Jones, Skelton & Hochuli

# Reporter

SUMMER 2016 ISSUE




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# MESSAGE FROM THE EDITOR

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

Now that we have hit triple digits and Arizona's hot and dry summer is here, JSH would like to share our Summer Edition of the JSH Reporter. If you are a new reader of the JSH Reporter, welcome! We have designed this publication to provide information about changes in the law and how these affect a variety of industries, as well as to provide updates on what is happening within our firm.

JSH's biggest change by far this year was moving to Downtown Phoenix. After 25 years at our Midtown Phoenix location, we packed up our entire office, and headed exactly three miles south. Our new location is better suited to house our growing firm and puts us in closer proximity not only to court buildings, but also to our growing downtown community.

When JSH was founded 33 years ago, we had 12 attorneys and 23 staff members. Today, we have 82 attorneys and 130 staff members, all of whom have settled into our new home. Since April 4, 2016, we have been located on floors 24 through 27 of the Two Renaissance Square building. Our new office has two outside patios with amazing views of Phoenix. These stunning views can also be seen from our conference rooms, which are all fitted with video conference technology. As we make this new office home, here are a few facts about our building.

Renaissance Square is located in the heart of Phoenix's Central Business District on a full-city block bounded by Adams, Central and Washington streets, and 1st Avenue. The exterior of the building is polished carmine red granite and glass. The exterior is sculpted diagonally, giving the illusions of overlapping towers. Nearby amenities include several hotels, movie theaters, a variety of restaurants and cafes, and many speciality retail shops at the Arizona Center and throughout the surrounding area. Chase Field, Comerica Theater, and Talking Stick Arena are nearby venues, making this center a prime location.

As always, we appreciate your thoughts and feedback on this publication. Please let me know if a particular topic interests you. Share your ideas with me at *lvoepel@jshfirm.com*.

Lori Voepel
Partner and *JSH Reporter* Editor

*During Lori's 22 years of practice, she has handled nearly 300 state and federal appeals in virtually every area of law. She also provides appellate guidance to trial attorneys from the pleading through post-trial stages of litigation. Contact Lori at 602.263.7312 or lvoepel@jshfirm.com.*

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# DART CHEROKEE: SHIFTING THE BURDEN TO PLAINTIFF IN FEDERAL DIVERSITY CASES

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We've all seen this before: You've been assigned to defend a carrier in a bad faith lawsuit filed in State Court. One of your immediate concerns is removing the case to Federal District Court. You're satisfied that the diversity of citizenship requirement is met, however, you don't know if the jurisdictional amount of $75,000.00 is met. The complaint is silent on the amount of damages. You do know Plaintiff has certified the case as not subject to compulsory arbitration, i.e., the case is worth $50,000.00 or more.

It's the $25,000.00 plus gap which causes all the angst. Until now, arguably, the entire burden has rested on the Defendant carrier to establish that the amount in controversy exceeds $75,000.00. The recent U.S. Supreme Court Decision in *Dart Cherokee Basin Operating Co., LLC v. Owens,* 574 U.S., 135 S.Ct. 547 (Dec. 2014), may have changed all that. Indeed, under *Dart,* it is arguably incumbent upon Plaintiff, having decided to contest removal, to come forward with evidence that the jurisdictional amount in controversy has not been met.

Typically, in a Motion to Remand to State Court, Plaintiff will contend that the Defendant carrier has not proven the jurisdictional amount in controversy has been met by a "preponderance of the evidence," and therefore, the case should be remanded. As a result of *Dart Cherokee*, a defendant seeking to remove a case from State court based upon diversity jurisdiction need only submit "a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart, Slip Op*. at 7. The "'short and plain' statement need not contain evidentiary admissions." *Id*. at 2.

As explained in *Dart*, the analysis of the sufficiency of a defendant's removal notice starts with the removal statute, 28 U.S.C. § 1446. That statute, as amended in 2011, provides that the removal notice need only contain a "short and plain" statement of the grounds for removal:

> "(a) Generally - - a defendant or defendants desiring to remove any civil action from a state court shall file in the District Court for the United States for the District and Division within which such action is pending a Notice of Removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. §1446(a) (emphasis added).

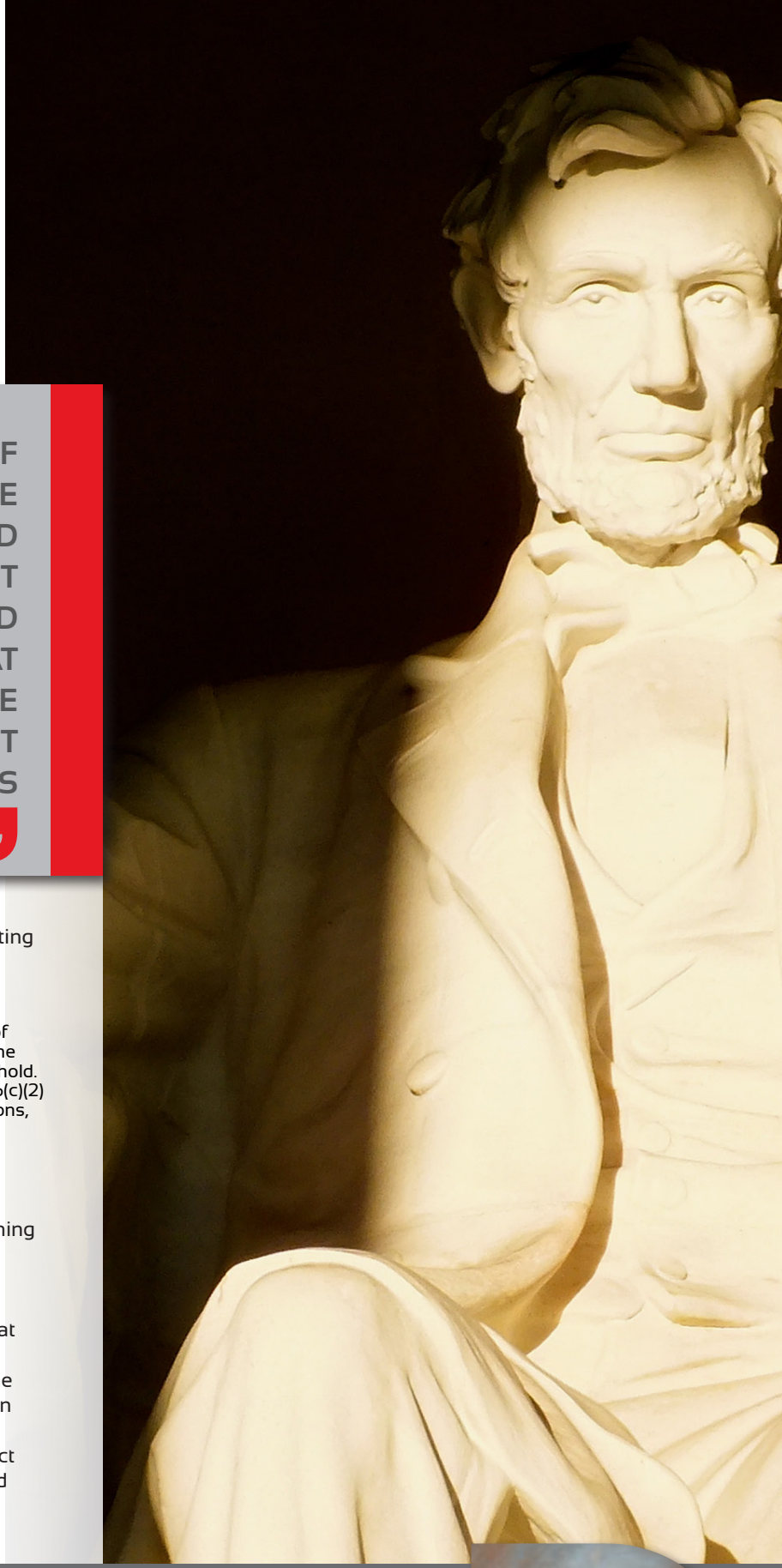
In *Dart*, the Plaintiff filed a class action suit seeking "a fair and reasonable amount." No specific monetary amount was alleged. In its removal notice, Defendant alleged that purported underpayments to the putative class were $8.2 million dollars, exceeding the $5,000,000.00 jurisdictional threshold under the Class Action Fairness Act (the diversity jurisdiction statute for class actions). The Plaintiff moved to remand to State court arguing that the removal notice was deficient, because Defendant had offered "no evidence" proving the amount in controversy exceeded the jurisdictional threshold. *Dart, Slip Op.*, at 2. Defendant responded to the motion by providing a declaration that included a damages calculation exceeding the jurisdictional amount. Plaintiff objected to the attempt to introduce post-removal evidence. The District Court remanded the matter.

Although remand orders are generally not subject to review, a special provision of the CAFA allowed the Defendant to petition for review. The Tenth Circuit denied review, but the Supreme Court granted Certiorari. As framed by the majority, the question presented was:

> Whether a defendant seeking removal to Federal Court is required to include evidence supporting Federal jurisdiction in the notice of removal, or is alleging the required "short and plain statement of the grounds for removal" enough?

In answering this question, the Court looked to the language and legislative history of the removal statute, particularly the 2011 amendment. The Court concluded that Congress' use of the "short and plain" language in the statute was an effort to simplify the "pleading" requirements for removal, so that removal notices were governed by the same liberal rules that apply to other pleadings. *Dart, Slip. Op.,* at 5. The Court observed that when the plaintiff alleges an amount in controversy in its complaint, it is accepted if made in good faith. The Court then observed that it would be anomalous if the same standard were not applied to a defendant's notice of removal. *Id.* The Court then quoted the House Judiciary Committee Report discussing amendments to the removal statute in 2011:

> [D]efedants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, Defendants may simply allege or assert that the jurisdictional amount has been met. . .



> UNDER *DART,* A PLAINTIFF CONTESTING THAT THE JURISDICTIONAL THRESHOLD HAS NOT BEEN MET MUST NOW COME FORWARD WITH EVIDENCE THAT ESTABLISHES THE JURISDICTIONAL AMOUNT IN CONTROVERSY IS NOT PRESENT.

*Dart, Slip. Op.*, at 6. The Court concluded by enunciating the standard for determining the sufficiency of a defendant's removal notice:

> In sum, as specified in § 1466(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation.

*Id*. at 7.

It is unlikely that a Federal District Court, in determining whether to remand to State Court, will find *Dart* dispositive of the jurisdictional amount issue. But it is one more argument to bolster an opposition to a remand motion. Under *Dart*, a Plaintiff contesting that the jurisdictional threshold has not been met must now come forward with evidence that establishes the jurisdictional amount in controversy is not present. In such a case, discovery may be had, Defendant may present evidence, and if there is a dispute, the District Court will decide whether the jurisdictional threshold has been met. *See Dart, Slip. Op.,* at 6-7.


## ABOUT THE AUTHOR **BILL CARAVETTA**

During his 16 years as an attorney, Bill has advised corporate risk managers on insurance coverage issues, indemnity agreements and risk transfer options through commercial contracts. Bill frequently speaks at the local and national levels on issues relating to bad faith and insurance coverage.

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# APPELLATE HIGHLIGHTS

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

June 9, 2016

## *ACLU-AZ v. ADCS*

### (Arizona Court of Appeals, Division One)

Arizona's public records law requires a state agency to search its electronic database, but does not require it to analyze the data to compile previously un-compiled statistics.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Divi/2016/1%20CA-CV%2014-0781.pdf

May 23, 2016

## *Abbott v. Banner Health Network*

### (Arizona Supreme Court)

Settlements requiring patients to pay treating hospitals negotiated amounts to release medical liens were valid regardless of whether federal law preempts Arizona's medical lien statutes.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2016/CV150013PR.pdf

May 17, 2016

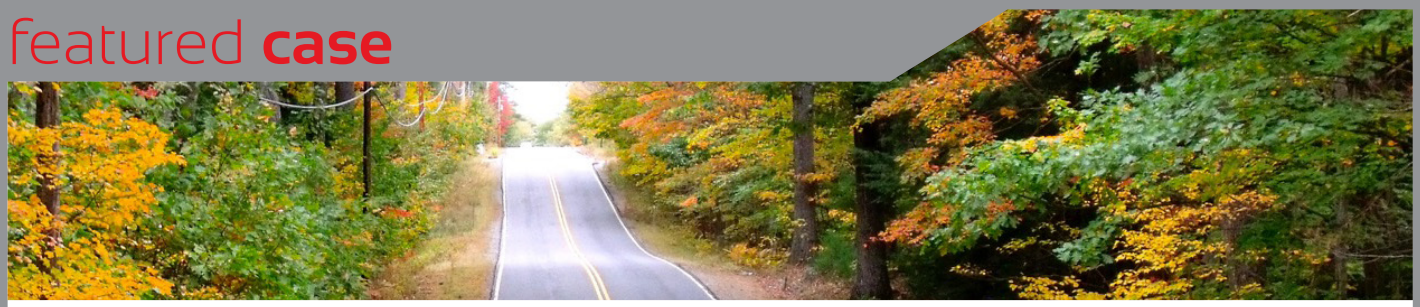
## *Rasor v. Northwest Hospital, LLC dba Northwest Medical Center*

### (Arizona Court of Appeals, Division Two)

Plaintiffs' wound care nursing specialist was not qualified to testify as a standard of care expert for intensive care nurses under A.R.S. § 12-2604.

MORE INFORMATION:
https://www.appeals2.az.gov/Decisions/CV20150065opinion.pdf

# featured **case**



May 19, 2016

*Handled by JSH Appellate Counsel*

## *Soto v. Sacco*

**(Arizona Court of Appeals, Division One)**

Order granting remittitur must be signed to constitute a "final order," despite the conditional language of Rule 59(i), because the conditional nature of a remittitur order does not alter the fact that it operates to either grant or deny a new trial.

**MORE INFORMATION: http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/CV%2015-0092.pdf**

February 5, 2016

## *American Power Products Inc. et al v. CSK Auto Inc.*

**(Arizona Supreme Court)**

When juror asked how long deliberations usually lasted, bailiff's response that "an hour or two should be plenty" was improper, but did not require evidentiary hearing before denial of plaintiff's motion for a new trial.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2016/CV140261PR.pdf

February 2, 2016

## *Carter v. The Pain Center of Arizona*

**(Arizona Court of Appeals)**

Overturns defense verdict in medical malpractice conditional consent case.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2016/1%20CA-CV%2014-0672.pdf

January 21, 2016

## *Watts v. Medicis Pharmaceutical Corp.*

**(AZ Supreme Court)**

Arizona's high court decides products liability case of first impression and adopts learned intermediary doctrine.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2016/CV150065PR.pdf

January 19, 2016

## *Murray v. Farmers Insurance Company*

**(Arizona Court of Appeals, Division Two)**

Allows emotional distress damages for professional negligence claims for the first time in AZ, and grants standing to beneficiaries of insurance contracts to sue directly.

MORE INFORMATION:
https://www.appeals2.az.gov/Decisions/CV20140123OPN.pdf

December 3, 2015

## *Alcombrack v. Ciccarelli*

**(Arizona Court of Appeals)**

A couple that defaulted on a house owed no duty to a locksmith who was shot and seriously injured by the couple's tenant.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/CV%2013-0148.pdf

August 27, 2015

## *Fidelity Nat. Title Ins. Co. v. Centerpoint Mechanic Lien Claims, LLC*

**(Arizona Court of Appeals)**

Purported "Morris agreement" between insureds, as owners of a deed of trust, and insureds' wholly owned entity that had purchased lien claims from claimants was outside the permitted parameters of Morris and was therefore unenforceable against title insurers.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/1%20CA-CV%2012-0721%20and%201%20CA-CV12-0726.pdf

## JSH RESOURCE ALERT! Law and Case Alerts

The *JSH Law and Case Alerts* are periodic publications that provide reviews of recent court decisions. In order to provide up-to-date decisions, we publish *Law and Case Alerts* individually, within 48 hours of the case's original publication date. These are sent to our clients via email, posted to our website and distributed via social media. To be added to our email distribution list, please send an email to marketing@jshfirm.com. Archives of past *Law Alerts* are available at www.jshfirm.com/publications and www.jshfirm.com/casesofnote.

August, 25, 2015

### *Ritchie v. Costello*

**(Arizona Court of Appeals )**

Cottonwood Airport did not owe a duty of care to pilot of ultralight aircraft after takeoff, when he had a mid-air collision with a hot air balloon.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/CV14-0185.pdf

August 25, 2015

### *Lewis v. Debord*

**(Arizona Supreme Court)**

Failing to attach an information statement to a certified copy of the judgment does not invalidate an otherwise valid lien under Arizona's judgment lien statutes; rather the judgment lien simply lacks priority against competing creditors who record liens against the property before the information statement is filed.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2015/CV140293PR.pdf

September 9, 2015

### *Gambrell v. IDS Property Casualty Insurance Co.*

**(AZ Court of Appeals)**

The Uninsured Motorist Act generally requires insurers to make underinsured motorist coverage (UIM) available. A.R.S. § 20–259.01(C), however, permits insurers to exclude UIM when the insured is driving a large truck used in a business for transporting property.

MORE INFORMATION:
http://www.apltwo.ct.state.az.us/Decisions/CV20140147OPN.pdf

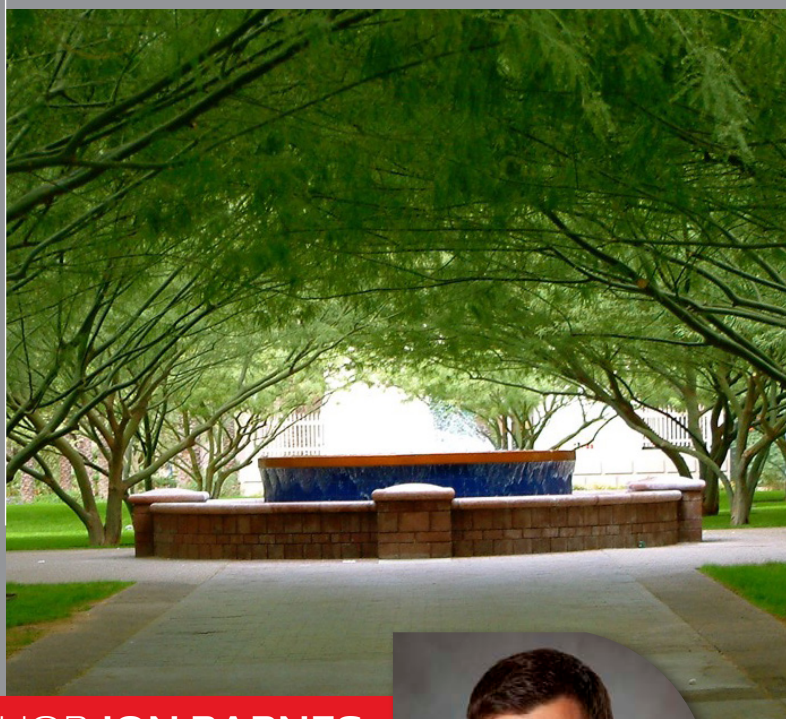
August 4, 2015

### *Rodriguez v. Fox News Network*

**(Arizona Court of Appeals )**

Fox News Networks broadcasted a high-speed chase and the suspect's subsequent suicide live, during which the suspect's two teenage sons learned their father had killed himself. The Court affirmed dismissal of mother's emotional distress claims as barred by the First Amendment.

MORE INFORMATION:
http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/1%20CA-CV%2014-0437.pdf



## ABOUT THE AUTHOR **JON BARNES**

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

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# SOCIAL MEDIA RESEARCH AFTER VORI DIRE – THE JODI ARIAS CASE

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

Forward-thinking attorneys are utilizing social media websites such as Facebook, Twitter, Instagram, and LinkedIn to perform preliminary jury research during voir dire, but what happens after the jury is empanelled? Courts have already held that parties are expected to perform internet research before the jury is selected, but it is unclear if the parties are expected, or even allowed, to continue jury research after voir dire. In *U.S. v. Countrywide Financial Corporation*, et. al., No. 12 Civ. 1422(JSR). (S.D.N.Y. 2012), for instance, the court admonished an attorney for "improper conduct" where he inadvertently viewed a juror's LinkedIn profile after the jury was empanelled.

**Social media research after the jury is empanelled can be equally as important as the social media research during voir dire. Before conducting this research, counsel should ensure that the court will allow the parties to continue their jury research after it is empanelled.**

The failure to perform social media research can carry serious consequences. For example, in *U.S. v. Daugerdas*, 867 F.Supp.2d 445 (S.D.N.Y 2012), one of the largest tax fraud prosecutions in United States history, the court determined that attorneys who knew about a juror's misconduct, but failed to report it until after the verdict was final, waived their client's Sixth Amendment right to a fair trial. More recently, in *State of Arizona v. Jodi Ann Aria*s, one of the most high profile murder cases in recent years, the court faced the dilemma of what to do when a juror utilized social media to express a view during the case, even though jurors were specifically instructed not to view outside media during trial.

## Case Study – Jodi Arias

Jodi Arias was convicted of first-degree murder on May 8, 2013. Following the conviction, jurors were tasked with determining whether Ms. Arias would be sentenced to death or spend the rest of her natural life in prison. After the first sentencing phase resulted in a hung jury, the sentencing phase was set for retrial in late 2014. During the retrial on sentencing, jurors were asked if they had "read, seen or heard anything about the case in the media."

After multiple months of testimony, the jury received the sentencing portion of the case for deliberation on February 25, 2015. According to reports revealed after the verdict was rendered, now infamous Juror 17 immediately made known that she was not in favor of giving Ms. Arias the death penalty. After several days of deliberations, the jury remained deadlocked 11-1, with Juror 17 the only person against the death penalty.

Prosecutors filed a motion to have Juror 17 removed from the jury panel, telling the court that her Facebook page showed she recently viewed the movie Dirty Little Secret, the made-for-television movie regarding the Arias case, and "liked" a list of local and national media sites known for covering the trial, including Nancy Grace from the Headline News Network. When questioned, Juror 17 told the court that she watched Dirty Little Secret before becoming a juror and, contrary to her Facebook page, she had not done any research related to the case or read or saw anything about the trial in the media. Despite the information on Juror 17's Facebook page, the court denied the motion to remove her. After additional deliberations, the jury returned deadlocked 11-1 on whether to give Ms. Arias the death penalty, with Juror 17 as the lone holdout. Consequently, Ms. Arias was sentenced to natural life in prison.

## Practical Considerations

Social media research after the jury is empanelled can be equally as important as the social media research during voir dire. Valuable information can be learned which may help in seeking removal of an unfavorable juror. Before conducting this research, counsel should ensure that the court will allow the parties to continue their jury research after it is empanelled.

If new information is discovered about a juror, it is essential to let the court know about the information immediately. Failure to inform the court can have adverse results for the attorney and client, including a waiver of the ability to make arguments to strike the juror.

## ABOUT THE AUTHOR **PATRICK GORMAN**

Patrick practices in bad faith, insurance coverage, and professional liability. He has served in a variety of capacities for the DRI Young Lawyers Subcommittee, including currently serving as the Vice Chair of Marketing. He is also active in the Papago Men's Golf Association.

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# JSH FIRM ANNOUNCEMENTS

## 16 Lawyers from Jones, Skelton & Hochuli Selected for Inclusion in The Best Lawyers In America© 2016

Congratulations to the 16 lawyers from JSH that were recently selected by their peers for inclusion in The Best Lawyers in America© 2016. New to the list this year are Gary Linder and Ryan McCarthy.

**Bob Berk**
Product Liability Litigation - Defendants

**Steve Bullington**
Medical Malpractice Law - Defendants

**Greg Folger**
Workers' Compensation Law - Employers

**Eileen GilBride**
Appellate Practice

**Ed Hochuli**
Personal Injury Litigation - Defendants

**Bill Holm**
Insurance Law

**Bill Jones**
Medical Malpractice Law - Defendants
Personal Injury Litigation - Defendants

**Gordon Lewis**
Education Law
Employment Law - Management
Litigation - Labor and Employment

**Gary Linder**
Personal Injury Litigation - Defendants

**Mike Ludwig**
Construction Law

**John Masterson**
Personal Injury Litigation – Defendants

**Ryan McCarthy**
Product Liability Litigation - Defendants

**Mel McDonald**
Criminal Defense: Non-White-Collar

**Don Myles**
Insurance Law

**Russ Skelton**
Medical Malpractice Law – Defendants
Workers' Compensation Law – Employers

**Georgia Staton**
Employment Law - Management

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## Don Myles Recognized as the 2016 Insurance Lawyer of the Year

Don Myles has been named the 2016 "Lawyer of the Year" for Insurance Law in Phoenix, Arizona by Best Lawyers. When an attorney is selected as "Lawyer of the Year," it reflects the high level of respect a lawyer has earned among other leading lawyers in the same community and practice area for their abilities, their professionalism, and their integrity.

## JSH Sponsors First Annual Pendergast Golf Tournament

JSH was proud to sponsor the Pendergast Elementary School District Foundation who hosted a golf tournament to raise money for their organization. Our very own Gordon Lewis was able to participate in this event.

# UPCOMING SPEAKING ENGAGEMENTS

## Stay up to date at jshfirm.com

### Ed Hochuli will be presenting at 2016 DRI Young Lawyers Seminar in Las Vegas

#### JUNE 15-17, 2016 IN LAS VEGAS, NV

Mr. Hochuli is a member of Defense Research Institute (DRI) and will be presenting to attorneys that are in their first 10 years of practice. The young lawyers will be able to listen to an in-house counsel panel discuss their expectations of outside attorneys, participate in deposition trainings, and learn negotiation tips from the experts.

### Ed Hochuli and Don Myles to Present at Fighting Fire with Fire Workshop

#### JUNE 22-23, 2016 IN CHICAGO, IL

Collaborating with several law firms across the nation, Ed Hochuli and Don Myles will be presenting at the Fighting Fire With Fire Workshop. This interactive workshop includes sessions regarding advance strategies for defending fire, explosion, and catastrophic burn injury claims.

### JSH Attorneys Presenting at PRIMA's Annual Summer Education Series

#### JULY 27-29, 2016 IN FLAGSTAFF, AZ

JSH will be platinum sponsors at PRIMA's 2016 9th Annual Summer Education Series. JSH has been reliable sponsor for PRIMA for the past several years. In addition to our firm sponsoring the event, JSH Attorneys John Masterson, Joe Popolizio, Lori Voepel, and Michelle Molinario will be presenting on the anatomy of a lawsuit.

The Arizona Chapter of PRIMA is dedicated to providing public risk managers with resources that assist in creating and sustaining proactive risk management programs that are fiscally prudent. The Arizona Chapter of PRIMA strives to further education in Risk Management. Their educational goal is to provide necessary tools and networking opportunities with peers that will accelerate your risk management program to new levels.

### Ed Hochuli Presenting at DRI Nursing Home and Assisted Living Seminar

#### SEPTEMBER 8-9, 2016 IN SCOTTSDALE, AZ

Mr. Hochuli, a member of DRI, was also selected to present at this year's DRI Nursing Home and Assisted Living Seminar. DRI's Nursing Home/ALF Litigation Seminar is a seminar for attorneys in private practice, in-house counsel, claims specialists, and other professionals involved in the defense of claims against long-term care facilities, assisted living facilities, and other aging services providers across the country.

### Josh Snell and Patrick Gorman to Present at Rimkus' 5th Annual Arizona CE Seminar

#### SEPTEMBER 9, 2016 IN PHOENIX, AZ

Rimkus is hosting a free, one-day seminar for Continuing Education credit. A variety of topics will be presented including: Vehicle Accident Reconstruction, Premises Liability Investigations, Finite Element Analysis, Construction Defect Cases & Fire Investigations. Josh and Patrick will be presenting on adjuster ethics.

# YOU'VE BEEN HIT WITH A **LARGE JURY VERDICT.** NOW WHAT?

AUTHOR: **Whitney Harvey** EMAIL: **wharvey@jshfirm.com** BIO: **jshfirm.com/whitneymharvey**

Excessive jury verdicts are typically challenged through motions for new trial. A new trial may, however, present additional challenges to clients: namely, additional trial expenses, as well as the delayed adjudication of claims.

Fortunately, there is a vehicle for contesting excessive verdicts which, if successful, obviates the need for a second trial. Pursuant to Rule 59(i)(1), Ariz.R.Civ.P., the trial court has the authority to reduce a damages award to an amount deemed supported by the evidence (referred to as remittitur). The remitted damages award is, however, conditioned upon the plaintiff's acceptance. Id.

The exercise of the power of remittitur rests within the sound discretion of the trial court. *See Spur Feeding Co. v. Fernandez*, 106 Ariz. 143, 149, 472 P.2d 12, 18 (1970) (affirming trial court's remittitur); *Duncan v. State*, 157 Ariz. 56, 63, 754 P.2d 1160, 1167 (App. 1988) (same). When the trial court orders remittitur, that ruling is accorded "[t]he greatest possible discretion because, like the jury, [the trial court] has had the opportunity to hear the evidence and observe the demeanor of witnesses." *Mammo v. State*, 138 Ariz. 528, 533–34, 675 P.2d 1347, 1352–53 (App. 1983).

Although a remitted damages award may be rejected by the opposing party, it is a valuable tool that can be used to achieve a reasonable settlement. Pursuant to Rule 59(i)(1), Ariz.R.Civ.P., the court must order a new trial if the opposing party rejects the proposed remittitur. As noted above, however, it may be disadvantageous for the parties to proceed with a second trial. The risks associated with a second trial are typically shared by the plaintiff. If fault is disputed, the plaintiff bears the risk of not recovering anything during the second trial. Even if fault is not disputed, the plaintiff risks recovering less than the remitted award.

A remitted damages award also provides the plaintiff with an objective view of the value of his or her case, which may have been inflated, then sanctioned by a runaway jury. The issue of inflated damages is one that defense counsel face time and time again. Quite often, it is the mistaken evaluation of claims that drives a case to trial, in lieu of settlement. Remittitur provides an objective evaluation of the plaintiff's damages which, in turn, may facilitate reasonable settlement negotiations.

> ALTHOUGH A REMITTED DAMAGES AWARD MAY BE REJECTED BY THE OPPOSING PARTY, IT IS A VALUABLE TOOL THAT CAN BE USED TO ACHIEVE A REASONABLE SETTLEMENT.

## What can the Court Consider In Determining the Proper Remittitur?

In determining a proper remittitur, the court may compare a jury's verdict to awards in cases with comparable injuries. *See Alabama Freight Lines v. Thevonot*, 68 Ariz. 260, 263-264, 204 P.2d 1050, 1052 (1949) (trial court compared jury's verdict to awards in cases with comparable injuries in determining that remittitur was appropriate); *Standard Oil Co. of Cal. v. Shields*, 58 Ariz. 239, 247, 119 P.2d 116, 119-120 (1941) (noting that while no two cases are alike and damages must be evaluated on a case-by-case basis, the excessiveness of the jury's verdict was further indicated by its comparison to verdicts awarded in other similar cases).

Comparable jury verdicts can be effectively presented to the court through a compendium of jury verdicts for similar injuries, or through some other form of reporting provided by an independent research service.

## Keep in mind...

Remittitur may work best in cases in which fault is contested. That is because both sides bear the risk of losing on liability and damages. When fault is conceded, however, and the jury returns an excessive verdict, the plaintiff's view of damages is likely to be bolstered. Moving for remittitur is therefore usually a more persuasive tool in cases where fault is at issue.

It is also important to consider your judge. The judge who presided over your trial is likely to be the same judge who will rule on your motion for remittitur. You will therefore want to consider the court's previous rulings, as well as the overall tone of the proceedings, in gauging the likelihood of a remittitur.

## ABOUT THE AUTHOR **WHITNEY HARVEY**

Whitney practices in general civil litigation, wrongful death and personal injury, commercial and business litigation, and dram shop and social host liability. She is on the Social Committee for the Arizona Women Lawyers Association and has served on the State Bar of Arizona's Committee on Minorities & Women in the Law.

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# EVEREST INDEMNITY INSURANCE COMPANY V. REA REJECTS IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

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

The Arizona Court of Appeals recently rejected a plaintiff's claim that the defendant insurance company impliedly waived the attorney-client privilege by simply consulting with counsel during the course of making a claims decision, and then later asserting its subjective belief in the good faith nature of that decision. *Everest Indem. Ins. Co. v. Rea,* 236 Ariz. 503, 342 P.3d 417 (App. 2015). In reaching this decision, the court ruled that plaintiff had "overread" *Mendoza v. McDonald's Corp*., 222 Ariz. 139, 213 P.3d 288 (App. 2009), to suggest that a defendant waives the attorney-client privilege simply by defending the subjective reasonableness of its actions after consulting with counsel. This argument, said the court, was "inconsistent with [the Arizona Supreme Court's decision in] *State Farm Mut. Auto. Ins. Co. v. Lee.*" Lee held that "To waive the attorney-client privilege, a party must make an affirmative claim that its conduct was based on its understanding of the advice of counsel – it is not enough that the party consult with counsel and receive advice." To waive the privilege, said the *Everest* Court, "something more is required" than mere consultation with counsel before the assertion of a subjective good faith defense. The "privilege is impliedly waived only when the litigant asserts a claim or defense that is dependent upon the advice or consultation of counsel." The *Everest* Court thus clearly repudiated the overbroad theory of implied waiver that many plaintiffs espouse in typical bad faith litigation. *Everest* clarifies that to waive the attorney-client privilege, a defendant must affirmatively place the advice of counsel at issue.

> "AS IT STANDS NOW, THE MAJORITY DECISION IN *EVEREST* IS CLEAR: NO IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE OCCURS WHERE ADJUSTERS THEMSELVES MAKE THE CLAIMS DECISIONS AND DO NOT RELY ON THE ADVICE OF COUNSEL TO FORM THEIR SUBJECTIVE BELIEF OF THE APPROPRIATENESS OF THEIR ACTIONS."

*Mendoza* involved a waiver of the attorney-client privilege because the adjusters specifically relied on the advice of counsel in scheduling IME's and determining the issuance of surgical authorizations. In *Everest,* however,

> [T]here has been no showing that Everest was in doubt as to any legal issue. Rather, it made decisions during the course of litigation and, of necessity, involved lawyers in that litigation. The decision Everest made to settle the case was not necessarily the product of legal advice, and Everest has not yet asserted – expressly or impliedly – that it was.

One judge dissented. Although she agreed with the majority's analysis of the legal issue, she disagreed as to application of the law to the facts in the case. She believed the facts established "the something more" than *Everest's* mere consultation with counsel. The dissent noted that because counsel participated in the settlement negotiations on *Everest's* behalf, this indicated that counsel did more than provide advice; counsel was directly involved in the relevant events. The dissent believed that counsel's participation, along with *Everest's* assertion of subjective good faith, was an affirmative interjection of counsel's role in formulating and acting upon *Everest's* subjective good faith in this litigation.

Insureds' counsel in bad faith cases might try to claim that the *Everest* majority misread Lee in concluding there could be no waiver of privilege until the insurer affirmatively claims its conduct was based on advice of counsel. Plaintiffs' counsel will likely claim that *Everest* is an aberration and a mistaken interpretation of *Lee* by a panel of a lower court. In truth, the *Everest* majority appropriately concluded that waiver is implied only when, after receiving advice from an attorney, a party makes an affirmative assertion that it was acting in good faith because it relied on counsel's advice to inform its own evaluation and interpretation of the law. This decision does not ignore *Lee*, but, rather, appropriately interprets and explains *Lee* in the context of the facts presented.

*Everest* leads one to ask, what facts do constitute waiver and what facts don't? The *Everest* dissent thought counsel's involvement with settlement negotiations was a telltale sign that *Everest's* actions were "inextricably intertwined" with the advice it received from counsel. Under the dissent's interpretation of Lee and its progeny, a carrier would not need to formally state that it actually relied on counsel before an implied waiver of the privilege would occur. Counsel's involvement in a carrier's decisions to dispute coverage, to appeal an adverse decision, or delay payment of benefits to achieve a favorable settlement would result in an implied waiver. But the *Everest* majority disagreed, concluding that participation by an insurer's attorneys in settlement negotiations or in the decision whether to settle at all did not impliedly waive the privilege. As it stands now, the majority decision in *Everest* is clear: No implied waiver of the attorney-client privilege occurs where adjusters themselves make the claims decisions and do not rely on the advice of counsel to form their subjective belief of the appropriateness of their actions.

# WELCOME NEW JSH LAWYERS!

## Stay up to date at jshfirm.com

JSH is thrilled that we have been able to consistently grow after being in business for 33 years. We have expanded to 82 lawyers with the addition of Dustin Christner, Sam Arrowsmith, Cory Tyszka, Jake Speckhard, Erica Spurlock, Jonathan Sullivan, Keith Collett, and Sarah Staudinger.

**Dustin Christner** joined our firm as a Partner where he concentrates his practice on Medical Malpractice and Health Care Law. He is an experienced litigator with significant experience defending claims of medical negligence, nursing home elder abuse liability, products liability and personal injury. Learn more about Dustin by clicking here: http://www.jshfirm.com/DustinAChristner

**Sam Arrowsmith** focuses his practice on Automobile Liability Defense, General Civil Litigation and Insurance Defense, Insurance Coverage and Fraud, and Premises Liability. Mr. Arrowsmith graduated from the Sandra Day O'Connor College of Law at Arizona State University. Learn more about Sam by clicking here: http://www.jshfirm.com/SamuelEArrowsmith

**Cory Tyszka** is an Associate in our Medical Malpractice Department. Ms. Tyszka built a solid foundation for the medical legal practice by receiving a Bachelor of Arts degree in Biology from Wheaton College, (MA), before graduating from Sandra Day O'Connor College of Law at Arizona State University. Learn more about Cory by clicking here: http://www.jshfirm.com/CoryETyszka

**Jake Speckhard's** practice concentrates on General Civil Litigation, Insurance Defense, Premises Liability, and Automobile Liability Defense. Mr. Speckhard received his law degree from Sandra Day O'Connor College of Law at Arizona State University, where he was named a Willard H. Pedrick Scholar and recipient of the CALI Excellence for the Future Award in Legal Advocacy and The Litigation Experience. Learn more about Jake by clicking here: http://www.jshfirm.com/JacobLSpeckhard

**Erica Spurlock's** practice centers on Personal Injury Defense, Dram Shop Defense, Employment Law, and General Liability Defense. Before graduating law school at Boston University, Ms. Spurlock worked as a Law Clerk for the Attorney General's Office in the Criminal Division and for The Law Offices of Diane Miller. She also was a summer intern for Jones, Skelton & Hochuli. Lean more about Erica by clicking here: http://www.jshfirm.com/EricaJSpurlock

**Jonathan Sullivan** joined Jones, Skelton & Hochuli as an Associate, focusing his practice on Professional Liability and Insurance Bad Faith. He graduated from Denison University with a degree in Biology before attending Arizona State University, Sandra Day O'Connor College of Law. Learn more about Jonathan by clicking here: http://www.jshfirm.com/JonathanLSullivan

**Keith Collett** is an Associate in our General Liability, Construction, and Auto Trial department. While attending the University of Arizona, James E. Rogers College of Law, Mr. Collett was the President of the Business Law Society and the President of the Catcall a cappella Choir. Learn more about Keith by clicking here: http://www.jshfirm.com/KeithDCollett

**Sarah Staudinger** is an Associate who focuses her practice on General Civil Litigation and Insurance Defense, Construction Litigation, and Automobile Liability Defense. Ms. Staudinger received a Bachelor of Arts degree in Criminal Justice from Indiana University before attending law school at Arizona State University, Sandra Day O'Connor College of Law. Learn more about Sarah by clicking here: http://www.jshfirm.com/SarahStaudinger


# JSH has Moved!

## TO TWO RENAISSANCE SQUARE, IN DOWNTOWN PHOENIX, ARIZONA.

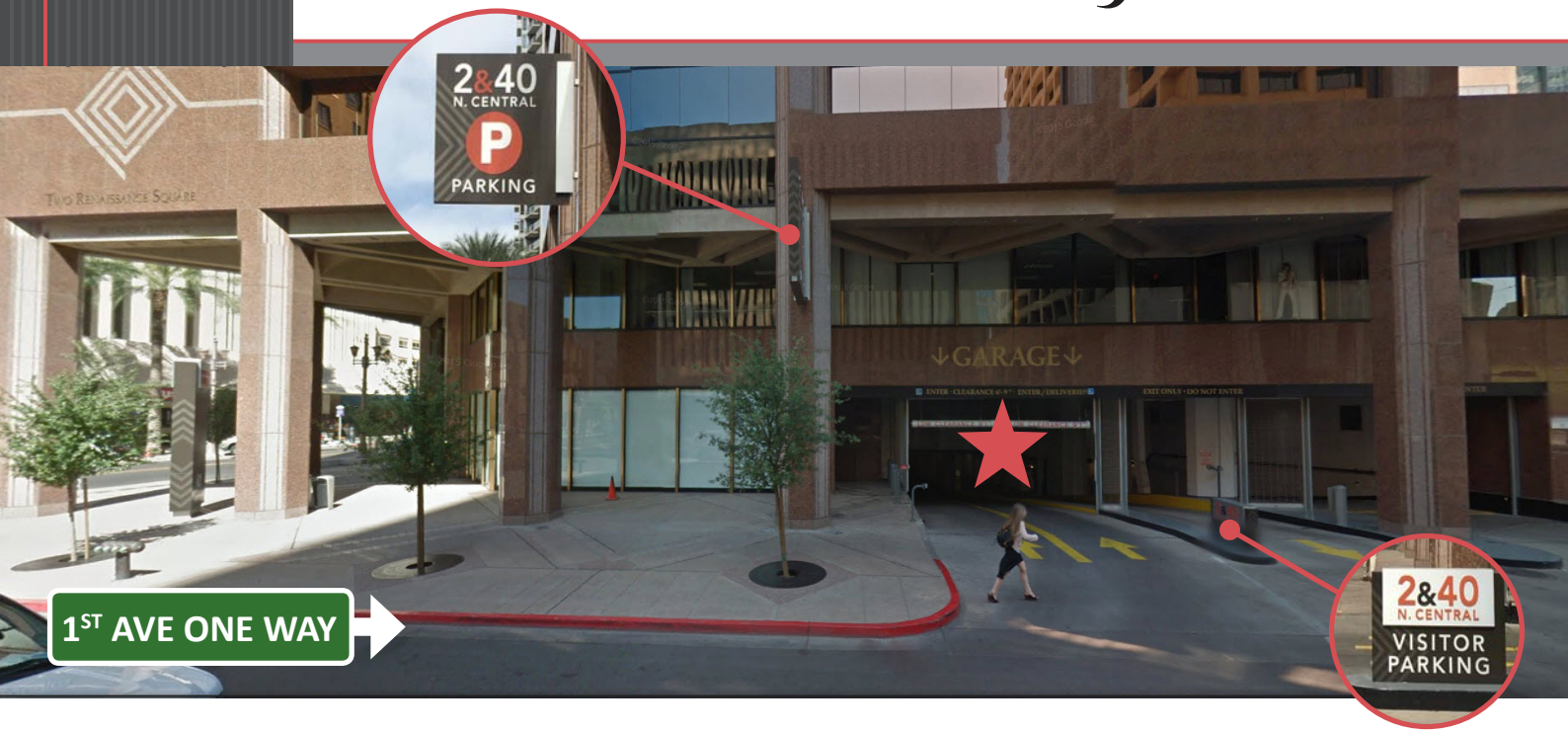
After 25 years at our Midtown Phoenix location, we packed up our entire office, and headed exactly three miles south. Our new location is better suited to house our growing firm and puts us in closer proximity not only to court buildings, but also to our growing downtown community.

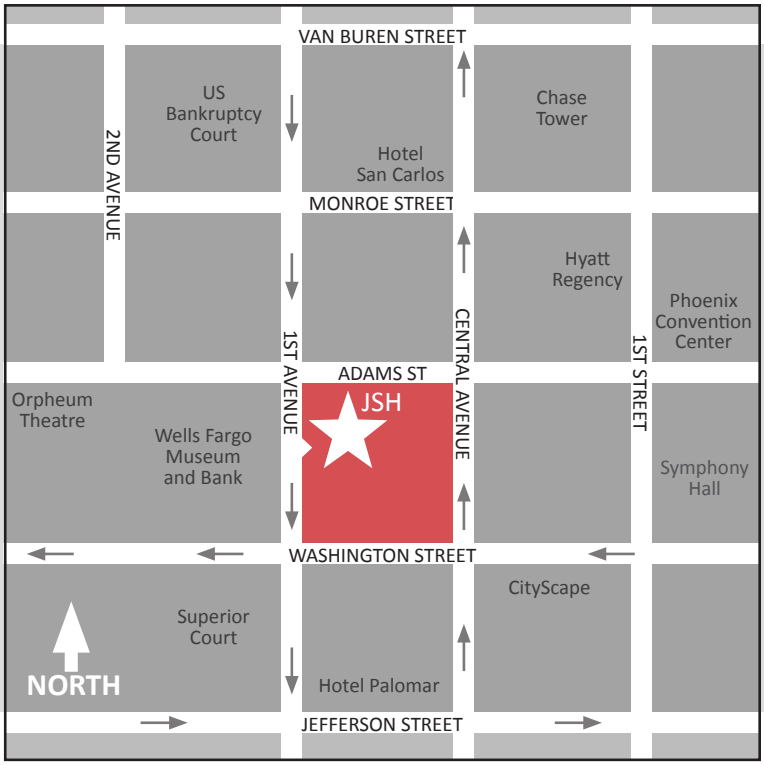
When JSH was founded 33 years ago, we had 12 attorneys and 23 staff members. Today, we have 82 attorneys and 130 staff members, all of whom have settled into our new home. Since April 4, 2016, we have been located on floors 24 through 27 of the Two Renaissance Square building. Our new office has two outside patios with amazing views of Phoenix. These stunning views can also be seen from our conference rooms, which are all fitted with video conference technology.

Renaissance Square is located in the heart of Phoenix's Central Business District on a full-city block bounded by Adams, Central and Washington streets, and 1st Avenue. The exterior of the building is polished carmine red granite and glass. The exterior is sculpted diagonally, giving the illusions of overlapping towers. Nearby amenities include several hotels, movie theaters, a variety of restaurants and cafes, and many speciality retail shops at the Arizona Center and throughout the surrounding area. Chase Field, Comerica Theater, and Talking Stick Arena are nearby venues, making this center a prime location.


# PARKING MAP & DIRECTIONS TO
## 40 NORTH CENTRAL AVE • SUITE 2700

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




## TWO RENAISSANCE SQUARE
## 40 NORTH CENTRAL AVENUE

Traveling south on 1st Ave (one way, south), cross Adams St and make an immediate left into the underground parking garage of the **Two Renaissance Square tower** (*see red star*).

Visitor parking is available on level **G1** in the underground garage. Once parked, take the elevator to the **L (Lobby) level**. Once you are on the Lobby level look for the elevator sign marked **Floors 15 - 28**. Take those elevators to the **27th Floor**, where our lobby is located.

Remember to bring your partking ticket to our reception desk for validation.

Renaissance Square is a high-rise complex located in downtown Phoenix, Arizona. The complex includes two towers which are connected by a hallway on the street level, as well as a skyway positioned halfway up the structures. Located near CityScape, Talking Stick Arena and the Superior and Federal Court Houses, the exterior of the buildings is polished carmine red granite and glass. The exterior is sculpted diagonally, giving the illusions of overlapping towers. The complex is located between Central Ave and 1st Ave, and Washington St and Adams St. Please note: vehicle clearance is 6’ 9” inside the parking garage. Public metered spaces are available on most nearby streets.



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# Downtown Phoenix

In 1870, the whole town of Phoenix encompassed what would presently be the Downtown Core, border by Van Buren Street south to Jackson Street, and Seventh Street to Seventh Avenue. Streets were laid out in a grid, with Washington Street as the main east-west road. The north-south streets originally bore Native American tribal names, but were changed to more easily remember numbers, with everything east of Center Street (later known as Central Avenue) names as streets and everything west as avenues. As the town continued to grow it was eventually incorporated as a city on February 28, 1881.

# AN INVESTIGATIVE PIECE ON CLAWBACK AGREEMENTS

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**who** Clawback agreement; Alias: Rule 502 Agreement.

**what** A mechanism to take back inadvertently disclosed privileged and/or confidential information and protect against an argument that you waived privilege.

**when** The Federal Rules of Evidence were amended in 2008 to introduce Rule 502. States adopted Rule 502 shortly after its introduction.

**where** Rule 502 is located in the Federal Rules of Evidence, and their State counterparts.

## why

The scope of discovery seems endless. The rules permit a party to obtain discovery regarding any nonprivileged matter that is "relevant" to any party's claim or defense. Fed. R. Civ. P. 26(b)(1). What is considered to be "relevant" evidence, for purposes of discovery, is essentially limitless. The Federal rules, and State counterparts, permit a party to obtain any piece of evidence that could lead to the discovery of admissible evidence. The rules, as they stand today, do not contemplate whether the discovery sought is sufficiently reliable, trustworthy, or even admissible at trial. They simply ask: "Can this request potentially lead to the discovery of admissible evidence?"

Attorneys routinely craft affirmative answers to that question. The rules, therefore, have not caught up with the mountain of evidence that could be construed as relevant in today's day and age. Parties can now seek discovery from another's Twitter®, FaceBook®, Instagram®, YouTube®, Email, Cellphone, WhatsApp®, Snapchat®, Parascope® or any other digital resource. Unless your client is willing to spend an extraordinary amount of money to have every email, picture, text, tweet, post, and document reviewed with a fine-toothed comb, the likelihood of inadvertently producing privileged or confidential information expands with each passing year as discoverable evidence becomes more and more "digitized." Rule 502 protects you if and when privileged or confidential information is inadvertently disclosed.

## Prior to 502 Rule

Before Rule 502, production of privileged or confidential information could permit your opponent to, rightfully, argue that you waived your claim of privilege and/or confidentiality. Some courts held that inadvertent production of even one privileged or confidential document constituted a waiver of the privilege for that document and all other documents related to that subject matter. As you can imagine, such subject matter waiver can drastically impact your client's case. Therefore, discovery costs skyrocketed as parties felt the need to review each and every document for privileged and/or confidential information to guard against the consequences associated with inadvertent production.

Rule 502 was implemented to protect parties who do not have Midas' war chest. Rule 502 bars an opposing party from claiming "waiver" if: (1) the disclosure was inadvertent; (2) you took steps to prevent the disclosure; and (3) you promptly took reasonable steps to rectify the error. Fed. R. Evid. 502(6).

## Extent of Rule

The rule only protects those who take steps to weed out privileged or confidential information beforehand. Therefore, the rules do not cover a blind "document dump" on your opponent in the hopes of your opponent calling your attention to privileged or confidential information. While your opponent is ethically bound to notify you and return any inadvertently produced privileged or confidential information, you should not rely on your opponent to identify all the privileged documents. Furthermore, the purpose of designating documents as "privileged" and "confidential"– secrecy–is defeated if your opponent has to read the documents to recognize that they are privileged and/or confidential.

> WHILE RULE 502 DOES NOT LESSEN YOUR BURDEN TO CAREFULLY REVIEW YOUR DISCOVERY AND PRECLUDE THE DISCLOSURE OF PRIVILEGED INFORMATION, IT DOES PROVIDE A MECHANISM TO ESSENTIALLY RECALL INADVERTENT DISCLOSURES AND PREVENT YOUR OPPONENT FROM RELYING ON THE INADVERTENT DISCOVERY TO MAKE THEIR CASE.

## When?

When should you talk to your opponent about a claw back agreement? In Federal Court, the ideal time to discuss a clawback agreement is during your Rule 16(b) meet and confer in Federal Court. The State Court counterpart to Rule 16(b), the Joint Report and Scheduling Order, is due significantly after discovery has commenced. Therefore, in State Court, it is advisable to formalize a claw back agreement in writing before you engage in discovery and then include the agreement with your Joint Report and Scheduling Order.

## What?

What should you talk to your opponent about? There are a plethora of talking points related to clawback agreements. Parties can: define what documents are subject to be clawed back, the procedures to invoke the clawback, what the parties' obligations are when they discover privileged and/or confidential information has been disclosed, etcetera. However, the top three points of discussion should regard: (1) defining what "reasonable steps" each party would take to prevent the mistaken disclosure of privileged or confidential materials. (Defining what is and is not reasonable can potentially "head-off" any disputes about failing to discover privileged material); (2) establishing procedures for invoking the clawback and procedures for resolving disagreements about whether an inadvertently produced document is privileged or confidential; and (3) defining what categories of documents could contain privileged or confidential information. For example, witness depositions could be subject to redaction if they disclose privileged information. This process will ideally help ease discovery disputes and reduce the need to involve the Court during the discovery process.

## How?

How can you enforce a clawback agreement? Rule 502(d) permits "a federal court [to] order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding." The Court's protection is available only if incorporated in a court order. Rule 502(e) specifies that an agreement not incorporated in an order "will be binding only on the parties to the agreement" and will have no effect in a subsequent court action or on nonparties.

While Rule 502 does not lessen your burden to carefully review your discovery and preclude the disclosure of privileged information, it does provide a mechanism to essentially recall inadvertent disclosures and prevent your opponent from relying on the inadvertent discovery to make their case. Planning your discovery litigation ahead with the careful use of "claw back" agreements should be a valuable instrument in your "discovery toolbox" to help navigate the increasingly treacherous waters in our digital age of e-discovery production.

## ABOUT THE AUTHOR **JUSTIN ACKERMAN**

Justin joined JSH as an Associate in our Appellate Department. After graduating as the Valedictorian of his class from Arizona Summit Law School, Justin worked as a Law Clerk for the Honorable Michael J. Brown in Division One of the Arizona Court of Appeals.

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## ABOUT THE AUTHOR **MICHELE MOLINARIO**

As a trial attorney since 2000, Michele has tried state and federal jury and bench trials and administrative law hearings. Michele focuses her civil litigation practice on governmental entity defense with an emphasis on civil rights matters.

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# FIRM ANNOUNCEMENTS

## Stay up to date at jshfirm.com

## **Mark Zukowski** - Named One Of The Top 20 ADR Attorneys in Arizona

Mark Zukowski has been named one of the Top 20 Alternative Dispute Resolution (ADR) attorneys in Arizona by Arizona Business Magazine.

ADR refers to alternative processes to the traditional jury trial to resolve disputes. Some forms of ADR include Mediation, Arbitration, Summary Jury Trials, Mini Trials, and Neutral Case Evaluation. It can often better serve the needs of clients by providing a more cost efficient and economical resolution of disputes without incurring the tremendous emotional cost of traditional conflict resolution by way of a jury trial.

**Mark offers online scheduling at: jshfirm.com/markdzukowski.**

## **Georgia Staton** - Appointed as Vice Chair of American College of Trial Lawyers' Arizona State Committee for 2015-2016

Congratulations to Georgia Staton on being appointed as Vice Chair of the American College of Trial Lawyers' Arizona State Committee for 2015-2016. She is the first woman to serve on the State Committee. This appointment is quite an honor and speaks to the recognition of Ms. Staton's substantial talents as a trial lawyer. A lawyer becomes a Fellow in the American College of Trial Lawyers by invitation only. To be selected as a Fellow in the ACTL, an attorney must be identified as a highly skilled trial lawyer in the opinion of judges and practitioners, and as a person whose ethics, moral standards and collegiality are above reproach. Fellowship is limited to one percent of the lawyers in any individual state.

## **Carole Spivey** - Welcome our New Executive Director

Carole Spivey joined JSH as Executive Director in the Fall of 2015. Ms. Spivey has a wealth of experience in the legal service business and held similar management positions for more than 25 years in law firms in Phoenix, Denver, San Francisco, and Honolulu. She received her Bachelor of Arts degree from University of Washington. She served as a faculty member in various educational settings, instructing courses in law office management for both attorney and legal managers. Ms. Spivey has held positions at the national, regional, and local levels of the Association of Legal Administrators.

## Steve Bullington Inducted Into American College of Trial Lawyers

Steve Bullington was inducted as a Fellow of the American College of Trial Lawyers (ACTL), which is one of the premier legal associations in North America. This is an incredible accomplishment as ACTL membership is capped at only 1% of the total lawyer population of a state. Fellowship in the College is extended by invitation only, and only after careful investigation, to those experienced trial lawyers of diverse backgrounds, who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of fifteen years of trial experience before they can be considered for the Fellowship.

## Josh Snell Celebrates 10 YEARS at Jones, Skelton & Hochuli

It was career day at Washington High School. Josh Snell, along with his classmates, sat down to learn about some of the opportunities that would be available to them after high school. A local attorney's speech caught Josh's interest setting him on a path towards his career as an attorney.

After high school, Josh went on to receive his Bachelor's Degree in Criminal Justice at Grand Canyon University. Upon graduation in 1996, Josh went on to work as a Youth Supervisor at a juvenile probation office until 1998, when he decided to follow his dream of going to law school.

Having never been outside of Arizona, he took the opportunity to attend Baylor University School of Law in Dallas, Texas from 1998 to 2001. After working for a small insurance defense law firm in Dallas, Josh decided to return to his roots and moved back to Phoenix in 2002, where he worked for a local Medical Malpractice firm until 2005.

In 2005, Josh joined Jones, Skelton & Hochuli, where he has concentrated his practice on insurance coverage and bad faith, commercial litigation, personal injury defense and retail law. In 2012, Jones, Skelton & Hochuli welcomed Josh into the partnership. Josh is very active within the firm and serves on the firm's Recruiting Committee, Firm Seminar Committee, and serves as the Mentor Liaison for new attorneys. As the Mentor Liaison, Josh works with each new hire to pair them with a seasoned lawyer to assist in their successful transition to the firm. Because Josh knows all the new attorneys, he serves as an unofficial mentor to a number of young attorneys as well.

Outside the office, Josh enjoys spending time with his wife and kids, playing basketball and watching football. In addition to spending time with his family, Josh has served on the Board of Directors for the Salvation Army of Phoenix. He was drawn to this particular board because their mission statement of "Do The Most Good" really resonated with him. It was something his dad instilled in him growing up and it's a message he will pass on to his three children as well.

## The Arizona Association of Defense Counsel Elects Jason Kasting as Young Lawyers Division President

The Arizona Association of Defense Counsel's Young Lawyer Division elected Jason Kasting as their 2015/2016 Executive Board President. He previously served as Vice President and Secretary for the Young Lawyers Division. Established in 1965, AADC is an organization made up of defense attorneys who mainly practice in the area of civil defense litigation. AADC is dedicated to the education of its members and the judiciary and increasing community awareness of positive aspects of the legal profession.

## Phil Stanfield Selected as a Board of Directors Member for USLAW

We would like to congratulate Phil Stanfield for being selected as a 2015-2016 Board of Directors Member for the USLAW NETWORK (USLAW). From 2009 to 2010, Mr. Stanfield was the Transportation Group Chair for USLAW. As an accomplished trial attorney, Mr. Stanfield focuses his practice on transportation defense, professional liability, product liability, and defending insureds covered by GL Policies.

## Russ Skelton Selected as Top 100 Lawyer in Arizona

Russ Skelton was selected as one of the Top 100 Lawyers in Arizona by AZ Business Magazine. AZ Business magazine's editor team, in collaboration with industry experts, choose the Top 100 Lawyers in Arizona from a poll of more than 1,000 of the most talented and successful attorneys from throughout the state. The decision is based on each lawyer's professional success, impact on their law firm, impact on their community, and impact on the legal profession. Mr. Skelton has been a Partner with JSH since its inception in 1983 and practices in medical malpractice and workers' compensation defense.

# 25 JSH Lawyers

## Selected As 2016 Arizona Super Lawyers and Arizona Rising Stars

Super Lawyers selected 25 attorneys from Jones, Skelton & Hochuli, to appear on the 2016 Arizona Super Lawyers and Arizona Rising Stars list. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive the honor of being listed as an Arizona Super Lawyer and no more than 2.5 percent of lawyers in the state are selected as Arizona Rising Stars.

### Southwest Super Lawyers

- Donn C. Alexander
- Stephen A. Bullington
- Eileen D. GilBride
- Edward G. Hochuli
- William R. Jones
- Michael A. Ludwig
- Donald L. Myles
- Jay P. Rosenthal
- J. Russell Skelton
- Josh M. Snell
- Phillip H. Stanfield
- Georgia A. Staton
- Lori L. Voepel
- Mark D. Zukowski

### Arizona Rising Stars

- Brandi C. Blair
- Heather E. Bushor
- Chelsey M. Golightly
- Ashley Villaverde Halvorson
- Whitney Harvey
- Jeremey C. Johnson
- Daniel O. King
- Kenneth L. Moskow
- R. Christopher Pierce
- Erik J. Stone
- David L. Stout, Jr.

# JSH Resource Alert!

### USLAW Releases 2016 Construction Compendium of Law

The construction compendium is a multi-state resource that addresses legal questions that often arise in construction law.

To view or download the updated compendium, click here:

http://www.uslaw.org/files/Compendiums2016/Construction16/2016_USLAW_Construction_Compendium_of_Law.pdf

### USLAW Releases 2016 Transportation Compendium of Law

The updated transportation compendium is a survey of state law on various issues associated with the derivative negligence claims of negligent entrustment, hiring, retention and supervision in truck accident cases.

To view or download the updated compendium, click here:

http://www.uslaw.org/files/Compendiums2016/Transportation16/2016%20USLAW%20Transportation%20Compendium%20of%20Law.pdf

### USLAW Releases 2016 Retail Compendium of Law

With ownership and management of retail establishments, shopping and hospitality centers comes exposure to all sorts of liabilities. The updated retail compendium is designed to permit users to easily access common and state-specific liability issues. **New to the 2016 updates is the addition of a Dram Shop Liability section.**

To view or download the updated compendium, click here:

http://www.uslaw.org/files/Compendiums2016/Retail16/2016%20USLAW%20Retail%20Compendium%20of%20Law.pdf

# NEVADA ADPOTS *CUMIS* COUNSEL REQUIREMENT - WHO'S NEXT?

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In September 2015, the Nevada Supreme Court issued a decision in *State Farm Mut. Auto. Ins. Co. v. Hansen,* 131 Nev. Adv. Op. 74, which held that Nevada law requires an insurer to provide independent *Cumis* counsel when there is an actual conflict of interest between the insured and the insurer. *Cumis* counsel derives from the seminal California case *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984), which similarly held that an insurer must retain, at its own expense, independent counsel for the insured where there is a conflict of interest. Hansen is a new branch of common law that will lead to new litigation in Nevada, as well as possibly affect jurisdictions outside of Nevada that have not directly addressed whether an insurance company must retain separate counsel when there is a conflict of interest between itself and the insured.

**Western states, such as Arizona or New Mexico, could examine the *Cumis* case to determine if it would be appropriate to adopt in modern insurance litigation.**

## *State Farm Mutual Insurance Company v. Hansen*

Hansen was a first-party claim where the insured alleged that State Farm breached its contractual obligations by refusing to provide independent counsel to its insured. In the underlying case, State Farm's insured was sued for intentional torts and negligence following an incident at a house party and successive car accident. State Farm defended under a reservation of rights, but refused to provide independent counsel to its insured. In subsequent coverage litigation, the United Stated District Court for the District of Nevada considered the issue of whether State Farm breached its contractual duty to defend because it did not provide independent counsel to its insured. After its initial ruling, the District Court reconsidered and certified the issue of whether independent counsel needed to be appointed to the Nevada Supreme Court.

Following *Cumis*, the Nevada Supreme Court held that "counsel may not represent both the insurer and the insured when their interests conflict and no special exception applies." The Nevada Supreme Court found that a conflict of interest exists if the insurer-provided counsel has "control over an issue in the case that will also decide the coverage issue," and the reservation of rights is not "extrinsic or ancillary to the issues actually litigated in the underlying action." The Court rejected the notion that a per se conflict of interest exists in every case in which a reservation of rights letter is issued. Instead, Nevada courts must ask whether an actual conflict exists on a case-by-case basis.

## Effect of Hansen Outside and Inside of Nevada

With the decision, Nevada joined California, along with several other jurisdictions, requiring an insurer to not only retain, but pay for, independent counsel. While there are no defined patterns in jurisdictions adopting or rejecting a *Cumis* counsel requirement, Hansen provides non-precedential authority and reasoning to consider when adopting or rejecting *Cumis*. Western states, such as Arizona or New Mexico, could examine the *Cumis* case to determine if it would be appropriate to adopt in modern insurance litigation.

Within Nevada, collateral litigation related to the appropriate billing rate will likely occur. In addition, by failing to clarify when a conflict necessitating independent counsel arises, the Nevada Supreme Court established a standard that may be difficult for insurers and appointed defense attorneys to apply. Furthermore, when independent counsel is not appointed, insurance companies will face allegations of a breach of the duty to defend and the duty of good faith and fair dealing.

## Concluding Remarks

Insurers must be aware of the potential consequences of the *Hansen* decision, in order to fulfill the duties to defend and indemnify. Within Arizona, there are immediate issues that will arise due to Nevada's adoption of *Cumis* counsel. For example, must an insurer appoint *Cumis* counsel for a Nevada insured when the lawsuit is in Arizona? Arizona courts have previously held that an insured is entitled to seek independent counsel when a reservation of rights is issued, and protect against the threat of personal liability by entering into *Morris* agreement. Whether insurers are required to provide that counsel is an issue that is likely to be addressed by Arizona courts.

## ABOUT THE AUTHOR **PATRICK GORMAN**

Patrick practices in bad faith, insurance coverage, and professional liability. He has served in a variety of capacities for the DRI Young Lawyers Subcommittee, including currently serving as the Vice Chair of Marketing. He is also active in the Papago Men's Golf Association.

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# JONES, SKELTON & HOCHULI
# CASES OF NOTE

June 6, 2016
Donn Alexander

**DONN ALEXANDER OBTAINS DEFENSE VERDICT IN MEDICAL MALPRACTICE CASE**

This 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.

## *Esquivel v. City of Yuma*

May 3, 2016
Michele Molinario, Jon Barnes, and Amelia Esber

**MICHELE MOLINARIO, JON BARNES, AND AMELIA ESBER PREVAIL ON SUMMARY JUDGMENT**

Michele Molinario, Jon Barnes, and Amelia Esber 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. This case involved the use of a taser in dart-mode to seize Plaintiff Gavino Esquivel, who was actively fleeing the scene of a dispute 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 defendants 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."

## *Pulido v. AAA Insurance*

April 20, 2016
Mike Halvorson and David Potts

**MIKE HALVORSON AND DAVID POTTS OBTAINED A DEFENSE VERDICT IN FAVOR OF AAA MEMBERS INSURANCE COMPANY IN A TWO-WEEK TRIAL CONCERNING A PEDESTRIAN-VEHICLE ACCIDENT**


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 undisputed that the accident caused Plaintiff to suffer numerous pelvic and lumbar fractures, 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. These experts also testified that Plaintiff's pubic symphysis healed in an uneven, asymmetrical manner, which is causing further chronic inguinal pain. Both the SI joint and inguinal pain will continue to increase for the remainder of his 60+ year life expectancy. 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 the litigation, Plaintiff filed an Offer of Judgment for the policy limit of $500,000 against AAA, and AAA filed an Offer of Judgment for $51,000.

During trial, Plaintiff called numerous witnesses and police officers to support his argument that the driver was speeding and traveling 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 ½ hours before returning a complete defense verdict for AAA Members Insurance Company.

## *Watts v. Medicis Pharmaceutical*

January 21, 2016
Lori Voepel, Don Myles, and Josh Snell

**LORI VOEPEL, DON MYLES & JOSH SNELL OBTAIN FAVORABLE OPINION FROM THE ARIZONA SUPREME COURT**



Lori Voepel, Don Myles and Josh Snell have obtained a favorable Opinion from the Arizona Supreme Court in an important products liability case. In Watts v. Medicis Pharmaceutical Corporation, No. CV-15-0065 (Jan. 21, 2016), the Arizona Supreme Court adopted the "learned intermediary doctrine," under which a prescription drug manufacturer satisfies its duty to warn end-users by giving appropriate warnings to the prescribing physician or other health-care provider who is in a position to reduce the risks of harm from the drug. The Arizona Supreme Court, which had never previously addressed the doctrine, also rejected a "direct to consumer" marketing exception, joining the vast majority of other jurisdictions that follow the doctrine with no direct-to-consumer marketing exception.

In largely vacating the underlying Arizona Court of Appeals' Opinion, the Court rejected Watts' rationale that the learned intermediary doctrine "creates a blanket immunity for pharmaceutical manufacturers," because the manufacturer who fails to give adequate warnings to the physician orhealth-care provider can still be liable. The Supreme Court also rejected the Arizona Court of Appeals' holding that the learned intermediary doctrine is "incompatible" with the Uniform Contribution Among Tortfeasors' Act. As the Court explained, Arizona's UCATA simply requires the apportionment of damages based on degrees of fault. Under the learned intermediary doctrine, the manufacturer that gives adequate warnings to the learned intermediary is simply not at fault. Finally, the Supreme Court rejected Watts' argument that the doctrine violates the anti-abrogation clause in Arizona's Constitution.

The Supreme Court upheld the Court of Appeals' determination that prescription drugs are covered by Arizona's Consumer Fraud Act and remanded to the trial court on that ground. The Supreme Court expressly left two issues open for further litigation on remand: (1) whether the materials relied upon by Watts constituted "advertising" under the Act, and (2) whether

her state consumer fraud claim is pre-empted by federal law. The Court also remanded the case to the trial court for a determination of whether Medicis gave adequate warnings to Watts' physician or health care provider. If so, her products liability claim must be summarily denied under the learned intermediary doctrine.

Watts, a minor, had sought medical treatment for acne and received a prescription for Solodyn, a drug manufactured by Medicis, which contains minocycline. Watts' Complaint alleged that after taking two 20-week rounds of Solodyn as prescribed by her health-care provider, she developed drug-induced lupus and autoimmune hepatitis (the latter of which ultimately resolved). Medicis' full prescribing information materials included warnings that: "The long-term use of minocycline in the treatment of acne has been associated with drug-induced lupus-like syndrome, autoimmune hepatitis and vasculitis," and that "Autoimmune syndromes, including drug-induced lupus-like syndrome, autoimmune hepatitis, vasculitis and serum sickness have been observed with tetracycline-class drugs, including minocycline." The full prescribing information also warned that: "Symptoms may be manifested by arthralgia, fever, rash and malaise" and that "Patients who experience such symptoms should be cautioned to stop the drug immediately and seek medical help." Watts did not allege that she received this full prescribing information, but claimed that she relied on two other publications about the drug (one from her physician and one from her pharmacist) that contained warnings about Solodyn.

JSH received amicus support for its client's position from several national and statewide organizations whose contributions were pivotal. These included The Product Liability Advisory Council, The Pharmaceutical Research and Manufacturers of America, the U.S. Chamber of Commerce, the U.S. Chamber Litigation Center, the Arizona Chamber of Commerce & Industry, and the Arizona Manufacturers Council.

## *Jankowski v. Hurtado*

December 8, 2015
Mike Halvorson and Jessica Kokal

**MIKE HALVORSON AND JESSICA KOKAL OBTAIN DEFENSE VERDICT IN PERSONAL INJURY CASE**


On May 23, 2011, Plaintiff, a grade school teacher and former college athlete, began to brake for slowing traffic when she was rear-ended by Defendant. Plaintiff claimed the impact speed was greater than 20 mph, and she suffered injuries to her shoulder, neck and back. Plaintiff further claimed she treated with various medical doctors and specialists for over four years with little relief. Thus, she made claims for permanent impairment, pain and suffering, loss of enjoyment of life, and loss of consortium, as well as for lost wages and unspecified future care costs.

Defendant admitted that she was solely responsible for causing an impact to the rear of Plaintiff's vehicle, but she denied the forces from the impact were sufficient to cause the injuries claimed. Defendant further argued that four years of treatment was excessive and unnecessary. In the alternative, Defendant suggested that if Plaintiff did, in fact, suffer injury, it was limited to soft-tissue injuries which should have resolved in six to eight weeks of treatment.

Plaintiff called numerous fact witnesses to support her damages, including her employer, husband, friend, and father. Plaintiff also called two medical experts, Justin Dunaway, a physical therapist, and Chad Campbell, a physician's assistant. Both experts testified that Plaintiff sustained injuries to her neck, back, and shoulder as result of the accident, which necessitated various forms of treatment and medication over the next four years. Dunaway further opined that Plaintiff's current ongoing complaints were caused by the subject accident, and that all of the treatment she had received was causally related to the accident.

Defendant testified that the impact was minor, and she called a biomechanical engineer, Robert Anderson, to testify that the forces involved in the accident were unlikely to have caused injuries to Plaintiff, as they were less than those typically involved in daily life. Defendant also retained an orthopedic surgeon, Dr. Michael Domer, to testify as a rebuttal expert. He was expected to testify that it was medically possible Plaintiff sustained a cervical strain from the collision for which it would have been reasonable to allow six weeks of non-operative management for her injury. However, Defendant decided not to call him as a witness following the close of Plaintiff's case.

Following a four day trial and one hour of deliberations, the Jury found unanimously for Defendant.

## *The ACT Group v. WaterFurnace International, Inc.*

Novemeber 13, 2015
Mark Zukowski and Erik Stone

**MARK ZUKOWSKI AND ERIK STONE SUCCESSFULLY OBTAINED A DIRECTED VERDICT FOR WATERFURNACE INTERNATIONAL, INC.**


Mark Zukowski and Erik Stone successfully obtained a directed verdict on all claims in favor of their client, WaterFurnace International, Inc., during a highly complex copyright infringement trial held in the United States District Court for the District of Arizona. Plaintiff, The ACT Group, sought nearly $1 million in damages and alleged that WaterFurnace and co-defendant, James Hamlin, jointly infringed on The ACT Group's copyrighted sales-training material. At trial, Plaintiff argued that its former employee, Hamlin, used Plaintiff's protected material to develop a series of sales-training seminars for WaterFurnace. In defense, WaterFurnace argued that it did not participate in any allegedly infringing conduct and was not responsible for any unauthorized use of the Plaintiff's protected material. After completing the first week of a two-week trial, JSH attorneys Mr. Zukowski and Mr. Stone obtained a directed verdict in favor of WaterFurnace. They will be seeking a full recovery of their client's attorney fees and costs.

## *Fernandez v. City of Phoenix*

October 27, 2015
Don Myles, Lori Voepel, Michele Molinario, and Justin Ackerman

**DEFENSE WINS MOTION REGARDING DAMAGES IN FERNANDEZ V. CITY OF PHOENIX**

JSH Defense team obtained a win for the City of Phoenix at the Superior Court of Arizona. Plaintiffs, assignees of former Phoenix police officer Richard Chrisman, brought a declaratory action against the City of Phoenix to enforce an $8.5 Million dollar Morris type agreement.

On summary judgment, Defendant Phoenix prevailed on the issue that the Phoenix City Code limits Plaintiffs' damages to Mr. Chrisman's costs of defense in the underlying Federal Court case. The Court agreed with Defendant Phoenix that its obligations to Mr. Chrisman, and therefore Plaintiffs, cannot extend beyond the limits set by the Phoenix City Code. The parties then moved for clarification of the summary judgment order because the Plaintiffs believed that their damages consisted of the amount of attorneys' fees and costs of the defense incurred in the underlying matter, rather than the actual amount of attorneys' fees and costs paid. The Court agreed with Defendant Phoenix and found that Plaintiffs' are only entitled to recover reimbursement for actual amounts paid by Chrisman for his reasonable fees and expenses and not the amount incurred.

## *Redmond (Zavala) v. Mid-Century et al.*

October 22, 2015
Don Myles and Ashley Villaverde Halvorson

**DON MYLES AND ASHLEY VILLAVERDE HALVORSON PREVAIL ON MOTION FOR SUMMARY JUDGMENT FOR MID-CENTURY INSURANCE COMPANY (FARMERS)**

Don Myles and Ashley Halvorson recently prevailed on a motion for summary judgment for Mid-Century Insurance Company (Farmers), and were successful in limiting damages from a $3.3 million stipulated judgment to the $100,000 auto policy limit.

In *Redmond (Zavala) v. Mid-Century et al.*, the insured, Redmond, alleged Mid-Century breached the duty of good faith and fair dealing when it denied his claim for benefits on a cancelled auto policy. Redmond's son was in an auto accident and injured plaintiff Zavala. Redmond was insured by Mid-Century but had cancelled his policy five days before the accident and had instead insured the vehicle with State Farm. The Redmonds were defended and indemnified by State Farm but sought additional coverage from Mid-Century, arguing they had never cancelled the Mid-Century policy. Mid-Century denied the claim in part based on a cancellation notice in the file signed by Redmond. Redmond denied signing a request to cancel his policy, claiming that the cancellation was forged by someone in his insurance agent's office. Thereafter, Redmond assigned his bad faith claim to Zavala and stipulated to a $3.3 million judgment.

Mid-Century moved for summary judgment, arguing that its investigation of the claim and its decision to deny coverage was reasonable as a matter of law. In the alternative, Mid-Century moved for partial summary judgment, arguing that Zavala's damages must be limited to the $100,000 policy limit because Mid-Century was never presented with, nor had it rejected, an offer to settle the case. Absent the refusal of a reasonable settlement offer, an insurer is not liable for the amount of a judgment that exceeds the policy limits. *Rogan v. Auto-Owners Ins. Co.*, 832 P.2d 212, 216 (App. 1991). The Court agreed there was no evidence that a settlement offer was made, or that Mid-Century had refused such an offer. It therefore limited the damages to the limit of the applicable policy.

## *Bennett, Terri v. Pima County Community College*

August 24, 2015
Georgia Staton and Elizabeth Gilbert

**ATTORNEYS OBTAIN UNANIMOUS DEFENSE VERDICT IN AN "ENGLISH ONLY" TRIAL**

Georgia Staton and Elizabeth Gilbert obtained a unanimous verdict in favor of Pima County Community College in a highly contested two-week civil trial in Tuscon involving Arizona's "English Only" Constitutional Provision.

Plaintiff, a nursing student at the Desert Vista Campus, claimed that her learning was disrupted when Spanish-speaking students would occasionally speak to each other in Spanish in class. Plaintiff claimed that the College failed to "preserve, protect and enhance" her rights as someone who used the English language. The College introduced evidence that her rights to use English at the College were not infringed upon and that there was no evidence that anyone ever spoke Spanish to her. Administrators confirmed that all instruction, written material, exams and classroom interactions were conducted in English.

Plaintiff confronted a student stating: "This is America. You're not in Mexico. Speak English." She also referred to the Spanish language as "gibberish." Plaintiff became increasingly antagonistic referring to Hispanic students as "spics, beaners and illegals." She also threatened a Hispanic student stating that she had a black belt and could "kick her ass." She also intimidated her instructor and a staff member. Plaintiff was suspended from the nursing program because of her conduct. She appealed her suspension to the president of the Desert Vista Campus who upheld her suspension. Plaintiff was allowed to return to the nursing program in January 2014 if she agreed to comply with the College's student conduct standards. She refused and, instead, sued the College.

The jury deliberated for less than three hours and returned a unanimous verdict in favor of the College.

# 4 SUMMER LAW CLERKS JOIN JSH

From the left, Brian Ripple, Christopher Heo, Lisa Bivens, Jon Brinkman.

Lisa Bivens, Jon Brinkman, Christopher Heo, and Brian Ripple have joined JSH as Law Clerks this summer. Our summer law clerk program is designed to introduce law students to our practice areas and clients, and give them insight into what it's like to be a lawyer here at JSH. Summer Law Clerks are given the opportunity to observe trials, depositions, mediations and settlement conferences and arbitrations. The Clerks also participate in social events, which provide them opportunities to get to know everyone in an informal setting.

# INHOUSE JSH EVENTS

## JSH Annual Company Picnic

We recently celebrated our JSH Annual Company Picnic at CrackerJax Family Fun & Sports Park. Normally this event has been an "indoor picnic" but this year we were able to host this event before we melted outside. Everyone brought their families to enjoy BBQ and play time. Our employees appreciated a little friendly competition by bumping into each other on the bumper tubes and racing while driving go-carts.



# BAD FAITH DEFENSE THEMES

AUTHOR: **Don Myles** EMAIL: **dmyles@jshfirm.com** BIO: **jshfirm.com/donaldlmylesjr**

Anyone who has defended an insurance carrier realizes that the general public, and thus juries, initially believe that companies are looking for ways to deny claim payments. Whether the facts or coverage language justify the denial, a jury must be convinced that the result was "fair." The battle of a jury trial is over "empathy." If jurors conclude that they are much more likely to be in the position of the Plaintiff in the future, it can be very difficult to win the case. Conversely, if the jurors do not identify with the Plaintiff and see Plaintiff's conduct or behavior as being inconsistent with their own, the case will likely be defended. As many a wise lawyer has said, the battle is not over Sympathy but Empathy.

> "IN DEFENDING BAD FAITH CASES, THE MOST IMPORTANT QUESTION IS THIS: WILL THE JURORS, AS THE EVIDENCE IS PRESENTED, SEE THEMSELVES IN THE POSITION THAT THE PLAINTIFF IS IN TODAY?"

Trial themes are not necessarily stated aloud, but are the foundation for everything that the jurors will hear in testimony as well as in opening and closing statements. The theme must anticipate the jurors' "end job" of reading and reacting to the evidence, the verdict form, and the jury instructions. In defending bad faith cases, the most important question is this: Will the jurors, as the evidence is presented, see themselves in the position that the Plaintiff is in today? Would they exaggerate or misrepresent items that were destroyed as a result of a loss? Would they set fire to their house? Would they intentionally lie regarding the extent of damage to items claimed? Would they expect and demand a new roof when they knew theirs was thirty years old because of fairly insignificant damage? You must separate the jurors from the conduct of the Plaintiff. If the Plaintiff is extremely likable, many of the jurors will forgive exaggerations and other conduct the Company might perceive as "misrepresentations." One or two "exaggerations" may be excused. But not four or five.

Misrepresentations regarding the value of items must be substantial and must occur more than once or twice. Anyone can make a "mistake." Anyone might "exaggerate on one or two items." Many jurors will believe that this does not make someone a "liar" or someone who has committed a "fraud." But what if there are four or five "exaggerations"? No juror will believe they were mistakes and jurors will separate themselves from the insured and accept the label "liar" or the term "fraudulent conduct" being used to describe the Plaintiff's conduct. Anything short of your ability to call them that in open court means you may not be able to win the battle of empathy.

Jury research, including mock trials done live and over the internet, repeatedly show that jurors are looking for a way to find in the Plaintiff's favor against an insurance company. In fact, the jury instructions and law regarding bad faith require a carrier to "give the benefit of the doubt" to the insured. Your jurors will do the same. In denying claims or taking coverage positions, it is important to also realize the pragmatic effect. You ultimately must be able to stand up in front of a group of strangers, point to the insured, and say they do not deserve to be compensated for their loss for the reasons set forth in the denial. If you are uncomfortable doing that, you may want to rethink your position.

## ABOUT THE AUTHOR **DON MYLES**

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

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## Steve Leach Elected As Chair-Elect for Fiesta Bowl Board of Directors

JSH Partner, Steve Leach, was elected as Chair-Elect of the Fiesta Bowl Board of Directors for the 2016-2017 season. Starting out as a volunteer in 2006, Mr. Leach has since ascended through various leadership positions within the Fiesta Bowl Committee. He was recognized as the "Rookie of the Year" during his first year, and later served as the Chair of the Yellow Jacket Committee for the 2010-2011 season. In 2011, he was invited to the Fiesta Bowl Board of Directors. After serving this year as Chair-Elect, Mr. Leach will be Chair of the Fiesta Bowl Board of Directors for the 2017-2018 season.

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

## Chelsey Golightly Joins Fiesta Bowl Yellow Jacket Committee

Chelsey Golightly has joined the Fiesta Bowl Yellow Jacket Committee. The Fiesta Bowl Committee is made up of a team of community leaders, who work with sponsors, volunteers, staff, and the Board of Directors to support the Fiesta Bowl and other events. The Fiesta Bowl produces a variety of local events, including two elite bowl games every year – the Fiesta Bowl and the Cactus Bowl.

## Heather McKinney and Raquel Gomez Pass NALA Exam

Congratulations to Heather McKinney and Raquel Gomez for passing the NALA exam and becoming JSH's newest Certified Paralegals. This certification signifies that Heather and Raquel are capable of providing superior services to firms and corporations and brings our count to nine Certified Paralegals in the firm. This credential is recognized by the American Bar Association as a designation which marks a high level of professional achievement.

## Dave Cohen and Robin Burgess, R.N. are Contributing Authors to Scottsdale Wound Management Guide, 2nd Edition

Partner Dave Cohen and Legal Nurse Consultant Robin Burgess are contributing authors to the Scottsdale Wound Management Guide, 2nd Edition. With the assistance of Karen Lou Kennedy-Evans, RN, FNP, APRN-BC, a nationally recognized pressure ulcer expert, Dave and Robin composed Chapter 1, Wound Assessment: Documentation. This section identifies the problem and solution for nine possible issues of defuse claims of negligence with nursing home documentation. If you would like to purchase this book visit http://www.swmghandbook.com/

## Aisha Alcaraz Selected as Diversity Legal Writing Program Scholar

Aisha Alcaraz was this year's JSH Diversity Legal Writing Program Scholar. For an entire spring semester, Ms. Alcaraz attended weekly training sessions that were designed to enhance her writing skills, teach her about the firm environment, and discuss practical tips for the practice of law. Ms. Alcaraz clerked 12 hours each week, where she completed projects assigned by her mentor attorney, Ashley Villaverde Halvorson. Ms. Halvorson mentored Ms. Alcaraz by providing feedback regarding each of her projects in an effort to improve her legal writing skills.

The Diversity Legal Writing Program provides second-year law students at Arizona State University with practical clerking experience in private law firms within Maricopa County. In addition to gaining valuable clerking experience, the firm will also provide Ms. Alcaraz with a $5,000 scholarship.

## JSH Sponsors AADC Softball Tournament for Southwest Human Development

The Arizona Association of Defense Counsel (AADC) hosted its annual softball tournament to benefit Southwest Human Development. Southwest Human Development is a charitable organization that serves thousands of families in the valley by focusing on early childhood development and providing disability services. Over $10,000 was raised and our JSH team came in 2nd place.

# JSH Resource Alert!

## Reference Guide to AZ Law

Our JSH Reference Guide to Arizona Law is published as updates are needed and is distributed to clients via print and electronic media. JSH updates the Reference Guide to reflect recent changes in case law and statutes. It includes a detailed table of contents and case law, and covers most of the major issues that arise in personal injury cases, as well as a short explanation of Arizona law on each point. To receive a copy of current v22 JSH Reference Guide, please send an email to: marketing@jshfirm.com, and we will send a copy.

## USLAW Judicial Profiles

USLAW NETWORK released the 2015 edition of its State Judicial Profile by County Report. The 50-state comprehensive report offers a judicial profile of each county in the U.S. and identifies counties as Conservative, Moderate or Liberal. This level of jurisdictional awareness of the court and juries on a county-by-county basis assists attorneys and their clients in successfully operating legal challenges throughout the United States.

Jurisdictions can change. If businesses have legal matters in counties across a particular state and across the country, the 2015 USLAW State Judicial Profile by County Report is a must-have go-to resource.

**Check it out here: http://web.uslaw.org/wp-content/uploads/2015/07/2015_USLAW_JudicialProfiles.pdf**

## JSH Donates in Honor of Parkinson's Awareness Month

During the month of April JSH contributed to the Shake Rattle & Roll Motorcycle ride in honor of Parkinson's Awareness Month. The ride raised $31,000, which directly went to the Banner Neuro Wellness in Gilbert to help promote a higher quality of life for those individuals and their care partners dealing with Parkinson's Disease. Wellness in Gilbert helps promote a higher quality of life for those individuals and their care partners dealing with Parkinson's Disease.

## JSH Sponsors Native American Bar Association 9th Annual Golf Tournament

This year the Native American Bar Association of Arizona (NABA-AZ) paired up with the Federal Indian Bar Conference to design the Native American Bar Association - 9th Annual Golf Tournament. All funds went to scholarships for Native American law students. The annual golf tournament is one of two major funding sources for the organization, the other being the annual 7 Generations Dinner in September.

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Published 2016
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