-820.03. The purpose of this article is to shed light on the benefits of the bifurcation provision set forth in S.B. 1025.

Under A.R.S. § 12-820.03(A) of the amended statute, "[a] public entity or a public employee is not liable for an injury arising out of a plan or design for construction or maintenance of or improvement to transportation facilities, including highways, roads, streets, bridges, or rights-of-way, if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the preparation of the plan or design; and the public entity or public employee gives to the public a reasonably adequate warning of any unreasonably dangerous hazards which would allow the public to take suitable precautions." S.B. 1025 also adds a new sub-section to A.R.S. § 12-820.03. This new sub-section, states: "If a genuine issue of material fact exists as to whether the public entity or public employee has met the requirements of subsection A of this section, the issue shall be resolved by a trial before and separate and apart from a trial on damages." A.R.S. § 12-820.03.

The Benefits of Bifurcation under A.R.S. § 12-820.03(B)

To the extent that the Court cannot make a determination of whether the public entity has established the affirmative defense set forth in A.R.S. § 12-820.03 due to disputed material facts, bifurcation is the solution. S.B. 1025's amendment to A.R.S. § 12-820.03(B) requires the determination of whether the public entity has met the statutory criteria to establish the affirmative defense to be resolved in a separate trial before a trial on damages. By requiring the affirmative defense to be adjudicated by a separate trial prior to a trial on damages, the amendment to A.R.S. § 12-820.03 is designed to prevent undue prejudice to the public entity that may result if the jury hears irrelevant and emotional testimony on damages before determining whether the public entity established the affirmative defense.



In particular, bifurcation is a way to reduce the often unavoidable human fallacy of juror hindsight bias. It is believed that hindsight bias may play a critical role in civil trials, in which the Defendant is disadvantaged because jurors know the tragic outcome of the Defendant's alleged behavior and may be more likely to think the Defendant should have known the risks associated with the alleged behavior. One can imagine the sympathy for a family due to the tragic loss of a loved one or the catastrophic injury suffered by the Plaintiff in a motor vehicle accident. Certainly, the determination of whether the public entity can be held liable should be decided without the concern the the jury will be swayed by compassion for the affected Plaintiff.

Not only does the amendment minimize the danger that the jury will overlook a valid affirmative defense simply due to sympathy for a seriously injured Plaintiff, but bifurcating the trial can reduce costs and increase efficiency—two things Arizona taxpayers should certainly appreciate. Specifically, a public entity may avoid the costs and fees incurred with a prolonged trial on damages by bifurcating.

The Arizona Legislature has given governmental defense attorneys a powerful tool to utilize in roadway design cases in an attempt to reduce the risk of juror hindsight bias. The practitioner defending a roadway design case should assert the affirmative defense of A.R.S. § 12- 820.03 early, tailor discovery accordingly, and file an early motion for summary judgment on the affirmative defense. If the Court finds a question of fact exists as to whether the public entity has established the criteria set forth in A.R.S. § 12-820.03, then counsel should file a motion to bifurcate liability from damages, relying upon the recent amendment.

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John focuses his practice in the areas of governmental liability, personal injury, dram shop/social liability defense, civil rights and insurance defense. His clients include municipalities, public entities, insurance carriers and private clients. In addition, John serves as a co-chair and faculty member of the Arizona College of Trial Advocacy.

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Amy worked as a law clerk (legal intern) at the firm during the summer between her second and third year of law school. She is expected to graduate from Arizona State University's Sandra Day O'Connor College of Law in 2018.

CYBER LIABILITY: THINK TWICE BEFORE HITTING SEND

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We have all seen it. A well-known celebrity sends out a series of nasty tweets or foolishly posts private pictures of someone online to embarrass or harass them. Inevitably, the celebrity will delete it, apologize, and most likely claim that their account was hacked. But often times what follows is a lawsuit. It should come as no surprise that the internet has opened up a whole new world of potential liability – both for individuals and businesses. This article will take a closer look at some of the most common claims arising from the internet and provide best practices for avoiding and defending such claims.

Defamation & Business Disparagement

Defamation is one of the most prevalent claims in cyber law. In recent years, these have come in the form of disgruntled customers or malicious competitors trying to gain an improper competitive advantage by posting defamatory material on message boards or websites like Yelp. In some cases, companies create fake Facebook accounts in a campaign to bring down a legitimate competitor.

Ultimately, the only way to avoid claims like these is to engage in fair competition. To ensure that employees do not expose their employers to liability, companies should implement policies on how their employees engage in the online marketplace. Most successful companies have a marketing department that handles the company's entire online presence so that mistakes are minimized. But, of course, mistakes do happen.

Once a lawsuit is initiated, the focus will be on potential defenses. To prove a claim for defamation in most jurisdictions, a Plaintiff must prove each of the following: (1) the Defendant made a defamatory statement about the Plaintiff; (2) the statement was false; (3) the statement was published to a third person; (4) the statement caused damage to Plaintiff; and (5) the Defendant knew the statement was false or made it with reckless disregard as to whether it was true.

A statement is defamatory if it tends to bring the Plaintiff into disrepute, contempt or ridicule, or if it impeaches the Plaintiff's honesty, integrity, virtue, or reputation. Statements like "Company X is poorly run" or "I was unhappy with Company X" are not defamatory. However, courts have found the following terms rise to the level of defamatory – e.g., "scam"; "fraud"; and "crooks."

Once a statement is proven to be defamatory, the case will turn to damages. In most cases, a defamatory statement has little to no impact – meaning no actual damages. There have been several cases in which Plaintiffs sustain absolutely no harm (i.e., no loss in sales or revenue) other than their reputation. In some cases, however, the Plaintiff has such a poor reputation to begin with that the allegedly defamatory statement has seemingly no effect.

Nevertheless, "presumed damages" are available for certain types of defamatory statements. Those include statements that impute criminal misconduct, sexual misconduct or diseases, and unfitness for a business, trade, or profession. Ultimately, damages will be determined by a finder of fact based on what fairly and reasonably compensates the Plaintiff.

Copyright Infringement

Another claim arising from the use of the internet is copyright infringement. A copyright is a type of intellectual property applicable to "works of art" – e.g., photographs, writings, paintings, music, jewelry, etc. The right is owned by the creator or author of the work, but it can be transferred just like any other piece of property. The owner of a copyright has exclusive right to control publication, reproduction, and distribution of the work.

Although the notion of copyright came about with the proliferation of the printing press in the 1700s, it has had a significant impact on the modern world. Today, copyright law protects nearly all of the content found on the internet. That includes all of the photos posted on Facebook and Instagram, as well as all of the 140-character tweets found on Twitter.

In cyber law, it's common to find allegations of copyright infringement stemming from the use of "stock" photographs used to advertise products and services. Often times such use is

clearly accidental. Unfortunately, under copyright law, accidental use is still no defense to liability. In fact, it's not uncommon for companies to be subjected to liability because they hired third-party web designers who mistakenly use copyrighted work when adding content to the websites they built.

As a result, it is recommended that clients obtain the proper licensing for all website content, or create the content themselves. When companies fail to do so, copyright holders are entitled to a variety of potential damages, including: (1) actual damages – lost profits; (2) the alleged infringer's profits obtained as a result of the infringement; (3) statutory damages ranging from $200 to $30,000; and (4) attorney fees and costs. Where a Plaintiff can prove that the infringement is "willful," statutory damages can be as high as $150,000.

Key Takeaway

Although the internet can undoubtedly be a company's greatest resource, it can also be its downfall. Knowing how quickly things on the internet can go viral (just ask United Airlines), it is highly recommended companies think twice before hitting send.

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JSH RESOURCE ALERT!

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Reference Guide to Arizona Law

The firm's Reference Guide to Arizona Law is distributed to clients via print and electronic media. JSH attorneys update the Reference Guide as needed to reflect changes in case law and statutes. The Reference Guide includes a detailed table of contents and case law, and covers most of the major issues that arise in personal injury cases, as well as a short explanation of Arizona law on each point. To receive a copy of the latest version of our Reference Guide, email marketing@jshfirm.com.

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BEWARE THE INSURED'S "REASONABLE EXPECTATIONS"

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In a recent insurance bad faith case handled by the firm, the insured had taken out a commercial auto policy insuring a fleet of trucks. The policy was standard, but it had a relatively uncommon endorsement, which limited the coverage of each truck to a given radius of miles centered on each truck's garage location. Outside that radius, there was no coverage. The insured could assign a different garage and operation radius to each vehicle on the policy. The truck at issue in this case had a scheduled operations radius of 300 miles from its garaging location. Predictably, it got into an accident 380 miles from its garaging location, and coverage was denied on that basis. Almost as predictably, the insured sued his agent for negligently obtaining the wrong insurance, and sued the insurance company for breach of contract and bad faith.

The claim against the insurance agent centered on the simple allegation that the insured had not authorized the agent to obtain coverage with a radius limitation. The allegations against the insurance company were a little more creative. They had to be, because the terms of the policy were clear, and even the insured agreed that the policy as written provided no coverage due to the radius limitation. The Plaintiff also did not dispute that the insurance company had delivered exactly the coverage that the agent had applied for—no more, and no less. So the Plaintiff's dilemma was how to bring claims for breach of contract and bad faith when the insurance company had issued the policy requested by the agent, and then did exactly what the policy said it would do.

Plaintiff turned to a doctrine that, under certain circumstances, allows the insured to re-write even a perfectly clear policy after an apparently uninsured loss occurs. That doctrine is the "doctrine of reasonable expectations." The doctrine of reasonable expectations permits a court to find that the insured has the insurance coverage he "reasonably expects"—even if the policy plainly and unambiguously says something quite different. The doctrine is thus a powerful weapon in the hands of a Plaintiff suing for bad faith.

The doctrine of reasonable expectations arose in the early 1970s. Thirty-eight states have adopted it in some form. As originally conceived, it amounted to little more than a fancy way of saying that an insurance company cannot promise one thing and then deliver another. And in many states the doctrine is little more than a re-expression of the requirement that ambiguity in an insurance contract be construed against the insurer. In those states, therefore, the doctrine is only employed after the court has found ambiguity in the policy. But Arizona's formulation holds the dubious distinction of being perhaps the most aggressive form of the doctrine in the United States, as it permits reformation even of a completely unambiguous policy. As a federal judge has observed, Arizona's formulation of the reasonable expectations doctrine is expansive." See *Gregorio v. GEICO Gen. Ins. Co.*, 815 F. Supp. 2d 1097, 1105 (D. Ariz. 2011).

In legalese, the doctrine operates to overrule the integration clause in an insurance contract. The integration clause is that portion of a contract stating that the written contract supersedes any negotiations or previous agreements. In the insurance context, the integration clause is the policy provision that declares the insured has no rights to insurance beyond those provided in the policy.

> "...ARIZONA'S FORMULATION HOLDS THE DUBIOUS DISTINCTION OF BEING PERHAPS THE MOST AGGRESSIVE FORM OF THE DOCTRINE IN THE UNITED STATES, AS IT PERMITS REFORMATION EVEN OF A COMPLETELY UNAMBIGUOUS POLICY."

The doctrine of reasonable expectations nullifies that provision, by providing that if a buyer and a seller of insurance reach an understanding about what coverage the buyer wants, and the seller assures the buyer he will get what he asked for, that assurance becomes the binding contract, even if the paper policy that follows says something different. Consequently, even if the policy is completely clear, a court can set it aside to give the insured coverage the policy does not provide, if that coverage is what the insured reasonably believed he was getting.

The Arizona Supreme Court adopted the doctrine in 1984, stating that it relieves an insured from "certain clauses of an agreement which he did not negotiate, probably did not read, and probably would not have understood had he read them." See *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 394 (1984). Or at least that was the idea. The most memorable words in the opinion came from the Chief Justice in dissent: "The decision makes the contents of a written insurance policy irrelevant in the determination of the nature and extent of coverage." *Id.*, at 401 (Holohan, C.J., dissenting). As subsequent events proved, Justice Holohan was, unfortunately, mostly correct. The Plaintiffs' bar seized the opportunity to hold insurers accountable for insurance that buyers of insurance "reasonably expected," regardless of what their policies said.

Three years later, the Supreme Court clarified the doctrine by identifying four situations in which it could be applied:

1. Where the contract terms, though not ambiguous, cannot be understood by the "reasonably intelligent consumer," the court will interpret them in light of the objective, reasonable expectations of the average insured;
2. Where the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage;
3. Where some activity that can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured;
4. Where some activity reasonably attributable to the insurer has induced a particular insured to reasonably believe he has coverage, although such coverage is expressly and unambiguously denied by the policy.

See *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 272-73 (1987).

At first, it might seem promising that the Court identified only four situations in which insurance policies could be re-written by a judge, but the four situations are so elastic and ill-defined that they open the door to virtually unlimited possibilities for an insured to nullify policy language, and replace it with what "the average insured" would expect to be in a policy—whatever that might be.

Close examination of the four situations shows how sweeping they really are. The first permits a court to "interpret" language that is "not ambiguous"—and therefore would not seem to require interpretation in the first place. The second requires "full and adequate notice" of policy terms be given to the insured, without explaining what that might be, beyond the obvious implication that merely putting the notice in the policy is inadequate. The third situation invites unlimited speculation about unspecified ways in which an insurer or its agent might conceivably "create an objective impression" of coverage in someone's mind. The fourth is broadest of all, because the inquiry is totally subjective and focused on the personal beliefs of the particular insured. Faced with all of this, Justice Holohan again dissented, though this time economically, with just two words: "I dissent." Id., at 275 (Holohan, J., dissenting).

> "EVEN IF THE POLICY IS COMPLETELY CLEAR, A COURT CAN SET IT ASIDE TO GIVE THE INSURED COVERAGE THE POLICY DOES NOT PROVIDE, IF THAT COVERAGE IS WHAT THE INSURED REASONABLY BELIEVED HE WAS GETTING."

The *Gordinier* decision posed no notable obstacle to reasonable expectations litigation by Plaintiffs. Fortunately, the court of appeals has since handed down rulings that serve to limit the havoc that unrestrained application of the doctrine might otherwise wreak.

The main limits on the doctrine stand on one of its original premises: the doctrine of reasonable expectations is limited to contract terms where "one party has *reason to believe* that the other would not have assented to the contract if it had known of that term." *Darner*, 140 Ariz. at 391-92 (emphasis added). That means that it is not simply a matter of what the insured believes about his coverage. The court must inquire into whether the *insurer* had reason to believe that the insured would not have bought the policy. It also means "a *Darner* issue is not raised simply by putting the insured on the stand and asking him, 'Did you reasonably expect that you would be covered?'" See *Shade v. U.S. Fid. & Guar. Co.,* 166 Ariz. 206, 208 (App. 1990) (rejecting reasonable expectations argument where insured never read his policy and testified that he believed he had coverage through discussions with the agent).

Another requirement limiting application of the doctrine is that "The expectations to be realized must be those that have

been induced by the making of a promise." See *State Farm Fire & Cas. Co. v. Powers By & Through Fleming*, 163 Ariz. 213, 216 (App. 1989). The requirement of a promise, alongside the Darner inquiry into what the insurance company had reason to believe, makes the doctrine less of a guessing game about what was going on inside the mind of the consumer, and places a greater emphasis on external, observable events—by asking what actually happened when the insurance was acquired, and what promises the insurer or its agent actually made. Plaintiffs who want to challenge the unambiguous terms of their policies have to produce evidence that they were promised something else, and cannot simply allege that they "reasonably believed" they were covered. That still deprives insurance companies of the protection of a final, fully integrated agreement—i.e., the policy—but at least actual evidence of a deception or mistake attributable to the insurer should be required before that fully integrated agreement can be thrown out.

Another set of rulings provides further limitations. The doctrine only applies to "certain *standardized clauses* of agreements which had not been negotiated, *providing* they were clauses which, because of the nature of the enterprise, customers will not be expected to read *and over which they have no real power of negotiation." See Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 272 (1987) (emphases added and punctuation omitted) (repeatedly stressing that the doctrine may only be applied to "boilerplate terms"); *Averett v. Farmers Ins. Co. of Arizona*, 177 Ariz. 531, 532 (1994) (applying the doctrine to "non-negotiated terms in a standardized agreement").

These rulings harmonize with the original vision of the doctrine, which was merely meant to protect what the *Darner* court called the "dickered deal." *Darner*, 140 Ariz. at 395. Of course, in the insurance context fairly little actual dickering goes on. The point appears to be that some portions of a policy are subject to the insured's control and others are not; some form part of the negotiations and discussions between the insured and the insurance agent or broker, others—generally the basic policy boilerplate—do not. To return to the example at the beginning, if the Plaintiff whose policy had the coverage radius limitation did not like something in the basic policy form, he probably needed to find a different insurance company. But if he did not like having a geographical coverage radius limitation, all he had to do was pick up the phone and ask his agent to take that endorsement off (and pay a different premium).

So, properly applied, the doctrine of reasonable expectations does not reward laziness on the part of the buyer of insurance. It only penalizes a failure by a seller of insurance to deliver on what was promised, and then only when the failure to deliver occurs through boilerplate language that the insured could not have changed even if he had known about it.

All of this suggests that if the doctrine of reasonable expectations has any value, it would be to prevent an insurance company from negotiating one deal in the endorsements, but then knowingly delivering something different in the boilerplate. The trouble is, we already have that pretty much covered. It is well-settled that "an endorsement normally prevails over inconsistent provisions of the policy." See *Price v. Zim Israel Navigation Co.,* 616 F.2d 422, 427 (9th Cir. 1980). "Provisions in the body of the policy are . . . abrogated, waived, limited, or modified by the provisions of an endorsement [if] the provisions in the policy proper and the endorsement are conflicting." See *Exch. Ins. Co. v. Mar-Fran Enterprises, Inc.*, 169 Ariz. 187, 188 (App. 1991). A conflict between the policy language and an endorsement "must be resolved in favor of the endorsement, insofar as it modifies, qualifies, or restricts the terms of the original policy." See *Mission Ins. Co. v. Nethers, 119 Ariz*. 405, 408 (App. 1978) (holding "an insurer has the right to limit coverage by use of an endorsement, and when it has done so the plain language of the limitation must be respected"). "[A]dditions to a policy by a rider are usually for the purpose of modifying the general terms of a policy, and, therefore, being specific, control the more general terms of the policy." See *N. River Ins. Co. v. Clark*, 80 F.2d 202, 204 (9th Cir. 1935). Consequently, it is difficult to see why it was helpful to introduce a new doctrine that—when handled properly—serves only to repeat what courts have already said.

Nevertheless, because the doctrine of reasonable expectations is a consumer-protection doctrine, it is probably not going to disappear any time soon, even if its actual contribution to the protection of consumers seems minimal. Hopefully, appellate decisions will continue to limit its application to situations where additional consumer protection is really needed. But absent a Supreme Court ruling overturning *Darner*, it remains the law in Arizona that, under certain circumstances, a court can re-write a completely unambiguous insurance contract in order to grant coverage not provided in the policy, if that is what the court determines the insured, or any reasonably intelligent consumer, would have expected. So for now, at least, beware the insurance consumer's reasonable expectations.

ABOUT THE AUTHOR **JOHN LIERMAN**

John focuses his practice in the areas of premises liability, personal injury and general civil litigation. He represents clients primarily in the retail and hospitality, insurance, and education industries. For several years before pursuing a legal career, John taught undergraduate students at the University of Sioux Falls.

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JSH Hires Six New Attorneys

Sarah E. Epperson is an associate in our General Liability Trial Group, practicing in the areas of areas practicing civil and commercial litigation, civil appeals, and criminal defense. As a true Wildcat fan, she received both her undergraduate degree, graduating *summa cum laude*, and law degree from the University of Arizona. Following law school, she served as a Judicial Law Clerk for the Honorable Virginia C. Kelly of the Arizona Court Of Appeals, Division II.

Timothy D. Butterfield is an associate in the Professional Liability, Bad Faith and Complex Litigation Trial Group. During the summer between his second and third year of law school, Tim worked as a summer associate at JSH and prior to that, was a liability claims adjuster for GEICO. He also served as a Judicial Extern for the Honorable David C. Bury, United States District Court, District of Arizona in Tucson, AZ. Tim earned his J.D., *cum laude*, from the University of Arizona and his B.A. in economics and political science from the University of Montana.

Ravi V. Patel began his legal career in Texas where he practiced primarily in employment law for 10 years. Since joining JSH, he has focused his practice on employment law, governmental liability, insurance defense, wrongful death and personal injury law and general civil litigation. He is experienced representing client before the NLRB and in cases involving Title VII, FMLA, FLSA, ADA, and wrongful termination. Ravi earned his J.D. from Southern Methodist University's Dedman School of Law and his B.A. in Political Science from Rice University.

Laura A. Van Buren is an associate in the Professional Liability, Bad Faith and Complex Litigation Trial Group, practicing in the areas of bad faith and extra-contractual liability, commercial and business litigation, insurance coverage and fraud, and professional liability. Laura earned her J.D., *cum laude*, from the Arizona State University Sandra Day O'Connor College of Law and her B.A. in History from Rice University. While in law school, she served as a judicial extern to the Hon. Mary H. Murguia on the Ninth Circuit Court of Appeals, and she was a research assistant with the Civil Justice Clinic, where she co-authored several papers with the Public Health Law Research Cluster.

Ryan D. Pont is an associate in the Professional Liability and Bad Faith Trial Group. Before joining JSH, he was a Judicial Clerk for the Hon. James P. Beene, Arizona Court of Appeals, and a law clerk for the Pima County Attorney's Office. While in law school, Ryan volunteered his time as a law clerk at Southern Arizona Legal Aid, served as a constituent service representative to Congressman Ron Barber, and worked as an office assistant to Congresswomen Gabrielle Giffords. Ryan earned both his B.A. and his J.D. from the University of Arizona.

Alexix G. Terríquez is an associate in the Transportation, Auto and General Liability Trial Group, focusing his practice in civil litigation and insurance defense. He is experienced in alternative dispute resolution, including mediation, arbitration and negotiation settlements. He earned his J.D. from Boston University School of Law and his B.A. from the University of California at Santa Barbara. During law school, Alexix interned at the Office of the Legal Advisor for the Boston Police Department and at Bank of America in the Global Wealth Investment Management Legal Department. He is a native Spanish speaker and fluent in French.

DID IT JUST GET EASIER TO PRESENT PUNITIVE DAMAGES TO A JURY IN ARIZONA?

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A high legal standard has long-governed punitive damages in Arizona. To be entitled to punitive damages, a Plaintiff must show that the Defendant acted with an "evil hand" guided by an "evil mind." See *Rawlings v. Apodaca*, 151 Ariz. 149, 162 (1986). The purpose of such a stringent standard is to limit the availability of punitive damages to those very rare circumstances in which the goals of punishment and deterrence will be served. See *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331 (1986).

To prove an "evil mind," a Plaintiff must show, by clear and convincing evidence, that the Defendant either: 1) intended to injure the Plaintiff; or 2) the Defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others, even if the harm was not intended. *Rawlings*, 151 Ariz. at 162. A Defendant's conduct must be aggravated and outrageous and demonstrate that the course of conduct was a "conscious action of reprehensible character." *Linthicum*, 150 Ariz. at 331. "[N]egligent conduct, no matter how gross or wanton, cannot be equated with the conduct required for punitive damages." See *Volz v. Coleman Co.*, 155 Ariz. 567, 570 (1987). The Arizona Supreme Court has analogized conduct justifying punitive damages in civil cases to "conduct involving some element of outrage similar to that usually found in crime." *Rawlings*, 151 Ariz. at 162 (quoting Restatement (Second) of Torts § 908 cmt. b). The Supreme Court further affirmed that punitive damages awards are appropriate only to penalize a party for "'outwardly aggravated, outrageous, malicious, or fraudulent conduct' that is coupled with an 'evil mind'" and declared that "punitive damages should rarely be awarded." See *Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 424, ¶¶ 17-18, (2002) (citing *Linthicum*, 150 Ariz. at 331).

There has long been a high bar not only to recovering punitive damages in Arizona, but also to even being allowed to present a claim for punitive damages to a jury. Indeed, claims for punitive damages are usually dismissed on dispositive motion. The recent holding in *Newman v. Select Specialty Hospital-Arizona, Inc.*, 239 Ariz. 558 (App. 2016), seems to have made it much easier, however, for a Plaintiff to be allowed to argue punitive damages to a jury.

Newman v. Select Specialty Hospital-Arizona, Inc.

Among other issues, *Newman* involved a post-trial appeal of a lower court's judgment as a matter of law on punitive damages. Mr. Newman brought an Adult Protective Services Act ("APSA") action against the Defendant Hospital, alleging abuse and neglect arising from the failure to appropriately treat a wound. Mr. Newman was transferred to the Hospital for ongoing care following a motorcycle accident, which rendered him a quadriplegic. Mr. Newman arrived at the Hospital with a wound on his sacrum. During his admission to the Hospital, the wound worsened, ultimately becoming a Stage III pressure ulcer. Mr. Newman's wound healed six months after he transferred to another facility; however, he claimed the wound area was continuously painful and negatively affected his life. At trial, Mr. Newman sought compensatory and punitive damages.

After Mr. Newman presented his case in chief, the trial court granted the Hospital's motion for directed verdict on punitive damages. The trial court found that Mr. Newman failed to offer evidence that could satisfy the clear and convincing standard to establish an evil mind. At the conclusion of the trial, the jury found in Mr. Newman's favor on his APSA claim and awarded him compensatory damages.

> "EVEN IF THE POLICY IS COMPLETELY CLEAR, A COURT CAN SET IT ASIDE TO GIVE THE INSURED COVERAGE THE POLICY DOES NOT PROVIDE, IF THAT COVERAGE IS WHAT THE INSURED REASONABLY BELIEVED HE WAS GETTING."

The Court of Appeals reviewed the trial court's judgment as a matter of law on punitive damages in a light most favorable to Mr. Newman, as the standard of review required. The Court of Appeals' decision reflected the following facts:

> Newman presented evidence [at trial] that the Hospital's nurses were aware of Newman's pressure sore and of the required courses of treatment for that wound. The Hospital's policies and procedures manual required that Newman be assessed, repositioned, and cleaned several times each day. Newman's physician also prescribed a topical medication to be administered to Newman's pressure sore twice each day. Moreover, Hospital staff testified that they were aware of the required treatment for Newman's sore and were aware that failure to uphold the treatment standards risked severely exacerbating Newman's condition. See *Newman*, 239 Ariz. at 562, ¶ 14 (emphasis added).

Mr. Newman had also presented evidence at trial that his medical chart lacked documentation of wound assessment over a twelve-day period. *Id*. ¶ 15. Likewise, over an eight-day period, Mr. Newman's chart contained no documentation indicating that the Hospital's nurses applied prescribed topical medication to Mr. Newman's wound. *Id*. Additionally, one of the Hospital's nurses testified at trial that the failure to chart assessments and application of prescribed topical medication should have prompted an investigation into whether Mr. Newman was receiving appropriate and prescribed care. *Id*. at 562-63, ¶ 15.

The Court of Appeals held that, based on the above-mentioned circumstantial evidence presented at trial, the jury could have inferred that the Hospital consciously disregarded a known risk of substantial harm to Mr. Newman. *Id*. at 563, ¶ 16. Accordingly, the Court reversed and remanded the trial court's ruling on punitive damages. *Id*. at 567, ¶ 43.

Newman Appears to Have Lowered the Standard of Proof for a Plaintiff to Present Punitive Damages to a Jury

Punitive damages require "clear and convincing" evidence of a very particular mental state – an "evil mind" – and aggravated and outrageous conduct that evinces a conscious disregard for a known risk of harm. Because of this high burden of proof, claims of entitlement to punitive damages have typically been disposed of through dispositive motions, never reaching a jury.

The Newman Court did not reference evidence, through testimony or otherwise, that the Hospital's nurses actually failed to provide prescribed care and treatment; the only evidence was that the staff failed to document the care. Although lack of documentation may constitute circumstantial evidence, which a jury may weigh under a preponderance of evidence standard of statutory abuse and neglect pursuant to the APSA, it does not, on its own, constitute clear and convincing evidence that the prescribed care and treatment was not provided. Thus, the Court of Appeals ruling in Newman has arguably made it much easier for Plaintiffs to present punitive damages to a jury.

Moving Forward – Practical Considerations

The *Newman* decision does not alter the evidentiary standard a jury must apply when determining recoverability of punitive damages. Indeed, both the legal standard and the Revised Arizona Jury Instruction on punitive damages remain unchanged and still require clear and convincing evidence that a Defendant acted with an evil mind. However, *Newman* will likely make it more difficult for Defendants to dispose of punitive damages claims on pre-trial motions. Consequently, punitive damages claims are now more likely to reach a jury. Plaintiffs will accordingly have the opportunity to rely on a potential punitive damages award to increase leverage at pre-trial mediations. In certain cases, the cost of settlement may rise and the risk of a punitive damages award at trial may increase.

Plaintiffs' lawyers' age-old cry of "if it wasn't documented, it didn't happen" may be inaccurate, but it is now likely to get punitive damages to a jury. This applies to medical negligence cases, including actions against hospitals and nursing homes, where the failure to document care that was actually provided may preclude summary judgment on punitive damages. It likewise applies to service industries, like trucking, which involve mandated documentation of adherence to safety standards prior to performing services.

The Arizona Supreme Court recently declined to review the *Newman* decision, which stands. To limit the potential for a Plaintiff to present punitive damages to a jury, prospective Defendants should educate their staff on the importance of accurate and careful documentation. Prospective Defendants should also monitor documentation and, when necessary, immediately address and correct any failures to perform important tasks.

ABOUT THE AUTHOR **KENNETH MOSKOW**

Ken focuses his practice in the areas of medical malpractice and nursing home defense, Section 1983 defense, wrongful death and personal injury defense, premises liability defense, and transportation defense.

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ATTORNEY PROFILE:
ASHLEY VILLAVERDE HALVORSON

It has been a busy year for attorney Ashley Villaverde Halvorson. Earlier this year, she was promoted to partnership at JSH. She was also recognized by the Hispanic National Bar Association as a 2017 "Top Lawyer Under 40," an award honoring accomplished lawyers who have demonstrated professional excellence, integrity, leadership, commitment to the Hispanic community, and dedication to improving the legal profession. In addition, AZ Business Magazine selected Ashley as one of 2017's Most Influential Women in Business.

As a passionate supporter of diversity efforts within the firm and her community, Ashley serves on the firm's Diversity Committee and chairs its Diversity Legal Writing Program. She is President-elect of Los Abogados, Arizona's Hispanic Bar Association. Since joining Los Abogados in 2010, she has served as its Vice President, Secretary, has chaired the fundraising gala and mentorship committees, and has been active with its Latina Mentoring Project. Ashley is also the recipient of the 2017 Los Abogados Emerging Leader Award for her leadership and demonstrated commitment to serving the Latino community. Los Abogados Director and Gala co-chair, Marcos Tapia, said, "Since joining our community as a young attorney, Ashley has exemplified this organization's values, and we look forward to what the future holds for her."

Ashley joined JSH immediately after earning her J.D. from Arizona State University's Sandra Day O'Connor College of Law. She also earned her B.A. in Political Science, *cum laude*, from ASU. She credits her internship experience with Rep. Ed Pastor, U.S. House of Representatives, as the impetus for wanting to pursue a law degree. "My decision to intern for Representative Ed Pastor in Washington, D.C. was my first exposure to politics, public service and the law. I pursued a legal degree as a direct result of the experience and encouragement I received that summer."

Ashley's practice focuses on defending insurance company clients in bad faith litigation, providing insurance coverage advice, and defending general personal injury and wrongful death actions.

An Arizona native, Ashley and her husband, Mike, also an attorney at JSH, spend much of their free time chasing after their 1-year old son Nicholas, cheering on the Cardinals and Sun Devils, and escaping to cooler temperatures in Flagstaff.

JSH RESOURCE ALERT!

USLAW NETWORK, INC

Each year, USLAW NETWORK and its member firms prepare and distribute Compendiums of Law, state-by-state resources that address legal questions and issues that often arise in each area of law and geographic region. To read and download any of these Compendiums, visit uslaw.org and search "Compendium of Law."

National Compendium of Law
Addresses a variety of litigation issues specific to each state, including: pre-suit and initial considerations; negligence; discovery; evidence, proofs and trial issues; and damages.

Transportation Compendium of Law
Explores issues associated with the derivative negligence claims of negligent entrustment, hiring, retention and supervision in truck accident cases.

Construction Compendium of Law
Discusses legal issues within the industry including breach of contract, breach of fiduciary duty, misrepresentation and fraud, indemnity claims, and statute of repose/statute of limitations.

Retail Compendium of Law
Focuses on the legal issues surrounding the ownership and management of retail establishments, shopping and hospitality centers in each state.

Annual State Judicial Profile by County Report
A 50-state comprehensive judicial profile of each county in the US, identified as Conservative, Moderate or Liberal. Provides a deep level of jurisdictional awareness of the court and juries on a county-by-county basis assists. As jurisdictions change, the USLAW State Judicial Profile by County Report is a must-have go-to resource. To view and download the Report, visit uslaw.org and search "Judicial Profile."

USLAW NETWORK is an international organization of defense-based law firms dedicated to improving client service. Only one firm per state is invited for membership. JSH has been a member of USLAW since its inception in 2001.

2017 Public Risk Management Association National Annual Conference

In early June, JSH sponsored PRIMA's annual golf tournament, where more than 100 golfers tackled Arizona's sweltering heat. Participants cooled off with iced beverages such as coffee and tea provided by the firm. During the 3-day conference, Michele Molinario and John DiCaro presented "Is Perception Reality OR Is Reality Truly Perceived?" to more than 110 attendees, making it the conference's best attended session. Ed Hochuli wrapped up the conference with his keynote presentation, "Average Joe Principal," which was also a major hit.

JSH FIRM ANNOUNCEMENTS

JSH Receives Metropolitan Tier One Law Firm Rankings in 2017 Edition of "Best Law Firms"

We are proud to announce our inclusion in the 2017 edition of "Best Law Firms," published by U.S. News & World Report and Best Lawyers. "Best Law Firms" rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process.

- Metropolitan Tier One Law Firm in Education Law; Employment Law – Management; Insurance Law; Medical Malpractice Law – Defendants; Personal Injury Litigation – Defendants; Product Liability Litigation – Defendants; and Workers' Compensation Law – Employers.
- Metropolitan Tier Two Law Firm in Appellate Practice; Construction Law; and Litigation - Labor & Employment.
- Metropolitan Tier Three Law Firm in Criminal Defense: General Practice.

Gordon Lewis Named 2017 "Lawyer of the Year" for Education Law

Gordon Lewis has been named the 2017 "Lawyer of the Year" by *Best Lawyers* for Education Law in Arizona. Only one attorney is selected in each metropolitan area for each practice area. This is Gordon's second time winning the award. He is also listed in the 2017 edition of *Best Lawyers In America* in the areas of Education Law, Employment Law – Management, and Litigation – Labor and Employment.

4 Law Students Hired as Summer Law Clerks at JSH

Nicolas Martino, Alexis Wood, Brendan Melander, and Amy Salamon (from left to right) joined JSH for the summer as law clerks. Our summer law clerk program is designed to introduce law students to private practice firms, giving them an opportunity to explore various practice areas and gain insight into what it's like to be a lawyer here at JSH. Our law clerks are given the opportunity to observe trials, depositions, mediations and arbitrations, as well as get to know our attorneys and staff at social events hosted throughout the summer.

J. Russell Skelton Honored

Invited to Join American Board of Trial Advocates

Russ is the ninth lawyer at JSH to receive the distinction of being invited to join the American Board of Trial Advocates ("ABOTA"). The purpose of ABOTA is to elevate the standards of integrity, honor, and courtesy in the legal profession. In addition, they seek to aid in the further education and training of trial lawyers, improve methods of procedure, serve as an informational center, and study and discuss matters of interest to trial lawyers.

Inducted Into American College of Trial Lawyers

Russ has been inducted as a Fellow of the American College of Trial Lawyers ("ACTL"), which is one of the premier legal associations in North America. Membership in the ACTL cannot exceed 1% of the total lawyer population of any state or province. There are currently approximately 5800 members in the United States and Canada, including active Fellows, Emeritus Fellows, Judicial Fellows (those who ascended to the bench after their induction) and Honorary Fellows.

John DiCaro Serves as Co-Chair and Faculty Member for Arizona College of Trial Advocacy

For the past five years, John DiCaro has served as a Co-Chair and Faculty Member of the Arizona College of Trial Advocacy ("ACTA"). The ACTA is an intensive, five-day workshop that provides practical hands-on training for trial lawyers. The college is strictly limited to 48 students. It culminates in a half-day mock trial with live jurors and judges in a Maricopa County Superior Court courtroom. The program is designed to significantly develop and refine the skills necessary for excellence in trial practice.

Marci Seek Re-Elected as Vice President of the Arizona Paralegal Association

Marci Seek, the firm's Litigation Technology Analyst, has been re-elected as the Vice President of the Arizona Paralegal Association ("APA"). She has been a member of the APA since 2010. Her duties as Vice President include coordinating monthly CLE seminars and webinars and writing technology-driven topics and tips to be published in the APA Newsletter.

Donald Myles Named President-Elect of the Federation of Defense & Corporate Counsel

Don Myles has been named the 2017–2018 President-Elect of the Federation of Defense & Corporate Counsel ("FDCC"). Don has been a member of the FDCC since 1991 and previously served as its Secretary/Treasurer. The FDCC is an invitation-only organization that consists of accomplished defense attorneys, corporate counsel, and individuals from the insurance industry.

20 JSH ATTORNEYS LISTED IN THE 2018 EDITION OF *THE BEST LAWYERS IN AMERICA*

Congratulations to our attorneys who have been selected by their peers for inclusion in *The Best Lawyers in America*. Five have been included in the list for the first time: David Cohen, James Curran, Michael Hensley, Lori Voepel and Mark Zukowski.

Robert Berk
Product Liability Litigation - Defendants

Stephen Bullington
Medical Malpractice - Defendants

David Cohen
Medical Malpractice - Defendants

James Curran
Commercial Litigation

Gregory Folger
Workers' Compensation Law - Employers

Eileen Gilbride
Appellate Practice

Michael Hensley
Insurance Law

Edward Hochuli
Personal Injury Litigation - Defendants

William Holm
Insurance Law

Gordon Lewis
Education Law
Employment Law – Management
Litigation – Labor and Employment

Gary Linder
Personal Injury - Defendants

Michael Ludwig
Construction Law

John Masterson
Personal Injury - Defendants

Ryan McCarthy
Product Liability Litigation – Defendants

Melvin McDonald
Criminal Defense – Non-White Collar

Donald Myles
Insurance Law

Russell Skelton
Medical Malpractice – Defendants
Workers' Compensation Law - Employers

Georgia Staton
Employment Law - Management

Lori Voepel
Appellate Practice

Mark Zukowski
Arbitration

Donald Myles Named 2018 "Lawyer of the Year" for Insurance Law

Don Myles has been name 2018 "Lawyer of the Year" by Best Lawyers for Insurance Law in Arizona. This is Don's second time winning the award. 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 community and practice area for their abilities, their professionalism, and their integrity.

American College of Trial Lawyers Appoints Georgia Staton as Chair of the Arizona State Chapter

The National Committee of the America College of Trial Lawyers has appointed Georgia Staton Chair of the Arizona State Chapter of the American College of Trial Lawyers for 2017-18. Georgia, a Partner at JSH, was inducted as a Fellow in 2010 and has served as Vice-Chair since 2015. ACTL is an invitation-only fellowship exceptional trial lawyers who demonstrate the very highest standards of trial advocacy. Membership does not exceed 1% of the total lawyer population of any state or province.

25 JSH LAWYERS SELECTED TO SOUTHWEST SUPER LAWYERS & RISING STARS

JSH is proud to announce that 25 of our attorneys have been named to the 2017 edition of Southwest Super Lawyers and Rising Stars. Three are named for the first time: David Cohen, John DiCaro and Gary Linder. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive the honor of being listed as a Southwest Super Lawyer and no more than 2.5 percent of lawyers in the state are selected as Rising Stars.

Southwest Super Lawyers

Donn Alexander
Stephen Bullington
David Cohen
John DiCaro
Eileen GilBride
Edward Hochuli
Gary Linder
Michael Ludwig
Donald Myles
Jay Rosenthal
Russell Skelton
Joshua Snell
Phillip Stanfield
Georgia Staton
Lori Voepel
Mark Zukowski

Southwest Rising Stars

Brandi Blair
Chelsey Golightly
Ashley Villaverde Halvorson
Jeremy Johnson
Daniel King
Kenneth Moskow
Chrisopher Pierce
Erik Stone
David Stout

IN-HOUSE NEWS & EVENTS

JSH Shining Stars Honored at Annual Staff Appreciation Breakfast

On April 26, JSH celebrated Staff Appreciation Day with a toast from our Managing Partner, Bill Holm, and a delicious catered breakfast on our 27th-floor patio. Every year, JSH lawyers and staff nominate employees for recognition as JSH "Shining Stars." A Shining Star is a person who goes the extra mile, is a team player, maintains grace under fire, provides service with a smile, and is proactive, friendly, and professional. This year, we are so very proud to congratulate Karen Gawel (Legal Secretary), Leslie Castaneda (Receptionist), Raquel Gomez (Paralegal) and Amber Guerrieri (File Clerk).

JSH's Annual Indoor Picnic

Our 2017 Annual Indoor Picnic had a luau theme. Employees wore tropical Hawaiian shirts while enjoying a catered Hawaiian lunch.

JSH's Annual Company Picnic

This year, we had a blast at our annual firm picnic at Dave & Buster's. JSH employees and their families were able to play arcade games, eat delicious food, and spend quality time together.

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

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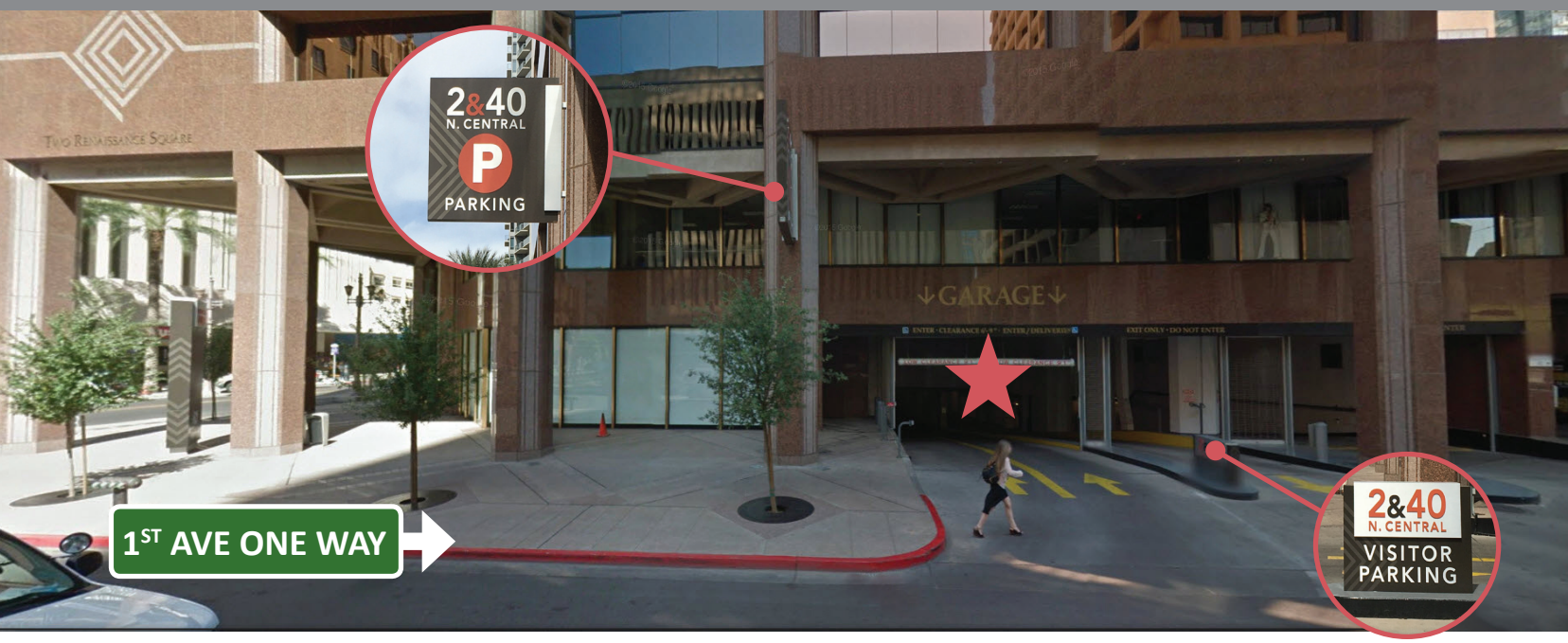

DIRECTIONS TO JSH

JSH is on the 27th floor of the Two Renaissance Square Tower, located on the south east corner of 1st Avenue and Adams Street.

The entrance to our underground parking garage is on the east side of 1st Avenue, immediately south of Adams Street. Traveling south on 1st Avenue (one way street), cross Adams Street and take an immediate left into our underground parking garage (see red star above). Visitor parking is available on G1. Take the elevator from the garage to the building lobby (L). Remember to bring your parking ticket to our receptionist on the 27th floor for parking validation.

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

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