Jones, Skelton & Hochuli

Reporter

SUMMER 2014 ISSUE

BACKGROUND CHECKS: TIPS FOR EMPLOYERS

PAGE16

& PRIVITY OF CONTRACT IS STILL THE RULE FOR SUB-Ks

PAGE10

& RECENT DEVELOPMENTS IN E-DISCOVERY ISSUES

PAGE22

APPELLATE HIGHLIGHTS

Check out significant recent appellate cases

PAGE6

WELCOME/ CONTENTS SUMMER 2014

articles

4 **Practitioners Beware - Unfavorable Allegations And Disclosure Can Be Used Against Your Client**
By: David Stout

8 **Equal Consideration Does Not Require Overpayment**
By: Jeff Collins

10 **Privity Of Contract Is Still The Rule For Breach-Of-Implied-Warranty Claims Against Subcontractors, Even For New Home Construction**
By: Jon Barnes

16 **Background Checks - Helping Employers Navigate The Battle Between Negligent Hiring And Discriminatory Hiring Practices**
By: Michele Molinario and John DiCaro

22 **Recent Developments In Court Decisions On E-discovery Issues**
By: Bill Caravetta

24 **Want To Improve Your Mediation Success? It Is As Simple As Picking The Right Pair Of Shoes**
By: Mark Zukowski

cases of note

6 **Appellate Highlights**
15 **Appellate Opinions**
20 **Trial Court Decisions**

announcements

12 **Upcoming Firm Events – Save the Date**
12 **JSH Firm Announcements**
19 **Inhouse JSH Events**
25 **Movie Review: Godzilla**

resources

7 **Law Alerts**
9 **Reference Guide**
21 **State Judicial Profiles**
26 **JSH Attorney Directory**

MESSAGE FROM THE EDITOR

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

Welcome! We are excited to launch the newly redesigned JSH Reporter, which will once again be published quarterly.

The JSH Reporter is designed to provide information about changes in the law and how these affect a variety of industries. We will also now include updates on what is happening within the firm. We are proud to have grown to a 72-lawyer firm, while still maintaining the traditions upon which the firm was founded in 1983.

In this issue, you'll find articles on e-discovery, privity of contract, employer background checks, and practical tips for disclosure and mediation. Plus you'll find appellate highlights, cases of note, recent JSH accomplishments, upcoming events, and even a review of the new movie, Godzilla.

On November 5th, JSH will host a full day educational seminar at the Phoenix Convention Center. The morning half will focus on governmental liability issues. In the afternoon, the firm will kick off its annual seminar, this year titled: "It's All Fun And Games Until Someone Gets Hurt." The day will be packed with useful information, networking and fun, and will end with a networking cocktail reception. Save the date, and watch your emails and the JSH Reporter for more information.

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

Keep an eye out for the next issue of the JSH Reporter, to be published this Fall.

Enjoy your summer!

Lori Voepel
Partner and *JSH Reporter* Editor

During Lori's 21 years of practice, she has handled well over 200 state and federal appeals in virtually every area of law. She also provides appellate guidance to trial attorneys from the pleading through post-trial stages.

Contact Lori at 602.263.7312 or lvoepel@jshfirm.com.

JSH Reporter

magazine **contact**

Published by Jones, Skelton & Hochuli, PLC
2901 N Central Ave, Suite 800, Phoenix, Arizona 85012

magazine team

EDITOR: **Lori Voepel, Partner**
t. 602.263.7312 e. lvoepel@jshfirm.com

PHOTOGRAPHER: **Bill Schrank, Partner**
t. 602.263.1766 e. wschrank@jshfirm.com

DESIGNER: **Katie Bien, Director of Business Development**
t. 602.263.1769 e. kbien@jshfirm.com

distribution

The *JSH Reporter* magazine is published four times a year. Print copies are available upon request. To subscribe, contact our Subscriptions Manager.

SUBSCRIPTIONS MANAGER:
Steven Crocchi, Marketing Coordinator
t. 602.263.1798 e. scrocchi@jshfirm.com

contributing authors

Jon Barnes, Associate
Appellate Law

Bill Caravetta, Partner
Insurance Coverage and Bad Faith

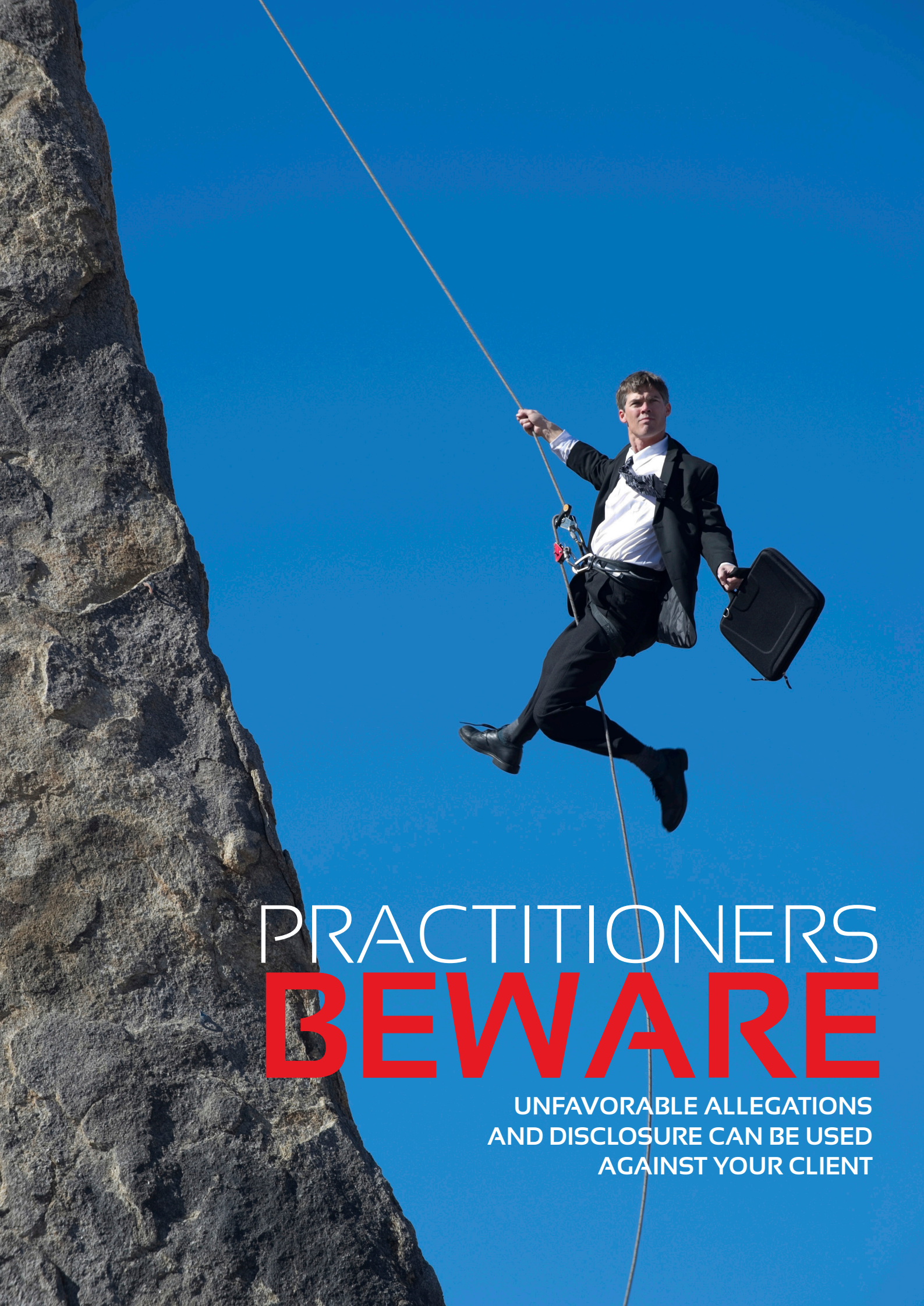
Jeff Collins, Partner
Coverage Law

John DiCaro, Partner
Governmental Liability & Civil Litigation

Michele Molinario, Partner
Employment Law and Governmental Liability

David Stout, Associate
Civil Litigation and Insurance Defense

Mark Zukowski, Parnter
Mediator, Alternative Dispute Resolution



PRACTITIONERS BEWARE

UNFAVORABLE ALLEGATIONS AND DISCLOSURE CAN BE USED AGAINST YOUR CLIENT

AUTHOR: **David Stout** EMAIL: **dstout@jshfirm.com** BIO: **jshfirm.com/davidlstoutjr**

Arizona is a pure comparative fault state, which allows the finder of fact to apportion fault to parties and non-parties alike. As a general rule, defendants will only be responsible for their apportioned share of fault – nothing more. Plaintiffs frequently name multiple defendants in a lawsuit, and their pleadings describe the various grounds for finding fault. If a plaintiff settles with a defendant, that defendant will be dismissed from the lawsuit, but the allegations against that defendant do not disappear. Instead, the remaining defendants may, and frequently should, use those allegations against the plaintiff.

In *Ryan v. San Francisco Peaks Trucking Co., Inc.,* 228 Ariz. 42, 262 P.3d 863 (App. 2011), the Arizona Court of Appeals held: 1) that a party's disclosure statements are admissible (but not conclusive) evidence as to fault, and 2) a party's preliminary expert opinion affidavits can be used as substantive evidence. Given these holdings, parties and their counsel must be mindful that their disclosed allegations can be used against them by opponents.

In *Ryan*, a husband and a wife were riding a motorcycle when they were involved in a multi-vehicle collision. Both were injured, and the husband later died while hospitalized. The surviving wife sued San Francisco Peaks Trucking and multiple medical facilities and medical professionals for negligence and wrongful death. Her disclosure statements included four reports from expert witnesses who opined that the negligence of her husband's medical personnel led to his death. Before trial, she settled with two healthcare providers and dismissed the remaining providers - leaving San Francisco Peaks Trucking and its driver as the lone, remaining defendants. She also withdrew her medical experts as trial witnesses.

San Francisco Peaks Trucking designated the dismissed medical providers as non-parties at fault for "the reasons set forth in [the] plaintiff's pleadings and disclosure statements." It also intended to call plaintiff's previously named (and subsequently withdrawn) experts to testify at trial, and sought to rely on her pleadings and disclosure statements as admissions. Plaintiff moved for summary judgment, arguing that: (1) because San Francisco Peaks Trucking lacked its own medical expert, it could not present a prima facie case of negligence against the non-party healthcare providers; and (2) San Francisco Peaks Trucking could not rely on her disclosure statement and expert reports in support of the non-party at fault designations. The trial court found in favor of San Francisco Peaks Trucking on both arguments.

Reviewing the rulings, the Court of Appeals held that disclosure statements can be used against the disclosing party as a "party admission" because disclosure statements are prepared by an attorney in a representative capacity. However, the content of disclosure statements is not conclusive as to fault; the allegations must still be weighed by the jury. According to the Court of Appeals, such a result ensures that parties are held accountable for pleadings and disclosure statements, while preventing parties from reaping the benefits of asserting inconsistent arguments.

The Court of Appeals also held that a party's preliminary expert opinion affidavits can be used as substantive evidence at trial to prove a non-party at fault's negligence. It noted that while parties typically present live testimony at trial, Arizona law does not preclude use of an admissible expert opinion affidavit as substantive evidence. The Court reasoned that parties submitting preliminary expert opinion affidavits should be accountable for the substance of the statements set forth in the affidavits.

While *Ryan* only addressed a plaintiff's allegations and disclosures, its legal precedent affects all litigants. It is now clear that a party cannot escape allegations made earlier in a lawsuit that subsequently become less than optimal based on the procedural posture of the case. And while the earlier allegations and disclosures are not conclusive evidence, a litigant surely does not want to explain to a jury why a legal position was subsequently changed.

Under *Ryan*, litigants should continually evaluate disclosures in light of the evidence and procedural posture of a case. Practitioners should also analyze how allegations against one party may later be used against their client. *Ryan* is a stern reminder that parties will be held responsible for the content of their disclosures.

> **"IT IS NOW CLEAR THAT A PARTY CANNOT ESCAPE ALLEGATIONS MADE EARLIER IN A LAWSUIT THAT SUBSEQUENTLY BECOME LESS THAN OPTIMAL BASED ON THE PROCEDURAL POSTURE OF THE CASE."**

ABOUT THE AUTHOR DAVID STOUT

David Stout has practiced as an insurance defense attorney for 9 years and is listed as one of Southwest's Rising Stars by Super Lawyers. He has served on the Board of Directors for the Arizona Association of Defense Counsel, Young Lawyers Division, and is a member of the American Bar Association. Contact David at 602.263.7384 or dstout@jshfirm.com.

JSH Alumni Tyler Carrell wrote the original draft of this article.

APPELLATE HIGHLIGHTS

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

MAY 7, 2014

Empire West Title Agency v. Talamante

(AZ Supreme Court)

Waiver of the attorney-client privilege occurs only where a party reveals the advice of counsel.

MORE INFORMATION:
www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2014/CV130268PR.pdf

OCTOBER 12, 2013

Barkhurst v. Kingsmen

(AZ Court of Appeals)

Merely sponsoring and promoting an event, without any control or right to control, is not enough to impose a duty on event volunteers to protect an attendee from an assault while leaving the event.

MORE INFORMATION:
www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV%2013-0166.pdf

OCTOBER 12, 2013

Southwest Non-Profit Housing Corp. v. Nowak

(AZ Court of Appeals)

An appraiser owes no duty of care to a seller in a real estate transaction. An Appraiser's duty is to the person or a limited group of persons "for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it." His duty is not "to all whom might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it."

MORE INFORMATION:
www.apltwo.ct.state.az.us/Decisions/CV20130069OPN.pdf

featured **case**

FEBRUARY 10, 2014

Munoz v. Indus. Comm'n

(AZ Court of Appeals)

Reaffirming that earnings for services performed as an independent contractor are not included in the average monthly wage calculation.

MORE INFORMATION:
www.apltwo.ct.state.az.us/Decisions/IC20130001%20Opinion.pdf

OCTOBER 12TH

Newman v. Cornerstone NH. Ins. Co.

(AZ Court of Appeals)

A premium price is not required for a written offer of UIM coverage to be valid pursuant to A.R.S. § 20-259.01(B).

MORE INFORMATION:
www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV%2013-0082-177820.pdf

OCTOBER 7, 2013

Tucson Unified School District v. Borek

(AZ Court of Appeals)

Legislature's use of the word "knew" unambiguously shows its intent to require actual, rather than constructive, knowledge for application of the "propensity exception" to immunity under A.R.S. § 12-820.05(B).

MORE INFORMATION:
www.apltwo.ct.state.az.us/Decisions/SA20130099%20Opinion.pdf

March 21, 2014

Timmons v. Ross Dress for Less, Inc.

(AZ Court of Appeals)

Easement holder owes a duty to an invitee who uses the easement for the purpose for which the easement holder has secured it.

MORE INFORMATION:
www.apltwo.ct.state.az.us/Decisions/CV20130053Opinion.pdf

February, 10, 2014

Monroe v. Basis School, Inc.

(AZ Court of Appeals)

A charter school owes no duty of care to students outside its custody.

MORE INFORMATION:
www.apltwo.ct.state.az.us/Decisions/CV20130047OPN.pdf

May 13, 2014

Woodbridge Structured Funding v. Genex

(AZ Court of Appeals)

A direct interest, not a contingent interest, is required for a party's intervention in an assignment action.

MORE INFORMATION:
www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA-CV%2013-0043.pdf

May 6, 2014

Guerra v. State

(AZ Court of Appeals)

The State was entitled to summary judgment on a negligent training claim where Plaintiff failed to identify what other training should have been provided to DPS officers who erroneously advised family their daughter died in an auto accident.

MORE INFORMATION:
www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/CV%2012-0826.pdf

May 13, 2014

Estate of Ethridge v. Recovery Management Systems

(AZ Court of Appeals)

The plain language of Medicare's Part C preemption provision shows that Congress expressly preempted all but a very limited number of state laws; Arizona's anti-subrogation doctrine is not one of those limited exceptions.

MORE INFORMATION:
www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/Amended%201%20CA-CV%2012-0740.pdf

JSH RESOURCE ALERT!
Law Alerts

The JSH Law Alert is a periodic publication that reviews recent court decisions. Our May 2014 alert is available by clicking here: http://www.jshfirm.com/publications/pub_14_051514142751.pdf.

To receive a copy of our monthly Law Alerts, send an email to marketing@jshfirm.com. Archives of past Law Alerts are available at www.jshfirm.com/publications.

ABOUT THE AUTHOR
JON BARNES

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

Email: jbarnes@jshfirm.com

EQUAL CONSIDERATION DOES NOT REQUIRE OVERPAYMENT

AUTHOR: **Jeff Collins** EMAIL: **jcollins@jshfirm.com** BIO: **jshfirm.com/jeffersontcollins**

In Arizona, options are available to insureds when an insurer does not unconditionally agree to defend without issuing a reservation of rights letter, or denies coverage altogether. These circumstances give rise to *Morris* and *Damron* Agreements, in which an insured usually stipulates to a judgment in exchange for a covenant not to execute. The plaintiff then sues the insurer to recover that judgment, which typically exceeds the policy limits. Such agreements can also result, however, when the insurer fails to settle within the limits of the insurance policy, so it behooves all parties – the insurer, the insured and the plaintiff – to understand the potential consequences of such agreements.

One of the duties an insurance carrier owes to the insured is to give "equal consideration" to third-party demands within the limits of the insurance policy, irrespective of whether the insurer has unconditionally provided coverage or has reserved rights. The standard requires an insurer to examine "whether [the insurer] without policy limits would have accepted the [demand]." It must do so "objectively" and as if "[the insurer] alone would be responsible for the payment of any judgment rendered." If the insurance carrier breaches that duty, the insured is not bound by the "cooperation clause" in the policy and is free to negotiate a *Morris* Agreement with the plaintiff.

In examining whether an insurer has given "equal consideration" to a demand, Arizona courts consider the following factors:

- strength of plaintiff's case on issues of liability and damages;
- attempts by the insurer to induce the insured to contribute to a settlement;
- failure of the insurer to properly investigate the circumstances to ascertain the evidence against the insured;
- the insurer's rejection of advice of its own attorney or agent;
- failure of the insurer to inform the insured of a compromise offer;
- amount of financial risk to which each party is exposed in the event of a refusal to settle;
- fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and
- any other factors tending to establish or negate bad faith on insurer's part

Pruett v. Farmers Ins. Co. of Arizona,
175 Ariz. 447, 857 P.2d 1301 (App. 1993).

Morris Agreements are sometimes threatened prior to, or during, a mediation in which the plaintiff has demanded an amount within policy limits, but there remains a large gap between the insurer's and the plaintiff's valuation of the claim. A claim may realistically have a value lower than the demand, but a plaintiff may use the threat in an attempt to pressure the insurer to pay more to avoid a stipulated judgment in excess of policy limits. This threat is usually accompanied by a specific demand by the insured to settle the claim at any amount within policy limits. This is understandable, as the insured usually does not take issue with the amount paid; the insured only wants settlement of the claim without risk of personal exposure.

Although these situations pose difficult choices to insurers, they are also risky for plaintiffs because they become "all or nothing" propositions based on the ultimate issue of whether the insurer gave "equal consideration" to the demand. If it has, the insured will have breached the cooperation clause by entering the agreement, resulting in no coverage. This translates to a situation in which the plaintiff possesses a meaningless judgment and cannot execute against the policy limits.

When an insurance carrier is given a "take it or leave it" demand accompanied with a threat of a *Morris* Agreement, it needs to analyze its consideration of the demand in light of the *Pruett* factors. If it has done so, and if the demand continues to be unreasonable, the insurer need not hastily agree to "overpay" in light of a *Morris* threat. If a plaintiff's demand remains unreasonable, and equal consideration has been provided, it is the plaintiff who risks receiving nothing in pursuing a *Morris* Agreement that is ultimately deemed to be in violation of the policy's cooperation clause.

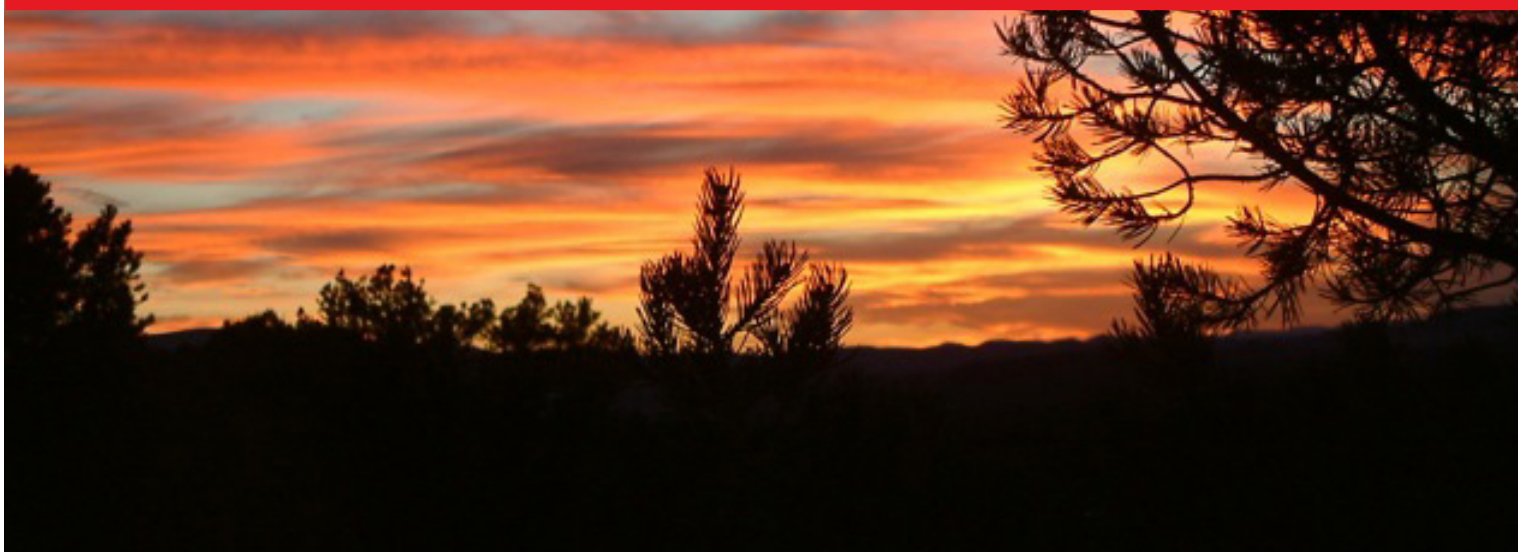
JSH RESOURCE ALERT! Reference Guide to AZ Law

Our JSH Reference Guide is published each year and distributed to clients via print and/or electronic media. JSH updates The Guide each year to reflect recent changes in case law and statutes. It 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 our current Reference Guide, send an email to: marketing@jshfirm.com.

ABOUT THE AUTHOR JEFF COLLINS

Jeff Collins works with insurance carriers in matters involving insurance-related disputes including bad faith, breach of contract and declaratory judgments. He also handles matters involving coverage issues including policy interpretation for many insurance lines, including commercial, professional and personal. Contact Jeff at 602.263.7346 or jcollins@jshfirm.com.



PRIVITY OF CONTRACT IS STILL THE RULE...

For Breach-Of-Implied-Warranty Claims Against Subcontractors, Even For New Home Construction

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

Arizona has long recognized the existence of an implied warranty arising out of new home construction. In *Columbia Western Corp. v. Vela.,* the Arizona Court of Appeals expanded implied warranty liability to cover builder-vendors with overarching responsibility for "new home construction." The Court viewed such an implied warranty as necessary to protect new-home buyers because: (1) modern building construction is complex; (2) the builder holds himself out as an expert in building houses for individual new-home buyers; and (3) ordinary homebuyers are not sophisticated enough to discover latent defects in a new home.

Typically, enforcement of an implied warranty requires privity of contract. Because implied warranty claims sound in contract, the general rule is that only parties and privies may enforce them. However, this rule proved to be inequitable in some "new home construction" cases arising under *Columbia Western*. Courts were faced with concerns that builders might escape the implied warranty by hiding behind the first purchaser, thus encouraging "sham first sales."

An exception to the rule requiring privity emerged. In *Richards v. Powercraft Homes, Inc.,* the Arizona Supreme Court held that subsequent purchasers of a home can enforce *Colombia Western* against the builder-vendor regardless of privity. The Court later took this exception one step further in *Lofts at Fillmore Condominium Assoc. v. Reliance Commercial Construction, Inc.* In *Lofts,* the Court allowed purchasers to enforce Colombia Western against non-vendor builders, regardless of privity. Both cases reasoned that the purpose for the implied warranty—to protect innocent buyers and hold builders responsible for their work—would be defeated unless an exception to the privity requirement applied under the circumstances.

In *Yanni v. Tucker Plumbing, Inc.,* 233 Ariz. 364, 312 P.3d 1130 (App. 2013), a group of plaintiff-homeowners discovered allegedly defective plumbing components in their homes. Instead of suing the general contractor in charge of the homes' construction, the homeowners sued the plumbing subcontractors. They argued that the *Richards/Lofts* exception completely abrogated the rule requiring privity in implied warranty cases. Thus, according to the homeowners, they could sue the defendant-subcontractors directly, regardless of privity.

The subcontractors, including one represented by JSH, successfully argued that *Richards* and *Lofts* did not completely abandon the privity requirement for all implied warranty claims. They prevailed on summary judgment, arguing that the *Richards/Lofts* exception applied only in a very narrow context. As the subcontractors explained, the *Richards/Lofts* exception developed in response to very specific policy concerns. Because these policy concerns are unique to implied warranty claims arising under *Columbia Western*, the *Richards/Lofts* exception should only apply in that context—namely, when the implied warranty covers "newly constructed buildings, completed at the time of contracting."

The subcontractors further argued that *Columbia Western's* implied warranty for "new home construction" runs only to the general contractor with overarching responsibility for the entire project—not to each individual subcontractor who may have hammered a nail or installed a pipe. Because the subcontractors were not in charge of the entire project, having worked only on the plumbing, they could not have warranted any particular home as a whole, only their specific work. This specific warranty also ran only to the general contractor, who warranted the entire home under *Columbia Western*. Although the *Richards/Lofts* exception would have applied to a claim against the general contractor, it did not apply to the homeowners' claim against the subcontractors.

The Court of Appeals agreed with the subcontractors, affirming summary judgment in a published Opinion. The Arizona Supreme Court denied the homeowners' petition for review. Thus, privity of contract is still the rule for breach-of-implied-warranty claims against subcontractors, regardless of whether the work involves new home construction. Homeowners with implied warranty claims must sue the general contractor in charge of "new home construction" if they are to find any recourse.

ABOUT THE AUTHOR JON BARNES

Jon Barnes clerked for Judge Orozco at the Arizona Court of Appeals before joining JSH and focuses his practice on state and federal appeals. Jon and Lori Voepel handled the appeal for Tucker Plumbing in *Yanni*. JSH trial counsel, Chris Pierce and Mike Ludwig prevailed on summary judgment. Contact Jon at 602.263.4437 or jbarnes@jshfirm.com.

"HOMEOWNERS WITH IMPLIED WARRANTY CLAIMS MUST SUE THE GENERAL CONTRACTOR IN CHARGE OF 'NEW HOME CONSTRUCTION' IF THEY ARE TO FIND ANY RECOURSE."

JSH FIRM ANNOUNCEMENTS

Super Lawyers®

2014

Donn C. Alexander
Stephen A. Bullington
Eileen Dennis GilBride
Edward G. Hochuli
William R. Jones, Jr.
(Mr. Jones also listed as a Top 50 Lawyer in AZ)
Michael A. Ludwig
Donald L. Myles Jr.
Jay P. Rosenthal
J. Russell Skelton
Georgia A. Staton
(Ms. Staton also listed as a Top 25 Female Lawyer in AZ)
Mark D. Zukowski

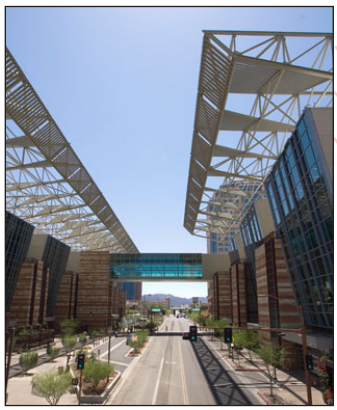
Super Lawyers®

RISING STARS 2014

Brandi C. Blair
Whitney M. Harvey
Ryan M. Hicks
Jeremy C. Johnson
Jason P. Kasting
Daniel O. King
R. Christopher Pierce
Erik J. Stone
David L. Stout, Jr.
Ashley G. Villaverde

Super Lawyers has selected twenty-one attorneys from Jones, Skelton & Hochuli to appear on the 2014 Arizona Super Lawyers and Arizona Rising Stars list. Each year, no more than five percent of Arizona lawyers are selected as Arizona Super Lawyers and no more than 2.5 percent of Arizona lawyers are selected as Arizona Rising Stars. In addition to being selected as Southwest Super Lawyers, William R. Jones, Jr. was listed as one of the Top 50 Lawyers in Arizona, and Georgia A. Staton was listed as one of the Top 25 Female Lawyers in Arizona.

A Thomson Reuters business, Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer reviews by practice area. The result is a credible, comprehensive and diverse listing of exceptional attorneys. For more information about Super Lawyers, visit SuperLawyers.com.



SAVE THE DATE
UPCOMING EVENTS on 11.5.14

"It's All Fun And Games Until Somebody Gets Hurt" The 2014 annual JSH Seminar will be held the afternoon of Wednesday, November 5th at the Phoenix Convention Center. This year's program will include a lively presentation on Arizona Law, Recent Case Studies, Damages, Claims Handling and Bad Faith Best Practices. It will also again feature a live Independent Medical Examination, and will end with a networking cocktail reception.

The Governmental Liability Group will host its annual seminar the morning of Wednesday, November 5th, also at the Phoenix Convention Center. We have a full schedule including presentations on Focus Juries, Social Media and First Amendment Issues, Notices of Claim and Public Records Requests. Guests are invited and encouraged to stay for the afternoon portion of our firm seminar.

Both seminars will offer CLE and CE credit for over thirty states. Details will be posted on our website.

WHAT'S HAPPENING AROUND THE FIRM ?

Stay up to date at jshfirm.com

JSH Welcomes Four Summer Law Clerks to the Firm

Jones, Skelton and Hochuli welcomes Erica Spurlock, Jacob Speckhard, Jennifer Mancuso and Cory Tyszka to the firm as summer law clerks. Our summer law clerk program is designed to introduce law students to our practices and clients and give them insight into what it's like to practice here at JSH. Summer law clerks are given the opportunity to observe trials, depositions, mediations and settlement conferences and arbitrations. Summer clerks also attend social and professional events where they can to get to know JSH attorneys in a relaxed setting.

Erica is a Phoenix native who has spent the last few years attending college and law school in Boston. She enjoys being active and continues to compete in basketball, swimming and alpine ski racing. She also loves to go running with her Olde English Bulldogge, Meatball.

Jacob is originally from Prescott, but grew up in Goodyear. After graduating from high school, he attended and played football at California Lutheran University. Jacob is a big sports fan who cheers on the Green Bay Packers. He now attends Arizona State University College of Law.

Jennifer worked for the Office of the Arizona Attorney General, as well as a small Phoenix-based law firm, before starting law school at the University of Arizona. She also worked as a law clerk at the Pima County Attorney's Office in Summer 2013. In her free time, Jennifer likes to read, garden, travel and spend time with her dogs.

Cory is about to start her third year at the ASU Sandra Day O'Connor College of Law, where she directs the Liberty Project and the Marshall-Brennan Constitutional Literacy Project. She is also a legal writing teaching assistant and will be the Issue Editor for the Arizona State Law Journal next year. In her free time, Cory enjoys practicing yoga and playing with her dogs.

Mike Hensley, Ed Hochuli and Georgia Staton Recognized as Top Lawyers

Arizona Business Magazine named Mike Hensley a Top Lawyer in Employee Benefits and Insurance, Edward Hochuli a Top Lawyer in Transportation Defense, and Georgia Staton a Top Lawyer in Government Relations.

Mike Hensley has practiced law for 28 years and focuses on general civil litigation and insurance defense. Mr. Hensley has served as a Judge Pro Tem for the Maricopa County Superior Court and is a member of the Defense Research Institute, the Arizona Association of Defense Counsel and the American Bar Association.

Ed Hochuli focuses his practice on professional liability, product liability, premises liability and transportation defense. He has practiced law for 38 years and has been listed by Best Lawyers in America for the past 10 years. He frequently speaks on the art of negotiation at seminars and conferences across the nation and belongs to a dozen professional organizations.

Georgia Staton primarily focuses her practice on employment law and governmental liability. Ms. Staton has practiced law for 40 years and is ranked as one of the Top 25 Female Attorneys in Arizona by Southwest Super Lawyers. As a faculty member at the Arizona Trial College, Ms. Staton teaches others the knowledge she has gained throughout her legal career.

William Jones, Jr. Selected as 2014 Lawyer of the Year for Medical Malpractice

Best Lawyers has selected Bill Jones as the 2014 "Lawyer of the Year" for Medical Malpractice Law in Phoenix, Arizona. Being selected as "Lawyer of the Year" reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and practice areas for his abilities, professionalism, and integrity.

Mr. Jones is one of the founding attorneys at Jones, Skelton & Hochuli, which was founded in 1983. Mr. Jones has been practicing law for 52 years and has tried over 250 civil jury cases in Arizona and other states. Although he currently concentrates his practice in the medical malpractice area, Mr. Jones is still involved in litigating and trying other types of civil and governmental liability cases. He has served as a Judge Pro Tem on both the Arizona Court of Appeals and the Maricopa County Superior Court.

Mr. Jones has passed along the knowledge he has gained throughout his legal career by speaking as a guest lecturer at Harvard University, Arizona State University and the University of Arizona. He has been listed as one of the Top 50 Lawyers in Arizona since 2007 by Southwest Super Lawyers.

William R. Jones, Jr.

Best Lawyers®
Lawyer of the Year
2014

Medical Malpractice Law - Defendants—Phoenix

RANKING
The Best of Arizona Business
ARIZONA

JSH Ranked 5th Best ADR Firm in Arizona

Jones, Skelton & Hochuli has been listed as the 5th best alternative dispute resolution law firm in Arizona by AZ Big Media. The rankings are based strictly on the opinions of voters who base their votes on quality, service and who they would recommend.

So what exactly is ADR? ADR refers to alternative processes to the traditional jury trial to resolve disputes. The two most common forms of ADR are: 1) mediation, where mediators bring opposing parties together to work out a settlement agreement; and 2) arbitration, which is a simplified trial headed by an arbitral panel. Alternative Dispute Resolution can be a cost-effective way to reach a resolution.

A number of JSH lawyers are nationally recognized in the field of ADR and are regularly asked to serve as Mediators, Arbitrators, Special Masters, Judges Pro Tem and Neutral Case Evaluators.

Kevin Broerman Joins the JSH Partnership

We are pleased to announce that Kevin Broerman has joined the Partnership at JSH. Mr. Broerman started his legal career following graduation from Western State University College of Law in 1992. He has focused his practice on bad faith and extra-contractual liability, construction litigation and professional liability. Mr. Broerman joined Jones, Skelton & Hochuli as an Associate in 2008. Prior to his legal career, Mr. Broerman served as a Captain in the U.S. Army.

Mr. Broerman serves on the Civil Jury Instructions Committee for the State Bar of Arizona. He is also a member of the Arizona Association of Defense Counsel, the Defense Research Institute and the American Association For Justice.

Donald Myles Selected to Join The American College of Coverage and Extracontractual Counsel

The American College of Coverage and Extracontractual Counsel (ACCEC) has selected Don Myles to join its membership as a Fellow. To join the ACCEC as a Fellow, an attorney must be admitted to practice law in the highest court of their respective state and be substantially involved in the practice of insurance law for fifteen or more years. ACCEC aims to improve the quality of the practice of insurance law by bringing together preeminent lawyers who represent both insurers and policyholders. ACCEC was founded in 2012 and serves to educate all sectors involved in insurance disputes.

Don Myles has been a partner at JSH since 1987 and has practiced insurance law for over 30 years. He has published articles concerning professional liability, insurance coverage and bad faith, as well as on trial practice and procedure. He also belongs to several professional associations including the American Board of Trial Advocates and the Federation of Defense & Corporate Counsel, and he is Past President of both the Arizona Association of Defense Counsel and USLAW.

CASES OF NOTE
APPELLATE OPINIONS

Yanni v. Tucker Plumbing

November 20, 2013
AZ Court of Appeals, Review denied April 22, 2014
www.appeals2.az.gov/Decisions/CV20130024%20Opinion.pdf

Mike Ludwig, Chris Pierce and Jon Barnes obtained a win at the Arizona Court of Appeals. Plaintiffs, who were Arizona homeowners, sought statewide class certification and sued under an implied warranty theory for damages sustained to their homes due to the installation of allegedly defective brass plumbing fittings by the defendant plumbing subcontractors.

In lieu of suing the homebuilders directly, Plaintiffs chose to sue the Defendant subcontractors, Tucker Plumbing. Defendants moved for summary judgment arguing that because Plaintiff lacked privity of contract with Defendants, such a claim could not stand. The trial court agreed and granted the motion. The Arizona Court of Appeals affirmed. In a published decision, the court concluded that Plaintiffs could sue the developer, general contractor, or vendor, but refused to expand the privity exception to include suits against subcontractors. This decision finally settles the long-running dispute whether homeowners can sue subcontractors directly for breach of an implied warranty, absent a contract. The answer is no.

Read the complete article on pages 10-11.

Munoz v. Indus. Commission of AZ

February 10, 2014
AZ Court of Appeals
www.apltwo.ct.state.az.us/Decisions/IC20130001%20Opinion.pdf

JSH lawyers Greg Folger, Lori Voepel, and Jennifer Anderson recently scored an important workers' compensation law victory for employers and insurance carriers. In *Munoz v. Industrial Commission of Arizona*, Division Two of the Arizona Court of Appeals reaffirmed the rule that earnings for services performed as an independent contractor are not included in the average monthly wage (AMW) calculation.

Munoz injured her shoulder while working part time for Sonic Restaurants. Her AMW was set at $1,570.68, which included wages from Sonic and concurrent earnings from a home improvement store. Munoz challenged the AMW calculation, claiming that prospective earnings from her horse training business should have been included. At the time of her injury, Munoz had signed contracts with horse owners to train and rehabilitate their horses, but she had not yet performed or been paid under the contracts. The Administrative Law Judge (ALJ) concluded that (1) the horse training contracts represented prospective income that could not properly be calculated as AMW; and (2) because the horse training contracts described an independent contractor relationship, any earnings under the contracts were not subject to the Workers' Compensation Act and thus not properly calculated as AMW. On these grounds, the ALJ excluded the prospective horse training earnings form Munoz's AMW calculation.

On Munoz's petition for administrative review, the court of appeals first reaffirmed the rule that because independent contractors are not subject to the Act, it would be improper to include a claimant's concurrent self-employment earnings in the AMW calculation. See *Wheeler v. Industrial Commission,* 22 Ariz. App. 488, 490, 528 P.2d 874, 876 (1974). The court next analyzed the relationship between Munoz and the horse owners. It concluded that Munoz was an independent contractor rather than an employee based on the various indicia of control outlined in *Home Ins. Co. v. Industrial Comm'n*, 123 Ariz. 348, 350, 599 P.2d 801, 803 (1979). Therefore, the court concluded Munoz's horse training earnings could not be included in the AMW.

Munoz argued for the first time on appeal that she was a "sole proprietor" and sole proprietors potentially are eligible for benefits under the Act. The court noted that a sole proprietor may be entitled to benefits at the discretion of an insurance carrier with whom the sole proprietor applies for workers' compensation coverage. Munoz, however, produced no evidence that she applied for or obtained coverage for her horse training business. Because the court concluded that Munoz was an independent contractor, it never reached the issue of whether her prospective earnings were properly excluded from the AMW calculation.

Munoz filed a Petition for Review with the Arizona Supreme Court, which the Court denied on May 28, 2014.

BACKGROUND CHECKS

CO-AUTHOR: Michele Molinario EMAIL: mmolinario@jshfirm.com BIO: jshfirm.com/michelemolinario
CO-AUTHOR: John DiCaro EMAIL: jdicaro@jshfirm.com BIO: jshfirm.com/johnmdicaro

HELPING EMPLOYERS NAVIGATE THE BATTLE BETWEEN NEGLIGENT HIRING AND DISCRIMINATORY HIRING PRACTICES

"By implementing a strong background investigation policy and using that policy in conjunction with a carefully tailored applicant screening process, employers can protect themselves from negligent hiring claims while still meeting the standards set forth under Title VII."

With quick and easy electronic access to personal information at an employer's fingertips, employers must learn how to properly utilize such information in the hiring process. The failure to perform adequate background checks can open an employer up to liability for claims based on negligent hiring. These claims can have a negative impact in the marketplace, adversely affect employee morale and be costly to defend. On the other hand, improper use of background checks during employee screening can expose employers to civil rights violations. These opposing pitfalls require employers to perform a precarious balancing act and to understand the liability to which they are exposed. Employers need to develop a hiring process that effectively insulates them from both negligent hiring and civil rights claims.

Employers understand that they bear a certain amount of liability for the actions of their employees during working hours. What some fail to realize is that hiring someone who is incompetent or unfit for the job can expose the employer to a negligent hiring claim based on harm that employee causes even if the employee's conduct is outside the employer's control. For instance, one court found the owner of an apartment complex liable for a handyman's assault on a tenant outside of working hours.[2] Liability existed because the owner failed to investigate the handyman's background, which included a laundry list of violent crimes.

The first step in avoiding liability for negligent hiring is to understand the elements of the claim. To prevail on a negligent hiring claim, a plaintiff must show that: (1) an employment relationship existed, (2) the employee was unfit for the position, (3) the employer knew or should have known the employee was unfit, (4) the employee negligently or intentionally caused the injury, and (5) the employee's conduct proximately caused the injury.[3] Regarding the first element -- employment relationship – employers cannot assume they can escape liability through artful contract language or independent contractor relationships.[4] Courts will look at the totality of the facts when determining employment status rather than simply reviewing the language of an employment contract. Second, when determining if an employee is unfit, courts will examine both the nature of the position and the risk the employee posed to those with whom he came in contact.[5] A job applicant cannot be deemed unfit solely because of a criminal conviction.[6] The third element -- requiring an employer to have knowledge that the employee was unfit – can be satisfied by showing that the employer should have discovered information showing the employee was unfit.[7] For instance, in the example of the apartment owner above, the owner should have discovered the handyman's history of violent crimes by simply checking his references and performing a public information search. Under the fourth element – the employee's tortious conduct -- an employer is liable only for an employee's torts. Therefore, if the employee's actions were not negligent or intentional, a claim for negligent hiring would fail.[8] Finally, on the issue of proximate cause, a plaintiff must show that the injuries were caused by a characteristic of the employee which the employer knew might cause harm.[9]

While applicants with criminal records are legally barred from holding certain positions, there are many others for which they still may be hired. To comply with federal law, a policy cannot blindly reject candidates based on their criminal record. For instance, as arrest and incarceration rates for African Americans and Hispanics exceed those of the general population,[1] a hiring policy that rejects any applicant with a criminal history might have a disparate impact on those two protected classes and might violate Title VII of the Civil Rights Act of 1964. Liability can be minimized by fully researching an employee's criminal background and applying that information to the standards set forth under a properly developed hiring policy. An employer should develop a hiring policy that relies on factors that are job-related. In order to show that an exclusion based on criminal history is a business necessity, the employer must take into account: (1) the nature and gravity of the offense, (2) the time that has passed since the conviction or completion of the sentence and (3) the nature of the job sought.[10] Even if a hiring policy does have a disparate impact on a protected group, it might still be legally valid if the requirement is job-related and consistent with business necessity.[11]

For instance, employees of Company A process credit card information. Therefore, during its hiring process, Company A screens applicants for convictions involving credit card fraud. However, employees of Company B do not have access to customer credit card information. In fact, Company B provides landscaping services and its landscapers do not collect customer payments. As such, Company B would have a difficult time arguing that credit card fraud convictions are related to a business necessity. Thus, while both of the processes for screening applicants can result in a disparate impact on a protected group, only Company A's policy meets the business necessity requirement.

In the above example, Company A considered "conviction" records rather than "arrest" records. An arrest does not necessarily establish that a criminal act has been committed. In fact, many arrests do not result in criminal charges, or the charges are dismissed for a variety

"TO COMPLY WITH FEDERAL LAW, A POLICY CANNOT BLINDLY REJECT CANDIDATES BASED ON THEIR CRIMINAL RECORD."

of reasons. Even if an individual is charged and prosecuted, he or she is presumed innocent unless proven guilty in a court of law. Therefore, an adverse employment action based on an "arrest", in itself, is generally not job-related or consistent with business necessity. But, in some circumstances, even without a conviction, the conduct underlying an arrest may make the individual unfit for the position in question. In those circumstances, the conduct, not the arrest, is relevant for employment purposes. Employers should consider seeking legal advice before taking any adverse employment action based on the conduct underlying arrest to ensure compliance with federal law.

An employer's potential liability under the doctrine of negligent hiring requires employers to weigh the potential disparate impact of their hiring policies. This should not discourage employers from investigating the backgrounds of their employees and implementing an appropriate application process. To the contrary, by implementing a strong background investigation policy and using that policy in conjunction with a carefully tailored applicant screening process, employers can protect themselves from negligent hiring claims while still meeting the standards set forth under Title VII.

BEST PRACTICES TIPS

- Conduct a thorough background check by accessing public record sites that would reveal an applicant's criminal background.
- Develop narrowly tailored written policies and procedures for screening applicants and employees for criminal conduct.
- Identify essential job requirements.
- Identify the specific criminal offenses that may demonstrate unfitness for performing such jobs.
- Record the justification for the policy and policies
- Document consultations and research considered in drafting the policies and procedures.
- Eliminate policies or practices with blanket exclusions of applicants based on any criminal record.
- When asking questions about criminal records, limit inquires to those records related to the job in question, consistent with business necessity.
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.
- Train managers, hiring officials and decision makers about Title VII and its prohibitions on employment discrimination.
- More training!

1 EEOC Enforcement Guidance, No. 915.002, at FN 10, dated 4/25/2012.
2 Ponticas v. K.M.S. Invs., 331 N.W.2d 907 (Minn. 1983).
3 Rodolfo A. Camacho, "How To Avoid Negligent Hiring Litigation," 14 Whittier L. Rev. 787, 794 (1993).
4 Santiago v. Phoenix Newspapers, 164 Ariz. 505, 508, 794 P.2d 138, 141 (1990).
5 Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 912 (Minn. 1983).
6 See Green v. Missouri P. R. Co., 549 F.2d 1158 (8th Cir. 1977).
7 Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964).
8 Di Cosala v. Kay, 91 N.J. 159, 173, 450 A.2d 508, 516 (N.J. 1982).
9 Ponticas at 915.
10 Green v. Missouri P. R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).
11 EEOC Enforcement Guidance, 915.002 (April 25, 2012).

ABOUT THE AUTHORS MICHELE MOLINARIO

Michele Molinario has been a trial attorney for 14 years, in both state and federal court and has defended public entities, private prisons and defendants in police-related non-lethal and lethal force incidents. Before receiving her law degree, Ms. Molinario spent 14 years working with the Tempe Police Department in the Narcotics and Special Enforcement Unit. Contact Michele at 602.263.1746 or mmolinario@jshfirm.com.

ABOUT THE AUTHORS JOHN DICARO

John DiCaro has been recognized for receiving one of Arizona's Top 10 Defense Verdicts while defending Billet Bar in a Dram Shop case. During his 28 years as an attorney, Mr. DiCaro has tried cases for the City of Phoenix and the City of Mesa and has been recognized as one of Arizona's Finest Lawyers. Contact John at 602.263.1777 or jdicaro@jshfirm.com.

INHOUSE JSH EVENTS

Whether we're celebrating a birthday or a holiday, there's always great company and good food at JSH. Such firm events contribute to why we are considered one of the best Arizona law firm employers. The pictures below were taken at our annual Cinco De Mayo salsa, queso, guacamole and bean dip contest.



2014 JSH Shining Stars

Each year, JSH lawyers and staff nominate four "Shining Star" employees. 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 proud to congratulate our 2014 Shining Stars Sruti Patel, Laurie Baker, Pam Beck and Justin Folkerth! Our Managing Partner, Bill Holm, and Executive Director, Jennifer Lovato, presented this year's awards to these very deserving JSH Shining Stars.

JSH Participates in Children's First Academy's Career Fair

JSH participated in Children's First Academy's recent Career Fair. We talked about all of the different types of jobs available in the legal industry and were very impressed with all of the young talent in the room. These kids are the future!

Staff Appreciation Day

JSH celebrated Staff Appreciation Day on April 23rd with a toast from our Managing Partner, Bill Holm, and a lovely breakfast. JSH staff are hard-working and dedicated to making JSH a great place to work.




CASES OF NOTE
TRIAL COURT DECISIONS

Ruth and Don Hall v. Black Angus Steakhouse

March 13, 2014
Maricopa County Superior Court
Mark Zukowski

After a 4-day jury trial before Maricopa County Superior Court Judge Rea, a unanimous verdict was reached in favor of the Plaintiffs, Ruth and Don Hall, in an admitted liability case. JSH Partner Mark Zukowski, who represented Black Angus Steakhouse, successfully persuaded the jury to award much lower damages than those sought by Plaintiffs.

Ruth Hall was a patron at Black Angus Steakhouse when a table leaf unexpectedly released and struck her in the right knee. Immediately after this incident, Ruth Hall complained of severe pain and swelling in her knee and sought emergency medical treatment. She was later diagnosed with a torn medial meniscus in her right knee. During trial, Mrs. Hall testified she could not afford health insurance and therefore had to wait 14 months until she qualified for Medicare to have her knee surgery.

During the 14 months Mrs. Hall waited for surgery, she claimed she was in severe and incapacitating pain and could not walk. She claimed she could not take pain medications (to which she was allergic), and that she became a prisoner in her home, where she fell 30 times during the 14 months. Her husband, Don Hall, made a separate claim for loss of consortium, for having to take over all household responsibilities and for the loss of the love and companionship of his wife during the 14 months Mrs. Hall was incapacitated.

Prior to trial, Black Angus admitted fault for the accident and admitted that Mrs. Hall suffered minor injuries as a result of the table leaf striking her knee, but denied Mrs. Hall tore her meniscus in this accident. The defense also claimed that Mr. and Mrs. Hall failed to mitigate their damages by seeking other available conservative treatment to improve Mrs. Hall's pain and mobility while she waited to have surgery. The trial court denied Black Angus' motion to introduce into evidence what Medicare paid for the surgery, allowing Plaintiffs to introduce the full billed charges for the surgery. The trial court also ruled that Black Angus could not introduce evidence of what Mrs. Hall could have done to have the surgery sooner, unless Mrs. Hall could testify that Black Angus and its insurance company had promised to pay all medical expenses, then refused to pay for her surgery.

During the four-day jury trial, the Plaintiffs testified and called three lay witnesses who all testified as to the disability and suffering Mrs. Hall experienced while she waited to have surgery. Plaintiffs also called Mrs. Hall's surgeon, Dr. Michael Seivert, who testified he believed Mrs. Hall tore her meniscus as a result of the incident. The defense called injury biomechanics expert, Joe Manning, who did testing to show the forces of the accident were insufficient to tear a human meniscus. It also called Dr. John Bradway who performed an IME and testified he believed Mrs. Hall had an asymptomatic torn meniscus before the accident, which was aggravated as a result of the accident. Dr. Bradway also testified that the billed charges for the surgery were excessive.

During closing arguments, Plaintiffs asked the jury to award Ruth Hall $865,000 and Don Hall $86,500. Defense counsel Mark Zukowski argued that Ruth Hall should be awarded no more than $70,000 and Don Hall no more than $1,000 on his separate loss of consortium claim. After deliberating for approximately two hours, the jury awarded Mrs. Hall $97,000 for her injuries and Don Hall $3,000 for loss of consortium. Plaintiffs had demanded $226,000 to settle prior to trial.

North 43rd Enterprises v. Hartford

January 30, 2014
Maricopa County Superior Court
Bill Caravetta

Bill Caravetta, a Partner at Jones, Skelton & Hochuli, recently obtained summary judgment in a $4.2 million bad faith case. The bad faith and breach of contract lawsuit stemmed from a commercial roof claim following a severe hail storm, which hit the Phoenix area on October 10, 2010. The Plaintiff, North 43rd Enterprises, retained Texas based Doyle-Raisner to bring the bad faith action against Hartford, who insured the building at the time of the storm.

Following an extensive investigation by Hartford, and based on numerous expert opinions, Hartford determined that North 43rd's roof had not sustained hail damage necessitating replacement. Plaintiff's experts disagreed and filed suit in federal court. Plaintiff's owner, Robert Howe, admitted in his deposition that Hartford "had a reasonable basis to deny the claim" based on its experts' opinions. He conceded that Hartford did not act in bad faith and admitted there was no basis for the punitive damages claim.

Based on these admissions, Hartford, through counsel Bill Caravetta, moved for summary judgment. Following oral argument, U.S. District Court Judge Verdin granted Hartford's motion, finding that Howe's admissions warranted dismissal of all claims, including breach of contract, bad faith and punitive damages.

Empire Talent v. Auto-Owners

February 12, 2014
U.S. District Court
Don Myles and Patrick Gorman

Don Myles and Patrick Gorman recently obtained a unanimous verdict in a breach of contract "reasonable expectations" case. Plaintiff Empire Talent & Modeling filed suit against Auto-Owners Insurance Company for breach of the insurance contract by not paying the policy limit of $100,000 for lost media and talent portfolios. Plaintiff also alleged bad faith and intentional infliction of emotional distress.

Plaintiff argued that Defendant Auto-Owners denied the claim for lost media and talent portfolios without a reasonable basis. It also argued that Defendants breached the insurance contract by not paying the policy limit after being presented with proof of loss. Mr. Myles and Mr. Gorman, counsel for Defendant, Auto-Owners, argued that Defendant's conduct was reasonable and had correctly interpreted the insurance policy.

The Court granted Auto-Owners' motion for summary judgment on bad faith, punitive damages, and intentional infliction of emotional distress. It denied summary judgment on the breach of contract claim, finding a question of fact on Plaintiff's claim for reasonable expectations. At trial, Defendant argued that its independent insurance agent never made any representations inconsistent with the policy, and that Plaintiff had unreasonable expectations regarding how a claim would be paid. After hearing the evidence, the jury returned a unanimous defense verdict (12-0) within two hours.

JSH RESOURCE ALERT! State Judicial Profiles

USLAW has released the 2014 edition of State Judicial Profiles by County, which provides insight into local courts and juries from USLAW member firms across the country. Through its annual State Judicial Profile by County resource, USLAW offers a judicial profiles for all fifty states. The profiles provide clients with additional insight into the markets where they have legal matters. The profiles are supported by the common consensus of many lawyers whose understanding of each jurisdiction is based on personal experience and opinion. County-by-county comparisons are conducted in-state, not between states. The 2014 State Judicial Profile by County is available by clicking here: http://web.uslaw.org/wp-content/uploads/2014/05/2014_USLAW_JudicialProfiles.pdf.

SAVE
THE DATE
Upcoming Annual Firm Seminar and Governmental Liability Seminar
SEE PAGE012

"THE COURT FOUND THAT AN ADVERSE INFERENCE INSTRUCTION WAS WARRANTED TO THE EXTENT DEFENDANT'S SPOLIATION AFFECTED PLAINTIFF'S ABILITY TO PROVE HER CLAIM."

RECENT DEVELOPMENTS IN COURT DECISIONS ON E-DISCOVERY ISSUES

AUTHOR: Bill Caravetta EMAIL: wcaravetta@jshfirm.com BIO: jshfirm.com/williamgcaravettalll

As seen on the Federal Defense Counsel Corporation Blog, Federation Forum www.thefederation.org/blogcfcx/client/

The duty to preserve and collect data that may be discoverable once litigation is reasonably anticipated is well established. The following are highlights from recent decisions affecting the eDiscovery process. Although these unpublished federal decisions are not citable in state court, they are in federal court. The decisions are also instructive.

In *Riley v. City of Prescott, Arizona*, CV-11-08123-PCT-JAT (D. Ariz. Feb 18, 2014), Judge James Teilborg granted Plaintiff's Motion for Discovery sanctions against the City of Prescott in the form of a spoliation instruction to the jury. The Court found that the City of Prescott became obligated to preserve emails between city employees and Plaintiff's employer prior to the date plaintiff first publicized his protest against the City. From the facts presented, the Court found that multiple emails potentially relevant to the litigation were deleted from the Mayor of Prescott's city-assigned email account and spoliation of those emails had occurred. The City argued that there was no evidence emails were deleted, except in the exercise of normal City practice and this did not constitute destruction with any culpable state of mind. But the Court found that Prescott's Mayor acted willfully and in bad faith when he continued to refuse production of email accounts and these emails were thereafter deleted. Plaintiff established, through a subpoena to Google, the existence of nine emails which indicated that Prescott's Mayor was corresponding with his assistant during a critical period prior to the litigation and that the Defendant produced none of these emails. The Court found that an adverse inference instruction was warranted to the extent Defendant's spoliation affected Plaintiff's ability to prove her claim.

In *McCann v. Kennedy Universal Hospital, Inc.,* 2014WL282693 (D.N.J. January 24, 2014), Judge Joel Schneider was faced with a Motion for Sanctions from Plaintiff because of Defendant's alleged failure to preserve emergency room lobby surveillance footage. Plaintiff claimed that he arrived at the Defendant's hospital in great pain and was left untreated for hours. He alleged that the hospital staff left him lying on the floor for more than ten minutes after he entered the emergency room. The following day, Plaintiff emailed the hospital threatening to sue for unfair and inhumane treatment. Plaintiff filed suit against the hospital and requested production of the emergency room surveillance camera footage. The hospital had erased the footage claiming that this was the normal course of business. Plaintiff claimed the hospital spoliated evidence. Judge Schneider determined that Defendant did not have a duty to preserve the surveillance footage because Plaintiff's email did not trigger the hospital's duty to maintain this evidence. The Court found that Plaintiff's email only indicated that he "intended to sue." *Id* at 6. Judge Schneider determined that Defendant did not erase the footage in bad faith or with the intent to destroy relevant evidence. *Id* at 7.

In *Calderon v. Corporation Puertorrique a De Salud,* 2014WL171599 (D.P.R. January 16, 2014), United States District Court Judge Francisco Besosa granted Defendant's Request for a Spoliation instruction based on Plaintiff's admission that he deleted text messages and failed to produce approximately thirty eight relevant text messages which Defendant obtained by subpoenaing Plaintiff's mobile carrier. The Court determined that Plaintiff intentionally spoliated evidence because he failed to produce and/or deleted text messages amounting to a conscious abandonment of potentially useful evidence which may have been unhelpful to his case.

Finally, District Court Judge David Bury entered summary judgment against Defendant as a spoliation sanction in *Slep-Tone Entertainment Corp. v. Granito,* 2014WL65297 (D. Ariz. January 8, 2014). Plaintiff had requested that Defendant produce computer hard drive information containing karaoke tracks which Plaintiff alleged contained approximately 150,000 counterfeit tracks. Defendant claimed that the hard drives could not be produced because they had been wiped clean one to two months prior to the lawsuit. Plaintiffs sought, as a sanction, summary judgment against Defendant because of the alleged spoliation. Defendant filed a counter motion for summary judgment on grounds that Plaintiff could not prove he possessed counterfeit karaoke tracks. Judge Bury entered summary judgment in favor of Plaintiff stating that Defendant had control over the evidence, had a duty to preserve the hard drives once he was served with the Complaint, and that Defendant had a culpable state of mind when he utilized specialized software to completely wipe the drives clean of information.

ABOUT THE AUTHOR BILL CARAVETTA

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

WANT TO IMPROVE YOUR MEDIATION SUCCESS?

IT IS AS SIMPLE AS PICKING THE RIGHT PAIR OF SHOES

AUTHOR: **Mark Zukowski** EMAIL: **mzukowski@jshfirm.com** BIO: **jshfirm.com/markdzukowski**

What does getting better mediation results have to do with picking the right pair of shoes? Let me explain.

If you have practiced long enough, you probably have a go-to mediator. Why? Because like your favorite pair of shoes, it feels comfortable. But, I'm sure you own more than one pair of shoes because your favorite pair isn't the right fit for every outfit you wear. Likewise, your go-to mediator may not be the best choice for every case you mediate. I'll bet even your go-to mediator has failed to settle all of your cases. Why? Because he or she probably wasn't the best fit for the cases that didn't settle.

Every case is a little different, just like every outfit in your closet is different. The next time you want to mediate a case, I suggest that you take the time to think about the case before automatically relying on your go-to mediator. For example, if you are completely comfortable with your case evaluation, do you really want your go-to mediator, who may be a seasoned attorney, telling you what he or she would settle the case for? On the other hand, if the reason the case has not settled is that you believe the opposing party has unreasonable settlement expectations, maybe a former judge is a better choice to mediate your case. Does your case involve an issue requiring specialized knowledge? If so, maybe a mediator familiar with the issue would be a better choice for your case

Like the shoes in your closet, there are many choices for mediators who can each offer you something a little different. So the next time you mediate a case, my advice is to do a little shopping for your mediator, just like you shop for shoes, so you get the best fit. Assess the issues and parties involved in your case, talk to your client and other lawyers and, by all means, talk to several prospective mediators about your case. If you do, I think you will be pleasantly surprised to see your success in mediation improve. You may also find a new favorite pair of shoes or find that you have more than one favorite pair of shoes when it comes to selecting a future mediator.

ABOUT THE AUTHOR MARK ZUKOWSKI

Mark Zukowski has more than 30 years of experience working in alternative dispute resolution and currently serves as a commercial and construction arbitrator and mediator for the American Arbitration Association. He has also served as a Judge Pro Tem for both the Maricopa County Superior Court and the Arizona Court of Appeals. He is a member of the prestigious National Academy of Distinguished Neutrals. Contact Mark at 602.263.1759 or mzukowski@jshfirm.com.

MOVIE REVIEW
GODZILLA

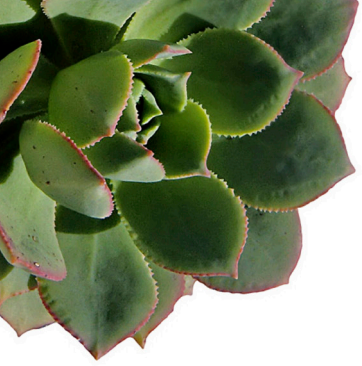
Author:
Steven Crocchi,
Marketing
Coordinator

With more than 30 Godzilla movies in existence, Director Gareth Edwards had his work cut out for him when making the newest installment of the Godzilla franchise. In this version of the film, two MUTOs (Massive Unidentified Terrestrial Organisms), escape from two government facilities and meet up in San Francisco, where they plan to breed. Ford Brody, a US Navy explosive ordinance disposal officer, played by Aaron Taylor-Johnson, works with the Navy Strike Force to lure the MUTOs away from the city and into the ocean, where the Navy plans to kill them using nuclear weapons.

After the first MUTO escapes from a government facility in Japan, Godzilla awakens and begins hunting it after laying dormant in the ocean for years. Godzilla follows the MUTOs to San Francisco, and after the Navy's plan fails, Godzilla is the only hope for killing the two monsters.

Unfortunately, the movie fell short of my expectations. After Bryan Cranston's success in the series Breaking Bad, many were excited to see his performance in this movie, but his role was much smaller than expected. The visual effects were outstanding, but unable to make up for the lack of plot and random, pointless scenes scattered throughout the film.

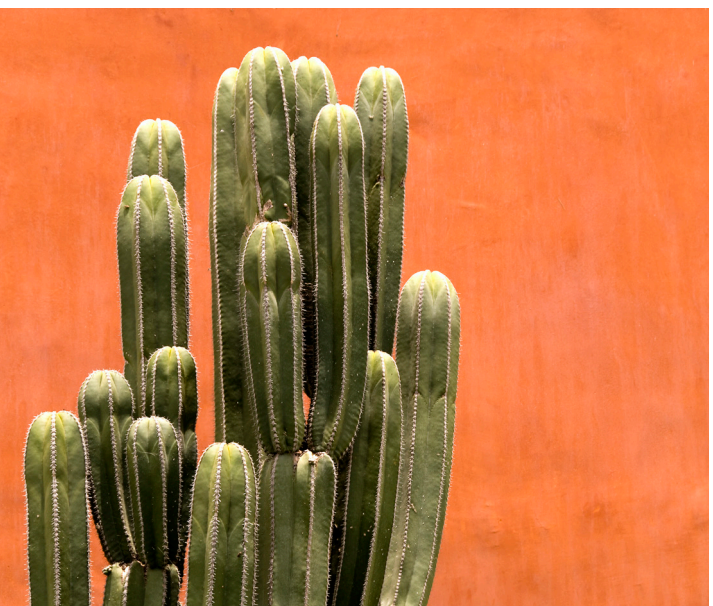
Some of the fighting sequences were also a little over the top. I don't think the producers needed to make Godzilla breathe fire or make the MUTOs emit EMPs (Electromagnetic Pulses). The ultimate fight between Godzilla and the MUTOs was quite entertaining, but too brief. The movie credits were longer than the final battle, which was very disappointing. I would recommend waiting for the Blu-Ray to be released.

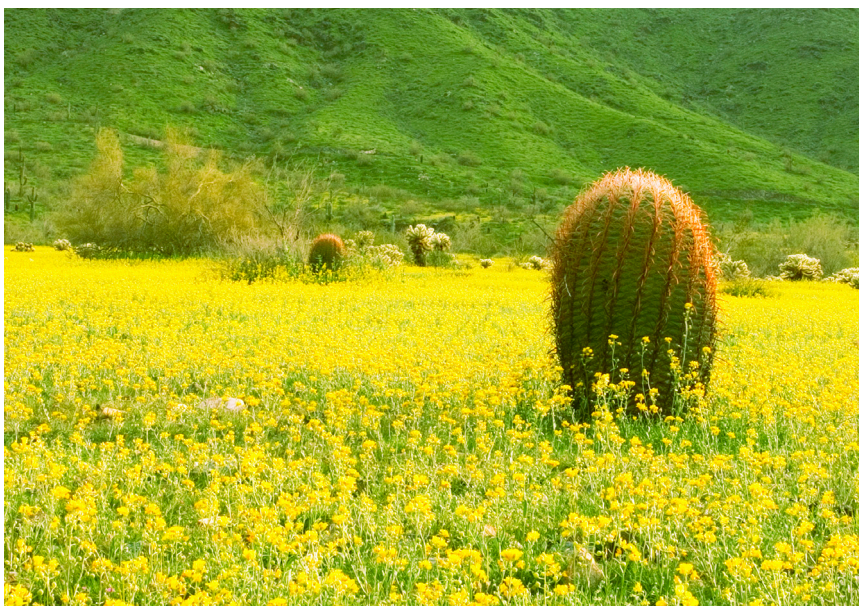


JSH ATTORNEY DIRECTORY

Lawyer Name	Title	Email	Phone	Link to Biography
Donn C. Alexander	Partner	dalexander@jshfirm.com	602.235.7126	www.jshfirm.com/DonnCAlexander
Jennifer B. Anderson	Associate	janderson@jshfirm.com	602.263.4419	www.jshfirm.com/JenniferBAnderson
Jonathan P. Barnes, Jr.	Associate	jbarnes@jshfirm.com	602.263.4545	www.jshfirm.com/JonathanPBarnes
Robert R. Berk	Partner	rberk@jshfirm.com	602.263.1782	www.jshfirm.com/RobertRBerk
Brandi C. Blair	Associate	bblair@jshfirm.com	602.263.4403	www.jshfirm.com/BrandiCBlair
Kevin K. Broerman	Partner	kbroerman@jshfirm.com	602.263.4407	www.jshfirm.com/KevinKBroerman
Stephen A. Bullington	Partner	sbullington@jshfirm.com	602.263.1773	www.jshfirm.com/StephenABullington
Heather E. Bushor	Associate	hbushor@jshfirm.com	602.263.1797	www.jshfirm.com/HeatherEBushor
Charles M. Callahan	Partner	ccallahan@jshfirm.com	602.263.4504	www.jshfirm.com/CharlesMCallahan
F. Rick Cannata, Jr.	Partner	rcannata@jshfirm.com	602.263.7385	www.jshfirm.com/FRichardCannataJr
William G. Caravetta, III	Partner	wcaravetta@jshfirm.com	602.263.7383	www.jshfirm.com/WilliamGCaravettaIII
Cristina M. Chait	Partner	cchait@jshfirm.com	602.263.1757	www.jshfirm.com/CristinaMChait
Andrew I. Clark	Associate	aclark@jshfirm.com	602.263.4543	www.jshfirm.com/AndrewIClark
David S. Cohen	Partner	dcohen@jshfirm.com	602.263.7326	www.jshfirm.com/DavidSCohen
Ronald W. Collett	Partner	rcollett@jshfirm.com	602.263.1754	www.jshfirm.com/RonaldWCollett
Jefferson T. Collins	Partner	jcollins@jshfirm.com	602.263.7359	www.jshfirm.com/JeffersonTCollins
Jonathan D. Confer	Associate	jconfer@jshfirm.com	602.263.1726	www.jshfirm.com/JonathanConfer
Douglas R. Cullins	Partner	dcullins@jshfirm.com	602.263.1792	www.jshfirm.com/DouglasRCullins
James P. Curran	Partner	jcurran@jshfirm.com	602.263.7356	www.jshfirm.com/JamesPCurran
John M. DiCaro	Partner	jdicaro@jshfirm.com	602.263.1763	www.jshfirm.com/JohnMDiCaro
Kathleen S. Elder	Partner	kelder@jshfirm.com	602.263.7358	www.jshfirm.com/KathleenSElder
Diana J. Elston	Associate	delston@jshfirm.com	602.263.1729	www.jshfirm.com/DianaJElston
Gregory L. Folger	Partner	gfolger@jshfirm.com	602.263.1704	www.jshfirm.com/GregoryLFolger
Sanford K. Gerber	Partner	sgerber@jshfirm.com	602.235.7151	www.jshfirm.com/SanfordKGerber
Elizabeth A. Gilbert	Associate	egilbert@jshfirm.com	602.263.4446	www.jshfirm.com/ElizabethAGilbert
Eileen Dennis Gilbride	Partner	egilbride@jshfirm.com	602.263.1787	www.jshfirm.com/EileenDennisGilBride
Chelsey M. Golightly	Associate	cgolightly@jshfirm.com	602.263.4409	www.jshfirm.com/ChelseyMGolightly
Patrick C. Gorman	Associate	pgorman@jshfirm.com	602.263.1758	www.jshfirm.com/PatrickCGorman
Michael W. Halvorson	Partner	mhalvorson@jshfirm.com	602.263.7390	www.jshfirm.com/MichaelWHalvorson
Whitney M. Harvey	Associate	wharvey@jshfirm.com	602.263.4464	www.jshfirm.com/WhitneyMHarvey
Michael E. Hensley	Partner	mhensley@jshfirm.com	602.263.1774	www.jshfirm.com/MichaelEHensley
Ryan M. Hicks	Associate	rhicks@jshfirm.com	602.263.4551	www.jshfirm.com/RyanMHicks
Edward G. Hochuli	Partner	ehochuli@jshfirm.com	602.263.1703	www.jshfirm.com/EdwardGHochuli
William D. Holm	Partner	bholm@jshfirm.com	602.263.1712	www.jshfirm.com/WilliamDHolm
Jeremy C. Johnson	Partner	jjohnson@jshfirm.com	602.263.4410	www.jshfirm.com/JeremyCJohnson

Lawyer Name	Title	Email	Phone	Link to Biography
Willam R. Jones, Jr.	Partner	wjones@jshfirm.com	602.263.1701	www.jshfirm.com/WilliamRJonesJr
Jason P. Kasting	Associate	jkasting@jshfirm.com	602.263.4520	www.jshfirm.com/JasonPKasting
Daniel O. King	Associate	dking@jshfirm.com	602.263.7349	www.jshfirm.com/DanielOKing
Jessica J. Kokal	Associate	jkokal@jshfirm.com	602.263.4541	www.jshfirm.com/JessicaJKokal
Alexander R. LaCroix	Associate	alacroix@jshfirm.com	602.263.4540	www.jshfirm.com/AlexanderRLaCroix
Steven D. Leach	Partner	sleach@jshfirm.com	602.235.7189	www.jshfirm.com/StevenDLeach
Gordon Lewis	Partner	glewis@jshfirm.com	602.263.4479	www.jshfirm.com/GordonLewis
John D. Lierman	Associate	jlierman@jshfirm.com	602.263.4548	www.jshfirm.com/JohnDLierman
J. Gary Linder	Partner	glinder@jshfirm.com	602.263.7340	www.jshfirm.com/JGaryLinder
Michael A. Ludwig	Partner	mludwig@jshfirm.com	602.263.7357	www.jshfirm.com/MichaelALudwig
John T. Masterson	Partner	jmasterson@jshfirm.com	602.263.7331	www.jshfirm.com/JohnTMasterson
Ryan J. McCarthy	Partner	rmccarthy@jshfirm.com	602.263.1783	www.jshfirm.com/RyanJMcCarthy
Melvin A. McDonald	Partner	mmcdonald@jshfirm.com	602.263.1760	www.jshfirm.com/AMelvinMcDonald
Michele Molinario	Partner	mmolinario@jshfirm.com	602.263.4449	www.jshfirm.com/MicheleMolinario
Kenneth L. Moskow	Associate	kmoskow@jshfirm.com	602.263.4523	www.jshfirm.com/KennethLMoskow
Donald L. Myles, Jr.	Partner	dmyles@jshfirm.com	602.263.1711	www.jshfirm.com/DonaldLMylesJr
James J. Osborne	Partner	josborne@jshfirm.com	602.263.7327	www.jshfirm.com/JamesJOsborne
Christopher R. Pierce	Associate	cpierce@jshfirm.com	602.263.4470	www.jshfirm.com/RChristopherPierce
Joseph J. Popolizio	Partner	jpopolizio@jshfirm.com	602.263.7307	www.jshfirm.com/JosephJPopolizio
David C. Potts	Associate	dpotts@jshfirm.com	602.263.4547	www.jshfirm.com/DavidCPotts
Jonah E. Rappazzo	Associate	jrappazzo@jshfirm.com	602.263.4550	www.jshfirm.com/JonahERappazzo
F. Kyle Robertson	Associate	krobertson@jshfirm.com	602.263.4524	www.jshfirm.com/KyleRobertson
Jay P. Rosenthal	Partner	jrosenthal@jshfirm.com	602.263.1705	www.jshfirm.com/JayPRosenthal
William J. Schrank	Partner	wschrank@jshfirm.com	602.263.1756	www.jshfirm.com/WilliamJSchrank
Gayathiri Shanmuganatha	Associate	gayashan@jshfirm.com	602.263.4518	www.jshfirm.com/GayaShanmuganatha
J. Russell Skelton	Partner	rskelton@jshfirm.com	602.263.1702	www.jshfirm.com/JRussellSkelton
Josh M. Snell	Partner	jsnell@jshfirm.com	602.235.7164	www.jshfirm.com/JoshMSnell
Clarice A. Spicker	Associate	cspicker@jshfirm.com	602.263.4544	www.jshfirm.com/ClariceASpicker
Phillip H. Stanfield	Partner	pstanfield@jshfirm.com	602.263.7318	www.jshfirm.com/PhillipHStanfield
Georgia A. Staton	Partner	gstaton@jshfirm.com	602.263.1751	www.jshfirm.com/GeorgiaAStaton
Erik J. Stone	Associate	estone@jshfirm.com	602.263.4475	www.jshfirm.com/ErikJStone
David L. Stout	Associate	dstout@jshfirm.com	602.263.4428	www.jshfirm.com/DavidLStoutJr
Kimberly J. Suciu	Associate	ksuciu@jshfirm.com	602.263.4542	www.jshfirm.com/KimberlySuciu
Linda K. Tivorsak	Associate	ltivorsak@jshfirm.com	602.263.4546	www.jshfirm.com/LindaTivorsak
Ashley G. Villaverde	Associate	avillaverde@jshfirm.com	602.263.1724	www.jshfirm.com/AshleyGVillaverde
Lori L. Voepel	Partner	lvoepel@jshfirm.com	602.235.7155	www.jshfirm.com/LoriLVoepel
Mark D. Zukowski	Partner	mzukowski@jshfirm.com	602.263.1742	www.jshfirm.com/MarkDZukowski





Published 2014
Jones, Skelton & Hochuli, PLC
2901 N. Central Ave, Suite 800
Phoenix, Arizona 85012
www.jshfirm.com