The Arizona Association of Defense Counsel

Common Defense

FALL 2016

A Magazine for Arizona Defense Attorneys

21st Annual Barry Fish Memorial Golf Tournament

This year the tournament hosted over 100 golfers and sponsors

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An interview with James R. Broening Distinguished Service Award Honoree

This award was presented at the Past President's Fall Kickoff on September 22.

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2016 AADC Annual Meeting

This year's Annual Meeting at the JW Marriott Scottsdale Camelback Inn Resort and Spa in Paradise Valley.

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President's Message

Our Legacy of Relationships

The first time I attended an AADC function was a December judicial reception in the early 1990s. In those days the holiday soiree was held at the top of the Chase Tower (known then as the Valley National Bank Tower) and it was quite a view from the 38th floor. The place was decked out for the holidays and the city lights were visible for miles. It was an impressive scene but it wasn't the view or the decorations that impressed me most. It was watching the partners from my office and other firms mingling with the judges and telling war stories. Real war stories about trials and depositions and judges who dared not show up! I was in awe. Not only did I aspire to be a trial lawyer who would one day have my own war stories but I was drawn to the obvious affection and mutual respect that these highly accomplished professionals had for one another. I saw authentic collegiality--what appeared to be a true bond throughout this fraternity of trial lawyers. As this year's AADC president, the legacy I most want to see passed on to our younger successors is the gift of community within our profession.

In recent years, my predecessors have written about the AADC's various member services, educational programs and practice resources. They have touted the development of our website and improvement in our electronic communications. However, our most important mission is to pass on an appreciation of how AADC membership can enhance and enrich a defense lawyer's career. To ensure that the benefits of AADC membership are enjoyed by those who are practicing twenty years from now, we need to tell the story of why the AADC has been so important to our professional development.

Each of us has our own story, of course. Some were just told to show up at AADC networking events. Some were sent to the CLE seminars. Some became members of the Young Lawyers Division and helped with events like the YLD Charity Softball Tournament. Some played in the Barry Fish ALS charity golf tournament and others attended the monthly advocacy lunch seminars to get their CLE hours and Honey Bear's BBQ fix. At these events, we met new people and we talked with people we had cases with. We got to know each other on a different level. From there, many of us went on to expand our involvement. We taught seminars or judged law school competitions, attended the annual meeting or volunteered in the pro-bono lawyer assistance or amicus briefing programs. We traded legal strategies and shared information about experts and opposing counsel. We exchanged research materials and pleadings on all kinds of topics. We got to know colleagues who not only had the skill set to assist us on our professional journey but they actually wanted to help us! Colleagues became friends and friendships took on added texture and depth. As time passed, those friendships paid many dividends—personally, professionally and financially.

The practice of law has changed a great deal since my mentor, Dick Segal, began his practice in 1956. Computers enable more people to fight over more issues in more courts than ever before. The internet has changed the way people communicate and obtain information both professionally and personally. Smart phones have improved our ability to organize but they have also turned convenience and immediate access into an expectation. Such progress has facilitated multi-tasking for lawyers but it has also minimized extensive human contact with court staff, clients, experts and other lawyers. Nevertheless, there is no substitute for developing real relationships through actual face time with people. The best professional advice you get is still handed out in the back of a conference room or the hallway of a courthouse. Professional relationships require an investment of time and authentic interaction. No lawyer I know ever developed a substantial client or referral relationship through social media exclusively. Just like Martindale Hubbell when I was young, LinkedIn and AVVO have their place but they are no substitute for developing personal relationships in our profession.

Our litigation craft demands a major investment of time; part of that investment must involve developing a professional network. Your "rolodex" of colleagues, consultants and touts is still best constructed through personal interaction--getting to know people over a drink, a sandwich or ten foot putt. Finding a mentor or a protégé does not happen by accident. Developing great referral sources or building stables of top tier experts depends on a strong web of connected professionals. We stand on the shoulders of those who came before us. We need not re-invent the wheel. If we are smart, we learn to borrow good ideas, sage philosophies, tested strategies and professional references from those willing to share. But we don't find those pearls of experience through a fiber optic cable or satellite signal. We come by them through time spent together. We look forward to seeing you at our upcoming events and seminars, including the judicial receptions in Tucson and Phoenix on December 1 and December 8, respectively. Come have a drink, grab a bite to eat and share a story with someone new. After all, "it's all about who you know."

Craig McCarthy, Esq.
President

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All views, opinions, and conclusions expressed in articles of this magazine are those of the authors and are not necessarily that of the Arizona Association of Defense Counsel, and/or the Board of Directors.

Correspondence and articles are welcome and should be sent to the Editor. Email articles for submission to Johnny Sorenson at johnny@sorensonlaw.net. The right is reserved to select materials to be published. Material accepted for publication becomes property of the Arizona Association of Defense Counsel.

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2016 AADC CALENDAR OF EVENTS

To register for any of these events go to the AADC website, www.azadc.org.

SPECIAL EVENTS AND CLE's

Young Lawyers Division Fall CLE
Thurs. November 3, 2016
1:30-5:00 pm
Gust Rosenfeld,
One E. Washington St.,
15th Floor, Phoenix

Substantive Law Group CLE's
November 17, 2016
4:00-5:30pm
'The Family Purpose Doctrine: Broad Liability but Questionable Insurance Coverage'
Speaker: Ryan Sandstrom, Esq., Sanders and Parks
Gust Rosenfeld
One E. Washington St.,
16th Floor, Phoenix

Tucson Judicial Reception
December 1, 2016
Arizona Inn
2200 E. Elm St.
Tucson, AZ

Phoenix Judicial Reception
December 8, 2016
Bitter & Twisted Cocktail Parlour
Phoenix, AZ

SAVE THE DATE
Annual Meeting
June 1-2, 2017

ADVOCACY LUNCHEONS

Advocacy luncheons are held from 12 - 1 pm at Gust Rosenfeld, One E. Washington St., 15th Floor, Phoenix

Nov. 9, 2016 E-Discovery from an Attorney's Perspective
Speaker: Meaghan Kramer and Damien Mayer

Dec. 14, 2016 Covenants not to Compete and Non-Solicitation Clauses
Speaker: Erica Stutman

2017 Dates
Jan 11
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Mar 8
Apr 12
May 10

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Broad Liability Under the Family Purpose Doctrine

By Ryan Sandstrom, Esq.

Sanders & Parks, P.C.

Ryan Sandstrom, Esq.

The Family Purpose Doctrine has existed in Arizona jurisprudence for nearly 100 years, but recently has become a more commonly pled allegation by Plaintiffs' lawyers in automobile accident cases. The expansiveness of the doctrine under the current Arizona common law requires revisiting the doctrine to examine whether it has exceeded its original purpose.

Evolution of the Family Purpose Doctrine in Arizona

In 1919, the Arizona Supreme Court heard the matter of *Benton v. Regeser*, 20 Ariz. 273, 179 P. 966 (1919), wherein a man's minor son caused a motor vehicle accident with a bicyclist. The plaintiff alleged that the father owned and maintained the vehicle involved in the accident for the "use of the members of his family, and for their pleasure and convenience." *Benton*, 20 Ariz. at 275, 179 P. at 967. The plaintiff, therefore, alleged that the father should be liable for the damages caused by his minor son. *Id*. The Court found that "a father who furnishes an automobile for the pleasure and convenience of the members of his family makes the use of the machine for the above purposes his affair or business, and that any member of the family driving the machine with the father's consent, either express or implied, is the father's agent." *Id.* at 278, 179 P. at 968. Accordingly, because the son was operating the vehicle with the implied consent of his father for a family purpose (driving his siblings to and from church), the Court found that the father was liable for the damages caused to the plaintiff. *Id.*

Since its judicial adoption in 1919, the scope of the Family Purpose Doctrine has significantly expanded beyond finding liability of a father for damages caused by his minor child's use of a vehicle that the father owns, maintains, and furnishes to the child. In *Mortenson v. Knight,* 81 Ariz. 325, 332, 305 P.2d 463, 468 (1956), the Arizona Supreme Court found that the Family Purpose Doctrine applied to hold a husband liable for the damages caused by his wife while driving the husband's employer's vehicle. The Court stated, "Agency, not ownership, is the test of liability." *Id.* at 333, 305 P.2d at 468. Because the vehicle involved in the accident was exclusively used by the husband and his wife, was garaged at their home, and the husband "furnished [his wife] the instrumentality which inflicted the injuries on the plaintiff," the husband could be liable under the Family Purpose Doctrine, even though he did not own the vehicle. *Id.*

The Family Purpose Doctrine was further expanded in 1968 to apply to adult children living at home, despite the adoption of Arizona's Safety Responsibility Act, codified at the time as A.R.S. §28-1101, et. seq. *Pesqueira v. Talbot,* 7 Ariz. App. 476, 441 P.2d 73 (1968). In *Pesqueira*, a mother purchased a Corvette Sting Ray for her 18-year-old daughter, agreeing that her daughter would repay her the value of the vehicle on a favorable, long-term oral loan. 7 Ariz.App. at 478, 441 P.2d at 75. Approximately one year later, at the age of 19, the daughter caused an automobile accident while driving the Corvette. *Id.* at 477, 441 P.2d at 74. At the time of the accident, the adult daughter lived with her mother, was employed, but did not pay rent or utilities. *Id.* The plaintiffs alleged that the mother and father (who lived in Texas but visited Arizona on the weekends) were liable under the Family Purpose Doctrine. *Id.*

The Court stated, "[the] Family Purpose Doctrine is to be given broad effect in Arizona." *Id.* at 480, 441 P.2d at 77. Moreover, the Court found that to succeed on a claim under the Family Purpose Doctrine, "there must be a family with sufficient unity so that there is a head of the family, the motor vehicle responsible for the injury must have been one 'furnished' by the head of the

family to a member of the family, and this vehicle must have been used on the occasion in question by the family member with the implied or express consent of the head of the family for a family purpose." *Id.* The Court found that a "family" existed because a family consists of people "who live in one house and under one head." *Id.* Further, the Court found that financial assistance in the form of a substantial gift or nonbusiness-like loan can constitute "furnishing" the vehicle. *Id.* at 481, 441 P.2d at 78. Additionally, the court found that the adult child was using the car to earn her own living, and that such constituted a "family purpose." *Id.* Accordingly, the Court found "unless the undisputed facts lead inexorably to a conclusion of non-liability, summary judgment [is] not proper." *Id.* at 479, 441 P.2d at 76. Therefore, the Court found the mother liable under the family purpose doctrine as she lived in the same household as the daughter. *Id.* at 481, 441 P.2d at 78. Furthermore, the father could also be liable if a jury concluded that the father was also a member of the "family" despite living away from the household. *Id.*

In 1984, the Arizona Court of Appeals further expanded the Family Purpose Doctrine in *Brown v. Stogsdill*, 140 Ariz. 485, 487, 682 P.2d 1152, 1154 (App.1984). In *Brown,* an adult son purchased a vehicle from his father for less than fair market value, and lived in his parents' unfinished garage, paid a small amount of rent – again less than the fair market value, and was independently employed. *Brown,* 140 Ariz. at 486-87, 682 P.2d at 1153-54. The Court held, "for the family purpose doctrine the family *is not limited to parents and their minor adult children.* An adult who is not dependent and who is self-sustaining can still be considered a member of the household for the purposes of the family purpose doctrine *so long as the family itself is a family unit with a family head.*" *Id.* at 487, 682 P.2d at 1154 (emphasis added). The court, in quoting the Supreme Court of Georgia, stated that "the controlling test is…whether the child 'was using the car for a purpose for which the parent provided it with the permission of the parent either express or implied.'" *Id.* at 488, 682 P.2d at 1155 (quoting *Dunn v. Caylor,* 218 Ga. 256, 127 S.E.2d 367 (1962)).

The Arizona Court of Appeals in *Brown* found that "control" alone was not a separate criterion but that there is sufficient control inherent in the elements of "head of the family", "furnishing" and "permission." *Id.* Thus, the Court refused to grant the parents' motion for summary judgment, allowing a jury to determine whether the son was "sufficiently emancipated to not be considered a member of his parents' family unit." *Id.* The Court determined that although the son paid room and board to his parents and purchased the vehicle from his father, the parents had still provided financial assistance because the amounts the son paid were less than fair market value. Therefore, the parents may have furnished the vehicle, and could be liable under the Family Purpose Doctrine. *Id.*

Recently in 2011, the Arizona Supreme Court again reaffirmed Arizona's application of the Family Purpose Doctrine despite the abolition of joint and several liability. *Young v. Beck,* 227 Ariz. 1, 251 P.3d 380 (2011). In *Young,* the minor son caused an accident while he was using his parents' vehicle in opposition to their strict instructions; specifically, the accident occurred while the son was transporting friends, which the parents strictly forbade. *Young*, 277 Ariz. at 3, 251 P.3d at 382. The Court stated that the "family purpose doctrine departs from traditional agency law." *Id.* at 5, 251 P.3d at 384. The Court concluded, "whatever the original soundness of the family purpose doctrine's use of agency principles, it is now usually recognized that the doctrine represents a social policy generated in response to the problem presented by massive use of the automobile. The doctrine's primary justification is to provide for an injured party's recovery from the financially responsible person – the family head – deemed most able to control to whom the car is made available." *Id.* Accordingly, the Court found that the Family Purpose Doctrine was still good law despite the abolition of joint and several liability, and the existence of Arizona's Financial Responsibility Act, A.R.S. §28-4009. *Id.* at 7, 251 P.3d at 386.

Summary of the Status of Arizona Law of the Family Purpose Doctrine

The Family Purpose Doctrine in Arizona has evolved from an agency principle of holding a parent responsible for the damages caused by his/her minor child's use of a family vehicle, to a social utility doctrine that can find a parent liable for the torts of his/her adult child even when the adult child is self-sustaining but received some financial assistance from the parent to allow the child

Broad Liability *(continued)*

to purchase the vehicle, and when the adult child was using the vehicle to earn an independent living. Such expansion is despite the abolition of joint and several liability, the addition of financial responsibility laws in Arizona requiring that each vehicle and driver be insured, and further despite A.R.S.§12-661, which limits parents or legal guardian's liability to $10,000 for malicious or willful misconduct of their minors.

The broad effect of the current state of the Family Purpose Doctrine in Arizona makes it challenging for a court to grant summary judgment unless the "facts lead inexorably to a conclusion of non-liability." *Pesqueira*, 7Ariz.App. at 479, 441 P.2d at 76. Because of such broad construction of the Family Purpose Doctrine, there are no published cases in Arizona where a court *granted* a parent's motion for summary judgment on the issue. While the vast majority of jurisdictions have abolished the Family Purpose Doctrine by statute or the common law, under the current state of Arizona law, it is conceivable that any parent could be liable if he/she provided financial assistance to his/her child to allow the child to acquire a vehicle. This is so even if the child was an adult, was the sole individual on the title, was self-sustaining, and lived away from the home, provided that there is "sufficient unity so that there is a head of the family" and the vehicle was used for the purpose of which the head of family furnished the vehicle to the child. *Id.* at 480, 441 P.2d at 77.

How to Defend a Family Purpose Doctrine Claim

It is somewhat speculative to determine how to defeat a claim under the Family Purpose Doctrine in Arizona, as no published opinion in Arizona shows the grant of summary judgment in favor of a parent on such a claim. However, the most reasonable and logical method to defeat the Family Purpose Doctrine Claim is to argue the extent of control. While the Arizona Court of Appeals in *Brown* indicated that control alone is not a separate criterion to determine Family Purpose Doctrine claims, control is inherent in the elements of

Broad Liability *(continued)*

"head of the family", "furnishing" and "permission." *See Brown*, 140 Ariz. at 488, 682 P.2d at 1155.

For example, if a parent does not live with his/her child, control his/her child's activities or use of the vehicle, or is unable to punish, set restrictions, or limit the child's use of the vehicle, such lack of control may indicate that there is insufficient unity to constitute a family with a family head. Similarly, if a parent has no control of a vehicle but merely gifted it to a child (or provided financial assistance whereby the child purchased the vehicle) with no strings attached, the vehicle may not have been furnished by the parent and the parent may not have granted any "permission" for the child's use of the vehicle, as the vehicle is merely the child's vehicle. Lastly, a court may conclude that an accident may not involve a "family purpose" if the parent maintains no control over the child or the vehicle, did not furnish the vehicle to the child, nor granted the child any "permission" to use the vehicle. Based on such arguments, a court may conclude that the social policy of finding liability against a parent may not be served because the parent is not "responsible" for the vehicle or his/her child.

Therefore, while the issue of liability under the Family Purpose Doctrine may ultimately be a question for the jury, the lack of a parent's control of the child and/or the vehicle should be the principal contention for the defense.

Conclusion

Defense attorneys in Arizona must realize the challenges associated with Family Purpose Doctrine claims, and notify their clients accordingly when such a claim arises. Additionally, while the legislature has passed many laws that arguably get close to abolishing the Family Purpose Doctrine, perhaps it is time for the legislature to either definitively abolish the antiquated and now overly-broad doctrine, or restrict the doctrine to apply to the limited circumstances for which it was originally adopted, specifically, when a parent furnishes a vehicle to a minor child that lives within the parent's household and is subject to the parent's control.

On November 17, 2016, Ryan Sandstrom will be presenting a CLE at 4:00-5:30pm for the Arizona Association of Defense Counsel (webcast is available) to discuss the Family Purpose Doctrine more thoroughly, and further to address numerous insurance coverage issues related to the doctrine.

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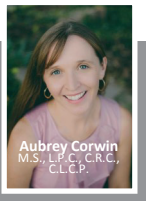

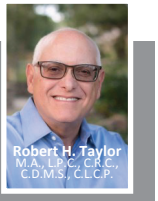

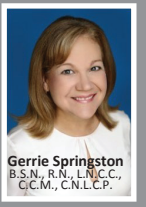

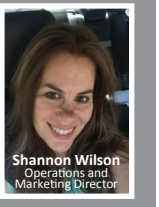

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The Rule of Non-Liability of a Landowner for an Independent Contractor's Employee's Injuries on the Premises

By Shanks Leonhardt, Esq.

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There is a common fact pattern in litigation involving serious workplace injuries. A landowner hires an independent contractor to perform to work on its property. During the course of performing that work, one of the independent contractor's employees is injured on your client's property. The injured independent contractor's employee cannot sue his employer due to workers' compensation statutes. Thus, he sues the landowner seeking to hold the landowner liable based on theories of non-delegable duty, inherently dangerous activity, or vicarious liability.

When handling such a case it is important to determine whether the landowner can even be liable as a matter of law. With the right set of facts, the landowner (or even independent contractor) may be able to prevail on an early motion to dismiss under well-settled Arizona law insulating landowners from certain claims based on injuries to their independent contractors' employees.

Liability for the acts of an independent contractor

The general rule is that an employer or landowner is not liable for the negligence of an independent contractor.[1] There are well-known exceptions to this rule of non-liability, including when the contractor is performing tasks that are considered non-delegable duties (e.g., the City's maintenance of its streetlight in Wiggs) or when the contractor is performing inherently or abnormally dangerous work (e.g., displaying a fireworks show in Miller). Arizona adopted these exceptions based on the various sections in Restatement (Second) of Torts ("Restatement"), including §§413, 416, 422, 427. In each of these scenarios, the law allows an injured party to seek recovery from a landowner even when the landowner has no active fault or negligence.

However, there is an important limitation on the extension of liability to landowners through the non-delegable duty or inherently dangerous activity exceptions. When applying theses exceptions, Arizona law distinguishes between two types of cases: (1) those cases seeking to extend such liability to the landowner for injuries to third-party bystanders/invitees; and (2) those cases seeking to extend liability to the landowner for injuries to an independent contractor's employee.[2]

For the second type of case, a landowner cannot be vicariously liable for the independent contractor's negligence and cannot be liable based on a non-delegable duty or inherently dangerous activity exception.

The rule of non-liability for injuries to independent contractors' employees

Courts have consistently recognized and applied this rule of non-liability for injuries to independent contractors' employees for over 50 years in various fact patterns.[3] The

1 See, e.g., Wiggs v. City of Phoenix, 198 Ariz. 367 (2000); Miller v. Westcor Ltd. P'ship, 171 Ariz. 387 (App. 1991).

2 See Lee v. M & H Enterprises, Inc., 237 Ariz. 172, 178 (App. 2015); Welker v. Kennecott Copper Co., 1 Ariz. App. 395, 404 (1965) *overruled on other grounds by* Lewis v. N.J. Riebe Enters., Inc., 170 Ariz. 384, 387-388 (1992).

3 See, e.g., Welker, 1 Ariz. App. 395; Rause v. Paperchine, Inc., 743 F. Supp. 2d 1114, 1124 (D. Ariz. 2010); Lee v. M & H Enterprises, Inc., 237 Ariz. 172, 177, ¶ 17 (App. 2015); Allison Steel Mfg. Co.

The Rule of Non-Liability *(continued)*

nature of the work as inherently dangerous work does not impact this rule. Courts have applied the rule in cases involving mining accidents, construction accidents and work involving high voltage power lines.[4] The reasoning behind this rule is two-fold. First, workers' compensation statutes already cover the injured employee, and the landowner is either directly or indirectly paying a portion of the premiums for those benefits.[5] Second, the bright-line exception for injuries to independent contractors' employees is predictable and easily evaluated in the risk analysis and pricing between landowners and contractors.[6] This rule of non-liability is tempered by the fact that a landowner can still be held *directly liable* for its own negligence in failing to turn over reasonably safe premises and/or if it retains control of the independent contractor's work.[7]

The Restatement (Third) of Torts has adopted a similar rule of non-liability for injuries to independent contractors' employees.[8] Comment h to Section 55 clarifies that the Restatement (Third) follows the Arizona rule, which is codified at Section 57. This Section 57 states "[t]he hirer of an independent contractor is not subject to liability to an employee of an independent contractor under any of the

v. Superior Court, 22 Ariz. App. 76, 81 (1974) (holding "the courts of this state have explicitly and consistently held that a landowner or contractor owes no non-delegable duty to the employee of a contractor or subcontractor to provide a safe place to work").

4 See Welker, 1 Ariz. App. at 404 (holding in a case involving a mining accident that "this court holds that the duties outlined in §§ 413, 416, 422 and 427 of the Restatement of Torts are not owed to employees of an independent contractor"); Rause, 743 F. Supp. 2d at 1122 (holding no non-delegable duty on landowner for independent contractor employee's injuries at paper mill); Parks v. Atkinson, 19 Ariz. App. 111, 113 (1973) (holding no strict or vicarious liability for independent contractor employee's injuries suffered from a fall from scaffolding at church construction site); Mason v. Arizona Pub. Serv. Co., 127 Ariz. 546, 551 (App. 1980) (holding no strict or vicarious liability for injuries to subcontractor's employees performing work near power lines).

5 Rause, 743 F. Supp. 2d at 1122.

6 Id.

7 See Lewis, 170 Ariz. at 387-388 (1992); see also Restatement § 414 (retaining control over the work); Restatement § 343 (turning over an unsafe premises prior to the work being performed).

8 See Restatement (Third) of Torts: Phys. & Emot. Harm §55 cmt. h (2012).

The Rule of Non-Liability *(continued)*

vicarious-liability avenues in this Chapter."[9] Like Arizona, the Restatement (Third) states "[t]he central reasons for this conclusion stem from the design of workers' compensation."[10]

The independent contractor's use of the rule of non-liability

The benefits of this rule of non-liability are not limited solely to landowners. In certain circumstances, the rule can also be used by the independent contractor who employed the injured worker. Workers' compensation statutes typically preclude an injured worker from suing his employer for negligence based on his workplace injury. However, an employer often still faces the prospect of litigation. A landowner facing suit from an independent contractor's employee will often file a third-party complaint against the independent contractor seeking contractual indemnity from the independent contractor.

In these situations, the independent contractor may be able to use the rule of non-liability described here to seek a dismissal of the third-party complaint. Specifically, the independent contractor can argue that the rule of non-liability bars the injured worker from collecting damages from the landowner based on any indirect liability deriving from the independent contractor's actions. Thus, there will never be anything for the independent contractor to indemnify. This argument depends on the contractual indemnity language at issue and whether it allows a landowner to recover indemnity for its own negligence in addition to the negligence of the independent contractor.

In summary, the rules of non-liability regarding injuries to an independent contractor's employee are important to know and evaluate when handling any case involving injuries to an independent contractor's employee.

9 Id. § 57.

10 Id. § 57 cmt. d.

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Shawn Aiken	Phoenix	(602) 248-8203	☑
Hon. Rebecca Albrecht	Phoenix	(602) 643-2300	☑
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Brice E. Buehler	Phoenix	(602) 234-1212	☑
Hon. Edward Burke	Phoenix	(602) 540-8368	☑
Jonathan David Conant	Prescott	(855) 626-6268	☑
David J. Damron	Phoenix	(602) 476-1836	☑
Joe Epstein	Scottsdale	(888) 355-2314	☑
Hon. Kenneth Fields	Phoenix	(602) 542-2280	☑
Hon. Lawrence Fleischman	Tucson	(520) 326-6400	☑
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AADC Young Lawyers Division President's Message

By Micalann C. Pepe, Esq.

Jaburg Wilk

Micalann C. Pepe, Esq.

It has been my pleasure to be a part of the Young Lawyers Division's growth and accomplishments since I first joined the legal profession. I am honored to continue the YLD's legacy of serving, educating, and welcoming the new and up-and-coming lawyers in our legal community as this year's President. With the help of our dedicated YLD Executive Board, this year will be the most exciting one yet.

One of the YLD's primary objectives is to constantly evolve to meet our members' needs. We sought feedback in recent years regarding how we can best serve the young lawyers in our community. Common themes among the responses we received include: professional networking opportunities, continuing legal education, and social networking. Our promise to you is to deliver in each of those categories.

This year, our focus will be on increasing the value and availability of professional networking opportunities for our YLD members. To accomplish this, we are working more closely with the AADC Executive Board. Our close relationship with the AADC Executive Board will provide our young lawyers more opportunities to get involved on the state level and forge networking relationships with some of the most established and prominent defense attorneys in our legal community. Establishing connections within our defense community is not only important for young lawyer growth and development, but it is key to building long-lasting and beneficial relationships with other lawyers interested in bettering themselves and their community. In furtherance of our relationship, the AADC Executive Board is hosting a welcome event for the YLD and all young members of our legal community, on October 13, 2016, from 5:30 – 7:30 at OHSO (Arcadia). For more information, please contact me at mcp@jaburgwilk.com. All AADC members and young lawyers are encouraged to attend to welcome new lawyers and learn more about how this organization benefits those who join.

The YLD will continue hosting two half-day continuing legal education events for the young lawyers in the community—one in the Fall and one in the Spring. The YLD's CLE programming provides young lawyers with basic litigation principles and techniques, relevant to all practice areas under the defense umbrella, such as: taking depositions, mediating, utilizing experts, ethical billing, writing an appellate brief, etc. Our first CLE event will take place November 3, 2016, at Gust Rosenfeld, from 1:30 – 5:00, and will be followed by a sponsored happy hour open to the entire AADC. Topics for this Fall's CLE include arbitration, utilizing experts, and ethical social media discovery (with the ever-entertaining Ruth Carter). Please contact Debbie Hanson at admin@azadc.org to receive more information or register.

Lastly, we look forward to hosting networking happy hours, not only within the AADC YLD, but with other organizations, such as the Defense Research Institute (DRI), to increase our young lawyers' exposure to other motivated young professionals in our community. If you are interested in receiving information about YLD social events, please contact me at mcp@jaburgwilk.com.

As young attorneys in the Phoenix legal community, we will be practicing alongside one another for many years to come. Let's meet one another, educate one another, and support one another along the way. The YLD provides support, guidance, and opportunities to young lawyers who are looking to get involved. To receive more information, or join us at any of our upcoming events, please contact me.

I look forward to leading the YLD this year and getting to know all of you.

Micalann C. Pepe
YLD President

21st Annual Barry Fish Memorial Golf Tournament

The 21st Annual Barry Fish Memorial Golf Tournament was held Saturday, April 30, 2016 at Arizona Biltmore Golf Course. The event was presented by the Arizona Association of Defense Counsel and Lewis Roca Rothgerber Christie, LLP. This year the tournament hosted over 100 golfers and sponsors. The proceeds of the tournament benefit the ALS Association Arizona Chapter. Barry Fish was an AADC past president who lost his life to ALS. The tournament raised $9,960 this year and has raised over $175,000 the last 20 years! ALS Association is the only non profit volunteer driven health organization dedicated solely to the fight against Lou Gehrig's disease. The 2017 golf tournament promises to be even better so plan on joining us to support the ALS Association Arizona Chapter!

AADC Annual Meeting at the JW Marriott Scottsdale Camelback Inn Resort & Spa

The AADC held its Annual Meeting at the JW Marriott Scottsdale Camelback Inn Resort & Spa in Paradise Valley in June. The CLE program included the Honorable John J. Tuchi from the U.S. District Court speaking about federal court practice and discovery disputes; Michael T. Liburdi, General Counsel to Governor Doug Ducey, speaking about judicial selection and legislation of interest to the civil defense bar; and Robert Berk from Jones, Skelton & Hochuli speaking on legal ethics. If you are interested in planning next year's Annual Meeting, please contact the AADC at admin@azadc.org to join the planning committee.

Supersedeas Bonds: Can You Secure the Availability of Funds to Pay Your Judgment While The Other Side Appeals? Maybe, Maybe Not.

By Eileen GilBride, Esq.

Jones, Skelton & Hochuli, P.L.C.

Eileen GilBride, Esq.

You know what a supersedeas bond is. When a party loses a money judgment at trial, he can put off having to pay the judgment while he takes an appeal by posting a supersedeas bond. Filing the bond with the court stays execution of the judgment. The bond can be cash, cash equivalent, or an actual bond procured from a bonding or insurance company. The purpose of the bond is to preserve the status quo while the case is on appeal. It protects the winning party by ensuring there will be funds to pay that judgment when the appeal is over. It prevents the losing party from dissipating his assets during the lengthy appeal process. And it protects the losing party from having to pay the judgment before he takes his appeal. These purposes are served, of course, when the bond process applies to all money judgments. But the fairly new supersedeas statute, A.R.S. § 12-2108, does not apply to all money judgments, and it does not provide full protection to judgment holders.

Traditionally, the amount of the bond was the amount of the judgment, plus accruing interest while the case was on appeal. This made sense, given the bond's purpose. Having the bond cover the full amount of the judgment plus accruing interest fully protected the judgment holder, ensuring that at the end of the day, there would be a sufficient source of money to pay the judgment if the judgment debtor lost his appeal. Further, requiring the appealing party to post the bond gave him some skin in the game, which helped thwart frivolous appeals. The appealer had to either come up with cash, a cash equivalent, or pay a premium to purchase a bond – typically a small percentage (1%-10% depending on the circumstances) of the bond's face amount.

Much of that changed in 2011 when the legislature enacted A.R.S. § 12-2108, the supersedeas bond statute. Apparently this statute is part of a nationwide tort reform movement to help the mega-corporate defendants who lost blockbuster billion-dollar tort judgments to prosecute their appeals without having to bankrupt themselves trying to post a supersedeas bond. *See, e.g., Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136- 39 (2d Cir. 1986), *rev'd*, 481 U.S. 1 (1987). That goal is certainly understandable. But the statute, as written, creates untoward consequences for the typical Arizona litigant, whether in state or federal court.[1] For example, the statute does not appear to protect defendant judgment-holders. It states, "If a plaintiff in any civil action obtains a judgment under any legal theory, the amount of the bond that is necessary to stay execution during the course of all appeals . . . shall be . . . ." (emphasis added). By tying the amount of a bond to a plaintiff-obtained judgment, the statute seemingly precludes defendants who obtain judgments from requiring supersedeas bonds from losing plaintiffs. Perhaps the proponents of the statute were mainly concerned about losing defendants in those billion dollar tort cases. After all, losing plaintiffs in those cases would not be hit with a money judgment, so would not have to worry about

1 As to the application of Arizona's supersedeas statute in federal court, see Wenger, "The Applicability of State Appeal Bond Caps in Suits Brought in Federal Courts Pursuant to Diversity Jurisdiction," 162 U. Pa. L. Rev. 979 (2014). *See also* S.B. 1212 (2011) ("Enacting a limit on the bond requirement to stay the execution of a judgment impacts the rights of appellants and is therefore a matter of substantive law that falls within the jurisdiction of the legislature.").

posting a bond when appealing.[2] But interpreted literally, the statute could be read to suggest that an Arizona defendant who has obtained a significant judgment – an award of fees, offer of judgment sanctions, or a large cost award – might not be entitled to any bond at all while plaintiff pursues an appeal.

The bill's "Findings and purpose" section does not indicate a legislative intent to leave defendant judgment-holders out in the cold. But a losing plaintiff can certainly use the statutory language to argue that plaintiff judgment debtors need not post any bond to avoid execution on their judgments while they spend a year or two appealing their cases. The bond statute is not even clear on whether, in this circumstance, the plaintiff's notice of appeal would automatically stay execution on the judgment (a circumstance unsupported by any statute or rule), or whether the plaintiff would need to ask the trial court specifically to stay execution on the judgment without filing a bond. Plaintiffs, in other words, would be able to proceed with no skin in the game. This outcome has no discernible justification. Defendants would take little comfort in the thought that their judgments are accruing interest while on appeal, without being able to ensure that funds will be there at the end of the case.

The appellate rule on supersedeas bonds, Rule 7, A.R.C.A.P., does not provide clarification. It was amended in 2012 to conform to the statute; and while it uses the word "appellant" rather than "plaintiff," the rule does not specifically require losing parties to post a bond to stave off enforcement. Rule 7(a)(1)(A) simply states that an appellant "may" file a supersedeas bond. Rule 7(a)(2) provides that the filing of a motion for a bond temporarily stays enforcement of or execution on the judgment until the motion is ruled upon; and Rule 7(b)(1) says the filing of a bond automatically stays enforcement or execution. The rule does not specifically state that judgments are enforceable unless the losing party posts a bond, and it does not address the issue the statute creates – whether a defendant judgment holder is entitled to require a plaintiff to post a bond in order to stay of enforcement or execution.

The statute might throw only one gnarled bone to successful defendants: an "appellee" (not "plaintiff") can request the court to require an appellant to post a bond if the appellee proves, "by clear and convincing evidence" that the appellant is "intentionally dissipating assets outside the normal course of business" to avoid paying the judgment. A.R.S. § 12-2108(B). Even then, a bond is not mandated; the trial court only "may" require the plaintiff to post a supersedeas bond.[3]

Not only might the statute leave successful defendants completely unprotected, but it also limits the amount of protection for those who <u>are</u> entitled to a bond. As noted above, the purpose for limiting the bond amount is to make a bond affordable for the appealing defendant who has been hit with a gargantuan tort judgment. But typical judgment holders are likely to get a raw deal in the process. The statute sets the amount of the bond at the lowest of (a) 50% of the appellant's net worth, (b) $25 million, or (c) "the total amount of damages awarded excluding punitive damages." Put aside the extremely rare billion-dollar tort judgment, and assume that most state court judgments are going to be much less than $25 million. Also put aside for the moment the appealing party's net worth, for many judgments will not apprsoach 50% of a litigant-company's net worth.[4] That bring us to the "the total amount of damages excluding punitive damages" formula. The court of appeals has held that "damages" means only the compensatory damages awarded by the court or jury, not the full judgment amount. "Damages" does not include attorneys' fees awarded (unless fees are awarded as a component of a party's damages), *Perkins v. Brain, supra*; nor does "damages" include sanctions. *Kresock v.*

2 The "Findings and purpose" language of S.B. 1212 (2011) states that under the traditional system, "defendants who are subject to overly large damage awards may simply be unable to post a bond to protect their assets and assert their appeal rights. They may be forced into bankruptcy or compelled to settle their case, thereby rendering the right to appeal nearly meaningless. . . Limiting the bond requirement . . . would ensure that defendants can fully exercise their fundamental right to appeal."

3 In *Perkins v. Brain*, 2015 WL 2450506 (Ct. App. April 23, 2015), an unpublished court of appeals case, defendants who won a $250,000 attorneys' fee judgment argued that the statute is simply a "bond reduction statute" that does not apply to defense judgments. The argument apparently was that the statute operates only to reduce the bond a losing defendant must post; it does not preclude successful defendants from obtaining bonds. The court did not address the argument. *Id.,* ¶ 6, n.1.

4 For individual judgment debtors, the "half your net worth" provision could well allow them to avoid execution on a judgment during an appeal without posting any bond at all.

Gordon, No. 1 CA-SA 16-0026, 2016 WL 1061930 (Ariz. Ct. App. Mar. 17, 2016). So in general, if the winning party's judgment includes nominal compensatory damages and a big statutory fee award, or no compensatory damages and only a statutory fee award, that party will get no protection from a supersedeas bond. *See City Center Executive Plaza, LLC v. Jantzen*, 237 Ariz. 37, 344 P.3d 339 (Ct. App. 2015) (golf course was required to post $1.00 supersedeas bond where $2.3 million judgment against it consisted of $1 compensatory damages and $2.3 million in attorneys' fees).[5] As the *Jantzen* court said, "Damages . . . may be a part of a judgment, along with attorneys' fees and costs, but judgments are not damages themselves." *Id.*, ¶ 14. And guess which litigants' judgments are going to be comprised of zero compensatory damages, and only non-bondable attorneys' fees and sanctions? Defendants'. Whether or not the legislature intended so, the upshot is that while the statute's proponents were attempting to aid defendants facing huge tort judgments, it leaves many judgment holders – especially defendant judgment holders – largely unprotected despite the affordability of a supersedeas bond premium for the appealing party.

The statute's inequities have not been lost on subsequent court of appeals panels. *Bobrow v. Herrod,* 239 Ariz. 180, 367 P.3d 84 (Ct. App. 2016), involved a divorce decree that awarded $1.3 million to wife. Though a decree is a judgment (not damages), *see* Rule 54(a), Ariz.R.Civ.P.; and though the family court does not award "damages"; and though *Jantzen* had held that the bond covers "damages, not judgments," nevertheless the court of appeals required the husband to post the full $1.3 million supersedeas bond. The court reasoned that requiring the full bond not only protected wife from the risk of dissipating funds, but also protected husband from enforcement of the decree pending his appeal. 239 Ariz. at ¶ 13. The court stated that if the word damages in the bond statute were to mean compensatory damages, then "supersedeas bond amounts in family court proceedings would always be zero," which would "not comport with Arizona case law," citing cases that pre-dated the statute by thirty years. *Id.,* ¶ 15.

In *Wells Fargo Bank, N.A. v. Rogers*, 239 Ariz. 106, 366 P.3d 583 (Ct. App. 2016), the court found a different way to avoid inequity. There, Wells Fargo obtained a $2.5 million judgment against Hoag and then a declaratory ruling that Hoag's attempt to shield his assets was invalid. Hoag appealed the declaratory ruling, and argued he need not post any supersedeas bond because the bond statute applies only to "money judgments." The court of appeals declined to address that argument. Instead, it ruled that neither the statute nor the rule eliminates the superior court's authority to enter "orders to preserve the status quo or the effectiveness of a judgment it has stayed pending appeal." *Id.,* ¶ 10. *See* Rule 7(a)(2), A.R.C.A.P.[6] Under this provision, said the court, the court can exercise its authority to preserve the status quo "when not to do so would effectively and practically deprive the appellee of the benefits it received by virtue of the judgment in its favor." *Id.,* ¶ 13. The court explained that a trial judge "may ensure that, pending appeal, the appellee will not lose the benefits of its judgment and thereby suffer real, not hypothetical or speculative, harm." *Id.,* ¶ 16. And in that case, without some protection, the stay would have allowed Hoag to continue to receive trust distributions even though the judgment allowed Wells Fargo to receive them – not only upending the status quo, but also jeopardizing the effectiveness of the judgment if Hoag were to lose his appeal. The court therefore directed the trial judge to consider Wells Fargo's suggestion (alternative to a supersedeas bond) that Hoag should place all trust distributions into an escrow account pending resolution of the appeal.

Bobrow and Rogers offer some small hope that defendants and others with significant fee or sanctions judgments can find some way to ensure the availability of funds to pay their judgments when an appeal is over, despite the problems with the bond statute. But the hope is small. *Bobrow* delivered the equitable result, but is questionable precedent given that it conflicts with *Jantzen* and relies on cases that pre-date the statute. And *Rogers* will likely be limited to those rare situations

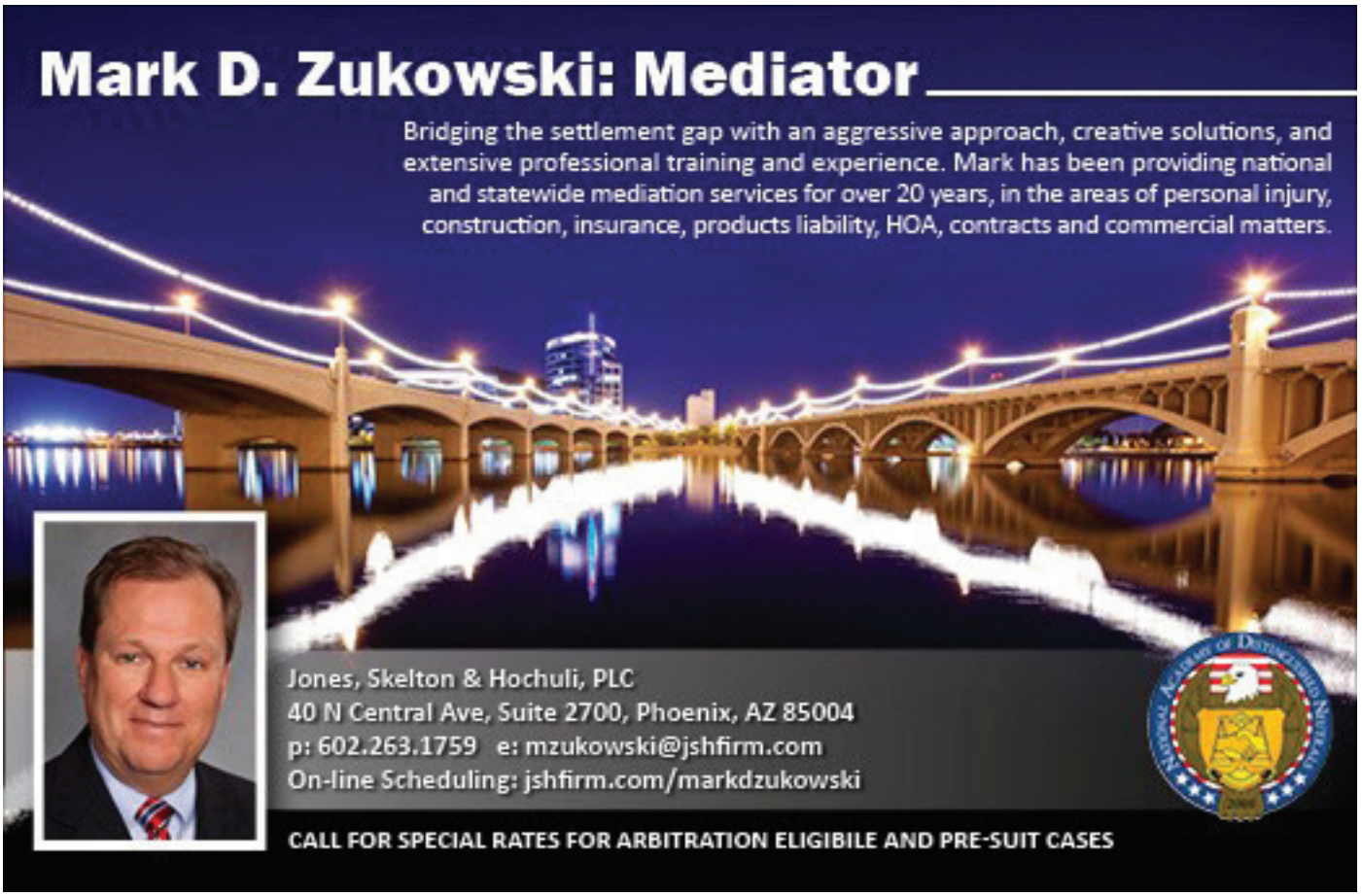
5 In *Jantzen,* the trial court had set the bond amount at the full $2.3 million, reasoning, "The supersedeas bond should reflect the real stakes and should be posted to protect the rights of the prevailing party." But the court reduced the bond on clear and convincing evidence that requiring the full amount would cause the defendant substantial economic harm. *Id.*, ¶ 7.

6 "The superior court may enter any further order, in lieu of or in addition to the bond, which may be appropriate to preserve the status quo or the effectiveness of the judgment."

Supersedeas Bonds *(continued)*

where the stay of enforcement/execution without security will affirmatively undermine the judgment.

The statute should be amended to remove the inequities it causes when applied to typical judgments while still achieving its goal for the rare mega-billion dollar case. Many states have statutes that cap supersedeas bond amounts without limiting their application to plaintiffs' judgments or to compensatory damages. Colorado, for example, provides that, "In any civil action brought under any legal theory, the amount of a supersedeas bond . . . shall be set in accordance with applicable law; except that the total amount . . . may not exceed twenty-five million dollars in the aggregate, regardless of the amount of the judgment that is appealed." Colo. Rev. Stat. Ann. § 13-16-125. Maryland's statute states, "[I]n a civil action the amount of the supersedeas bond . . . may not exceed the lesser of $100,000,000 or the amount of the judgment for each appellant, regardless of the amount of the judgment appealed." Md. Code Ann., Cts. & Jud. Proc. § 12-301.1. In Florida, "the amount of a supersedeas bond . . . may not exceed $50 million for each appellant, regardless of the amount of the judgment appealed." Fla. Stat. Ann. § 45.045. Even the Texas statute, which is more like Arizona's, does not limit its application to "plaintiffs'" judgments. Tex. Civ. Prac. & Rem. Code Ann. § 52.006. But until the statute can be amended, counsel will need to find creative ways to protect their clients' judgments pending appeal.



Let's Hear It For The Defense

Larry Langley and Kathleen Langley Obtain Defense Verdict in Lawsuit Brought by Homeowner Against Property Owners Association

Larry Langley and Kathleen Langley, attorneys at The Langley Law Firm, obtained a unanimous defense verdict on behalf of Sunrise Desert Vista Property Owners Association in a lawsuit brought by a homeowner. Plaintiffs alleged that Sunrise Desert Vista POA breached their fiduciary duties by mismanaging finances, failed to uphold their respective duties and obligations and failed to maintain the common areas. Plaintiffs also alleged that Sunrise Desert Vista POA wrongfully obtained an injunction and restraining order against Plaintiff in an attempt to prevent Plaintiff from attending open meetings and wrongfully called the county building inspector accusing Plaintiffs of deviating from the building codes. Sunrise Desert Vista POA denied liability, advancing the defense that Sunrise Desert Vista POA regularly sought and followed legal counsel on the actions needed, established a necessary budget and had necessary funds to perform all necessary maintenance. After a six day trial, the jury returned a unanimous defense verdict. As the prevailing party, Sunrise Desert Vista POA was awarded in excess of $150,000 against Plaintiffs for attorneys' fees, experts' fees and costs incurred in defending itself against Plaintiffs' claims.

Michael Halvorson and David Potts Obtain a Defense Verdict in favor of AAA Members Insurance Company in Pedestrian versus Automobile Accident

Michael Halvorson and David Potts of Jones, Skelton & Hochuli obtained a defense verdict in favor of AAA Members Insurance Company in a two-week trial concerning a pedestrian-vehicle accident near Pinnacle High School in September 2012. Plaintiff, a 15 year old sophomore at Pinnacle High School, was leaving a high school football game with friends. As the group was lawfully crossing a controlled intersection, Plaintiff's girlfriend told Plaintiff she had dropped her Chapstick within the marked crosswalk. Plaintiff went back to pick up the Chapstick and, as he was returning to his group of friends, was struck by a vehicle driven by a non-party driver. Just before the impact, the solid red "don't walk" pedestrian signal had illuminated. The non-party driver observed his light turn green as he approached the intersection, so he accelerated into the crosswalk, striking Plaintiff.

It was largely undisputed that the accident caused Plaintiff to suffer numerous pelvic and lumbar fractures in the accident, and Plaintiff continues to suffer chronic pain in his groin and sacroiliac joint (SI) joint. Plaintiff called an orthopedic surgeon and a pain management specialist who both testified that the fractures in and around Plaintiff's SI joint healed as a painful protrusion and would develop significant arthritis within ten years necessitating radiofrequency ablations, steroid injections and eventually a fusion of the joint. Plaintiff also called an ENT doctor to testify that Plaintiff suffered a broken nose and a deviated septum, and Plaintiff will need surgery to correct those conditions as well. In addition, Plaintiff suffered a mild traumatic brain injury in the accident. He called a neuropsychologist to testify that Plaintiff currently has trouble with various aspects of executive functioning. Plaintiff also continues to suffer from hypervigilance and anxiety as a result of the accident, which he will need treatment and medication to overcome.

The driver's liability insurance company paid its $100,000 policy limits to Plaintiff. Plaintiff then sued AAA Members Insurance Company for breach of contract for failing to pay him underinsured motorists benefits under his parents' auto insurance policy.

During trial, Plaintiff called numerous witnesses and police officers to support his argument that the driver was speeding and travelling too fast for conditions given the number of students leaving the football game, and that a reasonably careful driver would have seen and yielded to Plaintiff who was still lawfully in the crosswalk when the don't walk sign illuminated. Plaintiff further alleged that the driver unlawfully veered around and accelerated past several cars that were stopped at the crosswalk yielding to Plaintiff as he was crossing the street. In its defense, AAA alleged that the driver was not at fault as his speed was reasonable and he had a green light. Instead, Plaintiff was solely at fault for remaining in the crosswalk and running against a red "don't walk" pedestrian signal.

The trial lasted seven days. During closing arguments, Plaintiff asked the jury to award him between $1,035,473.20 and $1,150,525.80. The jury was out for 3 1/2 hours before returning a complete

defense verdict for AAA Members Insurance Company.

Michele Molinario and Amelia Esber Prevail on Summary Judgment Motion in Civil Rights Lawsuit

Michele Molinario and Amelia Esber of Jones, Skelton & Hochuli prevailed by summary judgment in a 42 U.S.C. § 1983 civil rights action against the City of Yuma and one of its law enforcement officers. The case involved the use of a Taser in dart-mode to seize Plaintiff Gavino Esquivel, who was actively fleeing the scene of a reported physical disturbance at a local restaurant that reportedly turned physical. Mr. Esquivel also brought claims of false arrest, malicious prosecution and assault. The U.S. District Court for the District of Arizona found that there was no liability on the part of the City of Yuma or its officer.

The central issue to the Motion for Summary Judgment concerned whether the officer used excessive force in his apprehension of the Plaintiff, and whether the officer was entitled to qualified immunity for his use of force irrespective of whether said force was excessive. Judge Neil V. Wake declined to determine whether the use of force was reasonable under the circumstances, but instead ruled in favor of the defense based on qualified immunity. Judge Wake agreed with the defense position that at the time of this incident in March of 2014, there was no clearly established law that would have put the officer on notice that the use of a Taser and similar devices on a fleeing suspect would constitute excessive force. In the words of Judge Wake, "the law was not clearly established in 2012 – and it is not now – that a single tasing of a fleeing suspect, who reportedly was involved in a physical disturbance and may have displayed a gun, after ordering him to stop, violates the Fourth Amendment."

Donn Alexander Obtains Defense Verdict in Medical Malpractice Lawsuit

Donn Alexander of Jones, Skelton & Hochuli obtained a defense verdict in a medical malpractice and wrongful death lawsuit. The medical malpractice and wrongful death case involved the death of a 16 month-old child. The child, who had previously been healthy, was admitted to the Pediatric Intensive Care Unit at a local Phoenix hospital after developing croup and respiratory distress. Plaintiffs alleged that Mr. Alexander's client, a pediatric critical care specialist, fell below the standard of care by failing to timely and properly intubate the child. The child ultimately coded and could not be resuscitated. The trial lasted five weeks. In closing Plaintiffs' counsel asked the jury to award the child's parents $15 - $20 million in damages. The jury returned a defense verdict.

Chris Begeman Obtains Favorable Verdict in Personal Injury Lawsuit

Chris Begeman of Righi Fitch Law Group obtained a favorable jury verdict in a personal injury lawsuit stemming from an automobile accident. Defendant, extremely intoxicated, pulled out of a private driveway immediately in front of Plaintiff causing the accident. After checking on Plaintiff to see if she was okay, Defendant fled the scene. Plaintiff claimed that she suffered neck and back injuries as a result of the accident and that she was entitled to punitive damages as Defendant blood alcohol content was nearly four times the legal limit at the time of the accident. At arbitration, Plaintiff was awarded nearly $9,000. Plaintiff appealed.

At trial, Defendant acknowledged that he was responsible for causing the subject accident but contended that Plaintiffs chiropractic care was necessitated by a subsequent slip and fall and that Plaintiff was not entitled to punitive damages. In closing arguments, Plaintiff asked the jury to award her $30,000 for general and special damages and $50,000 for punitive damages. Begeman asked the jury to award Plaintiff $1,459 for Plaintiff's day of medical expenses and to reject Plaintiff's request for punitive damages. After one hour, the jury returned with a verdict awarding Plaintiff $1,459. Defendant was deemed the prevailing party as Plaintiff failed to beat the arbitration award and an Offer of Judgment previously served by Defendant.

Kevin Broerman Prevails at Arbitration

Kevin Broerman of Jones, Skelton & Hochui prevailed on a commercial binding arbitration using the American Arbitration Association (AAA). Claimant asserted damages in excess of $5 million (capped pursuant to agreement with AAA at $1.5 million) arising from the alleged execution of a contract requiring minimum purchase of goods over a three year period of time. Respondent had actually signed the agreement and initialed

Let's Hear It For The Defense *(continued)*

every page. At the arbitration, Respondent maintained that prior approved drafts of any agreement did not contain any minimum purchase requirement and that the signing and initialing were done under the impression that no minimum purchase requirements were mentioned in the final document. The arbitrator found that the Claimant did not meet its burden of proof to establish a meeting of the minds. Claimant was also terminated by Respondent from a Professional Service Agreement. Claimant, at arbitration, claimed wrongful termination. The arbitrator found that Claimant did not establish he was terminated without cause.

John DiCaro and Jennifer Anderson Obtain Dismissal of Wrongful Death Claims Against Maricopa County Based On Plaintiff's Untimely Notice Of Claim

John DiCaro and Jennifer Anderson of Jones, Skelton & Hochuli obtained dismissal of a portion of a wrongful death lawsuit filed against Maricopa County. On January 22, 2014, Nathan Johnson fell to his death from a crane while working for a contractor outside the Lower Buckeye Jail. Mr. Johnson was survived by his widow Laura Johnson, parents, and two minor children. Ms. Johnson did not file a notice of claim against the County until January 21, 2015, the same day she filed a wrongful death lawsuit on behalf of herself and Mr. Johnson's statutory beneficiaries. The lawsuit alleged that soil conditions at the site were unsafe and caused Mr. Johnson's fall. DiCaro and Anderson moved to dismiss the claims against the County based upon Ms. Johnson's late notice of claim and failure to leave her settlement offer open for the statutorily-required 60-day period. Ms. Johnson argued she could not have known about the possibility of a claim against the County due to the "complicated" nature of the claim and contended that the 180-day period to file a notice of claim was therefore tolled.

Let's Hear It For The Defense *(continued)*

The Court disagreed, adopting the County's argument. The Court allowed the minor children's claims to continue, but dismissed the claims of Ms. Johnson and the other adult beneficiaries.

Michele Molinario, Justin Ackerman, and Amelia Esber Conquer Employment Discrimination Case Against A Local County

Michele Molinario, Justin Ackerman, and Amelia Esber of Jones, Skelton & Hochuli prevailed by summary judgment in an employment discrimination case against a local County, and various County employees. The case involved the lawful and non-discriminatory termination of Plaintiff, a former road maintenance worker, for a violation of the County Merit Rules pertaining to safety sensitive positions.

Plaintiff, who is of Native American descent, brought claims for racial discrimination pursuant to Title VII and § 1981, interference with rights under the Family Medical Leave Act (FMLA) and other civil rights violations under 42 U.S.C. § 1983. The U.S. District Court for the District of Arizona agreed with the County's position, that Plaintiff's termination was lawful and non-discriminatory. The majority of the discussion by the Federal Judge concerned the County's legitimate reasons for terminating Plaintiff, despite her unfounded allegations that her termination was pretext for discrimination, and that Plaintiff's claims lacked merit because they rested on nothing more than pure speculation.

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James R. Broening Distinguished Service Award Honoree

By Megan Gailey, Esq.

Broening, Oberg, Woods & Wilson

James R. Broening, Esq.

The Arizona Association of Defense Counsel is honored to present its Distinguished Service Award to James Broening. The award was presented at the Past President's Fall Kickoff on September 22, 2016. Here is some insight into this year's honoree.

James R. Broening is a founding shareholder with Broening, Oberg, Woods & Wilson, P.C. He has practiced law for over 40 years in Phoenix, focusing on civil litigation, including insurance defense, specifically medical malpractice and bad faith cases.

Q: What do you enjoy most about the practice of law?

A: The challenge of each new case. Although it is the same general format, I am always learning and moving forward. Particularly in the medical cases, it allows me to deal with the best experts in the country and get into the finer points of medicine and that has always been of interest to me. The part that is really satisfying is working with the different lawyers, particularly the lawyers in our firm, watching the progress of the young lawyers, being someone who can hopefully provide insight and mentoring, watching them develop not only as lawyers, but watching them develop practices and connections in the industry. We encourage our attorneys to develop their client base, all of which I think moves the firm forward and is better for everyone when you allow it to occur. Within our firm, we are not protective of clients, we encourage all of our lawyers to have direct client contact. We have developed a trust and growth of the lawyers within the firm, and is one of the most satisfying aspects to me, along with working with other lawyers, both co-defense lawyers and plaintiff's lawyers as well.

Q: What are the biggest changes you have seen in the practice of law?

A: There have been both positive and negative changes. Having a presumptive four hour limit on deposition time, restricting the scope of objections so that we do not end up getting into a shouting match between and among the lawyers, the adoption of pure comparative fault, and abolishing collateral source in medical malpractice cases are all positives. So from a structural standpoint, Arizona has done a good job in making positive changes in helping to reduce the cost of litigation. On the other hand, the front loading of costs is also a part of Arizona law. Because we are required to work up and disclose everything up front, costs are incurred that may be unnecessary. We have to anticipate what the other side feels is important and there is inconsistency within the judiciary in evaluation the disclosure requirements. Some judges are very strict and other judges view it in a very different way. There is inconsistency. I think that disclosure is accomplishing two things: 1) it front loads costs because you are always concerned about making sure that you have explored

and disclosed everything you can possibly think of; and 2) it places the burden on the wrong place. I should not be trying to make the other side's case for them and they should not be making my case for me. If I am a lawyer qualified to handle a case, I should be able to request and determine the information I need to prepare my client's case. It should not be a situation where I am relying on the other side to do that or they are relying on me to anticipate what they need for their case. So in my view, the entire concept of disclosure versus discovery results in more litigation costs, not less.

Q: Where do you see things going in the practice of law over the next ten years?

A: Unfortunately, jury trials are becoming less and less available, particularly, to young lawyers. Although insurance companies are in the risk business, sometimes in the final analysis, oftentimes they are not. They choose to settle cases that, in my view, should go to a jury. If an experienced lawyer tries a case and loses it, oftentimes that is acceptable. But oftentimes getting a young lawyer in the courtroom is difficult because of the individual in the insurance company handling the case. If that case is tried and loss, or something occurs that is unexpected, there is a trickle down accountability issue that places the claims adjuster in an uncomfortable position. In past years, the individual claims adjusters seem to have had more autonomy and decision making authority than I am seeing today in the insurance industry; less willingness to run the risk of a bad result and then having to explain why that occurred to management. That has had a chilling effect on getting young lawyers to try cases, which is unfortunate.

Q: What is the most important lesson that you have learned about the practice of law?

A: That you can be professional and respectful of lawyers on the other side and still do your job. To understand that they have a job to do and we have a job to do; to not get caught up in disputes and minutia in a case that won't impact the ultimate outcome.

Q: What is your best advice to young lawyers?

A: Get experience in a law firm that tries cases and has trial lawyers who are respected in the community. I think back to when I came out of law school and some of the cases I handled. Although I did my best, I recognize now that it was not even close to being what would have been done by someone who had been practicing for years who had the knowledge and experience I did not have. I think that we sometimes think that because we have a law degree, we know the answers across the board. It is clear to me that in addition to law school, there is a period of learning that occurs after law school that goes to the everyday practicalities of dealing with and satisfying clients we do not necessarily pick up at the time we receive the degree. So I think getting that experience in a quality firm, hopefully someplace you can stay forever, but getting that grounding is very important and very beneficial.

Q: If you were not a lawyer, what would you be and why?

A: If I wasn't a lawyer, I would probably be a physician. I enjoy medicine.

Q: What do you do when you are not lawyering?

A: I enjoy travelling, even though I travel a lot for work, I still enjoy having the time to explore new places. I enjoy boating and have a place at Lake Powell. I get up there as frequently as possible. Puttering around in the garage and doing things with my hands when I have time off is gratifying. I also enjoy household projects because insomuch of what we do we do not really see anything physical when we are done. I am a big tinkerer.

Q: What attributes do you believe a successful lawyer must have?

A: Whether it is as a lawyer or in any profession or occupation, the most important thing for an individual is to be self-motivated; to have interest in what they are doing, and to dedicate themselves to doing the best job they can do. I am still learning with every case that comes in. In every trial I learn. I have been practicing for over 40 years and I am still learning. So I think that the willingness to learn, the excitement of learning, the gratification of doing a good job and knowing within yourself that you have done a good

James R. Broening Award Honoree *(continued)*

job are the most important attributes not only in the legal profession, but any profession.

Q: You have practiced for 41 years. What do you believe has kept you going?

A: Enjoying what you do, the gratification of feeling that you have done the best job you can do for your client and the enjoyment which comes with the challenge of each new case. The funny part of it is, I am not a game board player. I am not a card player. I am not any of those things. But to me, each case is something that requires analysis like a game of chess. The challenge is figuring out how best to attack each case, the strengths and weaknesses of my case and the other side's case and trying to formulate and implement a plan that gets the best possible result.

Q: Would you do it all over again?

A: Yes, without question.

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