



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**CASE SUMMARY**

**In the Matter of a Member of the State Bar of Arizona: Kenneth J. Peasley  
SB-03-0015-D**

**Parties and Counsel:**

*Respondent:* Kenneth J. Peasley, represented by James W. Stuehringer, WATERFALL, ECONOMIDIS, CALDWELL, HANSHAW & VILLAMANA, P.C.

*State Bar:* Karen Clark, Staff Bar Counsel

**Facts:**

Peasley was admitted to practice in Arizona in 1975. He has no prior disciplinary record. Peasley is the former chief criminal deputy of the Pima County Attorney's Office. The State Bar charged him with misconduct arising out of his handling of the triple murder cases known as the El Grande homicides which occurred in June of 1992 in Tucson. Peasley is accused of intentionally eliciting false testimony from a police detective, Joseph Godoy, and knowingly making false statements in two of the El Grande capital murder trials, one in 1993, and a retrial in 1997. Detective Godoy later admitted that he lied under oath but claimed to have done so to avoid a mistrial in the cases. Based on Peasley's extreme misconduct in the first two trials, this Court found that double jeopardy barred a second retrial and the murder charges were dismissed with prejudice. See ***State v. Minnitt***, 203 Ariz. 431, 55 P.3d 774 (2002).

After a lengthy disciplinary hearing, the hearing officer found that Peasley had knowingly presented false testimony in the 1993 and 1997 capital murder trials and then argued that testimony to a jury. The presumptive sanction for this misconduct is disbarment. Considering the facts of the case, including the aggravating and mitigating circumstances, and a proportionality analysis of other cases involving false testimony/evidence, the hearing officer recommended that Peasley be suspended for 60 days. He found that the factors in mitigation, specifically Peasley's 25 years of service to Pima County and the State, were sufficiently compelling to call for a suspension rather than disbarment. He also recommended a probationary term of one year with the Law Office Management Assistance Program and payment of costs.

The Commission agreed with the hearing officer that the presumptive sanction for these violations was disbarment. The Commission examined the aggravating and mitigating factors in this case and determined that there was not sufficient mitigation to justify a lesser sanction. In this case, Peasley engaged in misconduct in a case where he was seeking the death penalty. In a criminal justice system where the prosecutor is allowed to seek the ultimate sanction, the integrity of the system and those who participate in it must be beyond reproach. Disbarment is the only appropriate sanction.

**Issues:**

1. Whether the commission's finding that Respondent failed to demonstrate a recurrence was unlikely and its reliance on this claimed failure as a *de facto* aggravating factor was contrary to law and prejudicial to Respondent especially where no evidence supports such a finding.
2. Whether misconduct regarding a lawyer's obligation to be truthful is neither more nor less likely to occur the more experienced a lawyer becomes thereby negating the commission's finding that Respondent's substantial experience in the practice of law was particularly aggravating.
3. Whether the commission abdicated its duty to consider mitigating factors when it refused to attach any weight to Respondent's unblemished disciplinary record over 25 years and substantial evidence of his good character as a lawyer.
4. Whether the commission's rejection of delay in the disciplinary proceedings as a mitigating factor was contrary to law and prejudicial to Respondent where the delay between the informal charge and the formal complaint was 32 months.
5. Whether the commission's decision to not adopt the hearing officer's finding in mitigation regarding

Respondent's ill health and medical disability was contrary to law and prejudicial to Respondent where the commission incorrectly relied on Standard 9.32(i).

6. Whether the commission's findings regarding aggravating factors of dishonest motive and multiple offenses were contrary to law and prejudicial to Respondent.

7. Whether the commission's failure to consider as mitigating factors steps taken by Respondent to correct his mistakes and the public and personal humiliation he suffered was contrary to law and prejudicial to Respondent.

### **Issues raised in Peasley's Supplemental Brief**

The hearing officer's adoption of findings made by Judge Nichols and his selective reliance on only portions of the judge's partial deposition violated due process and requires a new hearing where:

(a) We now know that Judge Nichols' findings of misconduct were tainted by the *ex parte* influence of his meeting with the FBI;

(b) The hearing officer denied Respondent's request to complete Judge Nichols' deposition and to call him as a witness at the hearing; and

(c) The hearing officer stated at the conclusion of the hearing that he would not consider and rely on findings made by Judge Nichols and then later made the judge's findings and testimony the linchpin of his decision.

***This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.***



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**CASE SUMMARY**

**Parking Concept, Inc., et al. v. Gary Tenney, et al.,  
CV-02-0439-PR**

**Parties and Counsel:**

*Petitioner :* Parking Concepts, Inc., is represented by Joseph C. Kreamer and Stephen M. Hopkins of Hopkins & Kreamer.

*Respondent:* Gulf Underwriters Insurance Company is represented by Gerald T. Hickman of Jardine, Baker, Hickman & Houston.

**Facts:**

In 1993, Gary Tenney brokered a real estate transaction for Parking Concepts (PCI). PCI later asserted that Tenney had misrepresented the tax liability for the property, and sued him and his employer, Scott Jackson Brokerage (SJB), for fraud, negligent misrepresentation, and breach of lease.

SJB was insured by Gulf Underwriters under a claims made specialty errors and omissions liability policy in the amount of \$1 million dollars. The policy contained a clause excluding coverage for any claims for or arising out of "any dishonest, fraudulent, criminal or malicious act or omission of the INSURED or of any person for whose acts or omissions the INSURED is legally liable. . . ."

Gulf agreed to defend SJB and Tenney, but reserved the right to argue later that there was no coverage due to the fraudulent acts exclusion. After two years of pretrial litigation, Tenney and SJB demanded that Gulf settle the case or defend unconditionally. When Gulf failed to do either, PCI, Tenney, and SJB entered into an agreement authorized by *USAA v. Morris*, 154 Ariz.

113, 121 (1987), whereby Tenney and SJB stipulated to a \$465,000 judgment in favor of PCI for negligent misrepresentation. Tenney and SJB personally agreed to pay PCI \$35,000 in partial satisfaction of the judgment, and to assign their rights against Gulf to PCI. In exchange, PCI agreed not to execute the judgment except as against applicable insurance coverage.

PCI then sought to garnish the Gulf policy. Gulf objected on the grounds that (1) it was not liable under the policy, and (2) the *Morris* agreement was invalid because the stipulated judgment was unreasonable. The trial judge granted partial summary judgment to PCI, finding that the policy covered Tenney and SJB. The court also found that the *Morris* agreement was neither fraudulent nor collusive, that the stipulated damages were reasonable, and that the policy exclusions did not apply. Final judgment was entered in favor of PCI.

Gulf appealed, raising numerous issues. The appeals court issued both an opinion and a memo decision, affirming in part, reversing in part, and remanding. This court granted review on one issue.

**Issue:**

Whether the trial judge, in deciding the reasonableness of the *Morris* settlement, erred in considering the risk that Tenney might lose his real estate license if the case went to trial and judgment were entered against him.

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**CASE SUMMARY**

**MADLINE SHOTWELL v. THE HONORABLE GARY DONAHOE and Real  
Parties in Interest SMITH PAINTING, INC.; MICHAEL SMITH and LINDA SMITH ,  
CV-03-0122-PR**

**Parties and Counsel:**

*Petitioner :* Smith Painting, represented by Richard A. Steiner and Norris C. Livoni, Steiner & Steiner, P.C.

*Respondent:* Madeline Shotwell, represented by Bobbie J. Rasmusson and Michael R. Pruitt, Jackson White.

**Facts:**

In September 1996, Smith Painting hired Shotwell as a painting foreman. She claims her supervisors did not provide the equipment she needed, and made remarks such as “you are just a woman” and “you have big tits.” Her appeal to Smith for assistance resulted in a transfer. One supervisor allegedly told her not to check the men’s work because “they will not take orders from a bitch.” She was demoted to painter after complaining to Smith about one of the supervisors. Smith allegedly stated that he did not discriminate against “Blacks, Mexicans or big boobs.”

Shotwell resigned in October 1997. She filed a charge of discrimination with the Arizona Attorney General’s Civil Rights Division, based on sexual harassment by coworkers and supervisors at Smith Painting. The Equal Employment Opportunity Commission (EEOC) investigated. It issued a determination, finding “reasonable cause to believe” Smith discriminated against Shotwell.

Shotwell timely filed a complaint in superior court alleging sexual harassment in violation of Title VII. Smith filed a motion in limine to exclude “any letter of violation, or decision and order of the EEOC.” The trial court granted the motion, finding the EEOC determination should be excluded; its probative value was outweighed by prejudice because it essentially told the jury how to decide liability issues. The trial awaits resolution of this petition for review.

**Issues:**

“A. Can an Arizona trial court in a Title VII action apply state rules of evidence to exclude a probable cause determination made by the Equal Opportunity Employment Commission?

“B. Was the ‘Determination’ letter properly excluded from evidence in a jury trial by the trial court?”

**Definitions:**

*EEOC* Federal agency responsible to investigate charges of workplace discrimination based on, for example, race, sex, or disability. It works cooperatively with the state Attorney General’s Office Civil Rights Division (also known as ACRD).

*determination* investigative finding of probable cause to believe discrimination occurred. It is not the same as a judgment following trial, in which only a finder of fact such as a jury or trial judge may find that discrimination in fact occurred.

*exclusion* a trial court decision that particular evidence will not be presented at trial or considered in deciding a case

*motion in limine* Request that a trial court issue an order that some evidence or testimony be excluded because of a specific claimed problem with it

*prejudice* The bad light that information or evidence would unfairly cast on the party or witness. Under the Arizona Rules of Evidence, only *unfair* prejudice is grounds to exclude evidence.

*probative value* The quality of evidence that tends to show that something is or is not true. For example, testimony that shows a person was born fifteen years ago has probative value to establish that the person is a minor. Without it being admitted into evidence, minority might not be proven.

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