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Jones, Skelton & Hochuli

# Reporter

SUMMER 2015 ISSUE



Photo of the National Trail in Arizona. Taken by Bill Schrank.

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# MESSAGE FROM THE EDITOR

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## Welcome to the Summer Edition of the JSH Reporter!

After a brief reprieve, we are back with our Summer Edition of the JSH Reporter. If you are a new reader of the JSH Reporter, welcome! We have designed this publication to provide information about changes in the law and how these affect a variety of industries, as well as to provide updates on what is happening within our firm.

In this issue, you'll find articles on the EEOC conciliation process, access to social media, and the different types of warranties that cover a contractor's work. Additionally, you'll find appellate highlights, cases of note, recent JSH accomplishments, and upcoming events.

As always, we appreciate your thoughts and feedback on this publication. Please let me know if a particular topic 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 in Fall 2015.

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

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JSH Reporter

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# HAS EXPOSURE TO **PUNITIVE DAMAGES** INCREASED IN ARIZONA?

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Until recently, it was generally accepted that punitive damages awards are to track awards of compensatory damages on a 1:1 ratio. This ratio was convenient for defendants, as it provided some amount of certainty when evaluating potential exposure to punitive damages. But in August 2014, the Arizona Court of Appeals altered this understanding with its ruling in *Arellano v. Primerica Life Ins. Co.*, 235 Ariz. 371, 332 P.3d 597 (App. 2014). Specifically, the Court of Appeals reduced a punitive damages award from a 13:1 ratio to a 4:1 ratio. While the reduction was welcome, it was a clear signal that the amount of punitive damages awardable in Arizona is likely to increase.

**Limitations on Punitive Damages**

An award of punitive damages is an extraordinary civil remedy that is recoverable only for the most egregious of wrongs. Punitive damages are not intended to compensate plaintiffs, but exist to punish the wrongdoer and deter future harmful conduct. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008). Such awards are not, however, without constitutional restraints. "A grossly excessive punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the defendant did not have 'fair notice' of its exposure to the extent of punishment that could be imposed." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

When reviewing whether a punitive damages award is excessive, a court must consider the following guideposts: 1) the degree of reprehensibility of defendant's conduct, 2) the disparity between plaintiff's actual or potential harm and the punitive damages award, and 3) the difference between the jury's punitive damages award and the authorized civil penalties in comparable cases. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409 (2003). The degree of reprehensibility of defendant's conduct is "perhaps the most important indicium of reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. And in assessing reprehensibility, a court considers whether: 1) the harm caused was physical as opposed to economic, 2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others, 3) the target of the conduct had financial vulnerability, 4) the conduct involved repeated actions or was an isolated incident, and 5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Nardelli v. Metro Grp. Prop.*

"*ARELLANO* LIKELY CAUSED THE VALUE OF PUNITIVE DAMAGES CLAIMS TO INCREASE IN ARIZONA, PARTICULARLY WHERE THE PUNITIVE CONDUCT IS RATHER REPREHENSIBLE. TO LIMIT AWARDABLE PUNITIVE DAMAGES, THE DEFENSE SHOULD FOCUS ON REDUCING THE IMPACT OF THE ALLEGEDLY EGREGIOUS CONDUCT ON THE REPREHENSIBILITY SCALE."

*and Cas. Ins. Co.*, 230 Ariz. 592, 610, 277 P.3d 789, 807 (App. 2012). Within this reprehensibility scale, acts of violence or threats of bodily harm are the most reprehensible, followed by acts taken in reckless disregard for others' health or safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence. *Hudgins v. Southwest Airlines, Co.,* 221 Ariz. 472, 490, 212 P.3d 810, 828 (App. 2009).

Turning toward the second guidepost – the disparity between actual or potential harm and the punitive damages award – "single digit multipliers are more likely to comport with due process, and a factor more than four comes close to the line of constitutional impropriety." *Id.* at 491, 212 P.3d at 829. That said, there is no bright line ratio that is accepted. A high ratio is justified if a particularly egregious act results in a small amount of damages or such damages are difficult to compute. *State Farm*, 538 U.S. at 425. Conversely, when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. *Id.*

Finally, the third guidepost instructs that the court compare the punitive damages award to authorized civil penalties in similar cases. Insofar as comparable civil penalties exist, an award of punitive damages should be in line with such penalties. This is normally the least useful of the guideposts.

**The Court of Appeals' Analysis in *Arellano***

*Arellano* involved breach of contract and bad faith claims based on the denial of a claim for life insurance benefits. Mrs. Arellano purchased a $150,000 life insurance policy for her husband, which she was told was "immediately in effect" with the payment of the policy premium. In light of Mr. Arellano's hypertension and the fact that his age was incorrectly stated on the application, Primerica required an underwriting medical interview. But when its outside vendor contacted Mr. Arellano for the interview, Mr. Arellano stated that his wife had already purchased a policy from a different company. The vendor issued an alert to Primerica that Mr. Arellano cancelled the application, but Primerica did not contact the Arellanos to resolve whether it had, in fact, been cancelled.

Shortly thereafter, Mr. Arellano suddenly died, and his wife submitted a claim for death benefits. Primerica denied the claim, asserting there was no policy or coverage because Mr. Arellano failed to complete the medical interview. Mrs. Arellano sued Primerica and asserted various claims, including breach of contract, bad faith and forgery (based on an attempt to reduce the $150,000 policy limit to $100,000). The jury found in favor of Mrs. Arellano, awarding her $82,000 on the bad faith claim and $1,117,572 on the punitive damages claim. On appeal, Primerica asserted that the punitive damages award was excessive and violated due process.

To evaluate whether the award of punitive damages was excessive, the Arizona Court of Appeals utilized the *Gore* guideposts described above. Focusing first on reprehensibility, it concluded that Primerica's actions reached the middle to high range on the reprehensibility scale. Specifically, the Court of Appeals noted that the jury found Primerica had forged the Arellanos' signatures in an attempt to reduce the life insurance policy from $150,000 to $100,000. It also noted that Primerica accepted the premium payment without properly obtaining the Arellanos' signatures, failed to provide copies of the application for the Arellanos to verify information, and failed to follow up with the Arellanos after the medical interview was cancelled.

Turning toward the disparity between the harm and the punitive damages awarded, the Court of Appeals found that a 13:1 ratio of punitive damages to compensatory damages was excessive and violated due process. Finally, the Court of Appeals compared A.R.S. § 20-456.B (which allows for a $50,000 civil penalty for unfair practices and fraud) to the punitive damages award of more than $1,000,000. It noted that the civil penalty and punitive damages award were vastly different, but it reiterated that Primerica's reprehensible conduct supported an award that exceeded a 1:1 ratio.

After performing this analysis and applying the *Gore* guideposts, the Arizona Court of Appeals relied on Primerica's conduct being found on the middle to high range of the reprehensibility scale and reduced punitive damages from a ratio of 13:1 to 4:1.

**Analyzing Punitive Damages Moving Forward**

It is clear that an analysis of punitive damages exposure should start with and focus on the degree of reprehensibility of the defendant's conduct. This is the most significant factor that will be considered, and acts of intentional physical violence will be seen as the most reprehensible, followed by acts of reckless disregard, affirmative acts of deceit, and finally, mere negligence. It is unlikely that a double digit ratio of punitive damages to compensatory damages will pass Constitutional muster even for the most egregious conduct. But reprehensible conduct found on the high range of the scale could very well

support a ratio of 7:1 or 8:1. Conversely, reprehensible conduct on the low range of the scale would appear to fairly justify a punitive damages award in the range of 1:1.

Ultimately, *Arellano* likely caused the value of punitive damages claims to increase in Arizona, particularly where the punitive conduct is rather reprehensible. To limit awardable punitive damages, the defense should focus on reducing the impact of the allegedly egregious conduct on the reprehensibility scale.

## ABOUT THE AUTHOR DAVID STOUT, JR.

Mr. 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 RESOURCE ALERT!

## USLAW Webinar Recording: Data Breaches: Insurance Coverage and Recovery of Costs for Cyber Liabilities

Data breaches and cyber liability present significant risks for businesses. The cost of defending and remedying a data breach can be staggering. Target recently reported more than $235 million in gross expenses related to its 2013 data breach. Fortunately, Target was able to recover $90 million of that expense from insurance coverage it purchased to protect itself against such exposures.

Target's experience is only one of many. A data breach can rear its head in many forms (e.g., laptop loss, hacking, and employee theft). Businesses must not only engage in vigorous loss prevention but should be continually evaluating and updating the insurance protection they have in place to protect against these potentially catastrophic risks.

Insurance protection for cyber risks may be available from several types of coverage. Cyber liability policies are available on the market and can offer a tailored layer of protection. These specialized policies are rapidly evolving. Coverage may also be available under more traditional insurance products (e.g., Commercial General Liability, Directors & Officers, or crime/fidelity policies).

This discussion, led by experienced insurance counsel and a business that has purchased cyber coverage, covers topics including:

- What sort of coverage should be purchased?
- What are the key coverages that insureds should insist on when purchasing cyber insurance coverage?
- How are courts treating requests for coverage for data breaches?
- Potential sources of recovery for data breaches through indemnification and third-party actions.

Watch the full webinar recording here: http://web.uslaw.org/webinars/data-breaches-insurance-coverage-recovery-costs-cyber-liabilities/

## USLAW Releases Updated Transportation Compendium of Law

The updated transportation compendium is a survey of state law on various issues associated with the derivative negligence claims of negligent entrustment, hiring, retention and supervision in truck accident cases. In addition to the transportation compendium of law, USLAW publishes Nullum Tempus, Offers of Judgment, Construction, Retail, Spoliation of Evidence, Workers' Compensation, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal.

To view or download the updated compendium, click here: http://www.uslaw.org/files/Compendiums2015/Transportation/2015_USLAW_Transportation_Compendium_of_Law.pdf

# THE DIFFERENT **WARRANTIES** COVERING A CONTRACTOR'S WORK

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A general's or subcontractor's job is far from over when it receives final payment on a construction project. Rather, final payment begins a new phase of the project, the warranty phase, which may last years. This is true even where the owner/contractor contract calls for a one-year period for the contractor to return to the site and repair "warranty" items. This article will address some of the warranty obligations that are created by contract and law.

**Call Back Warranties**

Many standard form contracts require a contractor to return to the project and repair or replace defective work for a period of one year. The AIA A201-1997 General Conditions provides under 12.2.2.1 call back warranty obligations of one year.

Under this provision, the owner and contractor each have obligations under the call back warranty. An owner must promptly notify the contractor of a defect in the contractor's work. If the owner's delay makes the problem more difficult or expensive to repair, the contractor may not be required to return and make repairs.

Although an owner's failure to timely notify the contractor of a defect may relieve the contractor of any obligation to make repairs, an owner must give the contractor the opportunity to make repairs before calling in another contractor and attempt to charge the original contractor for the cost of the repair.

An owner's notice must not only be prompt, it must also sufficiently identify the problem. A contractor must make

"CONTRACTORS ARE SUBJECT TO DIFFERENT TYPES OF WARRANTIES AND DIFFERENT TIME FRAMES THAT THEY MAY HAVE TO HONOR SUCH WARRANTIES. AN UNDERSTANDING OF THE DIFFERENCES AND THE APPLICABLE PERIODS OF TIME IS CRITICAL WHEN RESPONDING TO DEMANDS FROM OWNERS MAKING 'WARRANTY' CLAIMS."

the repairs within a reasonable amount of time after the request. The timing of the contractor's response is somewhat subjective, and may depend on the particular circumstances of the alleged defect and the nature of the repairs. If the contractor does not timely respond to the notice, the contractor may have breached the call back warranty.

From an owner's point of view, the notice should contain more than just an identification of the items needing repair. It should also inform the contractor that if it does not make the repairs, the owner will do so itself and charge the contractor for the costs. It should also request confirmation from the contractor that the work will be performed and inform when the contractor will do so. The contractor, on the other hand, should promptly respond to the request and inform the owner of its intentions with respect to the requested repair work. A contractor ignores a request at its own peril.

**Registrar of Contractors' Corrective Work Period**
In addition to call back warranties, Arizona contractors are also subject to the jurisdiction of the Registrar. For instance, if an owner is unable to get a contractor to make repairs after a call back period ends, that owner can file a complaint with the Registrar if it has been two years or less since the contractor performed the work that is the subject of the complaint.

The Registrar will investigate and may issue a corrective work order to the contractor, requiring the contractor to make repairs listed in the order. Of course, the contractor may request a hearing if it disagrees that corrective work is needed. However, the contractor cannot use the expiration of a contractual call back warranty to avoid the Registrar's order. *See* A.R.S. Sec. 32-1155.

**General Warranty Obligations**
Confusion often arises when a contractor believes that the call back warranty is the extent of its responsibility to the owner. As noted above, the call back warranty is separate and apart from other, more general warranty obligations. Thus, a contractor is not simply responsible for items that require repair if it receives notice within the call back period.

An owner may still be able to bring an action against a contractor and recover damages where the contractor refused to make repairs to items discovered after the call back period. The A201-1997 General Conditions makes it clear that the call back warranty is a period of time that the contractor is required to return and make repairs, and *is in addition to* the general warranty obligation. Compare Article 3.5 and 12.2.2.1.

**Implied Warranties and the Statute of Repose**
In addition to express contractual warranties, Arizona courts also recognize implied warranties in construction contracts. Those include the implied warranty of good workmanship. An owner's claim for breach of an implied warranty does not begin to run until the owner discovered or should have discovered the defect. As a result, in the case of a latent or undiscoverable defect, the contractor will be on the hook long after the project is completed.

Arizona's statute of repose effectively extends a contractor's warranty obligations for eight, and potentially nine, years from substantial completion of construction as defined in the statute. If an owner discovers defects in construction years after completion, that owner may bring an action in order to recover its damages.

**Conclusion**
Contractors are subject to different types of warranties and different time frames that they may have to honor such warranties. An understanding of the differences and the applicable periods of time is critical when responding to demands from owners making "warranty" claims.

## ABOUT THE AUTHOR MICHAEL LUDWIG

Mr. Ludwig concentrates his practice on construction law, personal injury defense and professional liability defense. He co-authored the Arizona Construction Practice Manual published by the Arizona State Bar and is a member of the Executive Council for the State Bar's Construction Section. He has been selected as a member of Arizona's Finest Lawyers and Southwest Super Lawyers for construction litigation. Contact Mike at 602.263.7342 or mludwig@jshfirm.com.

# In Honor and Memory of Mr. Ronald W. Collett

On April 8th, in a most untimely way, we lost a dear friend. Ron was a loving husband, a caring father and a dear friend to so many in our community. After spending over 30 years with us at JSH, Ron was family. Over the years, he served as a mentor to dozens of attorneys and played a big role in helping the firm get to where it is today. He was the type of person who was always willing to help whenever he was needed.

Anyone who worked with Ron could see that he was a man who truly enjoyed his work. It was a rare occurrence for someone to beat him into the office. After graduating from the University of the Pacific, McGeorge School of Law in Sacramento, Ron began his legal career at the Arizona Attorney General's Office and the Maricopa County Attorney's Office where he spent the first nine years of his practice.

Above all, Ron was a family man. He enjoyed spending time with his wife, children and grandchildren.

We will all miss him dearly.

# THE FRUSTRATING EEOC CONCILIATION PROCESS

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Employers are often frustrated when dealing with the Equal Employment Opportunities Commission (EEOC) regarding employee Charges of Discrimination. Many EEOC charges are legitimate and allow current or former employees an appropriate forum in which to remedy employer discrimination. Employers are encouraged to comprehensively investigate charges early, with counsel's assistance if appropriate, to determine if there is likely exposure on the allegations contained in the charge. If so, employers are well served by attempting to quickly resolve the matter.

However, employers are often frustrated by being forced to expend significant time, effort and funds to defend against what often appear to be groundless claims asserted by employees who do not realize that employers have the right to discipline or terminate employees for legitimate non-discriminatory reasons. Perhaps it is a sign of the times that many employees cannot accept being disciplined for inappropriate conduct, and instead can only conclude the discipline was imposed because of their gender, age, disability, or their purported membership in some other protected class. When an employer has legitimate defenses to a charge, we are generally able to work with them to prepare position statements and assist with the EEOC investigation process, with the end result of having the EEOC dismiss the charge.

Many EEOC charges are eventually dismissed. If not, the EEOC will render a cause determination against the employer. The employer will then be invited to participate in conciliation in an attempt to resolve the Charging Party's claims. With some charges, the employer has enough information from its investigation to evaluate potential exposure, and can accordingly attempt to resolve the charge. However, conciliation can become an exceptionally frustrating process when the employer sees no objective evidence to support the cause determination, and is therefore faced with either having to settle a seemingly groundless claim or accepting the risk of incurring significant costs to defend an enforcement lawsuit filed by the EEOC. This article discusses the difficulties faced by employers in that situation.

The EEOC is bound by Title VII to engage in conciliation in an attempt to resolve a charge before it can bring an enforcement action against the employer. 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 2000e-5(f)(1). In other words, if a charge is not resolved at conciliation, the EEOC can proceed to litigate the question of an employer's liability for alleged discriminatory conduct. *E.g.*, *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534-35 (2nd Cir. 1996).

Statutory conciliation requirements reveal Congress's intent to have the EEOC attempt to informally resolve charges and bring employers into compliance with anti-discrimination laws. As one court stated, "[t]he EEOC fulfills this mandate if it (1) outlines to the employer the reasonable cause for its belief that the employer is in violation . . . , (2) offers an opportunity for voluntary compliance, and (3) responds in a reasonable and flexible manner to the reasonable attitude of the employer." *Johnson and Higgins*, 91 F.3d at 1534-35. The conciliation process is therefore designed to allow the employer and the EEOC to negotiate how the employer may change its policies and practices to comply with Title VII in addition to determining the amount of damages, if any, the employer will pay to the Charging Party.

The important take-away from how courts interpret the conciliation process is that when Congress enacted anti-discrimination legislation, its intent was to develop a regulatory scheme that emphasizes voluntary proceedings and informal conciliation between an employer and the EEOC, as opposed to a regulatory scheme that encourages litigation. *EEOC v. Bloomberg L.P.*, 967 F.Supp. 2d 802, 811 (S.D.N.Y. 2013). Federal courts have specifically concluded that the conciliation process is intended to avoid over-burdening the federal judicial system -- a system that is not the preferred avenue for resolving employment discrimination disputes. *Occidental Life Insurance Company v. EEOC*, 432 U.S. 355, 367-68 (1977). The United States Supreme Court went so far as to describe the EEOC's purpose as follows:

> [T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.

*Id.* at 368.

As so described, the intent of the conciliation process seems entirely reasonable and logical. The frustration with conciliation therefore does not lie in its purpose, but in the EEOC's application, which often requires employers to evaluate what can be extremely significant EEOC conciliation demands without having the benefit of knowing what evidence the EEOC has to support its cause determination.


EEOC conciliation often requires employers to negotiate with an inequity in knowledge regarding the material evidence relevant to the charge. In normal litigation, disclosure obligations and discovery result in both sides having a relatively equal understanding of the relevant facts, so the parties can engage in an independent evaluation of liability and damages exposure. A settlement judge or private mediator can supplement that evaluation with their own objective analysis. Having the evidence out on the table – or at least most of it – enhances the parties' ability to reach an acceptable agreement because they are negotiating from the same or similar knowledge base.

In comparison, the EEOC conciliation process often forces the employer to negotiate from a position of ignorance because the EEOC is reticent to inform the employer about the evidentiary basis for the EEOC's cause determination. This is not a material issue for some charges because the employer's own investigation may uncover sufficient material facts to allow the employer to fully appreciate the nature and extent of its discriminatory conduct (e.g., an employer finds out after a charge is filed that a supervisor actually did sexually harass a subordinate).

But, what about charges where the employer performs an objective investigation, with the assistance of counsel, and finds little or no facts to support the EEOC's cause determination? Prior to rendering a cause determination, the EEOC receives information from the Charging Party, from the employer through its position statement, and through the EEOC's own investigation. Some of this evidence will be known to the employer, but some may not be known because the EEOC does not share the evidence obtained through its own investigation.

As a result, the employer may only know one side of the story, which greatly inhibits its ability to evaluate the EEOC's conciliation demand. While employers can request additional evidence and information from the EEOC, those requests are seldom responded to in a comprehensive manner because the EEOC takes the position that it is not required to provide evidentiary support for its cause determination.

To an employer, it can seem that the EEOC's position is, "you violated the law, but we are not going to tell you why we think that – trust us and accept our conciliation terms." That attitude is arguably inconsistent with the Supreme Court's belief that the EEOC is required to investigate "claims of employment discrimination and settl[e] disputes, if possible, in an *informal, noncoercive fashion*. *Occidental Life Insurance Company,* 432 U.S. at 368 (emphasis added).

**THE FRUSTRATION WITH CONCILIATION...DOES NOT LIE IN ITS PURPOSE, BUT IN THE EEOC'S APPLICATION, WHICH OFTEN REQUIRES EMPLOYERS TO EVALUATE WHAT CAN BE EXTREMELY SIGNIFICANT EEOC CONCILIATION DEMANDS WITHOUT HAVING THE BENEFIT OF KNOWING WHAT EVIDENCE THE EEOC HAS TO SUPPORT ITS CAUSE DETERMINATION.**

Adding to this frustration is the EEOC's tendency to quickly terminate conciliation discussions without significant negotiation if an employer takes a position that is substantially different from the EEOC's initial conciliation demand. In the end, employers can be faced with either paying far more than they believe a claim is worth, and accepting intrusive EEOC administrative demands, or with the painful prospect of becoming entwined in an EEOC enforcement action that may last years and result in enormous defense costs.

Employers may often conclude that they have no choice but to reject a conciliation demand and risk proceeding to litigation. However, this choice is contradictory to the entire purpose of the conciliation process which, as outlined above, is to encourage informal resolution without forcing the parties to resort to litigation in federal courts. In fact, the U.S. Senate recently recognized this problem, and others, in the EEOC's current handling of its administrative responsibilities. On November 24, 2014, the Senate Committee on Health, Education, Labor and Pensions issued a Minority Staff Report entitled "EEOC – An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency." The report outlines several concerns regarding the EEOC's conduct, including a history of being rebuked by federal courts for failing to adequately conciliate charges. The report cites examples where federal courts have criticized the EEOC's conciliation efforts as violating the agency's statutory obligation, and dismissing EEOC enforcement actions accordingly.

For example, in *EEOC v. Bloomberg*, 967 F. Supp.2d 802 (S.D.N.Y. 2013), the Court entered judgment against the EEOC because it sought to prosecute claims by individuals without first going through the conciliation process on those claims. The EEOC's conciliation demand included more than $6 million each for identified Charging Parties, and a $7.5 million fund to be divided by the EEOC among members of a then-unidentified class of employees allegedly suffering pregnancy discrimination. Although the employer found the discrimination claims lacked merit, it offered each Charging Party $65,000 but stated it could not agree to any fund for the alleged class, "absent further information about other potential claimants." The EEOC closed conciliation the day after receiving the employer's response. The EEOC then filed suit on behalf of the purported class of employees suffering pregnancy discrimination. The employer eventually obtained summary judgment on those claims, after which the EEOC sought to continue the case on behalf of twenty-nine claimants who were not previously identified in the charge or during the conciliation process.

The employer brought another motion for summary judgment asserting the claims by the newly identified individuals failed because the EEOC did not engage in conciliation regarding those individuals' claims. The Court's opinion granting the employer's motion is particularly damning of the EEOC's conduct. It found, "the EEOC spurned any efforts to conciliate individual claims beyond those of the Claimant Parties, let alone offer [the employer] an opportunity to tailor any class-wide conciliatory efforts to the breadth of legitimate claims it might face." *Bloomberg*, 967 F. Supp.2d at 813 (emphasis in original). The Court further concluded:

> The EEOC's pre-litigation conduct also failed to meet the requirements of the statute insofar as it failed to make a reasonable cause determination as to the specific allegations of any of the Non-Intervenors prior to filing the Complaint or to afford Bloomberg a meaningful opportunity to conciliate any individual claims beyond those brought by the Claimant Parties.

*Id.* at 814. The Court therefore granted judgment in favor of the employer on the twenty-nine discrimination claims. It further found that the employer was the "prevailing party," which could seek an award of attorney's fees against the EEOC.

The *Bloomberg* decision and others like it allow employers to file dispositive motions in EEOC enforcement actions if grounds exist for arguing the EEOC failed to conciliate the claims. That defense can be proffered when, as in *Bloomberg*, there is no actual conciliation effort for specific claims, and in cases where the EEOC's conduct in conciliation is sufficiently one-sided to constitute the lack of a good faith conciliation effort as required by non-discrimination statues. So, while employers may have little ability to create an equality of information in the conciliation process to develop a fair and reasonable settlement effort, they may be able to raise an ineffective conciliation process as a defense to subsequent EEOC litigation. Employers should therefore be mindful of keeping detailed records of their negotiations with the EEOC in order to support such motions.

Not surprisingly, the EEOC has repeatedly taken the position that federal courts do not have authority to evaluate EEOC conciliation efforts. Despite consistent federal authority to the contrary, in 2013 the Seventh Circuit Court of Appeals adopted that argument and held that EEOC conciliation efforts are not subject to judicial review. *EEOC v. Mach Mining, LLC*, 738 F.3d 117 (7th Cir. 2013). The Seventh Circuit stated:

> We therefore disagree with our colleagues in other circuits and hold that the statutory directive to the EEOC to negotiate first and sue later does not implicitly create a defense for employers who have allegedly violated Title VII.

*Id.* at 173. The issue of whether employers can assert a defense for failure to conciliate is now before the United States Supreme Court for review. Oral argument was held in January 2015.

A Supreme Court opinion in *Mach Mining* rejecting the EEOC's argument would provide even stronger grounds for dispositive motions by employers based on ineffective conciliation efforts. Of course, a contrary finding will put employers back in the position of having to accept the inequities that sometime arise in the EEOC conciliation process.

In conclusion, employers must do what they can to develop an independent understanding of the facts material to an EEOC charge, because the EEOC is unlikely to share the evidence it develops regarding that charge. If faced with a cause determination, the employer should ask the EEOC to further outline its findings even though the EEOC will probably not provide actual evidence discovered during its investigation.

Employers should also keep records of their communications with the EEOC regarding the conciliation process.

Importantly, employers are not bound to accept the EEOC's findings, or the elements of an EEOC demand. If, in the end, an employer truly does not understand the basis for the EEOC's cause determination, it must balance the weight of its conviction that it did not discriminate against the Charging Party against the possibility of having to defend an EEOC enforcement action. If that analysis leads an employer to ultimately reject the EEOC's conciliation demand, resulting in subsequent EEOC litigation, the employer may be able to assert a procedural defense that the EEOC did not engage in conciliation in good faith, and thereby violated its statutory responsibility to seek informal resolution of discriminatory claims before instituting litigation.

## ABOUT THE AUTHOR STEVEN LEACH

Mr. Leach has represented Arizona employers for over a decade. His practice is devoted to helping employers, and the companies that insure them, whether it be defending claims before state and federal agencies like the EEOC, representing employers before state and federal trial and appellate courts, or counseling employers on ways they can reduce the risk of employment liability exposure. He is committed to guiding his clients through the employment practices liability minefield in the most effective and efficient manner possible. Contact Steve at 602.263.7350 or sleach@jshfirm.com.

## JSH RESOURCE ALERT!

### USLAW Webinar Recording Presented by Brandi Blair: Men Are From Mars, Women Are From Venus - Language Differences in the Legal Arena

Men and women communicate differently, and these gender differences require specialized strategies in the world of litigation. This webinar identifies the communication differences between men and women and discuss how those differences can translate into effective and winning strategies in a variety of legal settings, including mediations, settlement discussions, legal arguments and trial. Differing perspectives are offered from both female trial lawyers and clients who have not only identified the communications differences, but have utilized them to their advantage to achieve their clients' goals.

Watch the full webinar recording here: http://web.uslaw.org/webinars/men-mars-women-venus-language-differences-legal-arena/

### USLAW Webinar Recording: Social Media Monitoring: How to Utilize Social Media, the Internet and Technology to Benefit Your Cases

The vast reach of the Internet and the ever-changing world of social media intersects our lives in so many ways. This webinar focuses on the role social media plays in investigations and surveillance. You will learn insights, tips and techniques that will improve your search on Facebook, Twitter and other social media sites. Keep in mind, though, that the Internet isn't just social media. We also discuss how to use Google technology to better enhance your chances of finding witnesses, plaintiff's and others. The digital world makes many things global so we will include an analysis of foreign social media and how it helps in combating a case here in the USA. The presentation addresses social media monitoring and how monitoring plaintiff's social media can help improve your chances of obtaining information that will produce a better outcome on surveillance or provide a photo or post of value.

Whether it is an insurance claim or an employment issue or anything in between, having the knowledge of how social media can help you will benefit you, your clients and your cases.

Watch the full webinar recording here: http://web.uslaw.org/webinars/social-media-monitoring-internet-investigations/

# APPELLATE HIGHLIGHTS

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

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

May 21, 2015

## *Merkens v. Federal Ins. Co.*

### (Arizona Court of Appeals)

**The court affirmed summary judgment for the workers' compensation carrier because plaintiff, a laboratory research associate, failed to seek a determination from the Industrial Commission that she was entitled to continuing benefits after her benefits were terminated. She thus failed to exhaust her administrative remedies, which precluded her bad faith claim.**

MORE INFORMATION:
http://www.jshfirm.com/contentadmin/files/Merkens%20v.%20Federal.pdf

April 21, 2015

## *Lee v. M&H, Wal-Mart*

### (Arizona Court of Appeals)

**The court affirmed judgment as a matter of law for plaintiff's special employer, M&H, on grounds that it was immune from tort liability under Arizona's worker's compensation law. M&H was the subcontractor in charge of supervising and controlling the construction project where plaintiff was injured. The court also affirmed summary judgment for Wal-Mart, which did not owe a non-delegable duty or retain any control over plaintiff's work, as plaintiff argued.**

MORE INFORMATION:
http://www.jshfirm.com/contentadmin/files/Lee%20v%20MH%20and%20WalMart.pdf

## featured **case**

April 23, 2015

## *State v. Bernstein (Herman)*

### (Arizona Supreme Court)

The court held that a trial court's "gatekeeper" role applies equally to Rule of Evidence 702(d) when a party contends that an expert has not properly applied generally reliable principles or methods. It further held that errors in application should result in the exclusion of evidence only if they render the expert's conclusions unreliable; otherwise, the jury should be allowed to consider whether the expert properly applied the methodology in determining the weight or credibility of the expert testimony.

More Information:http://www.jshfirm.com/contentadmin/files/State%20v.%20Bernstein.pdf

March 25, 2015

## *Austin, et al. v. the Peoria Unified School District*

### (Arizona Court of Appeals)

**The court affirmed dismissal because plaintiff's Notice of Claim was not filed with all members of the school district's Governing Board, as A.R.S. § 12-821.01 requires.**

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/1CA-CV14-0220.pdf

March 18, 2015

## *Newman v. Cornerstone National Ins. Co.*

### (Arizona Supreme Court)

**The court held that A.R.S. § 20-259.01(B), which requires motor vehicle insurers who write liability policies to "make available" and "by written notice offer" underinsured motorist coverage to their insureds, does not require the notice to specify the cost of the underinsured motorist coverage.**

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2015/CV140121PR.pdf

January 15, 2015

## *Desert Palm Surgical Group, PLC v. Petta*

### (Arizona Court of Appeals)

**The court overturned a $12 million jury award for defamation in favor of two doctor plaintiffs against their former patient, stating that the verdict shocked the court's conscience and was so extreme as to suggest passion, prejudice, mistake or a complete disregard of the evidence.**

MORE INFORMATION:
http://www.jshfirm.com/contentadmin/files/Desert%20Palm%20Surgical%20Group,%20PLC%20v.%20Petta.pdf

January 15, 2015

## *Everest Indemnity Insurance Company v. Rea*

### (Arizona Court of Appeals)

**The majority held that bad-faith defendant insurance company did not waive attorney-client privilege by defending itself on subjective reasonableness grounds following consultation with counsel. Dissenting Judge Orozco opined that insurance company's conduct was enough to waive the privilege.**

MORE INFORMATION:
http://www.jshfirm.com/contentadmin/files/Everest%20Indemnity%20Insurance%20Company%20v.%20Rea.pdf

December 23, 2014

## *Abbott v. Banner Health Network*

### (Arizona Court of Appeals)

**Hospital could not impose and enforce liens on funds that patients obtained from third-party tortfeasors because the liens were void under federal law; accord and satisfaction agreements between the Hospital and patients were also unenforceable on the same basis.**

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2014/1%20CA%20CV%2013-0259.pdf

December 02, 2014

## *McKee v. Peoria Unified School District*

### (Arizona Court of Appeals)

**Judgment against school district in public records case was reversed; District's response to request was "prompt" within the meaning of the public records statute.**

MORE INFORMATION:
http://www.jshfirm.com/contentadmin/files/McKee%20v.%20Peoria%20Unified%20School%20District.pdf

## ABOUT THE AUTHOR JON BARNES

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

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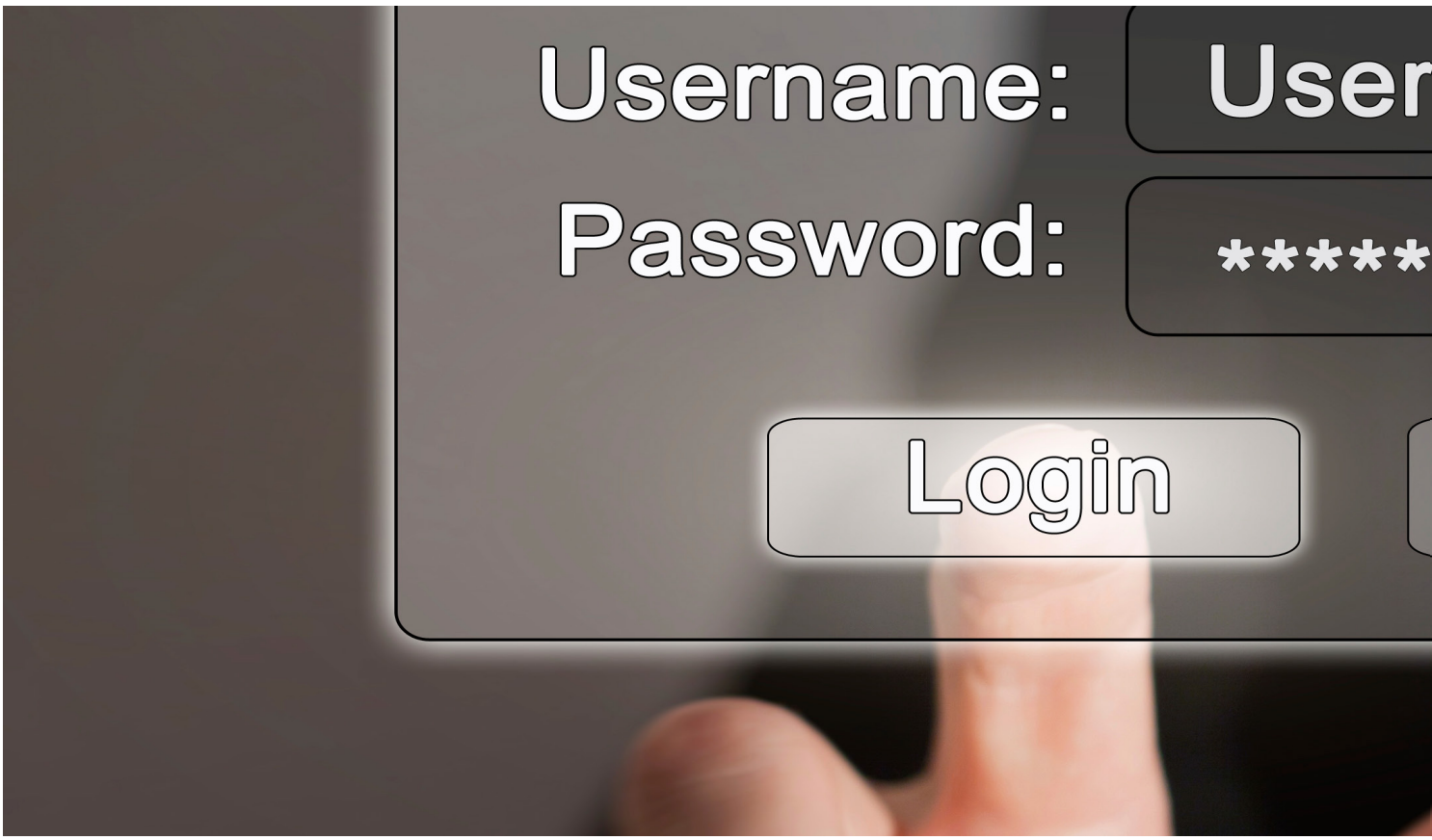


# DEMANDING ACCESS TO SOCIAL MEDIA AND PERSONAL INFORMATION - IS IT LEGAL?

AUTHOR: **Patrick Gorman** EMAIL: **pgorman@jshfirm.com** BIO: **jshfirm.com/patrickgorman**

Employers, both public and private, are using social media websites such as Facebook, Twitter, Instagram, and LinkedIn, to learn about prospective or current employees. Some employers have even gone so far as to request that the prospective employee provide them with usernames and passwords. Employers argue that this information is needed in order to perform a complete background check and even prevent the employer from being exposed to legal liability. On the other side, prospective and current employees are faced with the dilemma of either providing the information, or potentially losing the job. This common scenario is more complex because more than half of all job seekers utilize social media websites to help them find work. As a result, starting in 2012, lawmakers from several dozen states have enacted, or attempted to enact, legislation that prevents employers from requesting personal information or passwords to social media accounts. In 2014, legislation was introduced in at least 28 states and was enacted in seven states: Louisiana, Maine, New Hampshire, Wisconsin, Tennessee, Rhode Island, and Oklahoma. In total, there are at least twenty states that have now enacted laws restricting employers' access to social media or electronic mail, with more states certain to follow.

**Information Restricted by Legislation**

Legislation enacted on this topic varies from jurisdiction to jurisdiction. Broadly speaking, the legislation prohibits employers from requesting or requiring individuals to disclose information that allows access to, or observation of, personal online accounts. This suggests that employers should refrain from "friending" a prospective or current employee in order to learn information that is not otherwise publicly available. States such as Washington have banned employers from demanding that employees befriend them on social media. Certain states prohibit an employer from requiring an employee to change his or her privacy settings to allow the employer access to the employee's private social media accounts. Legislation also prohibits employers from taking retaliatory action against an employee for failure to disclose information to allow access to personal online accounts. The remedies for violation of these laws include civil penalties. Some states, such as Oklahoma, have provided for the recovery of attorneys' fees and costs for a violation of the statute.

**Information Not Restricted by Legislation**

Generally, these state laws do not restrict an employer's ability


"IN TOTAL, THERE ARE AT LEAST TWENTY STATES THAT HAVE NOW ENACTED LAWS RESTRICTING EMPLOYERS' ACCESS TO SOCIAL MEDIA OR ELECTRONIC MAIL, WITH MORE STATES CERTAIN TO FOLLOW."

to review public information, such as information that may be available to the general public on an applicant's social media pages. This would include any information that is not protected as confidential. One primary area of debate is an employer's access to private social media information during an internal investigation regarding claims of harassment or intimidation. Some states, such as Illinois and Nevada, provide no express exception for workplace investigations. California's social media law, on the other hand, provides that an employer may request that an employee provide social media logins and passwords when there is a potential violation of law. Arkansas's laws permit an employer to ask an employee to provide login credentials in order to investigate possible work misconduct.

**Other Legislation Related to the Access of Social Media and E-Mail Accounts**

Lawmakers have broadened the scope of these social media laws to include more than just employers. Several states have adopted, or attempted to adopt, legislation regarding access by educational institutions to social media. For example, Illinois passed a law that makes it unlawful for a school to request or require a student or prospective student to provide a password or other related account information in order to gain access to the student's or prospective student's account or profile on a social networking website. Louisiana passed a law that applies to both employers and educational institutions, which prohibits requesting individuals to disclose information that allows access to or observation of personal online accounts.

In 2011, the Arizona Senate introduced SB 1411, which prohibited employers from requesting or requiring a user name, password or other means of accessing an online personal account from employees or applicants. SB 1411 also prohibited an employer from not hiring an applicant for the applicant's refusal to disclose social media information. The bill was not passed out of the Rules Committee.

The California Legislature introduced Assembly Bill 2070, which would have prohibited a court from requiring or requesting a juror or prospective juror to disclose a username or password for the purposes of accessing personal social media or requiting that the juror or potential juror access social media in the presence of the judge, counsel, or any officer of the court. The legislation was not heard in committee. To date, there have been no other states to introduce legislation regarding requests for prospective jurors' confidential login information.

**Conclusion**

Social media accounts undoubtedly provide a wealth of information about a person, both public and private. State lawmakers are attempting to combat access to this information by employers and others, in an effort to keep this information private and confidential. As an employer, manager, or director of human resources, it is important to know your state's laws on social media access so you can conduct your practices accordingly. Finally, these laws are likely to be litigated against employers and educational institutions, as well as constitutionally challenged, in the years to come. Companies should keep up-to-date on these laws and litigation to ensure that their workplace investigation processes and policies affecting access to social media accounts are legal.

## ABOUT THE AUTHOR PATRICK GORMAN

Mr. Gorman concentrates his practice on bad faith and professional liability. He served as the Vice-Chair for the Defense Research Institute's Social Media Subcommittee and is a member of the Arizona Association of Defense Counsel.
Contact Patrick at 602.263.1761 or pgorman@jshfirm.com.

# JSH FIRM ANNOUNCEMENTS

## JSH Included in the 2015 "Best Law Firms" Rankings by U.S. News Media Group and *Best Lawyers®*

**We are proud to be included in the 2015 "Best Law Firms" Rankings by U.S. News Media Group and *Best Lawyers.®* We were ranked as a metropolitan tier one, tier two and tier three law firm for a variety of practice areas. A breakdown of our rankings can be seen below:**

**METROPOLITAN TIER 1 – Phoenix**
- **Construction Law**
- **Education Law**
- **Insurance Law**
- **Medical Malpractice Law - Defendants**
- **Personal Injury Litigation - Defendants**
- **Workers' Compensation Law – Employers**

**METROPOLITAN TIER 2 – Phoenix**
- **Appellate Practice**
- **Litigation - Labor & Employment**
- **Product Liability Litigation – Defendants**

**METROPOLITAN TIER 3 – Phoenix**
- **Criminal Defense: Non-White-Collar**
- **Employment Law – Management**

**To be eligible for a ranking, a firm must have a lawyer listed in *The Best Lawyers in America®*, which recognizes the top 4 percent of practicing attorneys in the US. The rankings are based upon a combination of ballots from both clients and peers, which makes the "Best Law Firms" list the most thorough and accurate ranking system ever developed.**

## Mark Zukowski Selected to the American Board of Trial Advocates

We would like to congratulate Mark Zukowski on being the ninth lawyer at Jones, Skelton & Hochuli to be invited to join the American Board of Trial Advocates (ABOTA). ABOTA membership is by invitation, and only lawyers who are of high personal character and honorable reputation are eligible to join.

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.

Mr. Zukowski joined Jones, Skelton & Hochuli in 1983, and has been a Partner since 1988. He has served on the firm's management committee and is a past chair of the firm's construction and insurance practice groups. In addition to his successful civil litigation practice, Mr. Zukowski is a construction and commercial arbitrator and mediator for the American Arbitration Association. He is also a member of the prestigious National Academy of Distinguished Neutrals. He has extensive experience as a private arbitrator and mediator and as a settlement conference Judge Pro Tem for the Maricopa County Superior Court. He has also previously served as a Judge Pro Tem for the Arizona Court of Appeals.

## Don Myles Elevated to Advocate Member by the American Board of Trial Advocates

ABOTA also elevated Don Myles' rank from Associate to Advocate in February 2015. In order to be eligible to elevate in rank to Advocate, an attorney must have at least (8) years of active experience as a trial lawyer and have tried a minimum of (50) civil jury trials to jury verdict or hung jury.

Mr. Myles has been a Partner at JSH for nearly 30 years and has spoken at seminars all around the country regarding litigation related issues, as well as trial practices and procedures. He concentrates his practice on insurance coverage, bad faith, professional liability and has tried in excess of 50 cases to verdict.

# WHAT'S HAPPENING AROUND THE FIRM ?

Stay up to date at jshfirm.com

## JSH Has Grown to a 78-Lawyer Firm with the Addition of Eight New Lawyers

In 1983, JSH was founded with 12 lawyers. Nearly 32 years later, we have grown to a 78-lawyer firm with the addition of Amelia Esber, Blake DeLong, John Gregory, Joel Habberstad, Sean Moore, Gianni Pattas, Dillon Steadman and Rachel Werner.

**Blake DeLong** rejoins JSH as a Partner and focuses his practice on premises liability litigation, automobile liability litigation, and general insurance litigation. Mr. DeLong graduated from Louisiana State University School of Law in 2002. Learn more about Blake by clicking here: www.jshfirm.com/ABlakeDeLong.

**Amelia Esber** focuses her practice on general civil litigation, transportation defense, and medical malpractice and nursing home defense. Ms. Esber obtained her law degree from the University of Arizona James E. Rogers College of Law. Learn more about Amelia by clicking here: www.jshfirm.com/AmeliaAEsber.

**John Gregory** focuses his practice on construction and general civil defense litigation. Mr. Gregory received his law degree from the University of Arizona James E. Rogers College of Law in 2013. Learn more about John by clicking here: www.jshfirm.com/JohnMGregory.

**Joel Habberstad** focuses his practice on transportation and general liability defense. Mr. Habberstad graduated from Arizona State University Sandra Day O'Connor College of Law. Learn more about Joel by clicking here: www.jshfirm.com/JoelWHabberstad.

**Sean Moore** focuses his practice on professional liability and insurance bad faith. Mr. Moore is a recent graduate from Vanderbilt University Law School. Learn more about Sean by clicking here: www.jshfirm.com/SeanMMoore.

**Gianni Pattas** focuses his practice on construction and general civil defense litigation. Mr. Pattas graduated from the University of the Pacific, McGeorge School of Law in 2012. Learn more about Gianni by clicking here: www.jshfirm.com/GianniPattas.

**Dillon Steadman** graduated with his law degree from the University of Arizona James E. Rogers College of Law and focuses his practice on professional liability, bad faith, and general civil liability. Learn more about Dillon by clicking here: www.jshfirm.com/DillonJSteadman.

**Rachel Werner** focuses her practice on general civil litigation and insurance defense, employment law and government liability. Ms. Werner graduated with her law degree from Washington University School of Law. Learn more about Rachel by clicking here: www.jshfirm.com/RachelCWerner.

Blake DeLong

Amelia Esber

John Gregory

Joel Habberstad

Sean Moore

Gianni Pattas

Dillon Steadman

Rachel Werner

## Mel McDonald Celebrates 30 Years at JSH

Nearly 30 years ago, Mel McDonald joined Jones, Skelton & Hochuli after serving as both a trial judge and U.S. Attorney for Arizona. Mel's journey into the legal profession began at a very young age. He was inspired to become an attorney at the age of 10, after reading a detective magazine that featured an article about a man who had just been sentenced to death. Mel believed the man to be innocent and wanted to learn more about why he was convicted. It turned out his parents knew the judge who had presided over the case. The judge met with Mel and, using the facts and evidence of the case, explained to him why the man was guilty. Ever since this experience, Mel was destined to be an attorney.

After graduating from the University of Utah College of Law in 1968, Mel decided to move to Arizona to clerk for the Honorable Charles C. Bernstein in the Maricopa County Superior Court. Mel would later go on to serve as a judge in that very same court from 1974-1981. After serving as a judge in Maricopa County Superior Court, he was appointed U.S. Attorney for the District of Arizona by President Ronald Reagan in 1981, where he remained until 1985.

In 1985, Mel joined Jones, Skelton & Hochuli, where he has focused his practice on criminal defense for the last 30 years. "You find people at the darkest point in their life. No one needs help more than people who are facing criminal charges," said Mel, when asked what drew him to criminal defense.

Outside the office, Mel and his wife enjoy traveling and have been to both the Middle East and Europe. They also love to spend time with their kids and grandkids.

## Lori Voepel Celebrates 10 Years at JSH

Growing up, Lori had a passion for writing and knew she wanted to make a difference in people's lives. It wasn't until she went to college that she found a way to do both. One day after her public speaking class, her professor asked if she had considered law as a possible career path. Knowing the law had always interested her, Lori decided to pursue a career in the legal profession.

After graduating from Northern Arizona University in 1990, Lori attended the University of Arizona College of Law. Competing in Moot Court at the UofA is where Lori discovered her passion for appeals. After graduating in 1993, Lori clerked for Justice Zlaket on the Arizona Supreme Court and for Judge Patterson on the Arizona Court of Appeals. In 1996, Lori joined a Phoenix-based firm where she focused her practice on criminal appeals and trials for 9 years.

In 2005, Lori joined Jones, Skelton & Hochuli, where she now co-chairs the Appellate Department. During the course of Lori's career, she has handled federal and state appeals in over 250 cases in virtually every area of the law.

One case stands out as Lori's greatest appellate achievement: the capital habeas appeal of Debra Milke, who was convicted and sentenced to death in 1990 based solely on the testimony of the arresting officer, who, it was later discovered, had a history of lying under Oath and serious constitutional violations in other cases.

Lori had represented Debra for 12 years on appeal, when the Ninth Circuit Court of Appeals granted habeas relief in 2013. After Debra's original conviction was set aside, she was released after spending nearly 24 years in prison (23 on death row). During retrial proceedings, Lori and her co-counsel sought dismissal on Double Jeopardy grounds, and recently won on that issue in the Arizona Court of Appeals, resulting in the dismissal of Debra's case.

Outside the office, Lori enjoys spending time with her husband, Terry, and 5-year-old daughter, Ciara, as well as hiking, and traveling.

## JSH Provides a Scholarship to a Diversity Legal Writing Program Participant

The Diversity Legal Writing Program provides second-year law students at Arizona State University Sandra Day O'Connor College of Law with practical clerking experience in private law firms within Maricopa County. As a participant in the program, JSH offered one student the opportunity to clerk for our firm for the entire Spring semester. In addition to providing valuable clerking experience, the firm also provided the student with a $5,000 scholarship.

Each of the participating students attended a weekly training session designed to enhance his or her writing skills, teach them about the law firm environment, and discuss practical tips for the practice of law. JSH hosted and presented at one such training session. Students clerked 12 hours each week and completed projects assigned by a mentor attorney. Participating students received feedback regarding each of their projects in an effort to improve their legal writing skills.

## Jim Osborne Appointed to Board of Directors for the Tumbleweed Center for Youth Development

The Tumbleweed Center for Youth Development, an emergency shelter and service provider for runaway and homeless youth, appointed Jim Osborne, General Counsel and Partner at Jones, Skelton & Hochuli, to its Board of Directors.

With more than a dozen direct service programs, the Tumbleweed Center for Youth Development currently provides care for over 3,000 homeless, conduct-disordered, abused, abandoned, neglected, and at-risk youth between the ages of 11-22. These safe spaces allow access to caring relationships, resources, and programs that offer opportunities for young people to develop their individual potential.

As the firm's general counsel since 2006, one of Mr. Osborne's areas of emphasis is professional responsibility, including legal ethics, lawyer discipline and legal malpractice defense.

## Don Myles Inducted into the International Academy of Trial Lawyers

Don Myles was recently inducted into the International Academy of Trial Lawyers (IATL) at their Annual Meeting held in March.

The International Academy of Trial Lawyers limits membership to 500 Fellows from the United States. The Academy seeks out, identifies, acknowledges and honors those who have achieved a career of excellence through demonstrated skill and ability in jury trials, trials before the court and appellate practice. Members are engaged in civil practice on both the plaintiff's and the defendant's side of the courtroom, and the trial of criminal cases. The Academy invites only lawyers who have attained the highest level of advocacy. A comprehensive screening process identifies the most distinguished members of the trial bar by means of both peer and judicial review. Mr. Myles has been evaluated by his colleagues and the judges in his jurisdiction and has been highly recommended by them as possessing these qualifications and characteristics.

## Ed Hochuli and Georgia Staton Recognized as Top Lawyers in Arizona

After gathering more than 1,000 nominations, Arizona Business Magazine has listed Ed Hochuli and Georgia Staton as two of the Top 100 Lawyers in Arizona. Selections were based on an attorney's professional success, impact on the firm, impact on the community, and impact on the legal profession.

## JSH RESOURCE ALERT!

## USLAW Releases Updated Construction Compendium of Law

The construction compendium is a multi-state resource that addresses legal questions that often arise in construction law. In addition to the construction compendium of law, USLAW publishes Nullum Tempus, Offers of Judgment, Transportation, Retail, Spoliation of Evidence, Workers' Compensation, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal.

To view or download the updated compendium, click here:
http://www.uslaw.org/files/Compendiums2015/Construction/2015_USLAW_Construction_Compendium_of_Law.pdf

USLAW NETWORK, INC®

# 24 JSH Lawyers Selected as 2015 Arizona Super Lawyers and Arizona Rising Stars

We are proud to announce that twenty-four of our attorneys were selected to appear on the 2015 Arizona Super Lawyers and Arizona Rising Stars list. 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 an Arizona Super Lawyer and no more than 2.5 percent of lawyers in the state are selected as Arizona Rising Stars.

**Southwest Rising Stars**

1. Brandi C. Blair
2. Heather E. Bushor **(New Southwest Rising Star)**
3. Ashley Villaverde Halvorson
4. Whitney M. Harvey
5. Jeremy C. Johnson
6. Jason P. Kasting
7. Daniel O. King
8. R. Christopher Pierce
9. Erik J. Stone
10. David L. Stout, Jr.

Super Lawyers
RISING STARS 2015

**Southwest Super Lawyers**

1. Donn C. Alexander
2. Stephen A. Bullington
3. Eileen Dennis GilBride
4. Edward G. Hochuli
5. William R. Jones, Jr.
6. Michael A. Ludwig
7. Donald L. Myles Jr.
8. Jay P. Rosenthal
9. J. Russell Skelton
10. Josh M. Snell **(New Southwest Super Lawyer)**
11. Phillip H. Stanfield **(New Southwest Super Lawyer)**
12. Georgia A. Staton
13. Lori L. Voepel **(New Southwest Super Lawyer)**
14. Mark D. Zukowski

Super Lawyers
2015


# Elizabeth Gilbert, Ashley Villaverde Halvorson and Whitney Harvey Graduated from the AADC Ladder Down Program

Elizabeth Gilbert, Ashley Villaverde Halvorson, and Whitney Harvey were members of the second graduating class of the Arizona Association of Defense Counsel's Ladder Down Program.

The AADC Ladder Down Program is a one-year course that was created to provide women lawyers proper training on how to build a book of business and how to become better leaders. The program began in 2013 with a class of 24 women and has since expanded to a class of 30 women in 2014. The program was designed to help women obtain the proper training to achieve positions as equity partners, shareholders and top rainmakers at firms across the nation. Chelsey Golightly and Clarice Spicker are currently enrolled in the 2015 program. Lori Voepel graduated from the founding class in 2013.

# JSH Ranked 3rd Best Personal Injury Law Firm in Arizona

Jones, Skelton & Hochuli has been listed as the 3rd best personal injury law firm in Arizona by AZ Big Media. The rankings are based strictly on the opinions of voters who base their votes on the quality of the product, service or who they would recommend doing business with.

# Jim Osborne Co-Authors Chapter in "The Law of Probate Bonds"

Jim Osborne, Partner and General Counsel at Jones, Skelton & Hochuli, recently co-authored a chapter in the second edition of *The Law of Probate Bonds.* In his chapter, "Types of Probate Bonds and Roles of Fiduciaries", Mr. Osborne discusses bonds that protect the assets of those under disability, decedents' estates, and trusts. Pick up a copy at the American Bar Association website here: http://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=171416616.

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

**Stay up to date at jshfirm.com**

## Ed Hochuli and Phil Stanfield to Co-Present at the American Trucking Association's 2015 Forum for Motor Carrier General Counsel

The American Trucking Association has invited Ed Hochuli and Phil Stanfield to co-present at the 2015 Forum for Motor Carrier General Counsel on July 19-22, 2015 in La Jolla, California. Mr. Hochuli and Mr. Stanfield will be co-presenting "Litigation Strategy and Public Relations Impacts: Which Takes Precedence?" This year's ATA Litigation Center Forum for Motor Carrier General Counsel again features a Symposium on Highway Accident Litigation. The program will include lectures, demonstrations and interactive sessions.

Register for the American Trucking Association's 2015 Conference here: http://www.trucking.org/event.aspx?uid=b79cfe80-c50b-4934-a7bd-1fd6fe2bb55e

## Bill Schrank to Present at the Arizona State Bar's 2015 CLE by the Sea

Bill Schrank has been invited to present "Enhancing Your Skills: Resolving Cases Outside the Courtroom" as part of the Arizona State Bar's 2015 CLE by the Sea on July 21, 2015.

In reality civil cases are rarely making it to trial. This reality creates the need for lawyers to have the tools and critical skills to successfully resolve their client's dispute in settlement negotiations, settlement conference, mediation or arbitration. You will gain practical tools and techniques in each of these areas. Learn the keys to success and how to reach an agreement both sides can live with. Develop your understanding of these tools and how to continue to learn from your own experiences. Enhance your ability to serve your clients during this interactive presentation.

Register for the 2015 CLE by the Sea event here: www.azbar.org/cleandmcle/cle/clebythesea/trialpracticetrack

## John DiCaro, Joe Popolizio, Narinda Greene and Gayle Hassman to Present at 2015 NALA Convention

John DiCaro, Joe Popolizio, Narinda Greene and Gayle Hassman are scheduled to present at the 2015 National Association of Legal Assistants Convention and Exhibition on July 22-24, 2015 in Tulsa, OK. Mr. DiCaro, Mr. Popolizio and Ms. Hassman will be presenting "Litigation with Emphasis on Governmental Liability Institute" and Ms. Greene will be co-presenting "To Tweet or Not to Tweet...".

Register for the 2015 NALA Convention here: http://www.nala.org/FORMS/2015_nala_conv_regi.htm

## JSH RESOURCE ALERT!

## USLAW Launches LawMobile

USLAW announces the launch of LawMobile, a fully customizable education program that delivers training, information and instruction on some of today's hottest legal topics, jurisdictional differences and legal decisions.

**How LawMobile Works**

- USLAW comes to you. We bring a select team of USLAW member attorneys to talk about the issues you tell us you want and need to learn about.
- We will focus on specific markets where you do business and utilize a team of attorneys to share relevant jurisdictional knowledge important to your business' success.
- Whether it be a one-hour lunch and learn, half-day intensive program or simply an informal meeting discussing a specific legal matter, USLAW will structure the opportunity to meet your requirements – all at no cost to your company.

For more information about LawMobile or to learn how your company can participate, contact Roger M. Yaffe, CEO of USLAW, at 800-231-9110.

# HOW TO MANAGE A CRIME FREE RENTAL PROPERTY IN ARIZONA

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A landlord who discovers that his tenant is engaging in criminal activity often cannot evict the tenant for that reason alone, even if the criminal activity is taking place on the landlord's property.

Of course, the landlord can call the police, always the first place to turn when crime is suspected. A prison sentence is more effective than an eviction for getting someone off your property. But many crimes will not be punished with incarceration. Moreover, criminal convictions take time and demand proof beyond reasonable doubt, a standard that may seem a little demanding if all you are trying to do is keep your own property crime-free.

If it seems strange that a landlord could know that crimes are being committed on his own property and still be powerless to do anything about it, remember that in entering into a lease, the landlord, or lessor, gives the tenant, or lessee, something called the "right of possession." For residential leases, that right is conferred by statute. Section 33-1323 of the Arizona Revised Statutes, part of the Arizona Residential Landlord and Tenant Act, states that at the commencement of the lease, "the landlord shall deliver possession of the premises to the tenant." Right of possession means that once the lease is signed, for most intents and purposes, the leased real estate belongs to the tenant.

The Residential Landlord and Tenant Act includes additional expressions of the tenant's right of possession. For example, A.R.S. § 33-1343, entitled, "Access," provides that: "A tenant shall not unreasonably withhold consent to the landlord to enter

**"SOME LANDLORDS THINK THAT ONCE THEY HAVE A VALID REASON TO AVOID A LEASE, THEY ARE ALLOWED TO GO ONTO THE PROPERTY AND CLEAR THE TENANT OUT THEMSELVES. BUT EVEN APART FROM THE RISK OF VIOLENCE, SELF-HELP CAN GET YOU INTO A LOT OF TROUBLE."**

into the dwelling unit in order to inspect the premises, make agreed or necessary repairs." Another portion of the same statute provides: "The landlord may enter the dwelling unit without consent of the tenant in case of emergency." Clearly, the "Access" statute is written on the assumption that, in general, the landlord cannot even enter the property without the tenant's permission. Even ordinary maintenance requires consent from the tenant.

If a landlord enters the leased property without consent in a non-emergency situation, or makes a lawful entry but does it in an unreasonable manner, or even makes repeated demands for permission to enter in a way that unreasonably harasses the tenant, the tenant can sue the landlord to get an injunction and compensation for any actual damages, starting with an amount equal to one month's rent. A.R.S. § 33-1376.

Of course, the possession conveyed in a lease is not permanent. The landlord has a future interest in possession, which will be realized at the end of the lease, when the right of possession returns to the lessor. Therefore, even during the lease a landlord retains certain present rights in the property—just not the right of possession. For example, the landlord has a right that the tenant not destroy the property. Obviously, the right to possess the property in the future would not be worth much if the person presently in possession had a right to destroy it.

Fortunately, there is more to the story. First, there are ten express exceptions to the right of tenant possession provided by Arizona statute. A landlord may immediately file an eviction action against a tenant who engages in any of the following on the leased property: homicide, assault, threatening or intimidating, gang activity, discharging a weapon, prostitution, drug possession, drug sales, drug manufacturing, and criminal nuisance. A.R.S. § 33-1368. Outside these listed ten crimes, the landlord's right to evict is not clear.

There is a simple solution -- to make commission of crime a breach of the lease. If committing a crime breaks the lease, then doing so would also end the tenant's right of possession to the leased property. Any landlord who wants to keep property crime-free should therefore write this condition into the lease agreement. It should be written in the same way as a "no pets" requirement, but "crime free" provisions can be a little trickier.

An easier approach is to use a "crime free" lease addendum. Many Valley police departments post a "crime free" lease addendum on their websites. One offered by the Mesa Police Department is here:
http://www.mesaaz.gov/police/tristar/Addendum/CrimeFreeLeaseAddendum.pdf.
And one from the Chandler Police Department is here:
http://chandlerpd.com/wp-content/uploads/2010/12/crimefree_leaseaddendum.pdf.
A property does not have to be in Mesa or Chandler to use these addendums in a lease. The wording of most "crime free" lease addendums is virtually identical, and any addendum can be used anywhere in Arizona.

But remember that even with a crime free lease, a landlord cannot engage in "self-help." Some landlords think that once they have a valid reason to avoid a lease, they are allowed to go onto the property and clear the tenant out themselves. But even apart from the risk of violence, self-help can get you into a lot of trouble. As a general rule, with few exceptions, "A landlord may not recover or take possession of the dwelling unit by action or otherwise, including forcible removal of the tenant or his possessions, willful diminution of services to the tenant by interrupting or causing the interruption of electric, gas, water or other essential service to the tenant." A.R.S. § 33-1374. This rule has been interpreted by the courts to mean that, even when the lease has expired or is not valid, "[w]here defendants had not been evicted by legal process subsequent to expiration of lease, the residence was still their home and neither the landlord nor the police had any right to enter without consent." *State v. Main,* 159 Ariz. 96, 764 P.2d 1155 (App. 1988).

Even when the tenant no longer has a valid lease, the only way to eject the tenant is for the landlord to go to court and sue for possession. In the case of material non-compliance with a lease, the landlord first must give the tenant ten days' written notice and an opportunity to come into compliance with the lease. On the eleventh day, the landlord may file an eviction action in the Justice Court. If the court grants a judgment of eviction, the landlord then must petition the court for a writ of restitution, which must be presented to the county sheriff's office for enforcement by deputies. Self-help by the landlord is never allowed. Eviction cases are governed by their own rules, the Arizona Rules of Procedure for Eviction Actions. Resources for landlords, and tenants, are available on the Justice Court website, here: http://justicecourts.maricopa.gov/CaseTypes/eviction.aspx.

The bottom line is that there is no reason a landlord should have to put up with criminal activity on his leased property. The best way to prevent such activity is to make all new tenants sign a lease that includes a "crime-free" lease addendum. Then, if necessary, the landlord should enforce the addendum by suing for possession of the property in the Justice Court.



## ABOUT THE AUTHOR JOHN LIERMAN

Mr. Lierman practices in the areas of premises liability, construction defect, and general liability. Prior to joining JSH, Mr. Lierman was a certified limited practice student in a trial group at the Office of the Maricopa County Attorney and a law clerk at the Office of the Arizona Attorney General, in the Natural Resources section. Contact John at 602.263.1750 or jlierman@jshfirm.com.

# CASES OF NOTE
# TRIAL COURT DECISIONS

## *Arcade v. AGCS Marine Insurance*

March 18, 2015
United States District Court, District of Arizona
Don Myles, Chelsey Golightly and Sean Moore

Don Myles, Chelsey Golightly and Sean Moore recently secured summary judgment in Federal Court for one of the Firm's clients, AGCS Marine Insurance, a division of Allianz USA ("AGCS"). Specifically, the United States District Court for the District of Arizona dismissed the Plaintiff's claims for breach of contract, breach of covenant of good faith and fair dealing, and punitive damages.

This case arose out of the alleged theft of amusement gaming machines from various small businesses in the Dallas/Fort Worth area. Plaintiff, owner of the amusement machines and an Arizona resident, used Craigslist to hire several persons to run the daily operations of its business in Texas. After some time, Plaintiff noticed a substantial decrease in its profits and sent a representative to Texas to investigate these changes.

After visiting the small businesses and a nearby storage unit, Plaintiff's representative discovered that all but a few of the machines were missing. The various small business owners told Plaintiff's representative that the persons hired from Craigslist removed the machines. The Craigslist hires were also the only persons with keys to the storage unit. There were no signs of forced entry.

Two months later, Plaintiff made a claim under its AGCS insurance policy claiming the machines were stolen. The policy, however, contained an exclusion for property lost or damaged as the result of the dishonest or criminal acts by anyone to whom the property had been entrusted. While AGCS was investigating the claim, and before a coverage determination was made, Plaintiff filed this lawsuit.

After minimal discovery, Plaintiff filed a motion for summary judgment claiming the above-referenced exclusion did not apply and AGCS' investigation was inadequate. Plaintiff argued that the persons hired from Craigslist were not entrusted with the equipment, and there was no admissible evidence that they stole the machines. In response, AGCS filed its own motion for summary judgment and argued that because the exclusion clearly applied, Plaintiff was not entitled to coverage under the policy. AGCS also provided evidence that it contacted Plaintiff within 24-hours of the initial claim and that it performed a reasonable and adequate investigation regarding the alleged theft.

Without hearing oral argument, the Court agreed with AGCS and granted its motion for summary judgment. Plaintiff's motion was denied, and the case was subsequently dismissed with prejudice.

## *Austin v. Peoria Unified School District*

March 5, 2015
Maricopa County Superior Court and
Arizona Court of Appeals
Michael Hensley, Jon Barnes and Erik Stone

Michael Hensley, along with Erik Stone and Jonathan Barnes, recently secured a Court of Appeals victory for one of the Firm's school district clients, Peoria Unified School District ("PUSD"). Specifically, the Arizona Court of Appeals upheld the Trial Court's dismissal of the case based on a failure to comply with the Arizona Notice of Claim Statute in *Austin, et al. v. the Peoria Unified School District.*

This case arose out of an accident between a PUSD school bus and two other vehicles in April of 2012. The driver and passenger in one of the vehicles alleged severe injuries as a result of the accident, which, as they claimed, was caused by the negligence of the school bus driver. Before a lawsuit can be filed against a public entity in Arizona, such as a school district, a notice of claim ("NOC") must be filed with the Chief Executive Officer of the entity. In cases where the CEO is a board, such as a county's board of supervisors or a school district's governing board, the NOC must be filed with the entire governing board. In October of 2012, the Claimants' attorney mailed notices of claim (one for each claimant) to the PUSD Administration Center, one PUSD Board Member, and PUSD's attorney, Michael Hensley.

The claims were denied and a lawsuit was subsequently filed in April of 2013. PUSD's attorneys at Jones, Skelton and Hochuli moved to dismiss the case arguing the Notice of Claim Statute had been violated, and that a lawsuit could not be initiated, because the Notice of Claim was not filed with all members of the PUSD Governing Board. The Trial Court agreed. Plaintiffs appealed, but the Arizona Court of Appeals affirmed the Trial Court's decision in favor of the Firm's client, holding that the NOC must be filed with all members of the PUSD Governing Board. The case was dismissed and PUSD was awarded its costs.

This case is an example of the coordination between the Firm's trial attorneys and appellate attorneys to secure a win for the Firm's client.

## *Chelius v. Small*

March 2, 2015
United States District Court, District of Arizona
Don Myles, Michele Molinario and Amelia Esber

Don Myles, Michele Molinario & Amelia Esber prevailed by summary judgment in a 42 U.S.C. § 1983 civil rights action against the City of Yuma. The U.S. District Court for the District of Arizona found that there was no liability on the part of the City of Yuma because the arresting officer did indeed have probable cause to arrest the plaintiff, Rodney Chelius. The net effect of this victory was to save the City of Yuma over $1.5 Million in potential damages and reiterate the Yuma Police Department's authority under the Constitution to arrest suspects when there is probable cause that a crime has been committed. A summary of the case is as follows.

The case stemmed from the September 2012 arrest of the plaintiff Rodney Chelius by Yuma Police Department officers. Although Chelius' arrest did indeed lead to a charge, the criminal case was eventually dismissed due to lack of cooperation by the alleged victim. Chelius, in turn, sued the City of Yuma and the arresting officer alleging false arrest and imprisonment, and malicious prosecution.

The central issue in the Motion for Summary Judgment concerned whether the officer's arrest was predicated on sufficient probable cause. In Arizona, probable cause exists to make an arrest when the arresting officer has reasonably trustworthy information that would lead a reasonable person to believe that a criminal offense had been committed. Judge

Douglas L. Rayes noted, "Arizona law permits an officer to arrest a person if the officer has probable cause to believe that domestic violence has been committed by that person, regardless of whether the offense is a felony or misdemeanor and of whether the offense was committed in the officer's presence." In summary, Judge Rayes agreed with the position of the defense, that sufficient probable cause existed that Chelius was guilty of some crime.

## *Stafford v. Burns*

January 23, 2015
Maricopa County Superior Court
Cristy Chait

Cristy Chait recently obtained a defense verdict in favor of her client in a wrongful death medical malpractice action. Plaintiffs, Kristine and Dalton Stafford, alleged the emergency room physician fell below the standard of care when she discharged their son Jesse Stafford after observation in the emergency department at St. Joseph's Hospital for approximately 11 hours following a methadone drug overdose. Jesse Stafford was discharged and sent home with Kristine Stafford. He was found deceased approximately 24 hours following discharge.

The ER physician denied liability, indicating Jesse Stafford was ambulatory, had normal vital signs, participated in a mental health examination, and was answering questions and cooperating with hospital staff appropriately. Defendants argued that Mr. Stafford's death was not caused by the physician's actions or care in the emergency department. Plaintiffs asked the jury for $1.2 million. The jury deliberated for approximately 2 hours and returned a Defense Verdict in favor of the physician and her group Empower Emergency Physicians.

## *Grovers v. Allied Insurance and AMCO Insurance*

January 21, 2015
Maricopa County Superior Court
Jeff Collins and Michael Hensley

Michael Hensley and Jeff Collins prevailed on summary judgment in a declaratory judgment/coverage litigation involving: (1) a choice of law issue (Minnesota or Arizona), and (2) an issue regarding "stacking" of Uninsured or Underinsured motorist coverage (UM/UIM) under Minnesota law (the law the court found applicable to the case). The net effect of this victory was to save the carrier over one million dollars in additional UM/UIM benefits.

In this case, Plaintiffs traveled to Arizona from Minnesota and were involved in a car/motorcycle collision. Mr. Plaintiff was driving the motorcycle with Mrs. Plaintiff as his passenger. As they went through an intersection, a car turned in front of them, causing the accident. Both Plaintiffs suffered severe injuries with the combined medical expenses exceeding one million dollars. The at fault driver had minimum limits insurance.

Plaintiffs' motorcycle insurer paid $100,000 in UIM coverage for each Plaintiff. Plaintiffs sought to "stack" additional UM/UIM coverage from policies they had on other cars and motorhomes onto what they had already received from the motorcycle insurer. The JSH client insurance companies contended that, under Minnesota law, they did not owe UM/UIM coverage on top of what was already covered. Plaintiffs then sued the carriers who insured their motorhome and automobiles, seeking $250,000 for Mr. and Mrs. Plaintiff, under each of the two polices, for a total of $1 million. They asked the court to declare that Arizona law applied and that Arizona law allowed them to stack the multiple UM/UIM coverages under policies insuring a variety of vehicles.

One of the major issues to be decided by the court was the choice of law. Plaintiffs argued that staying in their motorhome for multiple months after their arrival made them Arizona residents, so Arizona law should apply. The JSH lawyers argued the Plaintiffs were not residents of Arizona and that the choice of law analysis dictated that Minnesota law should apply in the "stacking" analysis. The court agreed with JSH's client's position based upon the relevant facts in the controlling Arizona case of *Beckler v. State Farm.*

Additionally, the JSH lawyers argued that applying Minnesota law, which limited stacking of UM/UIM coverage for multiple vehicles, meant their clients did not owe the $1 million in additional UM/UIM coverage. The court denied Plaintiffs' Motion for Summary Judgment and granted JSH's client's Cross-Motion for Summary Judgment, finding the Plaintiffs were not entitled to "stack" the UM/UIM coverage from their other vehicles on top of the UIM coverage they already recovered under the motorcycle policy. This victory saved JSH's clients one million dollars in additional UM/UIM payments.

## *Verduzco v. American Valet*

December 9, 2014
Maricopa County Superior Court
Michael Ludwig, and Jennifer Anderson

Michael Ludwig and Jennifer Anderson recently obtained the complete dismissal of their clients from a catastrophic injury and wrongful death case. The six plaintiffs— two adults and four children—were involved in a two-car accident that killed one passenger, caused traumatic brain injury to another, and significantly injured the remaining passengers. The plaintiffs' vehicle was struck by a car driven by a man who was allegedly under the influence of drugs and who, hours earlier, had stolen the car from a valet service by claiming to be the owner.

The plaintiffs sued the valet company, the hotel at which it operated, and the driver of the stolen car. Ludwig and Anderson filed a motion to dismiss all claims against the hotel and valet company, arguing that neither owed a duty of care to the plaintiffs because no special relationship existed between them. The plaintiffs responded by claiming that public policy supported imposing a duty of care on everyone to avoid creating situations that pose an unreasonable risk of harm to others. The trial court disagreed and granted the motion to dismiss on behalf of JSH's clients.

## *Franklin v. Clemett*

October 23, 2015
Maricopa County Superior Court
Bill Holm, Bill Schrank and Erik Stone

Bill Holm, Bill Schrank and Erik Stone obtained a unanimous defense verdict in favor of their client in a highly contested 3-week civil assault trial involving an altercation at the Phoenix Coyotes vs. Calgary Flames hockey game on Valentine's Day, 2009.

The Defendants attended the game with their wives or significant other, where they cheered for the Calgary Flames. After the Plaintiff noticed the Defendants were cheering for the visiting team, he began harassing the Defendants and their partners. Plaintiff's harassment continued throughout the game and became increasingly more obscene and vulgar. In particular, Plaintiff started directing his obscene gestures at Defendant Clemett's wife who had ignored him. In response, Defendant Clemett made a "cut-it-out" hand gesture toward the Plaintiff. According to the Plaintiff, the hand gesture infuriated him, so he decided to confront the Defendants who were seated 25 feet to the Plaintiff's right and two rows down. As the Plaintiff approached the Defendants, he invited them to a fight and threatened to kill them. Plaintiff then spit on

Defendant Clemett's wife who was seated two rows away. Fearing for their safety and the safety of others (there were several women and children nearby), the Defendants struck the Plaintiff three times as he continued to threaten them. The Defendants argued they acted reasonably under the circumstances and blamed the Plaintiff for starting the altercation. Defendants also claimed the Arena was negligent for failing to enforce the NHL fan code of conduct (Plaintiff should have been ejected earlier in the game). Last, Defendants argued Plaintiff was intoxicated, assumed the risk of injury, and was a bully. Plaintiff was the aggressor, not the defendants.

Plaintiff declined treatment, but continued to harass the Defendants even after he was restrained. The next day Plaintiff sought treatment claiming he suffered a fractured skull, concussion, traumatic brain injury, permanent brain injury, migraine headaches, TMJ, 50% sensorineural hearing loss in the right ear, and several more health-related complications. Plaintiff further claimed he spent the next two years recovering from his injuries, and that the brain injury, tinnitus, and hearing loss were permanent.

Plaintiff called a brain scan imaging expert, a neurologist and a neuropsychologist to testify Plaintiff sustained a permanent brain injury and cognitive deficiencies as a result of the altercation. Plaintiff also called an ENT doctor to testify he sustained a 50% permanent hearing loss in his right ear; an oto-neurologist to testify he sustained permanent tinnitus; and a family doctor to testify he suffered from ongoing TMJ, depression, headaches, insomnia and erectile dysfunction.

Defendants called a neuropsychologist to testify Plaintiff did not sustain a permanent brain injury. No cognitive (memory) complaints were reported until 13 months after the incident. All neurological exams were normal and there was no evidence of any brain injury on CT or MRI scans. Based on neuropsychological testing and the lack of any corroborating clinical evidence of a brain injury, the neuropsychologist concluded Plaintiff was malingering. Defendants also retained a neurologist and a security expert.

Plaintiff's counsel asked the jury to award Plaintiff $3.14 million. Defendants argued Plaintiff started the fight and was therefore 100% responsible for any and all injuries. In the alternative, Defendants argued Plaintiff was at least 70% at fault, Defendants were each 10% at fault, and Jobing.com Arena was 10% at fault for not ejecting the Plaintiff earlier in the game.

Before trial, Defendants jointly offered Plaintiff $60,000 ($30,000 each) and filed Offers of Judgment. Plaintiff filed a joint Offer of Judgment in the amount of $950,000. The Jury deliberated for approximately 1 hour and 15 minutes before returning a unanimous verdict for the Defendants.

## *Bodamer v. View Builders*

October 21, 2014
Maricopa County Superior Court
Edward Hochuli and Jeremy Johnson

Plaintiff, a 58-year-old welder, alleged that he fell through an unprotected hole in the floor (where a staircase was to be installed) in a large worksite in Flagstaff, AZ. Defendant general contractor, represented by Jeremy Johnson and Ed Hochuli was

the general contractor for the project. Defendant Wallace Steel Services was contracted to erect and install the steel staircases and Defendant Arizona Bridge & Iron was hired by Defendant Wallace Steel Services to provide the labor necessary for the erection and installation of the steel staircases. Plaintiff was employed by non-party, Yavapai Mechanical, which was to install furnaces and air conditioning units, as well as running the ductwork through the walls.

Plaintiff alleged that Defendant, as the general contractor for the worksite, failed to appropriately discover and correct dangerous conditions at the worksite and failed to hire safe subcontractors. Plaintiff also alleged that Defendant Arizona Bridge & Iron's employee had removed the safety railings from the stairwell while Plaintiff was working in the area prior to the fall, and that the employee forgot to replace the railing when he completed his work.

Defendant general contractor denied liability, advancing the defense that Plaintiff was an experienced construction worker, who had worked at the jobsite for several months prior to the fall. Defendants alleged that Plaintiff could not prove that he had not simply fallen down the stairs or, in the alternative, that Plaintiff was carrying trash at the time of his fall, was inattentive, and walked right through the danger tape.

Plaintiff alleged he sustained permanent injuries to his head, right eye, and his feet. Plaintiff also alleged he has continuing bleeds in his brain, plus blood in his right eye, which interferes with his sight, as a result of a skull fracture. Additionally, Plaintiff sustained multiple fractures to his feet and toes. Plaintiff also alleged that, as a result of his injuries, he is unable to perform his occupational duties.

Plaintiff claimed severe and permanent injuries and a total economic loss exceeding $3 million and made a claim for punitive damages. Defendants argued that Plaintiff's complaints had resolved within days after his fall, and any ongoing complaints were related to his preexisting condition. Defendants called a neurosurgeon and an orthopod.

The court granted the Defendants' Motion for Judgment as a matter of law, on the issue of punitive damages. Plaintiff's spouse made claim for loss of consortium. In closing, Plaintiffs requested that the jury award $3.75 million. Defendants asked for a defense verdict. The jury was out for approximately two hours and found in favor of the Defendants.


# TOP 10 WAYS TO **COMMIT BAD FAITH**

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An article in the Bad Faith Reporter contained a list of 10 things insurance companies do to mess up their files. I've modified the list somewhat and present it to you in a Top Ten "Letterman" format with explanations. Although hopefully humorous, it is meant to be a reminder of conduct to avoid lest you be deposed on the file someday.

**10. Forms** The public loves them. Never mind that many of them have nothing to do with the claim at hand. If you have a form, ask that it be filled out, preferably twice. For the best results, send out all the forms one by one spaced 2-3 weeks apart.

**9. Disparagement** Never miss an opportunity to insult the insured or the insured's lawyer with notes in the file. Brainstorming with co-workers at lunchtime and making entries later is the best way to come up with the funniest insults.

**8. Inconsistency** Life can sometimes be boring. Why miss the opportunity at work to treat similar claims or insureds differently? Make every effort to interpret coverages differently or value similar claims differently. If possible, enter incorrect figures into a computer program that evaluates claims and never waver from what the computer tells you. Computers are always right.

**7. Alzheimer's** Why make an effort to write down important information in the claim file? Rely on your superior intellect and ability to re-create the file years later under the pressure of a deposition.

**6. Savings** Try to make the underwriting department look good by underpaying claims or making low-ball offers to improve the loss ratio of the Company. The CEO will be impressed and give you a big raise and stock options.

**5. Surprise** Don't inquire as to the experience of defense counsel. I mean, we all started somewhere. It's much more fun to find out after an adverse result that the attorney for the insured never tried this type of case before.

**4. Bias** Make it appear that the insurance company is looking for a way not to pay the claim. Later you can convince the jury that it was just a coincidence that everything you highlighted or underlined in the file was adverse to the insured's interest.

**3. Prejudgment** (see also bias) This one is so good I had to bring it up again. Investigations will go quicker and you will save time if you first come up with a theory and then do only the investigation necessary to support your theory (i.e., fire = arson).

**2. Reservation of Rights** Do it early and often. More is better. The longer you can string cite provisions of the policy, the stronger your basis for denial. *Damron* and *Morris* agreements should not be feared...so what if the insured stipulates to a $1 million judgment on a $15,000 policy?!

**1. Delay** Everyone knows that if you wear down the insured you pay less on the claim. The jury will not hold it against you in a bad faith trial. They simply see this as a game. Call the insured at lunchtime. Call them at home when you know they are at work. Whenever possible, mail letters. This gives you additional time which will help in accomplishing the objectives set forth in number 6 above.

I hope you enjoyed my attempt to put a little humor into reminding us all what obligations exist in complying with the duties of good faith and fair dealing. Although rephrased to be funny, all of these scenarios are taken from actual cases. Needless to say, such conduct can produce significant hurdles in defending a bad faith case. It can also prove to be detrimental to an adjuster's health and overall longevity.

## JSH RESOURCE ALERT!

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

**Reference Guide to AZ Law**
Our JSH Reference Guide to Arizona Law is published each year and is distributed to clients via print and/or electronic media. JSH updates the Reference 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 the 2014/15 JSH Reference Guide, please send an email to: marketing@jshfirm.com.

**JSH Reporter**
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Mr. Myles has been a Partner at JSH for nearly 30 years and has spoken at seminars all around the country regarding litigation related issues, as well as trial practices and procedures. He concentrates his practice on insurance coverage, bad faith, professional liability and has tried in excess of 50 cases to verdict. Contact Don at 602.263.1743 or dmyles@jshfirm.com.

**Surveillance Compendium of Law**
USLAW released its 2014 Surveillance Compendium of Law. "USLAW member firms regularly collaborate to update existing or to create new USLAW compendiums of law on a variety of topics, including our newest one on surveillance" said Roger M. Yaffe, CEO of USLAW. "The Surveillance Compendium is the third in a recent series of new releases made available to USLAW members, clients and other professionals who are looking for state-specific legal information."

The USLAW Surveillance Compendium is a survey of state law on various issues associated with surveillance. It examines the applicability of the work product doctrine of the attorney client privilege to video surveillance, whether such surveillance must be disclosed and, if so, the scope and timing of disclosure. This compendium will be a useful resource for those involved in the defense of personal injury claims in particular.

View Compendium:
http://www.uslaw.org/files/Compendiums2014/Surveillance/AZ_Surveillance_Compendium_USLAW_2014.pdf

# INHOUSE JSH EVENTS

Whether we're celebrating a birthday or a holiday, helping to raise money for worthy charities, or participating in community events, JSH employees always have something fun going on. The pictures below were taken at our annual Cinco De Mayo homemade salsa, queso and guacamole contest.


## 2015 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 so very proud to congratulate our 2015 Shining Stars, Gayle Magadan, Colleen Smith, Kara Narcisse and Shea Morris!

## 2015 JSH Indoor Picnic

This year we had a blast at our annual firm picnic at Main Event in Tempe.

## 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 hardworking and dedicated to making JSH a great place to work.


# THE MEDIATED ARBITRATION:

## THINK OUTSIDE THE BOX THE NEXT TIME YOU REACH AN IMPASSE DURING MEDIATION

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Cases typically settle in mediation, because the parties can control the outcome and avoid the cost of further litigation. As appealing as that can be to both sides, it also results in some dissatisfaction, because the case is not decided on the merits. Sometimes cases do not settle at mediation. The next time you reach an impasse at mediation, don't give up. The mediated arbitration may be an acceptable solution.

Recently, I mediated a significant construction defect case. While the defect at issue was apparent, the parties had differing views of what repairs, if any, were needed and the cost of those repairs. For reasons not known at the time, the building owner was highly motivated to complete repairs as soon as possible, even if it meant self-performing the repairs and later suing to recap the cost of the repairs.

At mediation, it quickly became evident a mediated settlement was not possible. While the owner had identified the defect, it had not offered a cost of repair. The contractor had not fully investigated the defect or cost of repair, not wanting to bid against itself, or set the floor for settlement to negotiations. The dreaded and usually fatal impasse.

Sensing the parties frustration of no settlement, I proposed what I called a mediated arbitration. After some initial resistance to trying something new, the parties embraced my suggestion and agreed on a way to resolve the case that would involve both principals of mediation and arbitration.

Instead of reaching an agreed amount to settle the case, the parties agreed to jointly retain a neutral expert who would be tasked with identifying a reasonable scope of repair. In this case, the parties agreed in advance to three possible repair options which the neutral would have the sole discretion to decide: no repair necessary, partial repair – but not replacement, or full blown replacement.

To address the uncertainty of the final cost of repairs determined to be necessary by the neutral expert, the parties also agreed in advance to a reasonable cost for each repair option. The parties also agreed in advance on who would perform and certify the repairs. Finally, the parties agreed to allocate the cost of the neutral expert based upon the final cost of the repairs.
The parties left the mediation with a final resolution of the case even though neither knew what the final settlement figure would be. In the context of mediation, the parties set the parameters for what amounted to being a binding arbitration award. In doing so, the parties avoided the usual cost of litigation (significant attorneys' fee, expert fees, court costs, delay and no control over the outcome of the case.)

Both parties appeared extremely happy with this unusual outcome. The building owner achieved the certainty of getting things fixed that truly needed fixing at no cost to the building owner and fixed much quicker. The contractor was happy knowing it would only pay a reasonable cost for the repairs needed, far less than what was claimed, while at the same time avoiding the inevitable attorneys' fees, expert fees and cost of arbitration.

The next time you reach an impasse in mediation, think outside of the box. My example of what I referred to as a mediated arbitration is just one option to consider. With some creativity and open mindedness on the part of the parties and their attorneys, the options are endless.

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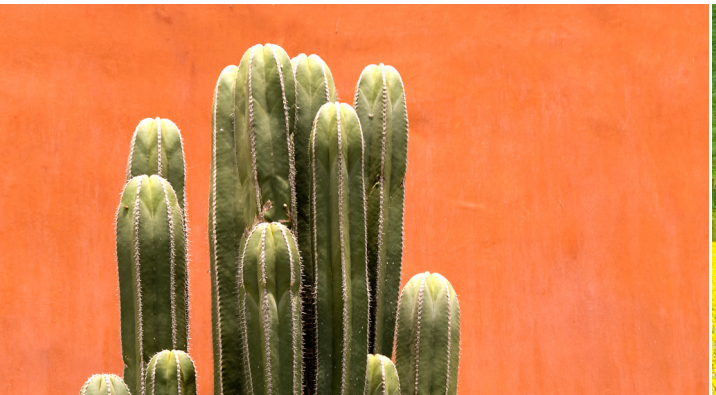



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