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

Reporter

Fall 2019 Issue

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IN OUR COMMUNITY

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MESSAGE FROM THE EDITOR

EDITOR: Lori Voepel | 602.263.7312 | lvoepel@jshfirm.com | jshfirm.com/lvoepel

Welcome to the Fall 2019 edition of The JSH Reporter. We are pleased to provide you with many new and updated resources on Arizona law, which have been published since our Fall 2018 edition.

The firm has published its 24-Chapter Reference Guide to Arizona Law, a detailed resource highlighting the most common issues associated with civil litigation in Arizona. The Guide is available in a convenient, eco-friendly format on our website where you can now view, download, search, print and share at any time. Read more on page 44 and visit jshfirm.com/ReferenceGuide to obtain your copy.

Our quick-reference resource, Arizona At-a-Glance: Defense Favorability by County, has been updated to include recent jury verdicts and trial court orders from each county. It includes 15 points on the most common questions and issues in personal injury claims and classifies Arizona counties as favorable or unfavorable to the defense. Read more on page 24 and download this resource at jshfirm.com/Arizona-at-a-Glance.

We are also excited to introduce you to the firm's exceptional Legal Nurse Consultant Team, supporting our Medical Liability & Health Care Trial Group. Our seven full-time legal nurse consultants boast over 280 cumulative years of clinical nursing and medical administration experience, and all are licensed, registered nurses in Arizona. Read more about our team and their invaluable contributions to our clients on page 30.

Finally, we are pleased to share firm news and recognition from the past year. We congratulate and thank JSH partner Mel McDonald for 50 years of exceptional legal service. Mel was honored during the Arizona State Bar's Annual Convention in June, and the firm is proud of his many contributions to the legal community. Read more on page 45.

We hope you enjoy the updated design of this issue of The JSH Reporter. Every article, case summary and court opinion is available for viewing and downloading directly from our website at jshfirm.com/reporter. Look for this icon throughout the magazine directing you to view and download these resources. The JSH Reporter is published entirely with our clients and contacts in mind. We welcome feedback on the educational content and encourage you to share ideas for future issues with me at lvoepel@jshfirm.com or with our editorial team at marketing@jshfirm.com.

Lori Voepel
Partner and Editor of *The JSH Reporter*

During Lori's 26 years of practice, she has handled over 300 state and federal appeals in virtually every area of law. She also provides appellate guidance to trial attorneys in all stages of litigation, from the pleading through post-trial stages.

MAGAZINE CONTACTS

PUBLISHED BY:
Jones, Skelton & Hochuli, PLC
40 North Central Avenue, Suite 2700 | Phoenix, Arizona 85004

Contributing Authors

Brandi Blair
Eileen GilBride
Michael Halvorson
Lori Voepel
Mark Zukowski
Justin Ackerman
Jonathan Barnes
John Gregory
Alexander Lindvall
David Potts

Magazine Team

EDITOR:
Lori Voepel, Partner
602.263.7312 | lvoepel@jshfirm.com

PHOTOGRAPHERS:
William Schrank, Partner (Editorial)
602.263.1766 | wschrank@jshfirm.com

Andrew Uilkie Photography (Attorney Headshots & Cover)
andrew@andrewpaulphotography.com

CONTENT & DESIGN
Anna Walp, Marketing & Business Development Manager
602.263.1769 | awalp@jshfirm.com

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APPELLATE HIGHLIGHTS

AUTHOR: Jonathan Barnes | 602.263.4437 | jbarnes@jshfirm.com | jshfirm.com/jbarnes

View and download the full court opinion for each of these cases at jshfirm.com/reporter

October 3, 2018

Doneson v. Farmers Ins. Exch.

Arizona Court of Appeals, Division Two

Insurer correctly denied benefits under a workers' compensation exclusion of the insured's automobile liability policy.

October 10, 2018

Starr Pass Resorts Devs., LLC v. Harrington

Arizona Court of Appeals, Division Two

Parties can use property in lieu of cash to post a supersedeas bond and stay a judgment while an appeal is pending.

November 13, 2018

Ahmad v. State of Arizona

Arizona Court of Appeals, Division One

Trial court failed to state with particularity the grounds for its remittitur and conditional new trial order, and the record did not reveal substantial evidence supporting the order.

Read the Law Alert for this case on page X.

November 15, 2018

Dupray v. JAI Dining

Arizona Court of Appeals, Division One

Trial court erred in failing to give proposed instruction on intervening and superseding cause in dram shop case.

Read the Law Alert for this case on page X.

November 27, 2018

Spooner v. City of Phoenix

Arizona Court of Appeals, Division One

Law enforcement officer is not subject to civil liability for simple negligence arising from an investigation into criminal activity.

Read the Law Alert for this case on page X.

November 29, 2018

Hopi Tribe v. Arizona Snowbowl

Arizona Supreme Court

Environmental damage to public land with religious, cultural, or emotional significance to the plaintiff is not "special injury" for public nuisance purposes.

December 4, 2018

Aguirre v. Industrial Commission of Arizona

Arizona Court of Appeals, Division One

Administrative Law Judge failed to make legally sufficient findings to enable proper judicial review of the Industrial Commission award.

December 18, 2018

Conklin v. Medtronic

Arizona Supreme Court

Federal Law impliedly preempts an Arizona common law failure-to-warn claim based on a medical device manufacturer's failure to submit adverse event reports to the FDA.

January 15, 2019

Danial v. Industrial Commission of Arizona

Arizona Court of Appeals, Division One

Airport taxicab driver who sought workers' compensation benefits for injuries he sustained while driving a taxi he leased from a cab company was an independent contractor and not an employee.

February 19, 2019

Span v. Maricopa County Treasurer

Arizona Court of Appeals, Division One

Unjust enrichment claim is not available where plaintiff paid taxes on his property and the defendant, rather than retaining the benefit, forwarded the money under color of law to a third-party lienholder that paid taxes initially.

February 28, 2019

Diaz v. Superior Court (State of Arizona)

Arizona Supreme Court

Arizona's implied consent statute does not require that the arrestee's agreement be voluntary before police may obtain a blood or breath sample from a person arrested for DUI.


Eileen GilBride


Lori Voepel


Jonathan Barnes


Justin Ackerman


Alejandro Barrientos

ARIZONA'S APPELLATE ADVOCATES

The JSH Appellate Group has handled more than 700 appeals at all levels of state and federal courts, providing effective counsel both before and after trial, from the answer stage through the post-trial motion stage. When civil and criminal court decisions are appealed to a higher court, the team is prepared to handle the matter, from administrative appeals to state trial courts, to federal appeals before the U.S. Supreme Court.

February 28, 2019

State of Arizona v. De Anda

Arizona Supreme Court

DUI arrestee's consent to a blood test was not invalid based on officer's statement that arrestee's driving privileges would be suspended if he refused the request.

March 14, 2019

Harle v. Williams

Arizona Court of Appeals, Division One

Contract barring a party from executing on a judgment tolls the statutory 10-year enforcement period.

April 30, 2019

Shepherd v. Costco

Arizona Court of Appeals, Division One

HIPAA does not preempt state-law negligence claims for wrongful disclosure of medical information and may inform the standard of care in state-law negligence actions.

May 9, 2019

Meno's Construction LLC v. Industrial Commission of Arizona

Arizona Court of Appeals, Division One

ALJ is required to evaluate the liability of each contractor and subcontractor made a party to a workers' compensation claim.

May 16, 2019

State v. Mahoney

Arizona Court of Appeals, Division One

State could properly name as a nonparty at fault the individual who negligently left open a state-maintained gate even though the State could not identify that person by name.

Read the Law Alert for this case on page X.

May 17, 2019

Normandin v. Encanto Adventures, LLC

Arizona Supreme Court

Defendant is not a "manager" of land used for recreational purposes and is therefore not entitled to immunity under Arizona's recreational use statute.

Read the Law Alert for this case on page X.

June 11, 2019

Dignity Health v. Farmers Insurance

Arizona Court of Appeals, Division One

Medpay coverage is not health insurance for purposes of the relevant lien statute, so those payments are subject to the health care provider lien.

Read the Law Alert for this case on page X.

Author: **JONATHAN BARNES**

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

602.263.4437 | jbarnes@jshfirm.com | jshfirm.com/jbarnes

CASE SUMMARIES: TRIAL COURT DECISIONS

John DiCaro and Eileen GilBride Win Summary Judgment in Double Death Case in *Johnson & Urbina v. Maricopa County*


Date: October 2018
Court: Maricopa County Superior Court
Related Practice Areas: Appellate, Governmental Liability, Insurance & Third-Party Liability, Premises Liability, Wrongful Death & Personal Injury
Related Industries: Government & Public Entities, Insurance

John DiCaro and Eileen GilBride won summary judgment for their clients in a wrongful death case stemming from the death of two painting contractors who were working on the outside of the Lower Buckeye Jail. While there were no witnesses to the accident, the workers apparently had placed an 85-foot aerial lift/bucket vehicle on the slope of a water retention basin (rather than on the flat bottom) so they could get closer to the building. They were in the bucket over 70 feet up power washing the building when the vehicle tipped over. Both workers fell to their deaths. Photographs taken after the accident showed tire marks on the retention basin slope next to the building. Though that particular bucket vehicle had a slope rating of 4 degrees, the slope of the retention basin on which the vehicle was parked was over 25 degrees.

Plaintiffs, the workers' surviving families, sued (among others) Maricopa County and then-Sheriff Arpaio. As against the Sheriff, plaintiffs argued that he was vicariously liable for the actions of the Sheriff's Office employees; but they failed to allege negligence by any employee. As against the County, the complaint alleged that it negligently allowed the lift to be set up on a slope where it "knew or should have known that dangerous and poor soil conditions would adversely affect the vehicle's operation." The theory was that the County had a "non-delegable duty to ensure the premises they own and control are reasonably safe for all individuals." JSH attorneys successfully argued that the decedents' employer – the painting company – was an independent contractor because the County had no control over the details of the painting work; and the County, as landowner, did not owe a non-delegable duty to the employees of an independent contractor. *See Lee v. M and H Enterprises, Inc.*, 237 Ariz. 172, 177 (Ariz. App. 2015). Plaintiffs attempted to get around this law by arguing it as a premises liability case – that a landowner owes a duty to warn invitees of dangers of which the occupier knows or should know and of which the invitee is unaware and unlikely to discover. Plaintiffs argued there was a hidden danger or weakness in the soil that caused the lift/bucket vehicle to tip over. But no evidence supported that theory. In fact, the record was undisputed that the ground at the area of the accident consisted of up to 2 inches of gravel over "hard packed dirt." Furthermore, what injured the decedents was not a condition of the land, but their conduct in parking the vehicle on a steep slope.

JSH attorneys David Potts and Christopher Stuart also assisted in working up the case for summary judgment.

Jay Rosenthal and Ryan Pont Obtain Unanimous Defense Verdict in *Karen Moore v. Martin R. Altamirano and Integrated Landscape Management, L.L.C.*


Date: October 2018
Court: Maricopa County Superior Court
Related Practice Areas: Automobile Liability Defense, Wrongful Death & Personal Injury Defense
Related Industry: Insurance

Following a six-day trial, Jay Rosenthal and Ryan Pont obtained a unanimous defense verdict in Maricopa County Superior Court. The client, a landscape business, had backed a landscape vehicle into a car Plaintiff was driving at a low speed, causing damage to the front of her vehicle. The damage to the vehicle was minimal. The Plaintiff, however, initially claimed over $400,000 in medical expenses for various surgeries and treatment. The defendant company admitted fault for the accident, but disputed whether the minor motor vehicle accident caused Plaintiff's alleged injuries.

The defense was based on the general rule that damages are limited to those proximately caused by the negligence of a defendant. The defense argued that the plaintiff had pre-existing and unrelated degenerative conditions. Plaintiff argued that she

was an "egg shell" party, and the accident caused her injuries and subsequent surgeries.

After the parties presented their cases, the Plaintiff asked for an award of $725,000; the defense recommended the jury award Plaintiff $30,000 to $40,000, at most, if it found causation. After deliberating for less than one hour, the jury returned a defense verdict.

Chelsey Golightly and Bill Holm Obtain Defense Verdict in Wrongful Death Case in *Dumbrell v. Hanson*


Date: November 2018
Court: Maricopa County Superior Court
Related Practice Areas: Insurance Coverage & Third-Party Liability, Premises Liability, Wrongful Death & Personal Injury Defense
Related Industry: Insurance

After a seven-day jury trial, Chelsey Golightly and Bill Holm obtained a defense verdict in Maricopa County Superior Court. On September 5, 2015, Michael and Annette Hanson's 21-year-old son, Jordan Hanson, had guests over at the Hansons' residence after attending a party at another friend's house. Some of the friends were invited to the home by Jordan, while others were not. Michael and Annette were on vacation in Montana at the time. While at the Hansons' residence, an altercation occurred and one of Jordan's friends was shot and killed. Jordan was subsequently convicted of second-degree murder and sentenced to serve 12 years in prison. Jordan argued self-defense and is currently appealing his criminal conviction.

After Jordan was charged, the parents of the decedent ("Plaintiffs") filed a lawsuit against Jordan and his parents for wrongful death. Michael and Annette Hanson were sued under the theory that as property owners they were legally obligated to control the conduct of their 21-year-old son. The defense argued that because Jordan Hanson was an adult, owned the firearm used in the shooting, and Michael and Annette Hanson (the property owners) were 1,300 miles away, they were not liable for Jordan's decisions nor the accidental shooting.

At trial, Plaintiffs argued grief, the loss of love and affection from their son, and pain and suffering experienced in the past and expected in the future. Plaintiffs suggested that $10-$20 million in compensatory damages was fair given the "reckless conduct" of Jordan Hanson and the bond that the Plaintiffs had with their son. They further asked the jury to send a message to punish Jordan for his reckless conduct and to deter similar conduct in the future. Plaintiffs suggested $20-$40 million in punitive damages would be appropriate under the circumstances.

Because the Court had ruled prior to trial that Jordan Hanson was liable to the Plaintiffs, the jury was instructed to determine compensatory and punitive damages against him. Michael and Annette Hanson argued they were not at fault and requested a verdict in their favor. In closing arguments, counsel for Jordan Hanson suggested $300,000-$500,000 in compensatory damages was appropriate, and no punitive damages, because Jordan is already serving 12 years in prison as punishment.

After four hours of deliberation, the jury found in favor of Jordan's parents, Defendants Michael and Annette Hanson, and returned a defense verdict. The jury found Jordan Hanson 100% at fault and awarded Plaintiffs compensatory damages in the amount of $1,554,500 and punitive damages of $550,000 against Jordan Hanson.

Mike Halvorson and Erica Spurlock Obtain Unanimous Defense Verdict in Highly-Publicized Wrongful Death Lawsuit in *Brown v. Dembow*


Date: November 2018
Court: Maricopa County Superior Court
Related Practice Areas: Automobile Liability Defense, Wrongful Death & Personal Injury Defense
Related Industry: Insurance

Attorneys Mike Halvorson and Erica Spurlock obtained a defense verdict in a wrongful death lawsuit stemming from a vehicle-pedestrian accident.

On November 15, 2015, 77-year-old Howard Brown was walking the family dog around his neighborhood in Paradise Valley, Arizona. On his way home, he attempted to cross Invergordon Road when he was hit by a car driven by 20-year-old Paige Dembow, who was driving to her father's house in the same neighborhood. Mr. Brown was taken to the hospital, where he ultimately died from his injuries. Mr. Brown's wife of 53 years and his three adult daughters filed a lawsuit against Paige Dembow alleging she was negligent in causing his death. They also sued Paige Dembow's father, Paul Dembow, who was the vice-mayor of Paradise Valley, arguing that he continued to exercise fatherly control over his daughter as the head of her household, and that he had furnished the car to her which she would not otherwise have had. The Browns sought to hold Mr. Dembow vicariously liable for his daughter's accident under Arizona's Family Purpose Doctrine. Because Mr. Dembow also lived in the neighborhood and arrived on the scene immediately after the accident, the Browns also sued Mr. Dembow for negligent interference with the police investigation. This claim was dismissed by summary judgment prior to trial.

JSH attorneys Mike Halvorson and Erica Spurlock represented Mr. Dembow in the litigation. The parties called 19 witnesses, including experts, over the course of a three-week trial. The Brown family presented evidence that Paige Dembow was unreasonably traveling above the speed limit in a residential area surrounded by homes when she failed to observe Mr. Brown crossing the street in front of her car. Plaintiffs argued that Mr. Brown had safely traversed almost the entire width of street before the impact, meaning there was sufficient time and space for Paige Dembow to have seen and avoided hitting him. The Browns further argued that Mr. Dembow had continued to financially support and provide for his daughter, and he should be held liable for her negligent use of a vehicle they argued he furnished to her.

Paige Dembow presented evidence that Mr. Brown had stepped in front of her vehicle without looking, and at a distance that was impossible for her to avoid hitting him regardless of her speed. Mr. Dembow presented evidence showing his daughter was an emancipated adult living apart from the family home, and who obtained the vehicle on her own without his assistance.

The Browns each sought an award for their individual loss of consortium damages, as well as an additional $253,743.43 in medical bills and $5,361.22 in funeral costs. After less than an hour of deliberation, the jury returned a unanimous verdict in favor of both Paige and Paul Dembow as to all of Plaintiffs' claims.

Steve Bullington and Cory Tyszka Obtain Defense Verdict in Medical Malpractice Suit After 7-Day Jury Trial


Date: December 2018
Court: Maricopa County Superior Court
Related Practice Areas: Medical Liability & Health Care, Wrongful Death & Personal Injury Defense
Related Industries: Insurance, Medical Service Providers, Professional Service Providers

Health care defense attorneys Steve Bullington and Cory Tyszka recently obtained a defense verdict in a medical malpractice case. Their client, an orthopedic surgeon, was facing allegations of medical malpractice arising from a total hip arthroplasty procedure. During the 7-day jury trial, Plaintiffs alleged that Defendant was negligent by failing to repair an intraoperative femur fracture, failing to leave the prosthesis in proper anatomical alignment, and failing to recommend revision surgery, causing Plaintiff to suffer anatomical deformity, an inability to walk, and loss of employment. Defendant maintained that he met the standard of care in all respects, and that Plaintiff's inability to walk was not caused by the surgery but was instead caused by pre-existing osteoarthritis, severe spinal stenosis, and Plaintiff's failure to adequately engage in physical therapy. Plaintiffs claimed $429,000 in lost wages and at least $1 million in damages due to pain and suffering, loss of consortium, and loss of enjoyment of life. The case was tried in Maricopa County Superior Court before the Honorable Teresa Sanders. After deliberating for less than 45 minutes, the jury returned a defense verdict.

Bill Holm and Erik Stone Win Summary Judgment in Copyright Infringement Case in *Budiyanto v. DJ Rachel Willes*


Date: February 2019
Court: Federal District Court for the District of Arizona
Related Practice Areas: Commercial & Business Litigation, Intellectual Property

Commercial litigation attorneys Bill Holm and Erik Stone obtained a judgment in favor of their client, DJ Rachel Willes, a wedding DJ, in a copyright infringement case. The Plaintiffs, a married couple, brought copyright infringement claims against 12 wedding vendors, including DJ Rachel Willes, after the vendors accidentally used a photograph of the Plaintiffs without permission to advertise on various social media platforms. In a case of mistaken identity, the vendors believed the couple gave them permission to use the photograph, but it turned out to be the wrong couple. In supporting their claims, the Plaintiffs alleged they were the rightful owners of the copyrights to the photograph. They sought $150,000 in statutory damages from each defendant.

During the course of discovery, the defense discovered that Plaintiffs had lied about being the rightful owners of the subject copyrights. The true copyright holder was identified as a third-party wedding photographer who had no knowledge of the Plaintiffs' lawsuit. Discovery also revealed that the Plaintiffs and their attorney actually conspired to create a sham agreement, which purportedly gave the Plaintiffs the copyrights to the photograph. The defense reported the Plaintiffs' misconduct to the Court. The Court immediately dismissed the case with prejudice and sanctioned the Plaintiffs by awarding the Defendants all of their attorney fees and costs incurred in defending a clearly frivolous lawsuit. Ultimately, Plaintiffs agreed to pay a substantial portion of the judgment entered in favor of the Defendants.

Download the Court Opinions online

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Donn Alexander Obtains Unanimous Defense Verdict in 5-Day Jury Trial Involving Alleged Negligence of an Orthopaedic Surgeon

Date: March 2019
Court: Mohave County Superior Court
Related Practice Areas: Insurance Coverage & Third-Party Liability, Medical Liability & Health Care, Professional Liability, Wrongful Death & Personal Injury
Related Industries: Insurance, Medical Service Providers, Professional Service Providers

Health Care Defense partner Donn Alexander obtained a unanimous defense verdict in favor of his client, an orthopaedic surgeon practicing in northwest Arizona. After a 5-day trial, the jury deliberated for less than 30 minutes before returning its verdict in our client's favor.

Plaintiff alleged that the Defendant surgeon negligently performed surgery to repair a rotator cuff injury. At trial, Plaintiff's expert testified that the surgeon negligently failed to perform a proper preoperative workup, failed to perform the surgery in accordance with the applicable standard of care, and negligently treated Plaintiff post-operatively. Plaintiff's counsel argued that Defendant's negligence caused Plaintiff's failed surgery, resulting in additional treatment, surgery, pain, possible permanent injury, and financial and emotional distress. During trial, Donn argued that the surgeon acted in accordance with and met all medical care standards. Records also demonstrated that the Plaintiff did not follow certain discharge instructions, and refused recommended medications and treatment plans.

Steve Bullington and Cory Tyszka Obtain Unanimous Defense Verdict in $8-Million Wrongful Death Medical Malpractice Suit After 15-Day Jury Trial

Date: April 2019
Court: Yuma County Superior Court
Related Practice Areas: Medical Liability & Health Care, Wrongful Death & Personal Injury Defense
Related Industries: Insurance, Medical Service Providers, Professional Service Providers

Health care defense attorneys Steve Bullington and Cory Tyszka obtained a unanimous defense verdict in a wrongful death medical malpractice case. Their client, a cardiothoracic surgeon, was facing allegations of medical malpractice arising from an open-heart surgery of an 18-year-old woman following an unrestrained motor vehicle crash. During the 15-day jury trial, Plaintiff alleged that Defendant was negligent by failing to establish bypass before the start of surgery, failing to control the patient's bleeding during surgery, and negligently placing the patient into deep hypothermic circulatory arrest. Plaintiff claimed that Defendant's alleged negligence caused the patient to suffer permanent brain injury, which led to the withdrawal of life support and her subsequent death. Defendant maintained that he met the standard of care in all respects, and that the severe cardiac rupture suffered during the patient's motor vehicle accident was not survivable. Plaintiff claimed $8,000,000 in pain and suffering and loss of consortium.

The case was tried in Yuma County Superior Court before the Honorable Larry Kenworthy. After deliberating for approximately one hour, the jury returned a unanimous defense verdict.

CASE SUMMARIES: APPELLATE COURT DECISIONS

Lori Voepel, Jeff Collins and Don Myles Obtain Favorable Opinion from Arizona Supreme Court in *Twin City Fire v. Leija*



Date: August 2018
Court: Arizona Supreme Court
Related Practice Areas: Appellate, Bad-Faith & Extra-Contractual Liability, Insurance Coverage & Third-Party Liability, Workers Compensation, Wrongful Death & Personal Injury Defense
Related Industry: Insurance

Appellate partner Lori Voepel, and trial counsel Jeff Collins and Don Myles, prevailed in the Arizona Supreme Court in *Twin City Fire Ins. Co. v. Leija*, 244 Ariz. 493 (2018). In *Leija*, the Arizona Supreme Court held that when an employee settles all of his or her third-party tort claims, and a workers' compensation carrier asserts its statutory lien against those settlement proceeds to receive reimbursement for benefits it paid to the employee, the employee is not entitled to a post-settlement trial to determine the percentage of employer fault to reduce or extinguish the carrier's lien. The high court reversed the Arizona Court of Appeals' Opinion, which had extended the rule of "equitable apportionment" under *Aitken v. Indus. Comm'n*, 183 Ariz. 387 (1995), to such settlements, even though the rule had previously been limited to third-party tort actions tried to verdict and resulting in a damage award and apportionment of fault to parties and non-party employers. In the latter situation, *Aitken* requires that a carrier's lien be reduced by the same percentage of employer fault allocated by the jury, to avoid a situation where the employee is forced "to endure the combined effect of first having his or her award reduced by reason of the employer's fault, and thereafter having to satisfy a lien against this diminished recovery in favor of the employer and its carrier to the full extent of compensation benefits provided." *Aitken*, 183 Ariz. at 392.

After her husband died in a work-related accident, Mrs. Leija and her children applied for and received workers' compensation benefits and sued numerous third-party tortfeasors under A.R.S. § 23-1023(A), alleging those third parties negligently contributed to her husband's death. During settlement negotiations, Twin City asserted its right under § 23-1023(D) to seek full reimbursement against the settlement proceeds for the amount of worker's compensation benefits it had paid and would pay in the future. Twin City offered, however, to reduce its lien by five percent if the Leijas settled all their third-party claims. The Leijas rejected the offer, arguing that under the rationale of *Aitken*, Twin City was required to significantly reduce its lien based on some unknown percentage of alleged comparative fault of Mr. Leija's employer and co-worker in causing the accident. Twin City took the position that it is not required to equitably apportion its lien under *Aitken* where the employee's damages and percentage of employer fault are not "fixed by verdict in the third-party action." The Leijas ultimately settled with all third-party defendants for $1.6 million, after which Twin City filed an action to enforce its lien against the recovery. The Leijas filed a counterclaim, arguing that Twin City breached its duty of good faith and fair dealing by refusing to reduce its lien to account for the employer's alleged comparative fault, and requesting the superior court to set a trial under *Aitken*, solely to establish the employer's proportionate fault and the resulting amount of Twin City's lien. Following two rounds of summary judgment briefing led by Jeff Collins on Twin City's behalf, the superior court rejected both of the Leijas' arguments and entered summary judgment for Twin City.

The Arizona Court of Appeals reversed, holding that "when a worker settles a claim against a third party for less than the limits of the third party's insurance, the worker may obtain a judicial determination of whether the carrier's lien should be reduced to account for the employer's comparative fault." *Twin City v. Leija*, 243 Ariz. 175, 177 (App. 2017). The court reasoned that the fact that the Leijas settled their third-party claims rather than trying them to a verdict does not preclude equitable apportionment under *Aitken*. The court upheld, however, the superior court's ruling in Twin City's favor on the bad faith claim.

The Supreme Court granted review and Lori Voepel presented oral argument on behalf of Twin City. Following oral argument, the Supreme Court reversed the court of appeals, agreeing with Twin City that a settlement between an employee and third-party defendant does not necessitate a determination of liability and damages, including the apportionment of fault among parties and non-parties. The Supreme Court explained that there are "good reasons to limit application of the equitable apportionment rule to only those cases that are tried to verdict." For one, the inequity recognized in *Aitken* will exist in every case that is tried to verdict, but an inequity will not exist in every case where a claimant settles with a third-party defendant. The Court found it is "purely speculative" to assume that merely because a third-party claim settles for less than policy limits, the employee's recovery was reduced by the non-party employer's alleged fault. *Id.* Moreover, the Supreme Court agreed that many factors may influence an employee's decision to settle with a third-party defendant and

the settlement amount, including difficulties in proving fault or causation, and avoiding the risk of having a jury apportion a substantial amount of fault to the employee or his employer, and thereby reducing the employee's total award. The Supreme Court also noted that a carrier could be similarly concerned with the risk that a jury would apportion substantial fault to the employee and/or employer, which would also reduce the value of the carrier's lien. This alignment of risks encourages the carrier to reduce its lien so the employee will be incentivized to settle.

Finally, the Supreme Court agreed with Twin City that the post-settlement trial created by the Court of Appeals would itself create "perverse incentives and inequities" because the employee in a third-party action "has every incentive to maximize the percentage of fault allocated to the third-party defendant" whereas the employee would then later "be incentivized to take the diametrically opposite position by maximizing the fault attributable to the employer (and therefore minimizing the fault accruing to the settling third-party defendant) solely to reduce or extinguish the insurance carrier's lien on the settlement proceeds." On balance, the Supreme Court observed that although a carrier's refusal to reduce its lien may be inequitable in some circumstances, "it is difficult to understand how the possible gamesmanship created by a post-settlement trial process is more equitable than permitting an insurance carrier to exercise its statutorily authorized lien on a claimant's settlement proceeds to the extent of compensation benefits paid" when "there may be no inequity at all."

The Court added that even in a settlement context, the workers' compensation carrier has an obligation to act in good faith by giving equal consideration to the employee's interests, especially where evidence of employer fault is "clear, undisputed, and substantial." The Court also reaffirmed, however, that because a carrier's statutory lien has strong protection under the law, the carrier " may reasonably protect its right to recover the lien amount" and is "not required to completely disregard its own interests."

Mike Halvorson and JSH's Appellate Team Prevail on Appeal in Motor Vehicle Insurance Coverage Case Concerning Exclusion of Damage to "Transported" Property in *Viking v. Link & Walton*

Date: September 2018
Court: Arizona Court of Appeals
Related Practice Areas: Appellate, Automobile Liability Defense, Transportation Defense
Related Industries: Insurance, Transportation

Partner Mike Halvorson prevailed on appeal for an Insurer in a motor vehicle liability coverage case addressing the exclusion authorized by A.R.S. § 28-4009(C)(4)(c) for damage to property "transported" by the insured. The Policyholder insured his new pickup truck through the Insurer, which had also insured his prior vehicles. The Policyholder had no direct contact with the Insurer; instead, the dealership arranged for insurance. Within two weeks, the Policyholder received a copy of the insurance policy, which he did not read except to confirm that the policy listed the pickup truck. Consistent with § 28-4009(C)(4)(c), the policy contained an exclusion for "[d]amage to property . . . being transported by . . . an insured person."

The Policyholder borrowed a tractor from the Plaintiff, then rented a utility trailer to return it. While towing the tractor behind the insured pickup truck, the trailer detached from the truck and rolled over, causing damage to the tractor. After the Plaintiff sued the Policyholder, the Insurer provided a defense under a reservation of rights to deny coverage pursuant to the transported property exclusion. The Plaintiff and Policyholder settled the underlying suit by entering into a "Morris agreement" pursuant to which the Policyholder consented to a judgment awarding the Plaintiff damages for destruction of property, loss of use, and "emotional distress" damages. The Policyholder also assigned any claims he had against the Insurer to the Plaintiff in return for a covenant not to execute on the judgment.

In the Insurer's separate declaratory relief action, the trial court granted summary judgment to the Plaintiff. The trial court concluded that although the policy defined the term "property damage" to include "loss of use," it did not define the term "damage to property," which was used in the exclusion. Because the exclusion did not mention "loss of use" or "emotional distress" damages, neither were excluded from coverage. In addition, the trial court found that pulling a trailer is an intended use of a pickup truck and the Policyholder therefore had a "reasonable expectation" of coverage for towed property.

The Arizona Court of Appeals reversed the trial court's ruling. The appellate court agreed with the Insurer that under the policy's plain language, the tractor was damaged while an insured person "transported" it, and the damage to the tractor was therefore excluded from coverage. The Court held a layperson using common sense would understand that "property damage" and "damage to property" mean the same thing, and that both encompass loss of use damages under the policy. The Court further held the Plaintiff's "emotional distress" damages arose solely from his inability to use the tractor and were therefore excluded from the policy as well. Finally, the Court rejected the notion that an exclusion for "damage to property . . . being transported by . . . an insured person" violates an insured's reasonable expectations, particularly since Arizona law expressly allows this exclusion. The court of appeals accordingly vacated the trial court's judgment and remanded for entry of judgment in the Insurer's favor.

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Trial Court Abused Its Discretion in Remitting $30-Million Wrongful Death Jury Verdict Against State in *Ahmad v. State of Arizona*

Date: November 13, 2018
Court: Arizona Court of Appeals
Authors: Eileen GilBride & Justin Ackerman
Related Practice Areas: Appellate, Governmental Liability, Insurance, Wrongful Death & Personal Injury Defense
Related Industries: Government & Public Entities, Insurance

On November 13, 2018, the Arizona Court of Appeals vacated a trial court order remitting a wrongful death verdict against the State from $30 million to $10 million.

During a law enforcement pursuit by State and City law enforcement officers, the criminal suspect's vehicle struck and killed Plaintiffs' son. Plaintiffs sued the State for wrongful death on the theory that the pursuit was unnecessary and dispatchers failed to communicate essential information. After trial, a jury awarded Plaintiffs $30 million, finding the State 5% at fault. The State moved to remit the verdict, arguing that it included unavailable punitive and compensatory damages and was excessive under the facts of the case. The trial court granted the motion and reduced the verdict to $10 million, which reduced the state's liability from $1.5 million to $500,000.

Plaintiffs appealed, and the court of appeals originally reversed the remittitur. On review, the Arizona Supreme Court remanded the case back to the court of appeals to reconsider in light of *Soto v. Sacco*, a recent Supreme Court case discussing the standards for remittitur. This opinion was the court of appeals decision on remand, and it reaffirmed its reversal of the trial court's remittitur. The trial court had failed to provide the requisite sufficient specificity for its order, describing "why the jury award is too high or low" in "sufficient detail to apprise the parties and the appellate courts of the specific basis for the court's ruling so that they may avoid speculation." The trial court's ruling, said the court, merely restated the remittitur rule while failing to provide this specificity.

Under *Soto*, a remitter order that lacks specificity may still be affirmed, but only where the party seeking to uphold the remittitur on appeal can demonstrate that the order "was supported by substantial evidence and did not constitute an abuse of discretion." In this case, the State failed to carry that burden. The court first found the verdict not excessive on the ground that "it was based on noneconomic damages alone," as the State had argued. Wrongful death damages encompass a wide range of noneconomic damages, including a decedent's earning capacity, the loss of companionship, comfort and guidance caused by the death, and the survivor's emotional suffering. And nothing in the amount of the jury's award suggested that the jury exceeded its authority or acted out of passion or prejudice. The record contained substantial, undisputed testimony regarding Plaintiffs' profound emotional distress, anguish, and the loss of companionship of their son. The court found that the $30-million verdict, when combined with the 5% attribution of fault to the State, reflected a "temperate deliberative process." Also, though Plaintiffs' counsel had suggested that the jury should "prevent future deaths," thus improperly implicating unavailable punitive damages, the court said the jury instructions adequately limited the jury to compensatory damages. Finally, the court of appeals found the State's comparisons of this verdict to other jury verdicts in similar cases insufficient to justify the remittitur.

In short, the Court held that the trial court abused its discretion in remitting the verdict and remanded the case for entry of judgment on the jury verdict.

Court of Appeals Reverses Dram Shop Verdict in *Dupray v. JAI Dining*

Date: November 15, 2018
Court: Arizona Court of Appeals
Author: Eileen GilBride
Related Practice Areas: Appellate, Dram Shop and Social Host Liability, Insurance, Premises Liability, Wrongful Death & Personal Injury Defense
Related Industries: Insurance

The Arizona Court of Appeals reversed an $8-million dram shop case against the owner of a gentlemen's club due to the trial court's failure to instruct the jury on "superseding, intervening cause."

Pedro Panameno was drinking with friends. Pedro's friend then drove them to the club, where Pedro drank 11 or 12 bottles of beer over the next three hours, becoming intoxicated. Pedro's friend then drove them back to his house. A few minutes later, Pedro drove to his girlfriend's house. His girlfriend argued with him, told him he should not be driving, and tried to take his keys away. Pedro became angry and drove off again. A short distance away, Pedro, traveling about 45 m.p.h., rear-ended plaintiff who was on a Vespa-type scooter.

Plaintiff sued Pedro and the club owner for overserving Pedro. It was determined that his BAC at the time of the accident was between .210 and .274. A toxicologist testified that Pedro would

have reached .10 BAC at the club. Another expert testified that Pedro was obviously intoxicated at the club and the club was negligent in failing to monitor him or preventing him from injuring others. The jury found for plaintiff, awarding $3.5 million in compensatory damages and allocating 60% fault to Pedro and 40% to the club owner. The jury also awarded punitive damages of $400,000 against Pedro and $4 million against the club owner. The club owner appealed.

The court first rejected the club's argument that it did not breach its duty because Pedro had left the club safely. There was evidence of breach because club personnel did nothing to see that Pedro reached home safely, and were not even aware of Pedro's presence there. The fact that a friend drove Pedro to and away from the club did not absolve the club of liability for failing to exercise reasonable care in serving him. The court also rejected the club's argument that its conduct did not proximately cause the accident. There was evidence that Pedro became intoxicated at the club and rear-ended plaintiff driving 45 m.p.h. The court said that the fact that Pedro was not driving when he arrived or left the club, and voluntarily drove from his friend's house to his girlfriend's house and then away again until he collided with the plaintiff, did not relieve the club of liability as a matter of law.

The court reversed the verdict, however, because the trial court had failed to instruct the jury on the concept of intervening, superseding cause. An intervening cause is an independent event that contributes to an injury independent of the original cause and for which the defendant is not responsible. A superseding cause is one that is unforeseeable by a reasonable person in the position of the original actor and "looking backward, after the event, the intervening act appears extraordinary." The court ruled that the jury could find Pedro's independent decisions to leave the friend's house and drive to his girlfriend's house, and then leave his girlfriend's house after being warned not to drive, were intervening, superseding causes that could break the causal chain. The failure to provide the instruction to address the concept of intervening and superseding cause hampered the club owner in arguing that it was not liable for plaintiff's injuries and hampered the jury in properly determining whether the owner was liable. The court remanded the case back to the trial court.

Simple Negligence Theory Does Not Apply to Police Officer's Discretionary Conduct in *Spooner v. City of Phoenix*

Date: November 21, 2018
Court: Arizona Court of Appeals
Author: Eileen GilBride
Related Practice Areas: Appellate, Governmental Liability, Corrections Defense, Insurance, Wrongful Death & Personal Injury Defense
Related Industries: Government & Public Entities, Insurance

This case arose from an alleged wrongful arrest. Detective Toni Brown investigated Spooner's financial relationship with a 95-year-old woman. Brown testified about her investigation at grand jury proceedings, and the grand jury indicted Spooner for theft from a vulnerable adult and unlawful use of a power of attorney. The State later dismissed the charges.

Spooner sued the City and Brown arguing, among other things, that the detective failed to properly investigate Spooner's relationship with the elderly woman. In pertinent part, the trial court granted the City and Detective Brown judgment as a matter of law on Spooner's negligent investigation claim. The jury rendered a defense verdict on the other claims. Spooner appealed.

The court upheld the judgment as a matter of law on Spooner's claim for negligent investigation. Because police investigation involves an exercise of professional judgment, this is a discretionary act that is protected by common law qualified immunity. This means a claimant cannot raise a simple negligence claim based on this type of discretionary conduct. The only viable claims based on discretionary conduct are gross negligence or deliberate indifference claims. The court reasoned that while Arizona's Governmental Tort Claims Act sets out some areas of immunity, these statutes do not erase the common law rules of tort immunity for public entities and officials. And under the common law, public officials—including police officers—are entitled to limited protection from liability (qualified immunity) when "performing an act that inherently requires judgment or discretion." Criminal investigations involve the exercise of personal deliberation and individual professional judgment that necessarily reflect the facts of a given situation. By its very nature, investigative police work is discretionary and appropriate for exemption from suit for simple negligence. Public policy therefore mandates that investigative police work, performed in the scope of an officer's public duty, is a discretionary act subject to qualified immunity.

The court set out the test as follows:

> If qualified immunity applies, a public official performing a discretionary act within the scope of her public duties may be liable only if she knew or should have known that she was acting in violation of established law or acted in reckless disregard of whether her activities would deprive another person of their rights. . . . A public official's conscious disregard of the law or the rights of others constitutes gross negligence, and she remains liable for such conduct. But a public official performing a discretionary act encompassed within her public duties is shielded from liability for simple negligence.

(internal quotations and citations omitted).

Those actions that allegedly violated clearly established law or reflected a reckless disregard of the plaintiff's rights were not entitled to common law qualified immunity, and were properly submitted to the jury. The jury was correctly instructed that it could find for Spooner if she proved gross negligence. But to the extent the detective's actions reflected the legitimate exercise of professional judgment, they were discretionary and protected by qualified immunity. Thus, the court rightly entered judgment as a matter of law in the City's favor on the claim for simple negligence.

Defendant Can Name Suspected Tortfeasor as a Non-Party at Fault in *State v. Mahoney*

Date: May 17, 2019
Court: Arizona Court of Appeals
Author: Eileen GilBride
Related Practice Areas: Appellate, Auto Liability Defense, Governmental Liability, Insurance, Wrongful Death & Personal Injury Defense
Related Industries: Government & Public Entities, Insurance

A motorist was killed when he collided with horses that had wandered onto a state roadway. Tracks showed the horses had passed through an open gate in a barbedwire fence maintained by the State adjacent to the highway. The motorist's parents sued the State (and others) alleging that the State negligently failed to secure the gate in that fence. Investigators had spotted tire tracks of one or more ATVs leading through the gate, so the State filed a notice of nonparty at fault asserting that "unknown ATV riders" left the highway gate open despite a sign saying "Keep Gate Closed."

The trial court struck the notice, noting the State had not tried to identify or locate the ATV riders and there was no evidence that any nonparty "was actually known" to be at fault.

On the State's special action petition, the court of appeals reversed. It held that the State could properly name as a nonparty at fault unknown individuals whom it alleged negligently left the gate open, even though the State could not identify that person by name. The court noted the importance of the defendant's statutory right to be assessed no more than its proportionate share of fault; and cited previous cases allowing nonparty at fault notices even though the defendant did not know the identity of the nonparty. For example, a supermarket could name an unknown person who dropped something on the floor resulting in the plaintiff's slip and fall. A defendant bar could name the person who assaulted plaintiff, even though the assaulter's identity was unknown. And a defendant in a car crash case could name the unknown individual who had waved the plaintiff through the intersection, thus causing the defendant and plaintiff to crash. The fact that the State had not tried to uncover the identity of the ATV drivers would go to the weight of that evidence at trial, rather than invalidate the nonparty at fault notice. The important fact was the existence of the nonparty, not his identity.

Plaintiff argued that in the cited cases, the nonparty undisputedly committed a fault-worthy act, whereas here no one saw ATV riders leave the gate open and thus their fault was speculative. The court rejected the argument. No one disputed that the gate was open; and plaintiffs had no evidence that it could have been opened any other way. Indeed, the horses' owner testified that these gates "don't get opened very often by people that can't close them." Since plaintiffs were suing the State for leaving the gate open, the State was entitled to argue that the jury should apportion fault to the ATV riders if it finds they opened the gate without closing it.

Encanto Park Concessionaire Cannot Benefit From Recreational Use Statute in *Normandin v. Encanto Adventures*

Date: May 17, 2019
Court: Arizona Supreme Court
Author: Eileen GilBride
Related Practice Areas: Appellate, Governmental Liability, Insurance
Related Industries: Government & Public Entities, Insurance

Pursuant to a concessionaire agreement with the City, Encanto Adventures ("Encanto") operates an amusement park in a fenced-in area of Encanto Park known as Picnic Island. The Agreement allowed Encanto to use an unfenced portion of Picnic Island adjacent to the amusement park as a "piñata area." Encanto's owner inspected and maintained Picnic Island. Encanto does not, however, have exclusive rights to use the piñata area, nor does it control public access to it.

Plaintiff fell in the piñata area of the park while hosting a birthday party for her daughter. She sued the City and Encanto for negligence. The trial court granted summary judgment to the City and Encanto based on the recreational immunity statute, A.R.S. § 33-1551(A). The court of appeals affirmed for both defendants.

The Supreme Court reversed summary judgment for Encanto. The recreational use statute states that the owner, easement holder, lessee, tenant, manager, or occupant of premises is not liable to a recreational user except if it engaged in willful, malicious, or grossly negligent conduct. The statute does not define "manager," but Encanto claimed it was a "manager" of the piñata area because it maintained that area. The Supreme Court disagreed. Analyzing the context of the statute, it held that a manager within the meaning of the statute "is someone imbued with authority to control the public's access to land for recreational use." Any other definition was inconsistent with the other classes of land occupants listed in the statute. This definition also supports that statute's purpose—to "encourage landowners and others to open lands to recreational users and to continue to keep the lands open." Encanto does not have that authority. Thus, Encanto was not entitled to the higher burden of proof in the recreational use statute.

MedPay is Not Health Insurance, Thus Is Subject to Health Provider Lien in *Dignity v. Farmers*

Date: June 17, 2019
Court: Arizona Court of Appeals
Author: Eileen GilBride
Related Practice Areas: Appellate, Insurance Coverage & Third-Party Liability, Medical Liability & Health Care, Wrongful Death & Personal Injury Defense
Related Industries: Insurance, Medical Service Providers

When a health care provider treats someone who has been injured, and the person receives payment from another for that injury, A.R.S. § 33-931 allows the health care provider to obtain a lien against that payment, except if the payment is from "health insurance" or underinsured and uninsured motorist coverage. Here, Elliott was injured in a car accident and was treated at Dignity Health. The usual and customary charges exceeded $160,000. Dignity perfected and recorded a health care lien for over $140,000 to secure payment for its services.

Farmers had issued Elliott an auto policy that included medpay coverage. Despite Dignity's lien, Farmers paid Elliott $99,000 in medpay benefits. Dignity sued Farmers claiming it violated Dignity's lien. The trial court dismissed Dignity's suit, ruling that the medpay benefits were not subject to the lien.

The court of appeals reversed. It went through the legislative history of the statute and rejected Farmer's argument that "health insurance" means "health insurance as defined in A.R.S. § 20-259.01" [the uninsured/underinsured statute]. And in any event, the term "health insurance" is not defined in § 20-259.01. Had the legislature wanted to exempt "health insurance motorist coverage as defined in § 20-259.01," it could have done so directly. The court also rejected the argument that the term "health insurance" had to mean the same as "medpay" because the contexts in which the statutes use the two terms is different. Indeed, another statute pertaining to an insurer's lien—arguably more analogous to this situation—treats the two terms as different things. The court finally observed that it had previously recognized the difference between health insurance and medpay coverage in a different context. *Haisch v. Allstate Ins. Co.* (Ct. App. 2000). For these reasons, the court held that the exclusion of health insurance from § 33-931 does not also exclude medpay coverage, and Farmers should have recognized Dignity's lien.

Author: **EILEEN GILBRIDE**

Eileen GilBride leads the firm's Appellate Department, and focuses her practice on representing clients in federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. Eileen has handled more than 400 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions.

602.263.4430 | egilbride@jshfirm.com | jshfirm.com/egilbride

Author: **JUSTIN ACKERMAN**

Justin Ackerman represents clients in federal and state appellate matters in cases involving excessive force, wrongful death, personal injury, bad faith, and premises liability. He has successfully represented clients and argued before the Arizona Court of Appeals, Arizona Supreme Court, and Ninth Circuit Court of Appeals.

602.263.1740 | jackerman@jshfirm.com | jshfirm.com/jackerman

JSH WELCOMES EIGHT ATTORNEYS

Christopher Stuart, Of Counsel

Chris has more than 20 years of complex commercial and mass tort litigation experience, handling cases involving bank collapses, industrial fires, floods, groundwater contamination, air contamination, and a host of other, mostly, manmade mishaps. His clients include governmental entities, financial institutions and asset management companies, and a variety of manufacturers. Before joining JSH, Chris consulted with the firm, and maintained his own successful private practice. He recently served as an editor of the Maricopa County Bar Association's Litigation Practice Manual. Born and raised in North West England, Chris has lived and practiced law in Arizona since 1988. He earned his J.D. from the University of Southern California Gould School of Law, and his A.B. in Anthropology from the University of California in Irvine.

602.263.1730 | cstuart@jshfirm.com | jshfirm.com/cstuart

Matthew Barney, Associate

Matt focuses his practice in the areas of transportation, auto, products and general liability defense. While pursuing his law degree at ASU's Sandra Day O'Connor College of Law, Matt served as a Student Ambassador for the Center for Law and Global Affairs, and participated in a humanitarian trip to Panama with the Law Society for Human Rights. During law school, he gained valuable experience in Washington, D.C. working as a legal intern for the Department of Justice's Civil Rights Division, and as an intern at the Department of State's Bureau of Western Hemisphere Affairs (WHA). Matt earned his B.S. in Spanish Linguistics from ASU, and is fluent in Spanish.

602.263.1764 | mbarney@jshfirm.com | jshfirm.com/mbarney

Alejandro Barrientos, Associate

Alejandro is the newest associate in the firm's Appellate Group. Prior to joining JSH, he served as a judicial law clerk to Judge Maurice Portley of the Arizona Court of Appeals, and Justice Ann A. Scott Timmer of the Arizona Supreme Court. He was also a deputy public defender for the Maricopa County Public Defender's Office. During law school, Alejandro served as the articles editor for the Arizona Summit Law Review. Alejandro earned his J.D. from Arizona Summit Law School, graduating *cum laude*, and his B.S. in Civil Engineering from the University of Wyoming. While pursuing his undergraduate degree, Alejandro worked as an assistant engineer and translator for Engineers Without Boarders in Honduras.

602.263.1715 | abarrientos@jshfirm.com | jshfirm.com/abarrientos

Stephen Best, Associate

Stephen represents construction companies, contractors, subcontractors and design professionals in construction defect and general civil defense litigation. Before joining JSH, Stephen worked at a Post-Conviction Clinic as a Rule 38 Certified Student Attorney, as a legal extern for the U.S. Department of Veteran's Affairs, and as a summer law clerk at a litigation law firm in New Mexico. During law school, Stephen spent two years as an Advocate for the Willem C. Vis International Commercial Arbitration Moot. In the 2018 Vis East Moot Competition in Hong Kong, his team was one of eight to reach the Quarterfinals and, individually Stephen achieved a top 10 ranking out of 243 advocates, and earned an Honorable Mention for Best Oral Advocate. In his third year of law school, Stephen was a Student Body Associate Representative and an ASU Law Cappella Representative. While pursuing his B.B.A. in Marketing at Texas A&M University, Stephen achieved a Certificate in Leadership Study and Development, and was a member of the Corps of Cadets ROTC Program from 2008-2012.

602.263.1755 | sbest@jshfirm.com | jshfirm.com/sbest

Alexander Lindvall, Associate

Alex focuses his practice in the areas of automobile and commercial trucking defense, products liability, wrongful death and personal injury, and general liability defense. Before joining JSH, Alex worked as a law clerk for three Valley law firms and as a legal extern for the Arizona Center for Law in the Public Interest. While pursuing his J.D. at ASU, Alex served as an articles editor of the Sports & Entertainment Law Journal, and as a research assistant for Professor Weinstein, where he contributed to the article, Free Speech and Domain Allocation. He earned his B.A., *magna cum laude*, in Political Science from Iowa State University, and worked as a teaching assistant for the Chair of the Pre-Legal Education Committee, then as Chief Justice for the ISU Supreme Court. He also earned the annual Ross Talbot "Outstanding Graduating Senior Award," and was an active member of the Pi Sigma Alpha Honor Society and Phi Kappa Phi National Honor Society.

602.263.1717 | alindvall@jshfirm.com | jshfirm.com/alindvall

Andrea Logue, Associate

Andie represents health care professionals and entities against claims involving medical malpractice, health care liability, and wrongful death and personal injury. Before joining JSH, she gained experience at a Tucson defense firm, where she represented clients against medical and legal malpractice claims, and before the Arizona Board of Dental Examiners. She also worked as an assistant professor at the University of Arizona College of Public Health, working with an undergraduate class focused on public health law, administrative law, and the correlation between law and regulation to influence public health policies. While pursuing her J.D. and M.P.H. at U of A, Andie worked as a legal intern for the Arizona State House of Representatives, and the Center for Disease Control and Prevention, Office of the General Counsel. She gained further public health law experience as a clerk for the Arizona Attorney General's Education and Health Section, and as a graduate research assistant for the University of Arizona Mel and Enid Zuckerman College of Public Health. Andie earned her B.A. in Sociology from Gonzaga University.

602.263.7325 | alogue@jshfirm.com | jshfirm.com/alogue

Erin Iungerich, Associate

Erin focuses her defense practice in the areas of trucking and transportation, auto liability, premises liability, products liability, wrongful death and personal injury, and general liability defense. She is an Executive Board Member of the Arizona LGBT Bar Association, and member of the Arizona Association of Defense Counsel and Maricopa County Bar Association. Before law school, Erin worked as a claims representative for two major insurers in the areas of auto and homeowners claims, coverage and underwriting, as well as in sales, public relations and technical problem-solving. While earning her J.D. at ASU, Erin served as Executive Articles Editor and Associate Editor of the Law Journal for Social Justice, earned a CALI Excellence for the Future Award in International Human Rights, and was recognized as a William H. Pedrick Scholar for Academic Excellence. She also published articles on the topics of criminal law and employment law reform. Erin earned her B.A. in History from the University of Illinois Urbana-Champaign, focusing in British colonial history and 19th century southern Africa.

602.263.7328 | eiungerich@jshfirm.com | jshfirm.com/eiungerich

Kyle Robertson, Associate

Kyle joins the firm's General Liability and Auto Defense Trial Group, focusing in the areas of transportation and trucking liability, products liability, premises liability, and dram shop liability. He is experienced in defending suits involving wrongful death, serious bodily injury and underinsured motorist claims, and has served as co-counsel in both state and federal court. Additionally, Kyle has served as lead counsel in numerous arbitrations. He earned his J.D. from ASU's Sandra Day O'Connor College of Law, and his B.S. in Finance, *cum laude*, from the W.P. Carey School of Business Barrett Honors College.

602.263.7353 | krobertson@jshfirm.com | jshfirm.com/krobertson

JSH Hosts Law Student & MCBA Diversity Legal Writing Scholar Ceci Shell

The Maricopa County Bar Association (MCBA) Diversity Legal Writing Program provides second year law students the opportunity to gain practical clerking experience in private law firms. JSH sponsors students through this program each year, and during the Spring 2019 semester, JSH hosted ASU law student Ceci Shell. For three months, Ceci worked on projects for various practice groups and attorneys, attended firm-hosted events, and participated in weekly training sessions aimed at enhancing her legal writing skills.

As a 2L at Sandra Day O'Connor School of Law at Arizona State University, Ceci participates in the Research for Legal Advocacy Writing Program and serves as a mentor with the AGUILA Prelaw Moot Court Program. She is also a member of the Innovation Advancement Clinic, Sports Lawyers Association, Arizona Women's Lawyers Association, Black Law Student Association, Intellectual Property Student Association, and Diverse Student Coalition. Ceci earned a Masters of Professional Studies in Sports Business & Finance from Georgetown University, and a Masters of Arts in Sports Marketing and bachelors of arts in Communications & Psychology from Tennessee State University.

FIRM NEWS

Gordon Lewis Profiled on Giving Tuesday

As part of their #GSACPCGivesThanks #GivingThanksTuesday campaign, the Girl Scouts Arizona Cactus-Pine Council (GSACPC) profiled JSH partner Gordon Lewis on its social media. Gordon has served on the Board of Directors for the GSACPC since 2009, and on the Executive Committee since 2013. As a father of daughters and Girl Scouts, as well as husband of a former Girl Scout, he is dedicated to the leadership development and empowerment of young women.

Gordon and JSH are proud to support GSACPC and those who help make our community a better place.

602.263.7341 | glewis@jshfirm.com | jshfirm.com/glewis

Ellen Yanok Celebrates 40-Year Employment Anniversary

Ellen Yanok was just 17 when she began working with Bill Jones, one of JSH's founding partners, in 1979. Through a high school work program, Ellen started as an errand runner/copy assistant. When Jones, Skelton & Hochuli formed, they encouraged Ellen to join the firm. Years later, when JSH began using billing software, she became a billing software clerk in what would become the Accounting Department. Today, Ellen is the firm's payroll administrator, managing payroll for 200 employees, doing general ledger bookkeeping, producing firm financial statements, overseeing the Charity Committee budget, and brightening our work days with her genuine smile, positive spirit and stories of JSH's early days.

We are proud to call Ellen our colleague!

Stephen Bullington Elected into the American Board of Trial Advocates

Steve is the tenth JSH attorney to be elected to ABOTA, a national association of experienced trial lawyers and judges. Membership is by invitation only to trial attorneys who have demonstrated excellent trial skills while maintaining the highest levels of professionalism, integrity, honor, and courtesy. He joins JSH partners James Curran, James Evans, William Holm, John Masterson, Donald Myles, Russell Skelton, Phillip Stanfield, Georgia Staton and Mark Zukowski.

Throughout his 29 years of practice, Steve has tried more than 20 cases before a jury. He represents health care professionals and medical service providers in matters involving allegations of medical malpractice.

602.263.1796 | sbullington@jshfirm.com | jshfirm.com/sbullington

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CONCERTED CHANGE: THE NLRB REDEFINES PROTECTED ACTIVITY IN *ALSTATE MAINTENANCE*

AUTHOR: David Potts | 602.263.1708 | dpotts@jshfirm.com | jshfirm.com/dpotts

Related Practice Areas: Commercial & Business Litigation, Employment Law, General Civil Litigation **Related Industry:** Insurance

The National Labor Relations Act (NLRA) grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection." Employers are prohibited from interfering with, restraining, or coercing employees in the exercise of these rights.

Some of these rights and restrictions are straightforward: an employer cannot fire employees who are trying to organize a union, for example. The phrase "other concerted activities for the purpose of…mutual aid or protection," though, is not so straightforward. Courts and the National Labor Relations Board (NLRB) define "concerted" activity as "the activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984). Even without group action, however, an individual employee's actions can be "concerted" if "the purpose of his acts are to enforce a collective bargaining agreement, seeking to induce group action, or acting on behalf of a group." *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4th Cir. 2005). In contrast, mere "griping" is not protected. See, e.g., *Capitol Ornamental Concrete Specialties*, 248 NLRB 851 (1980) (characterizing an employee's complaint about the conditions of a road surrounding the employee parking lot as a personal "gripe" that was not protected under the NLRA).

This definition gave the NLRB wide latitude to deem actions by an individual employee "concerted" under suspect circumstances. For example, in *WorldMark by Wyndham*, the NLRB concluded that an employee had engaged in concerted activity when he asked an executive questions regarding a newly implemented dress code policy in the presence of other employees. 356 NLRB 765 (2011). Reasoning that the employee questioned a "newly announced rule affecting all of his male colleagues…in the presence of several of those colleagues" and the employee used the words "we" and "us" in his conversation with the executive, the NLRB concluded that the employee "intended to induce group action," even if he was unaware of any other employees' displeasure with the dress code policy. Similarly, the NLRB has held that statements about certain subjects (like wages or work schedules) are "inherently" concerted.

> "This decision showcases the NLRB's current willingness to reconsider prior decisions and redefine what is protected under the National Labor Relations Act."

See *Alstate Maintenance, LLC*, 367 NLRB No. 68 at *1 (2019). Taken to its logical conclusion, this line of cases arguably makes any employee's "gripes" concerted so long as they concern other employees and are made in the presence of other employees.

No more. In a recent decision and order, *Alstate Maintenance, LLC*, 367 NLRB No. 68 (January 11, 2019), the NLRB reversed course. There, when a skycap at JFK International Airport was asked to help bring a soccer team's equipment into the terminal, he commented in front of other skycaps, "We did a similar job a year prior and we didn't receive a tip for it." The skycap was ultimately terminated for this comment, and the skycap filed a charge with the NLRB, alleging his comment was concerted activity. The NLRB disagreed, holding that this comment was a mere "gripe." The NLRB emphasized that there was no evidence that "the tipping habits of soccer players…had been a conversation among the skycaps" prior to the skycap's statement, nor was there evidence that the skycap's comment was aimed at changing his employer's policies. In holding that this activity was not "concerted," the NLRB expressly overruled *WorldMark by Wyndham*, finding the decision "impermissibly conflat[ed] the concepts of group setting and group complaints" and "reduce[d] to meaninglessness"

the distinction between unprotected individual activity and protected concerted activity. Instead, the NLRB maintained that, for a statement to a supervisor or a manager to be "concerted," it "must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." Whether this inference is "reasonable" depends on whether the statement was made in an employee meeting to announce a decision affecting terms and conditions of employment, whether the decision affects multiple employees at the meeting, whether the employee was complaining about the effect of the decision on other employees, and whether the meeting was the first opportunity employees had to address the decision.

There are two major takeaways from *Alstate*. First, the definition of what constitutes "concerted" activities has been altered and may be further altered in the future. In its decision, the NLRB expressly invited future challenges to its prior rulings that discussions about certain topics are "inherently" concerted, and, with this clarified standard, it would not be surprising to see the NLRB hold that complaints about wages are not per se concerted. Second, this decision showcases the NLRB's current willingness to reconsider prior decisions and redefine what is protected under the National Labor Relations Act. Almost two year's ago, the NLRB's decision in *The Boeing Company*, 365 NLRB No. 154 (2017), significantly changed the standard for whether a workplace rule violated the Act. It is clear that the NLRB, as currently configured, is ready and willing to rein in what it perceives to be overreach in prior decisions.

Regardless of what these future developments might hold, the NLRB's decision in *Alstate Maintenance, LLC* helps employers today. Gripes that happen to affect other employees and happen to be made in the presence of other employees are not "concerted," and employers who punish employees for perceived insubordinate gripes are less likely to face the wrath of the National Labor Relations Board going forward.

David authored an article on *The Boeing Company* decision, published in the Spring 2018 issue of The JSH Reporter. Visit jshfirm.com/Reporter to read the article.

RESOURCE ALERT!

USLAW NETWORK Releases Two Compendiums of Law

In late 2018, USLAW updated and published two Compendiums. JSH attorneys and summer clerks served as contributing authors for the Arizona chapters. Visit USLAW.org/resources/compendiums-of-law to view all available resources.

State-by-State Guide to When Joint and Several Liability Arises
This quick glance compendium serves as a reference tool for joint and several laws across the United States. The allocation of fault in cases is not simply who did what. State law variations affect whether a plaintiff may recover, how much a plaintiff may recover, and how much a defendant may owe. This 50-state summary is a snapshot of the laws that affect how fault is allocated and joint and several liability.

State-by-State Review of Workers' Compensation Claim Filing Deadlines
For those working in multiple jurisdictions, it is often difficult to discern whether an employee's claim is timely or not. Protecting your company and preventing what would otherwise be time-barred claims is an essential part of working in multiple jurisdictions. This compendium provides quick reference for those deadlines on a state-by-state basis.

USLAW NETWORK, INC®

Author: **DAVID POTTS**

David focuses his practice on employment law, general civil litigation, commercial and business litigation, and wrongful death and personal injury defense.

602.263.1708 | dpotts@jshfirm.com | jshfirm.com/dpotts

OVERTHINKING UNDERINSURANCE: SIMPLIFY YOUR UIM FORMS

AUTHORS: **Michael Halvorson | 602.263.7371 | mhalvorson@jshfirm.com | jshfirm.com/mhalvorson**
Alexander Lindvall | 602.263.1717 | alindvall@jshfirm.com | jshfirm.com/alindvall

Related Practice Areas: Auto Liability Defense, Transportation Defense **Related Industries:** Insurance, Transportation

Arizona's underinsured motorist (UIM) statute—A.R.S. § 20.259.01(B)—is remarkably opaque. It provides, in part:

> Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and shall by written notice offer the insured and at the request of the insured shall include within the policy underinsured motorist coverage that extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy. The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director shall be valid for all insureds under the policy. An insurance producer that uses such a form in offering underinsured motorist coverage and confirming the selection of limits or rejection of coverage by a named insured or applicant satisfies the insurance producer's standard of care in offering and explaining the nature and applicability of underinsured motorist coverage. A named insured's selection of limits or rejection of underinsured motorist coverage on a form approved by the director constitutes the final expression of the named insured's decision to purchase or reject underinsured motorist coverage. . . .

This is ambiguous writing, at best. Why the drafters of this statute chose to write it as a sphynxian riddle is as unclear as the language itself, but that's what we're left with. In distilled terms, this statute states that auto insurers must "be willing to provide" UIM coverage to their insureds, and they must "bring the availability of [UIM] coverage" to their insureds' attention in writing.[1] That's it. Auto insurers' obligations under A.R.S. § 20-259.01(B) are narrow. They are required only to "'make available' UIM insurance and… communicate that availability in a written notice" to their insureds. [2]

If, after being made aware of UIM coverage, an insured "affirmatively requests" UIM coverage, it must be added to their policy.[3] If the insured is made aware of UIM coverage and does not "affirmatively request" such coverage, it does not need to be added to their policy.[4] But if the auto insurer does not offer UIM coverage to its insured, the insured is afforded UIM coverage as a matter of law.[5]

Accordingly, this statute's requirements—as announced by the Arizona courts—are rather straightforward. The problem is that carriers too often insert unnecessary complications into their UIM notices. On behalf of our client, a national auto insurer, we recently authored a coverage opinion in which the carrier had provided the insured the following UIM form:

UNINSURED (UM) AND UNDERINSURED (UIM) SELECTION FORM

You have a legal right to purchase… Underinsured Motorist Insurance… Underinsured Motorist (UIM) Insurance provides protection if the negligent motorist does not have enough liability insurance to pay for the injuries caused… This policy will provide… Underinsured coverage in the same amount as the policy's Bodily Injury Liability limits unless you select a lower amount, or no coverage, as stated in this notice.

Underinsured Motorist Insurance

To make your selection, please initial on the line next to the option you are choosing:

_____ I hereby reject Underinsured Motorist (UIM) Insurance and understand that my policy will not contain this coverage.

_____ I select UIM limits that are equal to my Bodily Injury Insurance limits of $15,000/$30,000 (UIM Premium = $112).

NOTE: If this form is not signed and returned, your policy will be issued with…UIM limits equal to the Bodily Injury limits on your policy [15/30].

X_/s/ Insured's Signature_ X_____
Signature Date

1 *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 226 Ariz. 345, 348 ¶ 11, 248 P.3d 193, 196 (2011).
2 See *Newman v. Cornerstone Nat'l Ins. Co.*, 237 Ariz. 35, 37 ¶ 8, 344 P.3d 337, 339 (2015).
3 See *Blevins v. GEICO*, 227 Ariz. 456, 458 ¶ 7, 258 P.3d 274, 276 (App. 2011).
4 *Id.*
5 *Id.*

Most carriers use forms that are very similar to this. The problem in our case was that the insured did not initial next to either the "reject" or "select" options; he merely signed his name on the line below. And because the selection form said, "This policy will provide…Underinsured coverage…unless you select a lower amount, or no coverage, as stated in this notice," it was our opinion that the insured was entitled to UIM coverage, even though he had been paying the non-UIM premiums under his policy. The carrier lost money it should not have lost, solely due to the drafting of the form.

The message to be taken from this situation is this: keep it simple. When it comes to "offer[ing]" UIM coverage under § 20-259.01, auto insurers have very limited obligations. They need only carry UIM insurance and make their insureds aware of the availability of this UIM coverage with a written notice. For example, if an insurer sent its insureds a hand-written postcard that read: "Happy Holidays! (By the way, [carrier name] offers underinsured motorist coverage. Call your agent for additional information.)," it likely would have satisfied its statutory obligations under § 20-259.01(B).

The written notice does not need to explain what UIM coverage is.[6] It does not need to be translated into Spanish.[7] It does not need to state a premium price.[8] And it does not need to be signed or returned.[9] It just needs to be written in such a way that a reasonable reader would understand that they could purchase UIM coverage if they wish.[10]

The Arizona Legislature provides auto insurers an iron-clad method of demonstrating compliance with § 20-259.01. If the insurer has its UIM notice pre-approved by the Arizona Department of Insurance (ADOI), it is in compliance with § 20-259.01(B).[11] Additionally, insurers are not required to use ADOI-approved forms,[12] and insurers can still easily satisfy their statutory obligations by providing their insureds with their own written notice of the availability of UIM coverage.

> "In layman's terms, this statute states that auto insurers must "be willing to provide" UIM coverage to their insureds, and they must "bring the availability of [UIM] coverage," to their insureds' attention in writing."

Remember, don't overthink your underinsurance notices. Keep it simple and straightforward.

6 *Tallent v. Nat'l General Ins. Co.*, 185 Ariz. 266, 268, 915 P.2d 665, 667 (1996).
7 *Ballesteros*, 226 Ariz. at 349 ¶ 14, 248 P.3d at 197.
8 *Newman*, 237 Ariz. at 36 ¶ 1, 344 P.3d at 338.
9 *Blevins*, 227 Ariz. at 457 ¶ 1, 258 P.3d at 275.
10 *Newman*, 237 Ariz. at 37 ¶ 9, 344 P.3d at 339.
11 *See Wilks v. Manobianco*, 237 Ariz. 443, 445 ¶ 7, 352 P.3d 912, 914 (2015) (noting that § 20-259.01(B) creates a "safe harbor" for insurers who use ADOI-approved forms).
12 *Blevins*, 227 Ariz. at 460–61 ¶ 18, 258 P.3d at 278–79.

Author: **MICHAEL HALVORSON**

Mike's diverse practice focuses on trucking and transportation defense, including commercial cargo and property loss, as well as in the areas of motor vehicle liability, product liability, dram shop and premises liability defense.

602.263.7371 | mhalvorson@jshfirm.com | jshfirm.com/mhalvorson

Author: **ALEXANDER LINDVALL**

Alex works in the firm's Transportation, Auto, Products and General Liability Trial Group. He focuses his practice in the areas of automobile and commercial trucking defense, products liability, wrongful death and personal injury, and general liability defense.

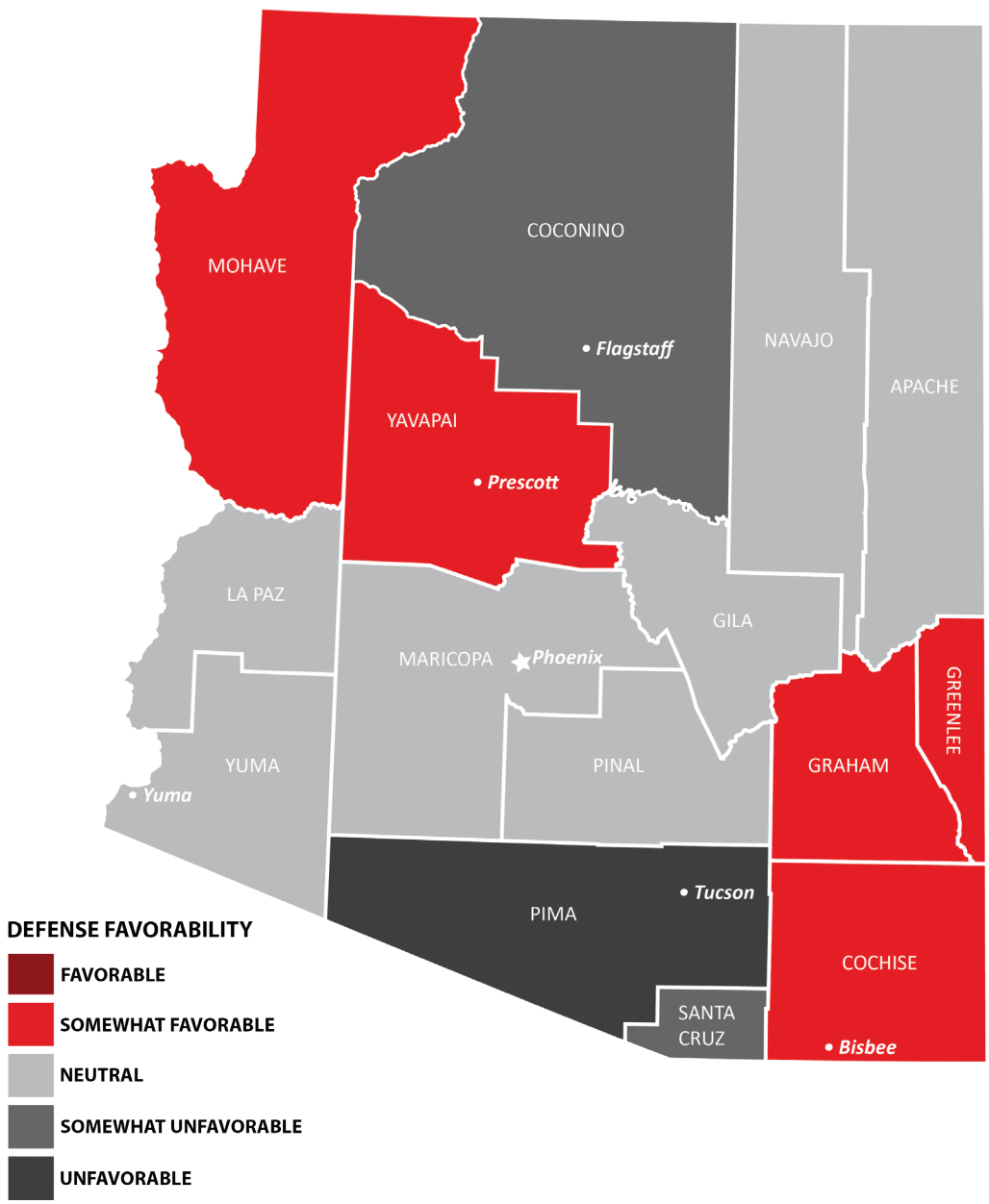
602.263.1717 | alindvall@jshfirm.com | jshfirm.com/alindvall

RESOURCE

ARIZONA AT-A-GLANCE: DEFENSE FAVORABILITY BY COUNTY

The firm's At-a-Glance resource has been updated to include recent jury verdict and trial court orders in each county, classifying Arizona counties as favorable or unfavorable to defense. Analysis includes 15 points on the most common questions and issues in personal injury claims, including: Statute of Limitations; Punitive Damages; Comparative Negligence; Assumption of Risk; Dram Shop Act; Negligent Infliction of Emotional Distress; Collateral Source Rule; Mandatory Liability Coverage; Med Pay; UM/UIM Coverage; Offer of Judgement; Seat Belt Rule; Courts; Wrongful Death Cases; and Settlement of Wrongful Death and Minor Cases.

Download this resource at jshfirm.com/Arizona-at-a-Glance



JSH WELCOMES FOUR SUMMER LAW CLERKS

JSH hosted four 2L law students from the Sandra Day O'Connor College of Law at Arizona State University as part of our summer clerkship program. The students had the opportunity to work with each of the firm's practice areas and various lawyers on writing and research projects, learn about the day-to-day practice of law in the private sector, and observe trials, depositions, mediations and arbitrations.

The firm is proud to recruit law students and graduates from our exemplary in-state law schools, and has been recognized as a top 10 recruiter of ASU law students nationally through our hiring of so many ASU graduates.

Samantha Cote

Samantha is a member of the Arizona State Law Journal and serves as Secretary of the Liberty Project. During her first year of law school, Samantha gained valuable experience as a volunteer with the Arizona Legal Center, an Alternative Dispute Resolution Extern at the City of Phoenix Prosecutor's Office, and as an extern at the Maricopa County Public Defender's Office. Samantha earned her B.S. in Sports Management, with a minor in Psychology, from the University of Massachusetts Amherst, where she was awarded the Glenn M. Wong Sports Law Scholarship. While pursuing her undergraduate degree, she interned in the Juvenile Unit at the Worcester District Attorney's Office, and in Baseball Operations with the Wachusett Dirt Dawgs – a Futures Collegiate Baseball League. She was awarded the Rob Carey Sports Law Scholarship.

Joshua Dunford

Joshua is an honoree of the Dean's Recruitment Award and a Willard H. Pedrick Scholar. He serves as Senior Article Editor of the Sports and Entertainment Law Journal, and is a member of the Executive Moot Court Board Problem Drafting Committee. During his first year of law school, Joshua worked as an extern at the Arizona Court of Appeals to the Hon. Kenton D. Jones. Before law school, he worked at the Family Crisis Center as a Peer Advocacy Program Coordinator. He earned his B.S. in Communications from Brigham Young University, where he also served as President of the Prelaw Society, earned 1st Place in the Research and Creative Works Conference, and coordinated and hosted a support group for LGBT students. After high school, Joshua spent a year in Peru doing community service, where he learned conversational Spanish.

Kathryn Hunnicutt

Kathryn is an active member of the Women Law Students' Association and Arizona Women Lawyers Association. She earned her B.S. in Marketing, with a minor in Spanish, from the University of Arizona Eller College of Management. In her final year, Kathryn studied abroad in idyllic Rome, completing courses in Macroeconomics and International Marketing for John Cabot University. Demonstrating her passion for leadership and social networking, Kathryn served as Social Chair Assistant for Chi Omega Sorority, and was a Social Committee Member for Alpha Kappa Psi Professional Business Fraternity. Before pursuing her law degree, Kathryn worked as Assistant Director at Primrose School of Ahwatukee, where she managed the day-to-day operations and marketing of this preeminent preschool. Kathryn has studied Spanish for eight years and continues to improve her proficiency.

Anne-Grace Reule

Anne-Grace serves as Associate Editor of the Jurimetrics Journal of Law, Science, and Technology at ASU. She works as a teaching assistant for the Legal Advocacy Writing Course, and earned the Excellence in Oral Advocacy Award for First-Year Legal Writing Course. Anne-Grace is the Vice President of the Moot Court Executive Board, and the recipient of the J. Windle Merit Scholarship at ASU. Her team earned 3rd Place in the Moot Court Jenckes' Closing Argument Competition, and was a finalist in the Moot Court Client Counseling Competition. During her first year of law school, Anne-Grace worked as a summer extern with the Arizona Justice Project. She earned her B.A., *magna cum laude*, in Political Science and Arabic Language from the University of South Florida. She also won the Outstanding Leadership of Student Organization Award, served as President of Alpha Kappa Psi Professional Business Fraternity, and as President of the Arabic Language Organization.

PUBLIC SERVICE ANNOUNCEMENT: IF YOU OWN A CLOSELY HELD BUSINESS ENTITY, YOU HAVE WAIVED FIFTH AMENDMENT RIGHTS

AUTHORS: **Lori Voepel | 602.263.7312 | lvoepel@jshfirm.com | jshfirm.com/lvoepel**
Alexander Lindvall | 602.263.1717 | alindvall@jshfirm.com | jshfirm.com/alindvall

Related Practice Areas: Appellate, Commercial & Business Litigation, Employment Law, Governmental Liability **Related Industry:** Commercial and Business Litigation

Most people are familiar with "pleading the Fifth." Most people understand it to mean that they have "the right to remain silent"[1] and that the government cannot force them to disclose incriminating information that could lead to their own indictment or conviction.[2] What most people don't know, however, is that this right does not apply to most business-related activities. For example, the Supreme Court has held that corporations,[3] partnerships,[4] labor unions,[5] and all "collective group[s]" with an "impersonal" character do not possess any privilege against self-incrimination.[6]

In its harshest opinion on this topic, the Court held in *Braswell v. United States*—by a vote of 5 to 4—that a corporation's sole shareholder could be forced to produce, compile, organize, and (by way of compelled testimony) authenticate his company's incriminating business records.[7] "[T]he custodian of. . .entity records holds those documents in a representative rather than a personal capacity," the Court reasoned.[8] Thus, "the custodian's act of production is not deemed a personal act, but rather an act of the corporation," which has no Fifth Amendment privilege.[9] In other words, businesses have no privilege against self-incrimination, and records custodians are mere extensions of their businesses; therefore, they forfeit that privilege while acting on behalf of the business.

What this means in real-world terms is that businesses and their records custodians can never resist government-issued subpoenas on Fifth Amendment self-incrimination grounds, regardless of how small the business may be and even if the individual custodian is the actual target of the investigation.[10] Assume, for example, that you and your spouse decide to open up a small business. You go to the Corporation Commission's website, fill out the necessary paperwork, and form Mom and Pop, LLC. Congratulations, you have just forfeited a fundamental constitutional right. The moment you filed your articles of organization with the Arizona Corporation Commission, you and your spouse, as the business's records custodians, surrendered your right to withhold any business-related documents from the government.[11] The IRS or criminal prosecuting agencies can serve you with a subpoena duces tecum and require you to produce, compile, and authenticate all of your business's records. If you refuse to comply, you will be held in contempt of court, meaning you could face serious fines and even jail time. In effect, the *Braswell* Court held that the government can force small-business owners to create the exhibits that will be used against them at trial.

On February 13, 2019, Jones, Skelton & Hochuli, in collaboration with Jones Day, filed a Petition for a Writ of Certiorari with the United States Supreme Court, asking the Court to hear a case that would have overturned or limited this case as it applies to small, family-owned, closely held businesses. The Court, unfortunately, denied this Petition—leaving in place, for now, the rule that businesses and their custodians do not enjoy a constitutional privilege against self-incrimination.

1 *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).
2 *See Williams v. Florida*, 399 U.S. 78, 111 (1970) (Black, J., concurring) (under the "plain and obvious meaning" of the Self-Incrimination Clause, "a criminal defendant cannot be required to give evidence, testimony, or any other assistance to the State to aid it in convicting him of a crime").
3 *Wilson v. United States*, 221 U.S. 361, 376, 385 (1911); *Dreier v. United States*, 221 U.S. 394, 400 (1911).
4 *Bellis v. United States*, 417 U.S. 85, 101 (1974).
5 *United States v. White*, 322 U.S. 694, 701 (1944).
6 *See id.* at 699, 701.
7 *Braswell v. United States*, 487 U.S. 99, 108–14 (1988).
8 *Id.* at 109–10.
9 *Id.* at 110.
10 *Id.* at 108–10.
11 *See id.*

> In effect, … the government can force small-business owners to create the exhibits that will be used against them at trial.

Under current Supreme Court precedent, such businesses have the right to engage in free speech,[12] the right to freely exercise their religion,[13] the right to freely associate with whom they choose,[14] the right to be free from unreasonable government searches and seizures,[15] the right not to be tried for the same crime more than once,[16] the right to a jury trial,[17] the right to equal protection under the law,[18] and the right to due process of law.[19]

In our Petition, we argued that it makes no sense to afford the owners of small businesses so many constitutional rights but to arbitrarily withhold Fifth Amendment rights without even requiring any type of waiver. As the Supreme Court recently explained in its *Hobby Lobby* decision: small, family-owned businesses are often mere extensions of "the human beings who own, run, and are employed by them."[20] And when rights are extended to businesses, "the purpose is to protect the rights of these *people*."[21] Unfortunately, the Court was not ready to address this discrepancy and will continue to withhold Fifth Amendment self-incrimination rights from the owners of small and family-owned businesses for the foreseeable future.

12 *Citizens United v. FEC*, 558 U.S. 310, 364–65 (2010).
13 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768–69 (2014).
14 *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000).
15 *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977).
16 *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977).
17 *S. Union Co. v. United States*, 567 U.S. 343, 350–52 (2012).
18 *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 536 (1933).
19 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 297 (1980).

20 *Hobby Lobby, 134 S. Ct. at 2768–69.*
21 *Id.* (emphasis added); *see also id.* ("[E]xtending Fourth Amendment protections to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being.")

Author: **LORI VOEPEL**

Lori has handled over 300 federal and state appeals in virtually every area of the law, including governmental liability, medical and legal malpractice, employment law, civil rights, insurance defense and bad faith, product liability, school law, prison liability, administrative law, commercial law, construction law, airline liability, criminal law, workers' compensation, and family law.

602.263.7312 | lvoepel@jshfirm.com | jshfirm.com/lvoepel

Author: **ALEXANDER LINDVALL**

Alexander focuses his practice in the areas of automobile and commercial trucking defense, products liability, wrongful death and personal injury, and general liability defense.

602.263.1717 | alindvall@jshfirm.com | jshfirm.com/alindvall

DEFENDANTS SHOULD PRESERVE "NO DUTY" ARGUMENTS IN NEGLIGENCE CASES WITH PRE-TRIAL AND POST-TRIAL MOTIONS

AUTHOR: **Lori Voepel** | **602.263.7312** | **lvoepel@jshfirm.com** | **jshfirm.com/lvoepel**

Related Practice Area: Appellate

In *Quiroz v. ALCOA Inc.*, 243 Ariz. 560 (2018), the Arizona Supreme Court clarified the "duty" element of a negligence claim and reaffirmed prior decisions holding that: (1) the plaintiff must prove the duty element in every case because courts will not presume a duty exists; (2) foreseeability is not a factor in determining the existence of a duty; (3) duties are based on special relationships or public policy; and (4) public policy may be expressed in state statutes, federal statutes, or the common law. The court refused to adopt the duty framework set forth in the Third Restatement of Torts, which ordinarily presumes a duty when a defendant's actions create a risk of harm to a plaintiff.

What does this mean in practice? Duty is a threshold issue and "a legal matter to be determined *before* the case-specific facts are considered." *Gipson v. Kasey*, 214 Ariz. 141, 145, (2007) (emphasis in original). Therefore, in every negligence case, defendants and their counsel should assess whether the plaintiff was owed a duty of care. If not, defense counsel should file a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment based on the lack of a duty.

Keep in mind that the denial of one of these pretrial motions is generally not reviewable on appeal, even after a final judgment is entered. *See John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 539 (App. 2004); *ClearOne Communications, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1172 (10th Cir. 2011). A defendant who wants to preserve a no-duty issue for appeal must do so by reasserting it in a motion for judgment as a matter of law both during and after trial, or in some other post-trial motion. *John C. Lincoln Hosp.*, 208 Ariz. at 539; *see* Ariz. R. Civ. P. 50.

> "Duty is a threshold issue and "a legal matter to be determined *before* the case-specific facts are considered."

There is an exception to this preservation rule for a "purely legal issue" asserted in a summary judgment motion. *Ryan v. San Francisco Peaks Trucking Co., Inc.*, 228 Ariz. 42, 48 (App. 2011). A "purely legal issue" is "one that does not require the determination of any predicate facts." *John C. Lincoln Hosp.*, 208 Ariz. at 539. Whether a duty exists is arguably a "purely legal issue." But it is still the better practice to reassert a no-duty argument in a Rule 50 motion if a pretrial motion is unsuccessful.

Author: **LORI VOEPEL**

Lori has handled over 300 federal and state appeals in virtually every area of the law, including governmental liability, medical and legal malpractice, employment law, civil rights, insurance defense and bad faith, product liability, school law, prison liability, administrative law, commercial law, construction law, airline liability, criminal law, workers' compensation, and family law.

602.263.7312 | lvoepel@jshfirm.com | jshfirm.com/lvoepel

26 JSH LAWYERS RECOGNIZED IN 2019 SOUTHWEST SUPER LAWYERS AND RISING STARS

Super Lawyers®

Southwest Super Lawyers has named 14 of the firm's lawyers to the 2019 edition of Super Lawyers, and 12 have been recognized on the *Rising Stars* list. Three of the firm's lawyers are appearing for the first time: Diana Elston, John Lierman and Cory Tyszka.

2019 Southwest Super Lawyers

Donn Alexander
Stephen Bullington
James Evans
Eileen GilBride
Gary Linder
Michael Ludwig
Donald Myles
Jay Rosenthal
Russell Skelton
Josh Snell
Phillip Stanfield
Georgia Staton
Lori Voepel
Mark Zukowski

2019 Rising Stars

Brandi Blair
Diana Elston
Chelsey Golightly
Ashley Villaverde Halvorson
Jeremy Johnson
John Lierman
Kenneth Moskow
R. Christopher Pierce
David Potts
Erik Stone
David Stout
Cory Tyszka

CHAMBERS USA AWARDS JSH AND DONALD MYLES "BAND 1" RANKING

New in 2019, Chambers USA created a general category for insurance law in Arizona. Based upon extensive market research, the firm's insurance practice and Don Myles each earned a Band 1 ranking, the highest ranking awarded by Chambers. Rankings are the result of extensive independent research based on one-on-one client interviews.

Feedback included: *"A well-reputed name in the Arizona insurance market on the insurer side for a wide spectrum of issues. Team consists of lawyers with longstanding knowledge of insurance coverage, bad faith and compliance, both in trial and advisory settings, as well as specialists in the area of transportation insurance defense."*

Sources reported, *"The team consists of 'very, very smart insurance coverage lawyers.'"*

Chambers USA is an annual legal publication highlighting individual and firm rankings based on extensive independent research in the areas of technical legal ability, client service, value, due diligence, industry knowledge, and professional conduct.

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FEATURED TEAM:
LEGAL NURSE CONSULTANTS

With 280 cumulative years of experience, the firm's seven legal nurse consultants (LNC) supplement our medical liability and health care defense group with extensive clinical and administrative experience. The LNC team provides all manner of litigation support, including conducting in-depth medical records review and research, identifying issues or manipulated medical records, creating medical chronologies for trial, interviewing clients and experts, developing collaborative case strategies, and so much more.

Our LNCs are licensed registered nurses in Arizona, and have significant clinical nursing and medical administration experience. They are an integral part of our health care and medical malpractice defense group, and true assets to the firm and our clients.

Learn more about our LNCs and health care defense group at jshfirm.com/medical-liability-and-health-care.

Judith Avery, BSN, RN

Judy has more than 50 years of nursing experience, working as a clinical nurse for 12 years, in medical risk management for 15 years, and as a legal nurse consultant for 23 years. In her 23-years as a legal nurse consultant, Judy has worked on more than 60 cases that went to trial, and many hundreds beyond that. Before joining JSH, Judy worked at five other Valley law firms as a legal nurse consultant. She is a Founding Member of the American Association of Legal Nurse Consultants (AALNC), and has served as President of the local AALNC Chapter. Dedicated to continuing education, Judy is a frequent presenter to medical and nursing students at U of A, Midwestern University, A. T. Still University School of Osteopathic Medicine, and ASU's College of Nursing.

602.235.7121 | javery@jshfirm.com | jshfirm.com/javery

Robin Hungerford Burgess, BSN, RN, LNCC

Robin has worked as a legal nurse consultant since 1999, beginning her career at a Valley plaintiff's firm focusing on medical malpractice and personal injury. Since joining JSH in 2003, Robin has provided essential support to the legal defense team. Before getting her foot in the door of an attorney's office as a Legal Nurse Consultant, Robin worked as a clinical nurse for 16 years. Her experience includes working as floor nurse and Charge Nurse for the orthopedic and neurology units at the old Mesa Lutheran Hospital, as the office nurse for an internal medicine provider in solo practice, as a Triage Nurse and Nursing Supervisor at a large medical clinic with up to 24 providers, and as Nursing Supervisor at a primary care and urgent care clinic. She is knowledgeable in policy development, regulations, and staffing matters. In addition, due to personal experience with loved ones, she is knowledgeable in areas of needs and services for the disabled and the chronically ill, including insurance coverage, home health care and outpatient therapies.

602.235.7142 | rhungerford@jshfirm.com | jshfirm.com/rhungerford

Denice Jarles, BSN, RN

Denice has 22 years of experience working with lawyers and law firms in matters involving medical issues and records, from initial investigation through trial. Before joining JSH, Denice owned her own consultancy and worked in-house at two other Valley law firms as a legal nurse consultant. She is especially adept in her ability to educate attorneys, experts and clients in the nuances of how medicine interacts with the legal aspects of a case. Throughout her 22-year career, Denice has worked on hundreds of cases involving professional liability (both medical and legal), personal injury, criminal and products liability.

602.235.7108 | djarles@jshfirm.com | jshfirm.com/djarles

Tina Larabell, BSN, RN

Tina is the group's most recent addition, working primarily in the areas of medical malpractice, nursing home and pharmacy defense, and commercial litigation. Before joining the firm, she worked as a procedural endoscopy nurse and team nurse at the Mayo Clinic in Scottsdale, and in the telemetry unit at Scottsdale Healthcare Shea. While pursuing her nursing degree, she worked as a nursing assistant at Scottsdale Healthcare Shea. Prior to that, Tina gained extensive professional administrative experience as an executive recruiter, office and operations manager of a trucking and transportation company, and executive legal assistant to the general counsel of an employment agency.

602.235.7125 | tlarabell@jshfirm.com | jshfirm.com/tlarabell

Patricia Shaw, BSN, RN

With 50 years of nursing experience, Pat brings extensive practical knowledge of emergency medicine, occupational medicine, primary care and diagnostic imaging. She began her nursing career as an emergency room nurse at St. Mary's Medical Center in Indiana. Pat then transitioned into the administrative side of medicine, gaining extensive experience at national and regional hospitals and medical groups. Her roles included practice administrator at Gilbert Primary Care, director of Primary Care Practice and director of Diagnostic Imaging at Chandler Regional Hospital, healthcare administrator at MedPartners, occupational medicine supervisor at CIGNA Healthcare, director of St. Joseph's Center for Business Health, business manager at Elkart Emergency Physicians, and emergency medical services coordinator at St. Mary's Medical Center. While working as EMS coordinator at St. Mary's, Pat was a Certified Emergency Nurse and served as an Instructor-Trainer with the Indiana State EMS System for the Advanced Trauma Life Support (ATLS), Basic Trauma Life Support (BTLS), and Advanced Cardiac Life Support (ACLS) courses. She also served as an Instructor-Trainer at the University of Evansville for their Paramedic and EMT courses.

602.235.7114 | pshaw@jshfirm.com | jshfirm.com/pshaw

Roxane Tompkins, BSN, RN, LNCC

Roxane has more than 20 years of health care and nursing experience, with particular emphasis in medical review and analysis, internal medical-charge and third-party medical charge audits, and hospital billing processes. A registered nurse and certified legal nurse consultant, she previously worked as a nurse auditor at Dignity Health, as a clinical audit specialist at the Cancer Treatment Center of America in Arizona, and as a staff nurse in the labor care unit at St. Joseph Hospital. She also served as a Clinical Adjunct Instructor for Phoenix College. In addition, Roxane gained legal nurse consulting experience while working for another Valley defense firm in their health care and medical malpractice group.

602.263.4459 | rtompkins@jshfirm.com | jshfirm.com/rtompkins

Victoria Zeidell, RN

Vicky has almost 40 years of clinical nursing and legal nurse consultant experience. For more than 20 years, she has worked as a legal nurse consultant for Arizona health care defense law firms. Before beginning her career as a legal nurse consultant, Vicky worked for 12 years as the Director of Nursing for a large regional medical center in Arizona. She also worked as a performance improvement coordinator, system coordinator for information services, and nursing clinical systems manager. Her in-depth clinical experience includes neurology, neurosurgery, neuro intensive care unit, psychiatric, medical, cardiac catheterizations, i-131 radiation therapy, gastroenterology, endocrinology and renal.

602.263.7317 | vzeidell@jshfirm.com | jshfirm.com/vzeidell

Nicolas Martino and Kimberly Page Named to AADC Young Lawyer's Division Board of Directors

The Arizona Association of Defense Counsel Young Lawyer's Division (AADC YLD) has named two JSH associates to its 2019-2020 Board of Directors. The AADC YLD Board includes attorneys from throughout Arizona, practicing in every substantive area within the defense bar.

Nicolas Martino will serve as Community Outreach Chair, focusing his efforts on the charity softball tournament, which raises $10k+ annually for the Devereux Foundation. Nic works in the firm's Trucking & Transportation Group, focusing his practice in the areas of insurance defense, wrongful death and personal injury.

602.263.1795 | nmartino@jshfirm.com | jshfirm.com/nmartino

Kimberly Page will serve as CLE Chair and Board Secretary, where she will oversee CLE programming and professional development for YLD members. She focuses her practice in the areas of professional liability, bad faith and complex litigation, and is experienced in matters involving construction defect and general liability.

602.263.1780 | kpage@jshfirm.com | jshfirm.com/kpage

PRESENTATIONS

Michele Molinario Co-Presents USLAW Webinar: "What's Reasonable When Employers Are Asked to Provide Accommodations Under the ADA or PDA?"

Employers must be aware of, and train managers about, the legal obligations that may impact decisions about treatment of qualified employees with disabilities under the Americans with Disabilities Act and Pregnancy Discrimination Act. Employers must be prepared to provide effective, reasonable accommodations for employees with disabilities. This one-hour webinar program is designed for all employers — from those involved in human resources to in-house counsel and other managers who deal with employment law issues on a regular basis. Presenters discuss the interactive process for providing reasonable accommodations, which may run the gamut of modified work schedules, to assistive technology and personal assistance services.

Michele represents governmental entities and their employees in employment matters involving Title VII, FMLA, § 1981, EEOC investigations, wage disputes, ADA, ADEA, wrongful termination, negligent hiring, and personal injury and wrongful death actions. She has dedicated her professional career to defending correctional institutions, and public entities and their employees, including police officers, detention officers, emergency responders, public works directors, and traffic engineers. Michele leads the firm's Governmental Liability & Employment Trial Group.

602.263.1746 | mmolinario@jshfirm.com | jshfirm.com/mmolinario

Watch the webinar on demand on our website at jshfirm.com/events

Eileen GilBride Presents a Strafford Live Webinar: "Trial Strategies for Multi-Million Dollar Verdict Reversals: Lessons From Recent Cases"

JSH partner and Appellate Department Chair Eileen GilBride co-presented this webinar, discussing the steps necessary to protect a successful result or reverse a defeat while your case is in trial. In this 90-minute CLE, panelists examined the identifying factors of recent reversals of multi-million dollar verdicts, and provided best practices for trial counsel, including methods for spotting, correcting and capitalizing on those factors.

Eileen has handled more than 400 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions. Substantive areas of her appeals include constitutional, contracts, torts, insurance coverage and defense, employment, municipal and school defense, civil rights, prisoner cases, professional malpractice, Indian law, legislative, administrative, personal injury, wrongful death, divorce, child custody and support, property rights and trusts.

602.263.4430 | egilbride@jshfirm.com | jshfirm.com/egilbride

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ARIZONA LEGISLATURE MAKES SIGNIFICANT REVISIONS TO SHAPE OF CONSTRUCTION DEFECT CLAIMS WITH SB 1271

AUTHOR: **John Gregory** | **602.263.7343** | **jgregory@jshfirm.com** | **jshfirm.com/jgregory**

Related Practice Area: Construction Litigation **Related Industries:** Construction, Insurance

This article was also published in the Spring 2019 Edition of AADC's Magazine, *Common Defense.*

On April 10, 2019, Governor Doug Ducey signed SB 1271 into law. The product of over two years of lobbying and interest group meetings, this bill makes significant and myriad changes to existing laws relating to residential construction.

Reversing *Amberwood* – Proportional Liability Only

One of the main ways this bill immediately impacts the contractor-subcontractor relationship is by limiting an indemnitor's potential obligations only to the extent of its own negligence. The 2017 Arizona Court of Appeals *case Amberwood Development, Inc. v. Swann's Grading, Inc.*, No. 1 CA–CV 15–0786, 2017 WL 712269, found that a subcontractor could be held responsible for indemnity broader than its own scope of work (and without a finding of fault) if the contract did not expressly limit its risk that narrowly. SB1271 creates a new statute, A.R.S. § 32-1159.01, to reverse that (non-binding) decision.

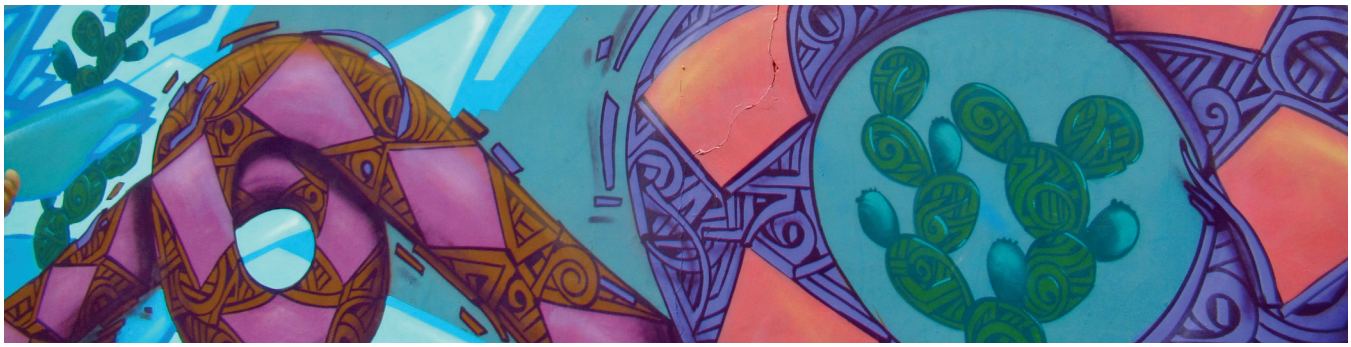
Section A of the new statute voids such broad indemnification agreements in construction or architect-engineer contracts as against public policy. It voids any such provision "to the extent that it purports to insure, to indemnify or to hold harmless the promisee from or against liability for loss or damage resulting from the negligence of the promisee or the promisee's indemnitees, employees, subcontractors, consultants or agents other than the promisor." Thus, a subcontractor's indemnity is now limited only to the extent of its own negligent workmanship.

Section D of the new statute notes that the duty to defend can still apply to claims "arising out of or relating to" the contracting party's work. Because this does not require a finding of fault to limit the duty to defend, it appears unchanged by the new statute.

Of note to insurers is Section C, which states that an insurer is not required to indemnify an additional insured for the proportion of fault allocated to it. This does not limit the duty to defend, however, so the policy should still be the first place to look when determining any defense obligation owed to an additional insured.

The statute's scope is limited to construction and architect-engineer contracts between private parties for residential dwellings. A.R.S. § 32-1159.01(E). These terms are given specific definitions that are broad enough to cover the work of virtually all engineers, architects, design professionals, contractors and subcontractors. *See* A.R.S. § 32-1159.01(G). The new statute does not apply to contracts with the state or a municipality (A.R.S. § 32-1159.01(F)(1)); agricultural improvement districts (§ 32-1159.01(F)(2)); surety or performance bonds by its principal or indemnitors (§ 32-1159.01 (F)(3)); an insurance agreement between the insurer

> "It is … not intended to affect insurance policies as between a carrier and its additional insureds or the multiple insureds of a single policy other than the proportionally limits any insured may have to the other insureds …."



and named insureds (§ 32-1159.01(F)(4)); and public service corporation's rules, regulations or tariffs that are approved by the Corporation Commission (§ 32-1159.01(F)(7)). It is likewise not intended to affect insurance policies as between a carrier and its additional insureds (§ 32-1159.01 (F)(5)) or the multiple insureds of a single policy other than the proportionality limits any insured may have to the other insureds imposed by the newly instituted Sections A, B, and C. (§ 32-1159.01 (F)(6)).

Revisions to the Purchaser Dwelling Act

Attorneys' Fees Reinstituted

The Legislature reinstated A.R.S. § 12-1364 to allow for recovery of attorneys' fees. A Court now may award reasonable attorneys' fees to the prevailing party. (§ 12-1364(A)). The homeowner is deemed the prevailing party "if the relief obtained by the purchaser for that contested issue, exclusive of any fees and taxable costs, is more favorable than the repairs or replacements and offers made by the seller…." *Id.* If it is not, the seller is considered the prevailing party.

The new statute sets guidelines to consider when calculating whether attorneys' fees are reasonable. The Court should weigh:

1. The repairs, replacements or offers made by the seller, if any, before the purchaser filed the dwelling action pursuant to section 12-1363.
2. The purchaser's response to the seller's repairs, replacements or offers made or proposed, if any, before the purchaser filed the dwelling action pursuant to section 12-1363.
3. The relation between the fees incurred over the duration of the dwelling action and the value of the relief obtained with respect to the contested issue.
4. The amount of fees incurred in responding to any unsuccessful motions, claims and defenses during the duration of the dwelling action.

Id. A "contested issue" is "an issue that relates to an alleged construction defect and that is contested by a purchaser following the conclusion of the repair and replacement procedures prescribed in section 12-1363." (§12-1364(E). The new statute does not replace contractual fee provisions (§ 12-1364(C)).

Subcontractor Participation in the PDA

The changes now require the general contractor to promptly forward any PDA notice to the subcontractors that worked on the house, and specifically allows electronic service. (§ 12-1363 (A)). The subcontractor is now provided the right to inspect, test, and repair the property that was previously provided to the general contractor in the 2015 revisions (§ 12-1363 (B)-(C)).

Homeowner Affidavits

A homeowner who brings a dwelling action must now submit an affidavit along with their complaint, affirming they have "read the entire complaint, agree[] with all of the allegations and facts contained in the complaint and, unless authorized by statute or rule, is not receiving and has not been promised anything of value in exchange for filing the dwelling action." (§ 12-1363(N)).

Impact on Third-Party Procedure

Changes are also made to the procedure of bringing third-party claims. The statutes of limitation and repose (e.g. A.R.S. 12-552) are now tolled from the date the general contractor receives the PDA notice until nine months after a civil suit or arbitration demand is served on it. (§ 12-1363 (G)). Once suit is commenced, subcontractors must be joined as third-party defendants if feasible and subject to the Arizona Rules of Civil Procedure (§ 12-1362(D)). The finder of fact must determine:

1.a. If a construction defect exists AND

1.b. The amount of damages caused by the defect AND

2. Each subcontractor whose conduct "whether by action or omission, may have caused, in whole or in part, any construction defect." (§ 12-1362(D)).

The homeowner specifically has the burden of proof as to steps 1.a. and 1.b., but the statute is silent as to who is tasked to proving item 1.c. The finder of fact must then allocate pro rata shares of fault to the subcontractors whose work is implicated. *Id.* The general contractor has the burden of proving each subcontractor's fault in step 2. Subject to the Arizona Rules of Civil Procedure, the new bill requires Steps 1 and 2 to be bifurcated. (§ 12-1362(E)).

Retroactivity

The statute did not specify a retroactivity date for the PDA changes. They presumably took effect on the general effective date of August 27, 2019. There remains an open question of what impact this bill has on pending claims and litigation. With respect to the procedural aspects and right to repair, that almost surely applies to any and all claims of defect raised on or after August 27, 2019. The amended (subcontractor right to repair and bifurcation) will apply from that day forward.

Less clear is what impact the indemnity revisions have on existing contracts. A substantive legal right within an existing contract may constitutionally be impaired if that right has not vested. *Newman v. Select Specialty Hospital-Arizona, Inc.*, 374 P.3d 433 (App. 2016). A right vests when: (1) every event has occurred which needs to occur to make the implementation of the right a certainty; (2) when it can actually be asserted as a legal cause of action; or (3) is so substantially relied upon that retroactive divestiture would be manifestly unjust. *FL Receivables Trust 2002-A v. Arizona Mills, LLC*, 281 P.3d 1028 (App. 2012). Any case that has already been commenced to enforce these now-void indemnity provisions can likely still proceed, as that right has actually been asserted. It is unclear, however, whether tendering the defense to a subcontractor to assert a now-void right to indemnity is enough to say that the indemnitee's rights have vested.

Next Steps

As with any new law, the contours have not been fleshed out. Parties have yet to explore the outer confines of what is and is not enforceable about this bill and its changes to the construction statutes.

Visit jshfirm.com/reporter to download a copy of SB 1271.

Author: **JOHN GREGORY**

John focuses his practice in defending clients facing law suits in the areas of construction defect, dram shop liability and general civil defense litigation.

602.263.7343 | jgregory @jshfirm.com | jshfirm.com/jgregory

FIRM NEWS

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Ashley Villaverde Halvorson & Lori Voepel Featured in Attorney at Law Magazine's Women in Law Issue

JSH partner Ashley Villaverde Halvorson served as the featured attorney in Attorney at Law Magazine's October 2018 Issue, Women in Law. The issue focused on exceptional women leaders in Arizona law, and their contributions to the profession and community. As part of her cover feature, Ashley was interviewed for "Portrait of Today's Woman: Mother, Lawyer, Leader," in which she discussed her journey to and through law school, her dedication to helping LatinX students succeed in the profession, and her role within Los Abogados, Arizona's Hispanic Bar Association.

In her legal practice, Ashley represents insurance companies in bad faith litigation, providing coverage advice, and defending general personal injury and wrongful death actions.

602.263.1793 | ahalvorson@jshfirm.com | jshfirm.com/ahalvorson

As a graduate of the Ladder Down program, JSH partner Lori Voepel authored an editorial article, "Ladder Up Profile: Finding Your Balance," for the October 2018 issue of Attorney at Law Magazine. She discussed the invaluable experience gained from participating in Ladder Down, a year-long program providing direct training and career development to empower women lawyers in leadership, business development and mentoring.

Lori has handled over 300 federal and state appeals in virtually every area of the law, including governmental liability, medical and legal malpractice, employment law, civil rights, insurance defense and bad faith, product liability, criminal law, and workers' compensation.

602.263.7313 | lvoepel@jshfirm.com | jshfirm.com/lvoepel

Brandi Blair Profiled in Attorney at Law Magazine's Veterans in the Law Issue

JSH partner Brandi Blair was featured in the November 2018 Veteran's in the Law issue of Attorney at Law Magazine. Brandi's profile, "From Observer to Advocate," discussed her military career as a Technical Observer on the OV-1 Mohawk, and how she transitioned into legal practice. She credits her personal philosophy – internal fortitude – as being learned during basic training, and was reinforced as she progressed through the military, her undergraduate studies, JAG acceptance, and law school.

Brandi defends clients against claims involving dram shop liability, premises liability, wrongful death and personal injury, professional liability, and Section 1983 defense.

602.263.1786 | bblair@jshfirm.com | jshfirm.com/bblair

THE ANATOMY OF A CONSTRUCTION CLAIM

AUTHORS: **Brandi Blair** | **602.263.1786** | **bblair@jshfirm.com** | **jshfirm.com/bblair**
Denise Montgomery | **215.963.2435** | **denise.montgomery@sweeneyfirm.com** | **sweeneyfirm.com/denise-m-montgomery**

Related Practice Areas: Construction Litigation, Premises Liability, Professional Liability, Wrongful Death & Personal Injury Defense
Related Industries: Construction, Government & Public Entities, Insurance, Professional Service Providers

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Understanding the relationships between the parties, the insured's role in the construction, and the project timeline are essential to the successful management of these complex claims.

Construction-defect litigation is on the rise. On December 3, 2018, the United States Census Bureau estimated that $1.3 trillion was spent in 2018 alone on private and public construction projects. Projects that were halted due to the 2007 recession have resumed, and so have the claims relating to possibly faulty construction. In a multi-unit project or large-scale public project, there may be dozens of defendants implicated in a claim. A carrier with multiple, insured defendants may exhaust construction-defect panel counsel and assign representation to general panel counsel. Practitioners who are new to, or unfamiliar with, this work need to understand the unique challenges that these claims present for the insured, insurer, and assigned counsel.

A construction claim may involve an injury to a person attributable to the faulty design or construction of a building, or it may involve a claim for damages related to the construction itself. A construction defect occurs when construction fails to perform as expected or intended and the failure causes physical injury to an individual, the work itself, or other property or work. The defect can involve the design, the work performed, and the building products and materials. Construction-defect matters that do not involve personal injury can have an extraordinarily long period of viability. Jurisdictions that apply the discovery rule to the applicable statute of limitations or that have an unusually long period associated with the statute of repose allow claims for defective construction to proceed years after the construction was completed.

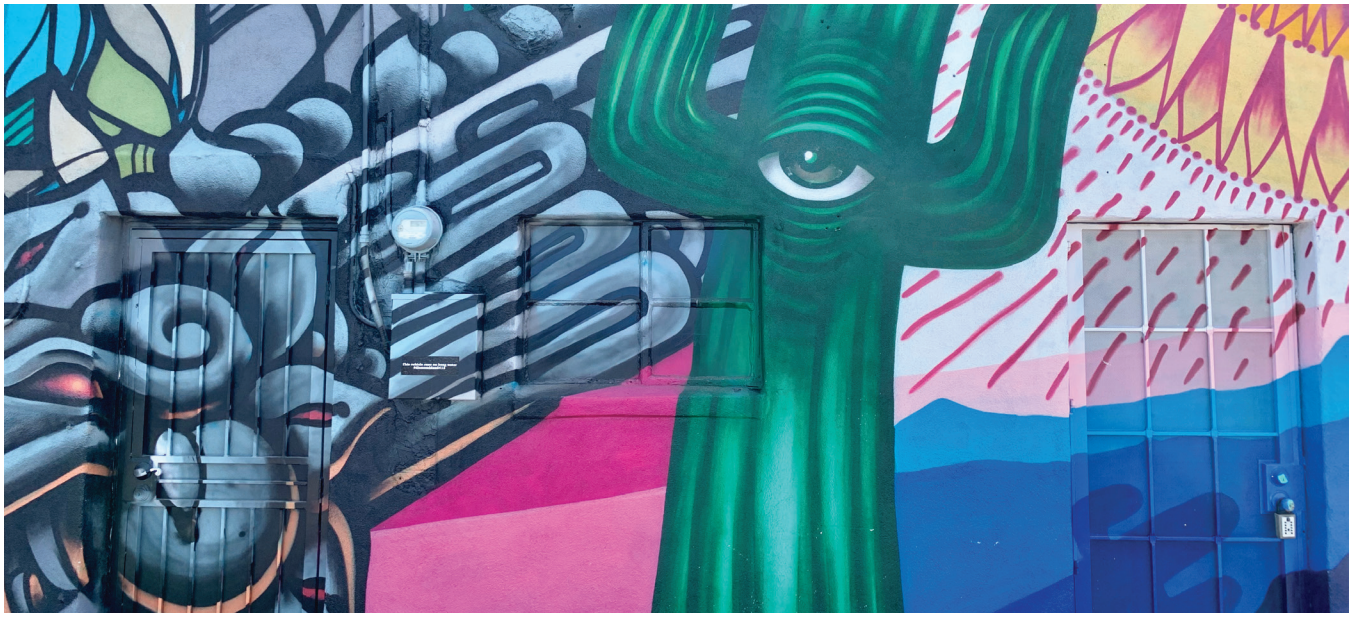
Understanding the Parties

Upon initial receipt of a complaint, it is imperative that you identify the parties named in the complaint. Plaintiffs often name corporate entities that are "almost right" but that do not actually exist or are the incorrect entity. It is important to make sure that the entities named are the proper entities involved in the relevant contract or project and they were served correctly. Additionally, it is vital to be aware that the initial complaint rarely includes all of the parties that may be at fault. Construction-defect suits involve a myriad of different parties, which appear in different combinations. The suits will often involve other areas of law, such as personal injury or wrongful death.

Common parties and claims include those filed by homeowner associations against owners or developers of planned communities. Planned communities such as condominium or multi-dwelling communities are generally constructed in phases and involve multiple designers, developers, and prime subcontractors, who perform work over many years. At the end of construction, as part of the transition of ownership of the common elements from the owner or developer to the association, the association will complete two key studies: a transition study and a capital reserve study. The transition study tells the association if there is any incomplete or faulty construction. The reserve study informs the association how much it will need to charge the unit owners in assessments to repair and replace the common elements in the community as needed. The transition report may be performed years after the work was completed, and it often serves the basis for actions filed by the association against the owner or developer to recoup costs that the association believes that it will incur to complete any unfinished work or fix defective work.

If the transition report cites poor design, the architects and engineers responsible for the design are often named as original parties. These are referred to as first-tier parties. The owner or developer will then sue the general contractor that it hired to complete the construction according to the design plans, the prime contractors implicated in the transition report, and the manufacturers of any defective materials used in the project. A prime subcontractor is a subcontractor hired by the general contractor to complete an integral part of the construction, such as structural steel, masonry, HVAC work, roofing, or plumbing. These parties are generally referred to as second-tier defendants. Project inspectors are also common parties when there is an issue involving defective construction involving structural steel or structural concrete. Some project inspectors are retained by the owner while others may be retained by the general contractor. This varies by project.

The third-tier defendants are those entities that the prime subcontractors hired to complete portions or all of the work promised by the prime to the general contractor under the subcontract. Often these third-tier parties hire other contractors to complete their work, a fact that may never have been communicated to the prime subcontractor. These last-tier defendants may not be joined to the litigation until years after the suit is initiated, which presents a variety of challenges to the practitioners assigned to defend them. These challenges apply to claims for poor construction and claims for personal injuries associated with construction.



Other Potential Parties

You should not rely upon your insured or the plaintiff to identify other responsible parties. Often the plaintiff's interest in identifying responsible parties ends after naming the owner or developer and general contractor. It is your responsibility to identify and pursue your insured's subcontractors, product suppliers, and product manufacturers and the third parties hired by others to perform the same kind of work originally subcontracted to your insured.

The first step is to meet with representatives from your insured client and ask to see the insured's physical file. This should contain time records and invoices that will tell you when your client started and finished its work and any payments made by the client to others for work and materials that could identify subcontractors. It is also crucial to understand what kind of work your insured performs, the alleged damages, and the chain of events that led to the damages to identify completely all of the individuals or entities that may be responsible for the alleged loss. In short, it helps to identify who touched the project between its conception and its failure.

Ideally, your insured will have signed contracts for the work that the insured completed and the work that it subcontracted to others. However, if the project is old, your client may not have these documents. If that is the case, ask for permission to obtain your client's insurance agent's file. Often, the agent will have copies of the contracts that your insured executed for purposes of providing additional insurance status to others. If your insured is out of business, the next step is to look to other parties to provide this information. Site sign-in sheets and safety training records are often a good source, which identify who was on the job site and when. You must be aggressive but also creative in locating the information that identifies other responsible entities.

The Duty to Defend

In a case that involves personal injuries related to construction, the first notice of claim may occur on the date of the incident. However, in cases that involve damages related to the construction itself, the notice of claim is generally when the insured is served with the complaint. Once the claim is received, the carrier that receives notice of the loss must determine whether or not the individual or entity seeking coverage is entitled to a defense. The two questions that must be answered before tendering a defense are whether or not there is "occurrence" as defined by the policy, and whether or not the individual or entity seeking coverage is an "insured" under the policy.

Generally, a duty to defend is triggered when there is a potentially coverable occurrence. The duty to defend is separate from, and broader than, the duty to indemnify. The duty to defend arises if the complaint filed against the insured alleges facts that fall within the policy's coverage. *Teufel v. Am. Family Mut. Ins. Co.*, 244 Ariz. 383, 419 P.3d 546, 548 (Ariz. 2018); *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 388–89, 267 A.2d 7 (N.J. 1970); *Westfield Ins. Co. v. West Van Buren, LLC*, 406 Ill. Dec. 99, 59 N.E.3d 877, 882 (Ill. App. Ct. 2016); *OneBeacon America Ins. Co. v. Urban Outfitters, Inc.*, 21 F. Supp. 3d 426 (E.D. Pa. 2014), aff'd on other grounds, 625 Fed. Appx. 177 (3d Cir. 2015); *Equine Assisted Growth & Learning Ass'n v. Carolina Cas. Ins. Co.*, 2011 UT 49, 9, 266 P.3d 733, 736 (Utah 2011). Virginia termed the analysis the "eight corners rule." If the four corners of the complaint fall within the four corners of the policy, there is a duty to defend. *AES Corp. v. Steadfast Ins. Co.*, 283 Va. 609, 725 S.E.2d 532, 535 (Va. 2012).

Typical policy language defines an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In a personal injury action involving a single instance of harm, there is an occurrence as defined by the policy. However, in the context of a claim for damages associated with defective construction, an occurrence varies based upon jurisdiction and the nature of the damages alleged in the complaint.

Damages for defective workmanship are typically not an "occurrence." *U.S. Fid. & Guar. Corp. v. Advance Roofing & Supply Co.*, 163 Ariz. 476, 482, 788 P.2d 1227, 1233 (Ariz. Ct. App. 1989); *Hull v. Berkshire Mutual Insurance Company*, 121 N.H. 230, 427 A.2d 523 (N.H. 1981); *Quality Stone Veneer, Inc. v. Selective Ins. Co. of Am.*, 229 F. Supp. 3d 351, 357 (E.D. Pa. 2017). To qualify as an occurrence, there must be damage to other materials not furnished by the insured. *Desert Mountain Properties Limited Partnership v. Liberty Mutual Fire Insurance Co.*, 225 Ariz. 194, 206, 236 P.3d 421 (Ariz. Ct. App. 2010); *Pekin Insurance Co. v. Richard Marker Associates, Inc.*, 289 Ill. App.3d 819, 822, 224 Ill. Dec. 801, 682 N.E.2d 362 (Ill. App. Ct. 1997); *Liparoto Const., Inc. v. Gen. Shale Brick, Inc.*, 284 Mich. App. 25, 37, 772 N.W.2d 801, 809 (Mich. Ct. App. 2009).

However, some jurisdictions have held that negligent construction is an occurrence under the plain definition of an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Architex Ass'n, Inc. v. Scottsdale Ins. Co.*, 27 So. 3d 1148, 1157 (Miss. 2010). Other jurisdictions have held that improper or faulty construction may constitute an accident as long as the resulting damage is an event that occurs without the insured's expectation or foresight. *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 137 P.3d 486, 491 (Kan. 2006); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 883 (Fla. 2007).

In a "notice pleading" state, a carrier may be obligated to provide a defense in a case for which there ultimately is no occurrence under the policy. Some jurisdictions allow a carrier that has tendered a defense under a reservation of rights to seek declaratory relief once it is apparent through discovery that there is no occurrence under the terms of the policy. This should be monitored by coverage counsel and pursued independently to avoid any potential conflict of interest between the insured and assigned defense counsel.

Determining whether an individual or entity other than a named insured is an additional insured under a commercial general liability (CGL) policy in a construction-defect claim requires that the insurer have all contracts executed by the named insured. The American Institute of Architects (AIA) promulgates contracts that are widely used by owners, designers, and general contractors. The standard AIA contracts executed between the owner and contractor include contractual provisions for indemnification and additional, primary insured status in favor of the owner and designer. The AIA Form A401 is the standard subcontractor agreement. It contains boilerplate language that requires subcontractors to "indemnify and hold harmless" not only the general contractor but also the project owner, the project architect, and the project architect's consultants (engineers).

The subcontractor is contractually obligated to indemnify these parties for damages, losses, or expenses, including reasonable attorney's fees, arising out of or resulting from the performance of the subcontractor's work. This obligation is limited to claims, damages, losses, or expenses attributable to bodily injury, sickness, disease, or death, or to injuries to or destruction of tangible property (other than the work itself), to the extent that these are caused by the negligent acts or omissions of the subcontractor. The indemnification obligation will exist regardless of whether the loss is caused in part by an indemnified party. The standard AIA indemnification language does not require the indemnitor to protect the indemnitee for its sole negligence. Depending upon the jurisdiction, the indemnification requirement may not arise until after a verdict finding that a plaintiff's damages arose out of the named insured's work under the contract.

The standard AIA forms also require subcontractors to provide additional insured status for claims caused in whole or in part by the subcontractor's negligent acts or omissions during the subcontractor's operations, and additional insured status for claims caused in whole or in part by the subcontractor's negligent acts or omissions during the subcontractor's completed operations. "Completed operations" coverage applies when the insured's work results in an occurrence of bodily injury or property damage during the policy period. The insurance must be primary and non-contributory to any general liability policy maintained by the additional insured. If it is commercially available to the named insured, it must provide no less coverage than ISO CG 20 10 07 04, CG 20 37 07 04, and CG 20 32 07 04.

If an insured executed a form AIA subcontract, the insured promised to provide this to the enumerated parties. If the policy contains language that defines an "additional insured by contract agreement or permit," these parties are potentially additional insureds under most policies.

OCIP/CCIP – Wrap Up Policies

Owner-controlled insurance programs (OCIP) and contractor-controlled insurance programs (CCIP) are insurance policies unique to the field of construction. OCIP and CCIP policies are insurance policies that are either held by the owner or general contractor for the length of a construction project. The owner of a construction project sponsors an OCIP, while a general contractor sponsors a CCIP. The sponsor is in charge of securing insurance coverage, paying for the coverage and administering the insurance program.

The industry refers to these policies as wrap-up policies and they typically provide general liability, workers compensation and excess coverage for the duration of the project. They are designed to provide primary coverage for the contractors that work on the project and protect them from liability and loss arising from the construction, rather than requiring each contractor to provide their own insurance. Wrap-up policies are typically used on large, individual projects or on projects completed on a rolling basis by aggregating smaller projects, which are started and completed over a defined time period.

A wrap-up policy is primary to any other coverage that a subcontractor may have promised and purchased as part of its underlying contract. The subcontractors may not be aware if a wrap-up policy was in place for the project, so it is imperative to find out if one exists to determine the primary insurance and to avoid waiving rights that your insured has to a defense and liability coverage.

Construction-Defect Claims and Insurance Coverage Implications

Owners often assert claims that go beyond garden-variety negligence and breach of contract claims and often involve claims for breach of common law or statutory warranties, delay damages, consumer protection violations, fraud, unfair trade practices, and other statutes that are applicable to new housing. Claims for personal injuries

related to construction emanating from an OSHA incident may form the basis for punitive damage claims that are not insurable in some jurisdictions.

An insurer must review each policy, endorsement, and exclusion and issue a timely explanation to the insured of the claims asserted in the complaint and which coverage and exclusions may apply. If the policy excludes claims for punitive relief, contract-based claims, fraud, or other damages that are not associated with an occurrence, the insurer must inform the insured which claims are being defended under a reservation of rights.

Insurers must be vigilant in identifying and raising any claims that fall under a policy exclusion. Exclusions vary by policy and may or may not be valid in the jurisdiction that has authority over the claim. A common exclusion can be the type of work completed by the insured such as an earth-movement exclusion. An exclusion may bar claims associated with the products or materials used by an insured in its work, such as an EIFS (exterior insulation finishing system) or Chinese drywall. Exclusions may also pertain to the type of construction itself, such as a high-rise exclusion (generally four stories or more), or a multiple dwelling or condominium exclusion.

As a point of practice, what is required in a reservation of rights letter will depend upon the jurisdiction. Some jurisdictions require that an insurer provide its insured with a right to refuse the appointed defense. A failure to include the required language can have draconian consequences, and in some instances, it can result in a waiver of all coverage exceptions. If there are any questions about which claims are and are not covered, coverage counsel should be engaged before drafting the appropriate reservation of rights to the insured. Assigned defense counsel should receive a copy of any reservation of rights letter sent to the insured so that the insured can be adequately counseled throughout the litigation of any potential exposure for non-covered claims.

Ancillary Claims and Competing Interests: Representing the Insured

A construction-defect claim often involves competing interests between the insured, the CGL insurer and other parties with a pecuniary interest in the insured's work at the project, i.e., a surety interest. These claims often involve damages associated with unfinished work or punch-list items. A punch-list item is generally not considered to have a defect. It is simply unfinished work that needs to be completed before final payment. Punch-list items, unpaid change orders, and unpaid retainages can be significant hurdles in the overall management of a claim. If an insured wishes to pursue a claim for unpaid work, some jurisdictions require that any claim arising out of the action must be asserted in the underlying action or it can be barred, even if it is not untimely.

Some jurisdictions such as New Jersey impose a continuing obligation upon litigants to identify all parties to pending or contemplated legal actions that are related to the matter in controversy. If a party fails to comply with that requirement in a first lawsuit, a subsequent lawsuit arising out of the same project may be precluded. Assigned counsel needs to ask the represented insured whether or not it has completed its work, has been paid in full, and whether it has any liens for unpaid work related to the project.

This is not to say that assigned counsel is required to file the claim; however, there is a general obligation on the part of the assigned counsel to adequately counsel the insured and advise of the insured's rights and obligations to pursue any potential claims related to the project. In 2016, the Massachusetts Supreme Court was asked to answer certified questions presented by the First Circuit Court of Appeals regarding the obligations that an insurer and insurer-appointed attorney have regarding counterclaims of an insured. In issuing an opinion after the Massachusetts Supreme Court did so, the First Circuit noted that the scenario of an insurer-appointed attorney presents a "dual-representation phenomenon" to both the insured and insurer. *Mount Vernon Fire Ins. Co. v. VisionAid,*

Inc., 875 F.3d 716, 724 (1st Cir. 2017). As the First Circuit wrote, "an insurer-appointed lawyer owes to each a duty of good faith and due diligence in the discharge of his duties, which in turn means that he cannot subordinate the rights of one to those of the other." *Id*. (internal citations and quotation marks omitted). The court held that if an insurer must defend a claim initiated against the insured, "the insurer's duty to defend that claim does not require it to prosecute any counterclaims its insured is legally required to file." *Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 875 F.3d 716 (1st Cir. 2017).

From a practical standpoint, unpaid work, if not prosecuted by an insured client, can impede settlement between the client's insurer and the plaintiff. Most settlement agreements seek to end any and all disputes between the parties. If your insured client believes that it is owed for work, assigned counsel cannot act in a manner that would foreclose any potential recovery by the insured. It is a good practice to memorialize any discussions that you have had with the insured that concerned ancillary claims that the insured needs to pursue, making sure to convey in clear and concise language the steps that the insured needs to take to preserve those claims and a timeline for doing so.

"Depending upon the applicable statute of limitations or statute of repose, a claim may not be filed for a decade after construction was complete."

Another common competing interest in construction-defect claims is the role of a surety. A construction bond is a type of surety bond used by investors in construction projects to protect against disruptions or financial loss due to a contractor's failure to complete the project or to meet contract specifications. Bonds are not insurance policies. They do not pay damages to individuals injured by defective construction. They do not reimburse an owner for defective work.

Prime contractors on a public project are generally required to purchase a bond for the project. If parts of the project are not complete, and the surety is a named party, this may impose significant financial obligations upon the insured. Sureties often require individuals (and spouses) of the principals to guarantee personally all sums paid by the surety, including attorney's fees and costs as they are incurred, and any sums paid by the surety, whether by verdict or settlement. Proper representation of the insured may require coordination and cooperation by counsel for the surety and the insured's appointed counsel.

Time on the Risk and Allocation

The majority of complex, construction-defect claims occur over a period of time, with multiple policy years and multiple insurers. Depending upon the applicable statute of limitations or statute of repose, a claim may not be filed for a decade after construction was complete.

Allocation issues arise when the loss is ongoing and indivisible and implicates multiple policies and multiple policy periods. The question that each carrier must answer is when is coverage triggered? Courts do not uniformly choose and generally apply one of four trigger theories and two methods of allocation.

The four trigger theories are the following:

> exposure, which triggers coverage when the first injury-causing conditions occur;
>
> manifestation, which triggers coverage when the personal injury or property damage becomes known, or is discovered by, the property owner or victim;
>
> continuous, under which progressive, indivisible injury or damage occurs continuously, from the time of exposure or installation until the time of discovery; and
>
> injury in fact, which triggers coverage when the personal injury or property damage underlying the claim actually occurs.

The two allocation methods for allocating an insured's loss under multiple policies are (1) "all-sums," or "joint and several," and (2) pro-rata.

The "all-sums," or "joint and several," method allows a policy holder to pick and choose the policies that are required to pay the loss. In *Keene Corporation v. Insurance Company of North America*, 667 F.2d 1034, 1049–50 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia applied the continuous trigger theory to a long-latency occupational disease case (asbestos) and held that the "insurers' liability to the plaintiff was joint and several, such that the plaintiff was entitled to select one of the triggered policies and collect the full amount of indemnification from that policy." Once the plaintiff had been compensated, the insurers were responsible for allocating the loss among themselves.

The pro-rata method provides that policies in a particular policy period respond in proportion to the amount of the injury or damage that takes place during that policy period. If the insured is uninsured by way of a denial or failure to maintain coverage, the insured is responsible for any period of insured loss.

Some jurisdictions have used a "pro rata by limits" allocation method that prorates coverage on the basis of policy limits, multiplied by years of coverage. Insurers with higher limits may be liable for damages incurred outside their policy period because their

percentage of responsibility is not determined by the risk assumed but by the number of available indemnity dollars. *Northern States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657, 662 (Minn. 1994); *Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co.*, 819 A.2d 410, 415 (N.J. 2003). The insurer's liability is determined by comparing its particular exposure to the total amount of exposure assumed by all carriers of the triggered policies. This comparison yields a percentage that is then applied to the amount of loss the policyholder sustained. *Id*. at 416–17. This method requires the insured to pay its share of "both defense and indemnification on account of years in which it was uninsured, self-insured, or its coverage was exhausted or bankrupt." *Id*.

Golden Tickets

The statute of repose is an excellent example of a golden ticket. Depending upon your jurisdiction, the statute of repose is the deadline by which a plaintiff can file a construction-defect claim. The statute of repose is different and typically longer than the statute of limitations. Any claims for any defects regarding the manufacture or construction of the home are barred. It is important to identify the date that the statute of repose begins to run, for purposes of an early motion to dismiss. Keep in mind, as discussed above, that the statute of repose can differ between different entities.

The statute of limitations is typically shorter than the statute of repose and often requires a fact-sensitive analysis into what a plaintiff knew or should have known regarding defects. In matters involving an association, the community management may provide a wealth of information regarding complaints by unit owners that may trigger the statute of limitations and cut off the plaintiff's remedy.

Depending upon the jurisdiction, there are various statutes that protect purchasers of new construction. Many jurisdictions have statutes that require new home warranties and provide administrative remedies available to purchasers of new construction. In some jurisdictions, the remedies are exclusive and if elected, they foreclose subsequent civil actions. If a plaintiff is an association that submitted any administrative claim for relief, even if unsuccessful, these statutes provide an excellent avenue for early dispositive work.

Conclusion

Understanding the relationships between the parties, the insured's role in the construction, and the project timeline are essential to the successful management of these complex claims. It requires assigned counsel to wear multiple hats and advocate the interests of the insured and insurers at every phase of litigation. Identifying the culpable parties, actively pursuing the potential insurance coverage available to the insured, and adequately counseling the insured regarding claims for which there is no coverage are all considerations that assigned counsel need to understand and put into practice when defending these claims.

Author: **BRANDI BLAIR**

Brandi defends clients against claims involving dram shop liability, premises liability, wrongful death and personal injury, professional liability, and Section 1983 defense. She represents clients in a variety of industries including retail and hospitality, medical and healthcare, legal, accounting, and governmental and quasi-governmental entities.

602.263.1786 | bblair@jshfirm.com | jshfirm.com/bblair

Author: **DENISE MONTGOMERY**

Denise is an attorney at Sweeney & Sheehan in Philadelphia. She practices in the firm's employment law section, and has worked in the areas of construction defect, automobile liability, insurance coverage, product liability, toxic tort litigation and general civil litigation.

215.963.2435 | denise.montgomery@sweeneyfirm.com | sweeneyfirm.com/denise-m-montgomery

RESOURCE

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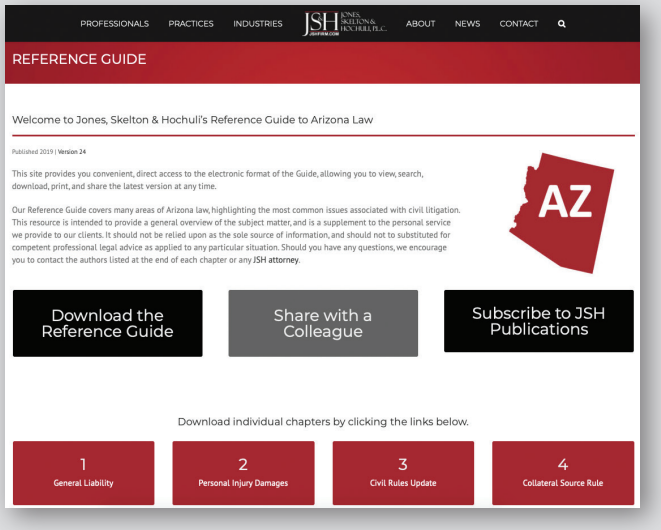

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MEL MCDONALD RECOGNIZED BY STATE BAR FOR 50 YEARS OF LEGAL SERVICE

At this year's State Bar of Arizona Convention, JSH partner A. Melvin McDonald received a Special Award of Honor in recognition of his significant contributions to the law throughout his 50 years of practice. Mel was presented with his 50-Year Certificate by Jeffrey Willis, President of the State Bar of Arizona (pictured together, left).

Originally from Utah, Mel graduated from the University of Utah College of Law in 1968. He then moved to Arizona, and served as a judicial law clerk for the Hon. Charles C. Bernstein and Hon. Jack D.H. Hay in the Arizona Supreme Court. Mel joined the Maricopa County Attorney's Office, and in 1972 and 1973, he prosecuted the two most serious sexual offenders in Arizona history - one receiving a 108-year sentence and the other a 90-99 year sentence. In 1974, Mel ran for a judgeship with the Maricopa County Superior Court, becoming the youngest Judge elected to the position. The day after the election, on September 11, 1974, Mel was featured with Sandra Day O'Connor in an Arizona Republic article relaying election results (shown right). O'Connor, who was also elected to Superior Court, became the first woman to serve as Arizona's or any state's Majority Leader. In six years, they would both be appointed by President Ronald Reagan (pictured together, below) to higher positions - Mel as U.S. Attorney for the District of Arizona, and O'Connor as the first woman Supreme Court Justice.


PUBLIC CHASER
CITY
A-H The Arizona Republic City Wed., Sept. 11, 1974

O'Connor and McDonald win judgeships in Superior Court

By GRANT E. SMITH

Sandra O'Connor and A. Melvin McDonald were well ahead in their efforts to unseat incumbent Superior Court Judges David J. Perry and David Lorbe as primary election results came in late Tuesday night.

With 218 of 456 precincts reporting, Mrs. O'Connor, Arizona Senate majority leader, was leading Perry, 20,494 to 17,325 in the District 15 race and McDonald was leading Lorbe 16,630 to 16,377 in the District 28 race. All are Republicans.

Lorbe and Perry were appointed by Gov. Williams.

Democrats did not field candidates in the primary election for the two court divisions, so the primary winners will be unopposed in the Nov. 5 general election.

McDonald credited his lead to "a statement by the people saying they want judges to take a tougher stance." The recent ranking of Phoenix as No. 1 in crime in the nation and a record of leniency by judges also helped, McDonald said.

"I think the people want a judge with a prosecutor's background," he said.

Mrs. O'Connor said she was probably more widely known than her opponent because of her service in the legislature. She said she also thought the main reason for her win as indication that the "people are looking for strong leadership in the courts."

McDonald had campaigned hard on the "get tough with the criminals" line, and Mrs. O'Connor had campaigned on her experience as a lawyer and legislator.

In the race for the Democratic nomination for Superior Court clerk, Mary L. Besett was leading Robert E. Miller, 21,750 to 20,714 with 358 of 456 precincts reporting. The winner will face Wilson A. Palmer, the Republican incumbent, in the general election.

With only partial returns, justice of the peace races stepped up as follows:

—Chandler: Coy Beasley, the incumbent, was leading Della Mae Bearfield, 420 to 361 for the Democratic nomination. Beasley will face no opposition in the general election.

—East Mesa: Gail Goodman Sr. was leading three opponents, including incumbent Lee Stapley, for the Republican nomination. Clyde J. Forman was leading two opponents for the Democratic nomination.

—South Phoenix: Robert Pastor led 2,120 votes to 1,387 for Marian Ralph Jenkins, former South Phoenix justice of the peace, and 91 votes for Lonnie Q. Gary in the race for the Democratic nomination. There is no opposition in the general election.

—Tolleson: Incumbent Albert Stamp led a 2-1 lead over two opponents for the Democratic nomination. There is no opposition in the general election.

—West Mesa: John L. Merrill, with 1,023 votes, was leading a four-way race for the GOP nomination. Frank H. Hall, with 1,686 votes, was leading a three-way race for the Democratic nomination.

—West Phoenix: Stevie Lopez was leading Martin D. Washington 1,086 to 958 for the Democratic nomination. The winner will face the Republican incumbent, Theodore E. Collins, in the general election.

With partial returns, constable races were as follows:

—East Mesa: Melvin Curtis was leading a three-way race for the Republi-

Mel McDonald

Sandra O'Connor

During his term as U.S. Attorney, Mel served on the U.S. Attorneys' Advisory Committee in D.C. and oversaw cases submitted by the FBI, IRS, CIA, DEA, U.S. Customs, and all other federal agencies. In 1982, Mel was deputized as an Arizona State Prosecutor, becoming the first U.S. Attorney to be appointed a special county prosecutor on a County case. The case involved the premeditated robbery and murder of two armored truck couriers committed by brothers in 1977. They were tried and convicted in 1979, but the Arizona Supreme Court later overturned the murder convictions based upon a piece of testimony and evidence the Court ruled should not have been introduced. The County Attorney declined a retrial due to the cost and evidence now excluded by the Court. Mel, outraged that the brothers would be paroled for this gruesome crime, persisted and investigated the remaining facts of the case. After a one-month trial, the brothers were convicted of murder in the first degree, a decision later affirmed by the Arizona and U.S. Supreme Courts.

In 1985, Mel went into private practice and joined JSH. He has devoted his practice to criminal, white collar, felony and misdemeanor defense, and major civil litigation. He continued to serve his community, leading numerous high-profile investigations. From 1995-1997, Mel headed a major investigation into the Arizona Boys Ranch in Queen Creek, which was the subject of multiple investigations by Child Protective Services. In 2003, the Arizona House of Representatives appointed Mel as Special Counsel to investigate what would become "impeachable offenses" of a Phoenix Corporation Commissioner. In 2004, Mel was appointed special prosecutor in the investigation of the 15-day Lewis Prison hostage situation, the longest standoff between inmates and law enforcement officers in U.S. history.

Throughout his career, Mel has taught criminal justice courses at Arizona State University and law enforcement certification courses at Glendale Community College. He served on the Phoenix City Council's Law Enforcement Advisory Committee, the Arizona Lottery Commission, and the Arizona Racing Commission, of which he also served as Chairman for 13 years. Mel is a Fellow of the American College of Trial Lawyers (ACTL) and has earned an AV-Preeminent Rating by Martindale-Hubbell.

For 20 years, Mel has been supported by his legal assistant, Diana Weeks (pictured together, right). In addition, Mel credits much of his success to the support of his wife, Cindy, and their family, including eight children, 19 grandchildren, and three great-grandchildren. Married to Cindy for 29 years, Mel is proud to also officiate weddings for close friends, including Diana's daughter's wedding. He is an accomplished pianist, learning and playing by ear.

Mel serves on the Board of Directors of Marc Community Resources, Inc., a non-profit providing educational, therapeutic, rehabilitation and social services to children and adults with disabilities.

The firm thanks Mel for his significant contributions to the law and our community.

CAPITALIZE ON YOUR MEDIATOR'S EXPERTISE TO MAXIMIZE YOUR SETTLEMENTS

AUTHOR: Mark Zukowski | 602.263.1759 | mzukowski@jshfirm.com | jshfirm.com/mzukowski

Related Practice Area: Alternative Dispute Resolution

One of the most frequent criticisms of mediators is that all they do during mediation is communicate new offers and demands between the parties. If this has been your experience, then you have not learned to tap into your mediator's full potential during mediation. Here are six practical suggestions to get more out of your mediator and achieve better mediation results.

1. Select the Right Mediator

Recognize that the success of your mediation can rise and fall on the mediator you select. You can have the best case, write a strong mediation brief, prepare your client fully, and still fail to settle your case or get the best possible settlement, simply because you didn't select the right mediator for your case.

Too often lawyers become comfortable using the same mediator or, worse, let the other side select the mediator without giving sufficient thought to the facts of their case. To maximize the opportunity to settle your case at mediation, take the time to properly vet your mediator. The next time you agree to mediate a case answer the following questions: (1) What are the key issues I will be asking the mediator to consider? (2) How well do I know the mediator? (3) What is the mediator's reputation? (4) How well does the mediator know my opposing counsel? (5) How familiar is the mediator with the subject matter of my case? (6) How familiar is the mediator with my jurisdiction and juries? (7) How well do I think the mediator will communicate and interact with my client? (8) Do I want a mediator who will independently evaluate my case or take a more facilitative approach? (9) Do I know the mediator's approach to mediation? (10) What other information would I like to know about the mediator, knowing what I know about the unique issues in my case?

> "Selecting the right mediator for your case can mean the difference between a good settlement, or no settlement at all."

Take the time to vet your mediator fully. Selecting the right mediator for your case can mean the difference between a good settlement, or no settlement at all.

2. Engage the Mediator Early and Often Before Mediation Begins

How many times have you had the first substantive conversation with your mediator at the start of the mediation? If the answer is more often than not, you are missing a valuable opportunity.

There is no rule against engaging the mediator before your mediation begins. Many mediators will convene a pre-mediation conference with the attorneys to have a preliminary discussion about the case. Take advantage of this opportunity, and don't stop there. Ask to speak to the mediator ex parte before your mediation begins. Good mediators are busy and may not contact each party prior to the mediation. I have never had a mediator— even the busiest ones—refuse to speak with me before mediation. An ex parte pre-mediation conference with your mediator can be an effective tool to sway him or her to your side of the case, giving you a significant advantage before mediation begins.

Set the tone for the mediation by getting your case in front of the mediator first. Mediators are human. While we espouse our neutrality, we can be guilty of drawing first impressions of a case. Talking through your case with the mediator before mediation begins can provide valuable insight into the mediator's view of your case, what he or she believes are the key issues, and his or her impressions of your position on those issues. Armed with this insight, you can then refine your mediation presentation and strategy.

An initial ex parte conference with your mediator can also serve as an opportunity to share sensitive issues with the mediator that may derail settlement. Do you have a client with unreasonable expectations? Does the other side have unreasonable expectations? Are there compelling reasons why you do not want to try the case? Is opposing counsel obstructing settlement by his or her conduct? Are there hidden agendas the mediator may not

recognize? Your mediator is most likely unaware of these potential impediments to settlement at the outset of your mediation. He or she can waste valuable time during mediation flushing these issues out. Worse, your mediator may never uncover these hidden agendas that can derail a settlement. If you make the mediator aware of these issues at the outset, he or she will be in a far better position to get your case settled.

When I serve as a mediator, I welcome these ex parte pre-mediation conferences. The more information I can gather before mediation begins, the better I will understand the issues in the case and the dynamics in the room, making it more likely I will do a better job.

3. Give Your Mediator the Tools Needed to Advocate Your Case

Mediators can only do as good a job as the information he or she is provided. I cannot stress enough the importance of writing a thorough mediation brief. If you expect the mediator to advocate your position when meeting with the other side, arm the mediator with the ammunition he or she needs. Mediators are busy, so don't take the easy route by attaching voluminous records to your mediation brief, and expect your mediator to do an exhaustive analysis to find the support for your claims. The better practice is to highlight and attach specific entries in the records that support each of your claims. Not only will this save your mediator valuable time, it will ensure your mediator is better prepared. Further, it demonstrates to your mediator that you are prepared, which will enhance your credibility with your mediator.

You can unintentionally derail your mediation success by focusing only on the strengths of your case, and ignoring weaknesses. Your mediator cannot effectively advocate for you with the other side if he or she is not adequately prepared to put your best foot forward on all issues in your case, even the weak ones. Having a candid discussion with your mediator about the weak points in your case will better equip the mediator to provide guidance regarding how best to address those points.

If you are concerned about disclosing too much regarding your case before your mediation begins, I encourage you to submit a separate confidential mediation statement to your mediator. When I mediate cases, I welcome separate confidential mediation statements from the parties. The more information you share with me and the more candid you are, the more effective I can be on your behalf.

4. Use the Mediator as a Sounding Board for Your Case

If you find yourself doing most of the talking during private sessions with your mediator, you are missing out on the opportunity to gain valuable insight from your mediator. Ask your mediator for feedback on the position you are advocating. Would your mediator take a different approach or focus on other issues? How did the other side react to your arguments or settlement offer? Where does your mediator see weaknesses in your case? What does he or she view as the strengths of your case? What does your mediator think is the best way to close the gap between what you are willing to settle the case for and what your opponent is seeking? Does your mediator have any new ideas for how to get the case settled? Often, the less you talk and the more you listen can be the best use of your time with your mediator.

Today, the norm in mediation is to spend little or no time in the same room with the other side. Mediators fear losing control over the mediation when the parties are together. Parties also seem more reluctant to discuss their case with the mediator in the presence of other parties. The consequence, however, of avoiding direct interaction is that it deprives you of the opportunity to gauge first-hand how opposing counsel and the parties react to your arguments.

Understanding the lack of first-hand knowledge you will gather if all negotiations take place in private meetings with your mediator, the next best thing you can do is empower your mediator to be your eyes and ears in the other room. Solicit input from your mediator each time he or she returns from meeting with your opponent. What did they focus on? How did they react to your arguments or settlement offers? Are they nearing the end of their rope? What is their appetite to take the case to the mat? The more information you can extract from your mediator regarding his or her communications with the other side, the better you will be able to address them and the more you will maximize your settlement opportunities.

5. Don't Let the Mediator Declare an Impasse Too Soon

Some mediators, especially inexperienced ones, declare impasse too soon and end the mediation before settlement is reached. Often this can occur simply because the magical 5:00 p.m. hour is near. No one likes to work late into the night, but the time of day alone should not justify your mediator declaring an impasse too soon.

If your mediator declares an impasse before the case has settled, ask your mediator to first review with you the specific reason(s) why he or she believes there is an insurmountable impasse. Review with your mediator the progress that has been made so far. Narrowing the issues still in dispute can lead to a refocusing that can break the impasse.

A good mediator will look for new ways to break an impasse by soliciting ideas from both parties, or will even propose their own ideas, before declaring an impasse. Getting beyond impasse is what separates the good mediators from the average ones. Before you walk away without a settlement, make certain you clearly understand the specific reason(s) your mediator has declared an impasse and exhaust all options available to you to restart negotiations.

6. If Your Case Does Not Settle at Mediation, Keep the Mediator Engaged

You may be surprised by the number of cases that settle after an unsuccessful mediation. There are too many reasons to discuss in this article why mediations fail. Sometimes you do just run out of time, or one of the parties has been pushed to the breaking point. Sometimes new information is shared for the first time during the mediation and the other side is not fully prepared to respond to it. Sometimes new terms for settlement need to be evaluated before responding.

Regardless of the specific reason(s) your case did not settle at mediation, I encourage you not to give up. Often, one or both parties just need to step back and re-evaluate their position before reengaging in meaningful settlement negotiations.

Keeping the mediator engaged after an unsuccessful mediation can lead to eventual settlement of your case. Once again, you should explore with the mediator why he or she believes the case did not settle, and ask for their recommendation as to what it may take to get the case settled. Make sure the mediator is continuing to talk to your opponent as well. If that fails, consider asking your mediator to provide a proposal for what he or she believes is a fair settlement.

I will let you in on a not-so-secret-secret: mediators have big egos. We take pride in settling cases. We are not eager to advertise a 90%-success rate. And we know that if we do not settle your case, you will likely not ask us to mediate another case.

Take advantage of your mediator's ego and let them continue to work for you to get your case settled.

Final Thoughts

You will achieve better mediation results if you maximize your mediator's full potential. It starts with selecting the best mediator for your case, but it doesn't stop there. Don't wait until the day of your mediation to begin to advocate your position with your mediator. Engage your mediator early and often. Give your mediator the tools he or she needs to effectively advocate your position. Understand how best to utilize your mediator during mediation. Solicit input from your mediator and use them as a sounding board. Engage your mediator's experience and take their suggestions for how best to advocate your case and reach the most favorable settlement possible. Don't accept it too quickly when your mediator declares an impasse. Finally, don't give up if your case did not settle at mediation. Keep your mediator engaged until a settlement is reached.

Author: **MARK ZUKOWSKI**

Mark has served as an arbitrator and mediator for more than 20 years. He received extensive training through the American Arbitration Association (AAA) and the Straus Institute for Dispute Resolution at Pepperdine University. Mark regularly serves as an arbitrator and mediator in a variety of personal injury and commercial cases. He is a construction and commercial arbitrator and mediator for AAA. In 2011, he was accepted into the prestigious National Academy of Distinguished Neutrals.

602.263.1759 | mzukowski@jshfirm.com | jshfirm.com/mzukowski

Cory Tyszka Quoted in PHOENIX Magazine's 2019 Top Docs Issue

JSH Medical Liability and Health Care Defense attorney Cory Tyszka provides legal perspectives in "Cross-Examination," published in PHOENIX Magazine's 2019 Top Docs Issue. Authored by Keridwen Cornelius, the article explores the disciplinary process at the Arizona Medical Board, and examines how the Board's actions relate to medical malpractice suits.

Read the article online at jshfirm.com/reporter

FIRM NEWS

JSH Shining Stars Recognized During Staff Appreciation Breakfast

On April 24, the firm hosted its annual Staff Appreciation Breakfast and recognized our 2019 JSH Shining Stars, Sara Neily, Kadie Lewis and Ed Kuhns. Every year, JSH attorneys and staff submit nominations for a paralegal, legal secretary and administrative professional who exemplify the Shining Star spirit: team players who always go the extra mile, maintain grace under fire, and are proactive, welcoming and professional.

Congratulations to this year's Shining Stars!

Sara Neily is a paralegal working with partners Don Myles and Ashley Villaverde Halvorson in the firm's Professional Liability, Bad Faith & Complex Litigation Trial Group. She joined JSH in 2017. In addition to her work with Don and Ashley, Sara is always willing and able to assist her fellow paralegals, ensuring a positive, team-oriented environment.

Legal secretary Kadie Lewis has worked at JSH for 11 years, and with partners Mark Zukowski and Erik Stone for the past seven. Kadie originally joined our firm as a back-up secretary, and has worked with nearly every attorney and practice area. She particularly enjoys the areas of intellectual property, ADR, and insurance coverage. Kadie promotes teamwork and truly loves her job!

Ed Kuhns, aka Mr. Fix It, works in the firm's Offices Services Department, helping wherever he is needed — conference room and event setup, general handyman work, mail delivery, and records. Ed joined JSH less than two years ago, but quickly became an integral part of the JSH team!

John Gregory Elected to AADC Board of Directors

Focusing his defense practice in the areas of construction defect, dram shop liability and general civil defense, John has been a member of the Arizona Association of Defense Counsel (AADC) since 2014. He served on the Young Lawyers Division Executive Board from 2014-2018, and as President from 2017-2018. As a member of the AADC Board of Directors, John will participate in the Membership Committee and Amicus Committee, and assist in coordinating social events, continuing education seminars, and law school competitions.

APPELLATE TIP: ARIZONA'S SUPERSEDEAS BOND RULE CHANGES

AUTHOR: **Lori Voepel** | **602.263.7312** | **lvoepel@jshfirm.com** | **jshfirm.com/lvoepel**

Related Practice Area: Appellate

Effective January 1, 2019, newly amended rules began governing the procedures and requirements for staying the enforcement and collection of both monetary and non-monetary judgments pending appeal in Arizona's state courts. The Arizona Supreme Court adopted these revisions to ARCAP 7 and ARCP 62 and 69 pursuant to a rule-change petition filed by the Arizona State Bar. The revisions make Arizona's rules more consistent with the federal rules, and address gaps and ambiguities that existed under the former rules.

One of the biggest changes impacts the amount of a supersedeas bond required to prevent a prevailing party from collecting on a money judgment while the losing party appeals. Under former ARCAP 7(a)(4), the appealing party only needed to post a bond for the total amount of "damages," excluding punitive damages. Prior caselaw construed this to not include attorneys' fees and costs, even where the fee award was significant. *See City Center Executive Plaza, LLC v. Jantzen*, 237 Ariz. 37 (App. 2015) (construing former rule as requiring only a $1 supersedeas bond where jury awarded $2.3 million in fees and costs but only $1 in nominal damages). Fortunately for many of our clients, new ARCAP 7(a)(4) now expressly includes costs, attorneys' fees and prejudgment interest included in the judgment when entered. The Supreme Court rejected, however, a recommendation to expressly include post-judgment interest and Rule 68 sanctions, so neither of those can be calculated in determining the amount of a supersedeas bond.

A number of additional revisions to ARCAP 7 were adopted, including those allowing for other forms of security to be posted in lieu of cash bonds, requiring supersedeas bonds for orders dividing assets in dissolution proceedings, providing guidance for staying injunctive or other forms of non-monetary relief, and allowing exceptions for parties who make a showing of undue hardship. ARCP 62 also adds an automatic stay of 15 days pending the filing of post-trial motions, and ARCP 69 has been revised to clarify that no post-judgment discovery can be served or taken during that time period.

Rather than posting a bond for the full amount required under ARCAP 7, the parties can stipulate to the bond amount, or the appealing party can file a motion asking the trial court to set the amount of a supersedeas bond. See ARCAP 7(a)(2). Filing a motion also stays enforcement of the judgment while the motion is pending, but it does not prevent the prevailing party from recording the judgment. ARCAP 7(a)(2).

Navigating supersedeas bond requirements can be tricky and somewhat intimidating. Regardless of whether you win or lose at trial, our experienced appellate lawyers can assist you with this process and to help you determine the best course of action in either posting a bond or requiring the opposing party to post a bond pending appeal.

Author: **LORI VOEPEL**

Lori has handled over 300 federal and state appeals in virtually every area of the law, including governmental liability, medical and legal malpractice, employment law, civil rights, insurance defense and bad faith, product liability, school law, prison liability, administrative law, commercial law, construction law, airline liability, criminal law, workers' compensation, and family law.

602.263.7312 | lvoepel@jshfirm.com | jshfirm.com/lvoepel

THREE ATTORNEYS PROMOTED TO PARTNER

Diana Elston

Diana represents clients in the areas of general civil litigation and insurance defense, personal injury, premises liability, homeowners association defense, and tribal law. She is admitted to five Tribal Courts in Arizona and handles a wide variety of issues for Indian tribes throughout the Southwest. Her tribal defense practice includes representing tribes and their enterprises (including casinos) in premises liability, conservatorships, and wrongful death and personal injury claims. Before joining the firm, Diana practiced for three years at a Flagstaff law firm, focusing in the areas of general civil litigation and bankruptcy. A Valley native, Diana was raised in Tempe and taught elementary school music in the area for two years before earning her J.D., *summa cum laude*, at Thomas Jefferson School of Law.

602.263.4413 | delston@jshfirm.com | jshfirm.com/delston

Chelsey Golightly

Chelsey began her legal career at JSH in 2012. She practices in the areas of general civil litigation and insurance defense, focusing on defending clients in cases involving wrongful death and catastrophic personal injury, premises liability, products liability, and social host liability. She has represented clients in complex litigation cases and has successfully taken cases to trial. She has also negotiated complicated settlements and obtained dismissals for many of her clients through motion practice. Chelsey serves as Co-Chair of the firm's Recruiting Committee, manages the summer associate program, and is a member of the Diversity & Inclusion Committee. Chelsey earned her J.D. from ASU's College of Law.

602.263.1732 | cgolightly@jshfirm.com | jshfirm.com/cgolightly

Patrick Gorman

Patrick began his legal career at JSH in 2011. He concentrates his practice in the areas of bad faith and extra-contractual liability, insurance coverage, professional liability and other general civil litigation matters. He represents large insurers in bad faith and breach of contract claims, often with allegations of punitive damages, through all phases of litigation in state and federal court. Patrick also represents attorneys, insurance brokers, and accountants in professional malpractice claims. Prior to joining the firm, Patrick served as a law clerk for a U.S. Senator on the Judiciary Committee, legal extern for the Honorable Paul G. Rosenblatt at the United States District Court for the District of Arizona, and law clerk for the Goodhue County Attorney's Office in Red Wing, Minnesota. Patrick earned his J.D., *cum laude*, from ASU's College of Law.

602.263.1761 | pgorman@jshfirm.com | jshfirm.com/pgorman

PRESENTATIONS

Five JSH Attorneys Present CLE at 2019 State Bar of Arizona Convention

JSH partners Robert Berk, Charles Callahan, John DiCaro, Lori Voepel and Mark Zukowski presented CLE programming during the Annual Convention, hosted at the Sheraton Grand at Wild Horse Pass June 26-28.

Watch & Learn: The Art and Science of Oral Argument

Appellate partner Lori Voepel co-presented this session, which included a live argument before the Arizona Court of Appeals, Division One, bookended by expert advice and analysis. Panelists consisted of judges and seasoned advocates who discussed why a good brief makes for a great oral argument; provided effective strategies to make every minute of argument count; and gave their opinions and insights after the argument.

Living Through Change: How the New Civil Practice Rules Are Working, and How They Will Affect You

Commercial and contract dispute litigator Bob Berk, and professional liability and insurance coverage defense attorney Charlie Callahan, co-presented this session. Panelists discussed major changes to the Arizona and Federal Rules of Civil Procedure, including filings under seal under new Rule 5.4. The group further explored the effect of the new rules regarding expert witnesses, and how the new rules on proportionality and tiering are working.

Focused Deposition Taking: How To Get What You Want Out of a Deposition

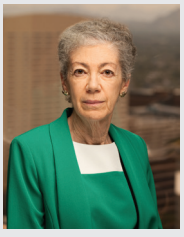
John DiCaro, General Liability & Auto Defense Trial Group Leader, provided practical strategies to determine what depositions to take, in what order to take them, and what to try to accomplish in each deposition. Attendees learned how to efficiently establish the background of a lay witness, test the credibility of that witness, conduct an examination regarding opinions of an expert witness, and make permissible objections.

ADR Talks

Bringing 20 years of experience as an arbitrator and mediator, Mark Zukowski joined a diverse and highly respected panel of arbitrators and mediators to address key aspects of alternative dispute resolution, and discuss what they believe lawyers need to know about the process. Attendees learned how to use the flexibility of the arbitration process to effectively present their case; tips for getting the most out of mediations and settlement conferences; and keys to mediation confidentiality.

Read Mark's article ,"Capitalize on Your Mediator's Expertise to Maximize Your Settlements," on page 46.

Phillip Stanfield & Georgia Staton Present During ACTL All-Day CLE



On May 10, the American College of Trial Lawyers (ACTL) hosted its annual CLE program at ASU's College of Law Downtown. This year's event, "It's All About the Money," drew more than 100 lawyers from throughout the state, who learned from some of Arizona's best trial lawyers what resonates with jurors — approaches to take, phrases to use, and exhibits to display to increase or decrease the potential for a large verdict. Phil presented two sessions: "Punitive Damages in the 21st Century: A Sledge Hammer or a Rubber Mallet," and "From Jury Selection to Closing Argument: Addressing Damages and Avoiding Ethical Violations." Georgia presented "Beyond Pain and Suffering: Hedonic Damages/Loss of Enjoyment of Life — What is it and How do You Prove It?"

Georgia is serving her third year as Chair of the Arizona Chapter of the ACTL. She was inducted as a Fellow in 2010 and served as Vice-Chair 2015-2017. ACTL is an invitation-only fellowship of exceptional trial lawyers who demonstrate the very highest standards of trial advocacy. Membership does not exceed 1% of the total lawyer population of any state or province. JSH is proud to have five lawyers as Fellows of this prestigious group, including Steve Bullington, Mel McDonald, Russ Skelton, Phil Stanfield and Georgia Staton.

IN OUR COMMUNITY ♥

2018 Phoenix Children's Hospital 5K

In October, JSH sponsored a team for the Annual Phoenix Children's Hospital 5k in downtown Phoenix. Almost 50 JSH employees, friends and family members (plus a few four-legged friends) participated in the October 6 event. A record-breaking 2,000 walkers, runners and kids participated in the event, raising a total of $313,000 for the PCH Foundation. As one of the largest children's hospitals in the nation, PCH relies significantly on philanthropy to support their 60+ hospital programs and services.

Diversity & Inclusion Programming Sponsor at 2019 State Bar of Arizona Convention: The Power of Inclusion

We believe that diversity and inclusion is an integral component of our continuing pursuit of excellence — both as individual attorneys and as a firm. JSH proudly sponsored the Diversity & Inclusion Programming at this year's event, which included sessions on Implicit Bias, Firsts for Women in Arizona, ICWA Law, Disability Rights & Discrimination, and the Nineteenth Amendment. JSH Diversity & Inclusion Committee member Patrick Gorman attended the Convention.

The firm's Diversity & Inclusion Committee Members include: partners Cristy Chait, David Cohen, Chelsey Golightly, Patrick Gorman, Ashley Villaverde Halvorson and Gordon Lewis; executive director Carole Spivey; human resources manager Shea Morris; and marketing & business development manager Anna Walp.


Cristy Chait


David Cohen


Chelsey Golightly


Patrick Gorman


Ashley Villaverde Halvorson


Gordon Lewis


Carole Spivey


Shea Morris


Anna Walp

IN OUR COMMUNITY ♥

Cycle for a Cause: 3rd Annual Tour de Ren

In April, JSH joined more than 150 employees and tenants of Renaissance Square to raise awareness for children's cancer research. Participants cycled on spin bikes for two-hours, and raised $36,000 for the Phoenix Children's Hospital Foundation. The firm has been a proud sponsor of the event since its inception.

This year's participants included Leslie Castañeda (receptionist), Jeff Collins (partner), Patrick Gorman (partner), Amber Guerrieri (legal support clerk), Donna Horner (director of office services), Lina Lujan (legal support coordinator), Krisha Stevens (paralegal), April Walker (office services and records clerk) and Lexi Wood (associate).

Native American Bar Association's Scholarship Golf Tournament

The firm and Tribal law attorneys Jim Curran and Diana Elston sponsored the 11th Annual Native American Bar Association of Arizona (NABA-AZ) Golf Tournament Fundraiser in May 2019. Raising funds for scholarships benefiting Native American law students attending school in Arizona, this year's event was hosted at the Whirlwind Golf Club on the Gila River Indian Community. Since 2008, NABA-AZ has awarded more than $90,000 in scholarships to deserving Native law students.

26th Annual Beach Ball Fundraiser for Phoenix Children's Hospital

Guests had a ball for a great cause at the 26th Annual Beach Ball, a Phoenix Children's Hospital fundraising tradition that has raised nearly $20 million over the last 26 years. A vital source of funding for the Hospital, this year's event raised more than $1.6 million. The firm and JSH attorneys Steve Bullington and Cory Tyszka were proud to sponsor and attend the event, hosted in March at the Camelback Inn Resort. Guests enjoyed live music and line dancing, all while raising money for a worthy cause! Pictured are Steve with wife Lisa and their guests, and Cory with husband Crush.

Young Lawyers Division Hosts Holiday Party for Sunshine Group Home Children

Each December, the State Bar of Arizona Young Lawyer's Division (YLD) hosts a holiday party for the children residing at Sunshine Group Home. Nearly 200 children enjoy a day of games and pizza at Peter Piper Pizza, as well as receive wrapped toys and a special visit from Santa. The Home cares for children who have been removed from their homes due to abuse, neglect or abandonment. The firm is honored to join other Valley law firms as an annual sponsor of this very special event.

HonorHealth Foundation's Honor Ball

Providing support for the programs and services of the Virginia G. Piper Cancer Center, the firm and JSH partners Cristy Chait, David Cohen and Doug Cullins sponsored a table at HonorHealth Foundation's Honor Ball 2019. The event raises funds to support the research being conducted by the HonorHealth Research Institute. As a Lifetime Member in the Foundation's Circle of Distinction, JSH is honored to be part of the Foundation's efforts to bring hope and healing to cancer patients and their families.

Chicano/Latino Law Students Association Annual Fajita Cook-Off Fundraiser

JSH sponsored a team for the 33rd Annual Fajita Cook-Off fundraiser, presented by the Chicano/Latino Law Students Association (CLLSA) at the Sandra Day O'Connor College of Law, Arizona State University. Voted by the student body as the Most Outstanding Student Organization Event, CLLSA hosted its cook-off in February 2019 at Encanto Park, where student teams competed to make the best fajitas for attendees to vote on and enjoy. The mission of CLLSA is to promote diversity, improve and encourage the legal education of Latino students, and to inform the legal community to the unique needs and issues that the Latino community faces. Proceeds from the event are used to provide Book Scholarships and Moot Court Competition Scholarships for members of CLLSA.

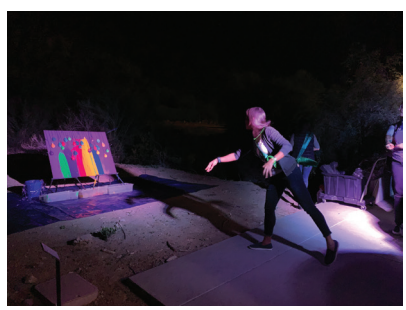
Hayzel B. Daniels Scholarship Award Gala

The Arizona Black Bar Association (ABB), Hayzel B. Daniels Scholarship Award Gala is hosted annually to support scholarships and mentoring resources for African-American law students. The 2018 Gala was hosted at The Legacy Golf Club in October and featured keynote speaker Ray Anderson, ASU Vice President for University Athletics and Athletic Director. JSH proudly supports this organization, and sponsored a table at the event for our attorneys and guests, including ABB Member and JSH partner Gordon Lewis, and JSH associates David Potts and Linda Tivorsak. Beginning in 1971, the ABB was originally named the Hayzel B. Daniels Bar Association, in honor of the state's first African-American judge. Today, the ABB continues to work to advance justice and equality in our community, the bar and on the bench.

Girl Scouts Annual Badge Bash

The Girl Scouts Arizona Cactus-Pine Council (GSACPC) hosted its annual Badge Bash at the Bob & Renee Parsons Leadership Center for Girls & Women at Camp South Mountain. The November event is a celebration of women and community members who are working to make Arizona a better place. The firm and JSH partner Gordon Lewis sponsored a "troop" for the November 2018 event, including Gordon and his wife Kara (pictured), JSH attorneys Kathleen Elder and Linda Tivorsak (pictured testing her dart-throwing skills), and marketing & business development manager Anna Walp. 500 guests enjoyed a fun-filled night testing their skills to earn merit badges and patches, all while exploring the new campus. City of Phoenix Chief of Police Jeri Williams was honored with the Woman of Courage award, and spoke of her experiences as a young Girl Scout and as the top law enforcement officer in Phoenix.

Dedicated to the leadership development of young women, Gordon has served on the GSACPC Board of Directors since 2009, the Executive Committee since 2013, and as Secretary since 2017.



IN OUR COMMUNITY ♥

5K Love Run Benefiting Homeless Youth Connection in Avondale, Arizona

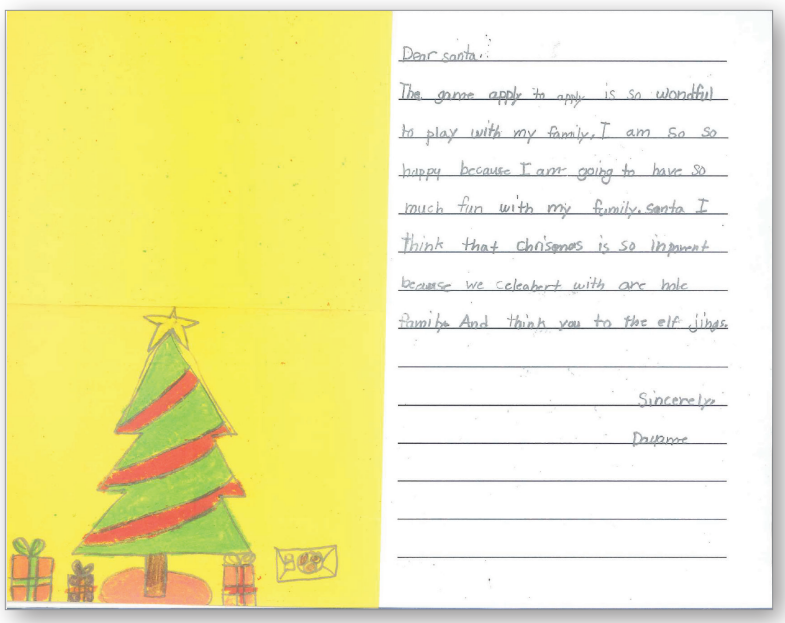
In February 2019, the firm and JSH attorneys Phil Stanfield and Clarice Spicker sponsored the Swift Charities 5K Love Run to benefit Homeless Youth Connection (HYC). The charitable arm of Swift Transportation, Swift Charities is funded from employee contributions and corporate matching. More than 600 people have raised $200,000 since the first Love Run in 2015. HYC's mission is to raise awareness and meet the needs of homeless youth so they can stay in school and graduate. Their ongoing goal is to provide homeless youth with housing, basic needs and services as they make positive, life-affirming choices toward becoming responsible, productive adults.

JSH Charity Committee Brings Holiday Spirit to 550+ Phoenix Elementary Students

The JSH Charity Committee wrapped up 2018 with a holiday party at Mitchell Elementary School. Santa Claus, played by Domingo Alvarado (office services assistant manager), delivered holiday joy in the form of candy canes and wrapped toys and games to every pre-K through 5th grade student. Committee members prepared for the party by purchasing age-appropriate gifts and wrapping each in advance, and helped distribute the presents throughout the day. "Elves" included Jennifer Bernardo (legal secretary), Ruby Castro (hospitality clerk), Andy Clark (associate), Taylor Fierros (legal support clerk and new matters specialist), Maddy Garcia (legal support clerk), Mike Hensley (partner), Kelli Huddleston (legal secretary), Lina Lujan (legal support coordinator), Chris Pierce (partner), Lori Voepel (partner), and Anna Walp (marketing & business development manager).

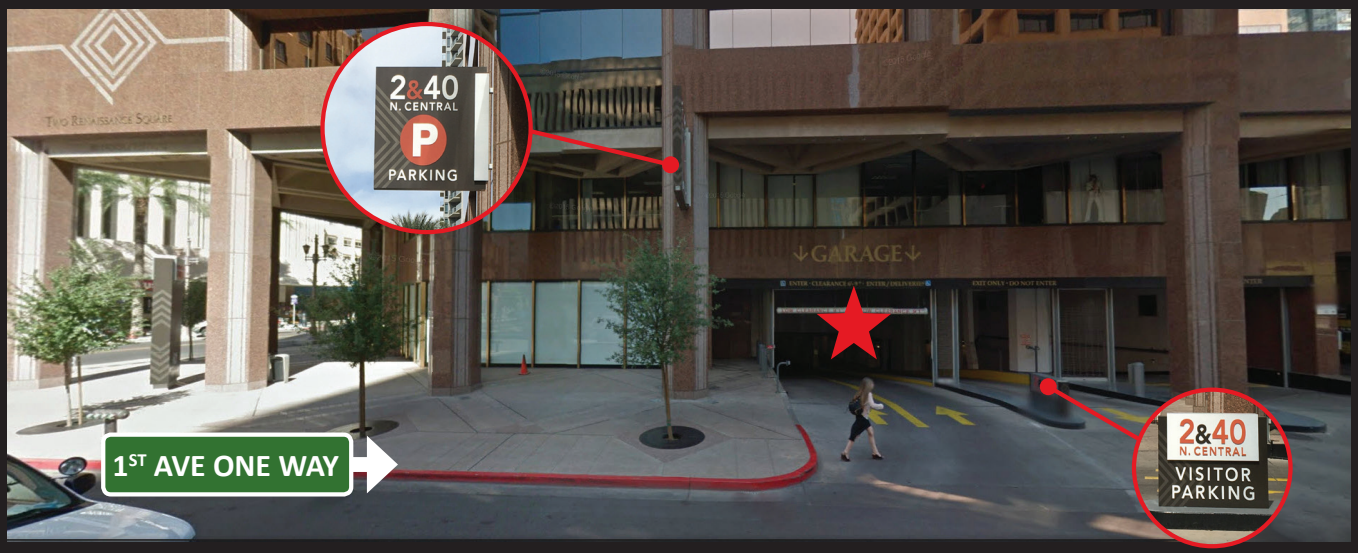
Thanks to the generosity of our attorneys, staff and vendors who donated to our silent auction, the Committee also adopted a very deserving and grateful family of four. The family was in dire need of new bedding, furniture, kitchen and household goods, clothing and shoes — not to mention a few toys for the boys to open on Christmas Day. The parents were able to give their growing boys new bikes, clothing and shoes, family board games, and a few of their favorite WWE figurines.

JSH Charity Committee



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

40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004 | 602.263.1700
jshfirm.com



Directions To JSH

The firm is located on the 27th floor of Two Renaissance Square Tower, on the south east corner of 1st Avenue and Adams Street. The entrance to our underground parking garage is on the east side of 1st Avenue, immediately south of Adams Street. Traveling south on 1st Avenue (one way street), cross Adams Street and take an immediate left into our underground parking garage (see red star above). Using one of the first three lanes to dispense a parking ticket, visitors may park on any level and in any space not marked Reserved. Upon parking, take the elevator from the garage to the building lobby (L). Remember to bring your parking ticket to our receptionist on the 27th floor for parking validation. If you have an oversized vehicle that will not fit in the underground parking garage (maximum clearance is 6'9"), you will need to use the metered parking spaces on Adams Street.

Visit phoenix.gov/streets/parking-meters/map for details and locations.

ATTORNEY DIRECTORY

Name	Title	Email	Phone	Link to Biography
Justin Ackerman	Associate	jackerman@jshfirm.com	602.263.1740	jshfirm.com/jackerman
Donn Alexander	Partner	dalexander@jshfirm.com	602.235.7152	jshfirm.com/dalexander
Jonathan Barnes, Jr.	Associate	jbarnes@jshfirm.com	602.263.4437	jshfirm.com/jbarnes
Matthew Barney	Associate	mbarney@jshfirm.com	602.263.1764	jshfirm.com/mbarney
Alejandro Barrientos	Associate	abarrientos@jshfirm.com	602.263.1715	jshfirm.com/abarrientos
Robert Berk	Partner	rberk@jshfirm.com	602.263.1781	jshfirm.com/rberk
Stephen Best	Associate	sbest@jshfirm.com	602.263.1755	jshfirm.com/sbest
Brandi Blair	Partner	bblair@jshfirm.com	602.263.1786	jshfirm.com/bblair
Kevin Broerman	Partner	kbroerman@jshfirm.com	602.263.7313	jshfrrm.com/kbroerman
Stephen Bullington	Partner	sbullington@jshfirm.com	602.263.1796	jshfirm.com/sbullington
Charles Callahan	Partner	ccallahan@jshfirm.com	602.263.7392	jshfirm.com/ccallahan
F. Richard Cannata, Jr.	Partner	rcannata@jshfirm.com	602.263.7332	jshfirm.com/rcannata
William Caravetta	Partner	wcaravetta@jshfirm.com	602.263.7389	jshfirm.com/wcaravetta
Cristina Chait	Partner	cchait@jshfirm.com	602.263.7391	jshfirm.com/cchait
Andrew Clark	Associate	aclark@jshfirm.com	602.263.1771	jshfirm.com/aclark
David Cohen	Partner	dcohen@jshfirm.com	602.263.7372	jshfirm.com/dcohen
Keith Collett	Associate	kcollett@jshfirm.com	602.263.1754	jshfirm.com/kcollett
Jefferson Collins	Partner	jcollins@jshfirm.com	602.263.7346	jshfirm.com/jcollins
Douglas Cullins	Partner	dcullins@jshfirm.com	602.263.7386	jshfirm.com/dcullins
James Curran	Partner	jcurran@jshfirm.com	602.263.7366	jshfirm.com/jcurran
A. Blake DeLong	Partner	bdelong@jshfirm.com	602.263.7399	jshfirm.com/bdelong
John DiCaro	Partner	jdicaro@jshfirm.com	602.263.1777	jshfirm.com/jdicaro
Kathleen Elder	Partner	kelder@jshfirm.com	602.235.7118	jshfirm.com/kelder
Diana Elston	Partner	delston@jshfirm.com	602.263.4413	jshfirm.com/delston
James Evans	Of Counsel	jevans@jshfirm.com	602.263.1765	jshfirm.com/jevans
Gregory Folger	Partner	gfolger@jshfirm.com	602.263.1720	jshfirm.com/gfolger
Sanford Gerber	Partner	sgerber@jshfirm.com	602.263.1779	jshfirm.com/sgerber
Elizabeth Gilbert	Associate	egilbert@jshfirm.com	602.263.1710	jshfirm.com/egilbert
Eileen Dennis GilBride	Partner	egilbride@jshfirm.com	602.263.4430	jshfirm.com/egilbride
Chelsey Golightly	Partner	cgolightly@jshfirm.com	602.263.1732	jshfirm.com/cgolightly
Patrick Gorman	Partner	pgorman@jshfirm.com	602.263.1761	jshfirm.com/pgorman
Derek Graffious	Associate	dgraffious@jshfirm.com	602.263.1748	jshfirm.com/dgraffious
John Gregory	Associate	jgregory@jshfirm.com	602.263.7343	jshfirm.com/jgregory
Joel Habberstad	Associate	jhabberstad@jshfirm.com	602.263.1753	jshfirm.com/jhabberstad
Ashley Villaverde Halvorson	Partner	ahalvorson@jshfirm.com	602.263.1793	jshfirm.com/ahalvorson
Michael Halvorson	Partner	mhalvorson@jshfirm.com	602.263.7371	jshfirm.com/mhalvorson
Michael Hensley	Partner	mhensley@jshfirm.com	602.263.1775	jshfirm.com/mhensley
Edward Hochuli	Of Counsel	ehochuli@jshfirm.com	602.263.1719	jshfirm.com/ehochuli
William Holm	Managing Partner	bholm@jshfirm.com	602.263.1749	jshfirm.com/wholm
Erin Iungerich	Associate	eiungerich@jshfirm.com	602.263.7328	jshfirm.com/eiungerich
Jeremy Johnson	Partner	jjohnson@jshfirm.com	602.263.4453	jshfirm.com/jjohnson
Daniel King	Partner	dking@jshfirm.com	602.263.4441	jshfirm.com/dking

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

Name	Title	Email	Phone	Link to Biography
Alexander LaCroix	Associate	alacroix@jshfirm.com	602.263.7302	jshfirm.com/alacroix
Gordon Lewis	Partner	glewis@jshfirm.com	602.263.7341	jshfirm.com/glewis
John Lierman	Associate	jlierman@jshfirm.com	602.263.1750	jshfirm.com/jlierman
Gary Linder	Partner	glinder@jshfirm.com	602.263.1722	jshfirm.com/glinder
Alexander Lindvall	Associate	alindvall@jshfirm.com	602.263.7341	jshfirm.com/alindvall
Andrea Logue	Associate	alogue@jshfirm.com	602.263.7325	jshfirm.com/alogue
Michael Ludwig	Partner	mludwig@jshfirm.com	602.263.7342	jshfirm.com/mludwig
Nicolas Martino	Associate	nmartino@jshfirm.com	602.263.1795	jshfirm.com/nmartino
John Masterson	Partner	jmasterson@jshfirm.com	602.263.7330	jshfirm.com/jmasterson
Ryan McCarthy	Partner	rmccarthy@jshfirm.com	602.263.1789	jshfirm.com/rmccarthy
A. Melvin McDonald	Partner	mmcdonald@jshfirm.com	602.263.1747	jshfirm.com/mmcdonald
Brendan Melander	Associate	bmelander@jshfirm.com	602.263.1788	jshfirm.com/bmelander
Michele Molinario	Partner	mmolinario@jshfirm.com	602.263.1746	jshfirm.com/mmolinario
Kenneth Moskow	Associate	kmoskow@jshfirm.com	602.263.1722	jshfirm.com/kmoskow
Donald Myles	Partner	dmyles@jshfirm.com	602.263.1743	jshfirm.com/dmyles
James Osborne	Partner & General Counsel	josborne@jshfirm.com	602.263.7337	jshfirm.com/josborne
Kimberly Page	Associate	kpage@jshfirm.com	602.263.1780	jshfirm.com/kpage
Ravi Patel	Associate	rpatel@jshfirm.com	602.263.1738	jshfirm.com/rpatel
R. Christopher Pierce	Partner	cpierce@jshfirm.com	602.263.1707	jshfirm.com/cpierce
Ryan Pont	Associate	rpont@jshfirm.com	602.263.7303	jshfirm.com/rpont
Joseph Popolizio	Partner	jpopolizio@jshfirm.com	602.263.1741	jshfirm.com/jpopolizio
David Potts	Associate	dpotts@jshfirm.com	602.263.1708	jshfirm.com/dpotts
Brian Ripple	Associate	bripple@jshfirm.com	602.263.7365	jshfirm.com/bripple
Kyle Robertson	Associate	krobertson@jshfirm.com	602.263.7353	jshfirm.com/krobertson
Jay Rosenthal	Partner	jrosenthal@jshfirm.com	602.263.1723	jshfirm.com/jrosenthal
William Schrank	Partner	wschrank@jshfirm.com	602.263.1766	jshfirm.com/wschrank
Russell Skelton	Partner	rskelton@jshfirm.com	602.263.1716	jshfirm.com/rskelton
Josh Snell	Partner	jsnell@jshfirm.com	602.263.1790	jshfirm.com/jsnell
Clarice Spicker	Associate	cspicker@jshfirm.com	602.263.1706	jshfirm.com/cspicker
Erica Spurlock	Associate	espurlock@jshfirm.com	602.263.7304	jshfirm.com/espurlock
Phillip Stanfield	Partner	pstanfield@jshfirm.com	602.263.1745	jshfirm.com/pstanfield
Georgia Staton	Partner	gstaton@jshfirm.com	602.263.1752	jshfirm.com/gstaton
Erik Stone	Partner	estone@jshfirm.com	602.263.7309	jshfirm.com/estone
David Stout	Partner	dstout@jshfirm.com	602.263.7384	jshfirm.com/dstout
Christopher Stuart	Of Counsel	cstuart@jshfirm.com	602.263.1730	jshfirm.com/cstuart
Linda Tivorsak	Associate	ltivorsak@jshfirm.com	602.263.1725	jshfirm.com/ltivorsak
Cory Tyszka	Associate	ctyszka@jshfirm.com	602.263.1739	jshfirm.com/ctyszka
Lori Voepel	Partner	lvoepel@jshfirm.com	602.263.7312	jshfirm.com/lvoepel
Alexis Wood	Associate	awood@jshfirm.com	602.263.1734	jshfirm.com/awood
Mark Zukowski	Partner	mzukowski@jshfirm.com	602.263.1759	jshfirm.com/mzukowski

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JSH JONES, SKELTON & HOCHULI, P.L.C.
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004

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