

appellate highlights

by Donn Kessler and Patrick C. Coppen

SUPREME COURT CIVIL MATTERS

A party who takes a deposition of her own expert witness for use in lieu of live testimony at trial cannot recover expert witness fees as taxable costs under A.R.S. § 12-332. *Schritter v. State Farm Mutual Automobile Ins. Co.*, CV-00-0226-PR, 12/13/01.

COURT OF APPEALS CIVIL MATTERS

Applying RESTATEMENT (SECOND) OF TORTS §51 and *Paradigm Ins. Co. v. Langerman Law Offices*, 200 Ariz. 146 (2001), lenders may sue lawyers representing the borrowers for malpractice for failing to perfect security interests given to the lenders where the contract documents provide the borrowers agreed to promptly execute and deliver all documents and take further actions requested by the lenders to perfect assignments and security interests. The court held the lenders' and borrowers' interests were not in conflict. The court rejected the lawyers' request to draw a bright-line test rejecting potential liability to non-clients where the nonclients are sophisticated clients represented by their own attorneys. *Kremser v. Quarles & Brady, LLP*, 1 CA-CV 00-0535, 12/20/01 ... Under both the exhaustion of remedies and primary jurisdiction doctrines, a trial court does not abuse its discretion in denying special action jurisdiction where a plaintiff business fails to follow proper administrative review procedures or exhaust available administrative remedies established by A.R.S. § 9-462.06 before appealing applicable zoning issues to the superior court. The statute establishes appropriate administrative review and determines when judicial review is available, whereas the primary jurisdiction doctrine requires in cases raising issues of fact outside of conventional experience of judges that agencies created by the legislature for regulating that subject matter should not be passed over if they have expertise in a specialized area. The court also held a trial court that had decided a partial summary judgment issue did not have continuing jurisdiction to consider subsequent controversy where no stipulation thereto was supported by the record and the supplemental pleading filed raised new issues. *Southwest Soil Remediation Inc. v. City of Tucson et al.*, 2

CA-CV 00-0219, 12/20/01 ... An insurance company is not liable for interference with prospective business advantage when, after initially defending the insured under a reservation of right and being informed of the insured's intent to enter into a *Morris* agreement with the party suing it, the insurer agrees to conditions for representation and indemnity of the insured in return for the insured's not entering into the *Morris* agreement. The court held that while the insurer's interests were not legally protected within the meaning of RESTATEMENT (SECOND) OF TORTS §773, the insurer's conduct was not improper under RESTATEMENT (SECOND) OF TORTS §767, at least where the agreement between the insured and the insurer did not impair the right of the plaintiffs to collect against the policy. *Strojnik v. General Ins. Co. of America*, 1 CA-CV 00-0209, 12/18/01 ... A trial court's order finding the parties were bound by a Colorado court's original dissolution decree and post-decree clarification entitling a former spouse to award of set percentage of combined retirement benefits regardless of subsequent unilateral disability diminution of retirement pay did not violate 10 U.S.C. §1408 (barring former non-military spouse from acquiring property interest in disability benefits paid to veteran) or preclude ordering make-up payments from non-disability sources. The court also held there is no violation of federal law when a trial court orders husband to pay "actual value" of retirement benefits previously ordered where retirement benefits are later unilaterally waived to obtain veterans disability benefits based upon previously unforeseen future disability ratings and corresponding waivers of retirement benefits. Neither the occurrence of post-dissolution contingencies nor possible ramifications of speculative future events on a prior division of property justify disturbing previously determined property allocations in a final divorce or override the policy concerns favoring finality of decrees and property settlements. Finally, the court held that while failure to comply with an order to pay child support, spousal maintenance or attorney's fees in a post-dissolution matter may support contempt proceedings, the lower court

lacked jurisdiction to find the party in contempt for failure to make property settlement payments pursuant to Art. II, Sec. 18 of Arizona Constitution. *Danielson (fka Evans) v. Evans*, 2 CA-CV 00-0184, 12/15/01 ... The Arizona State Board of Dental Examiners may hold a summary hearing without giving the dentist an opportunity to speak to suspend the dentist's license in cases involving the public health, safety or welfare. However, the Board may not refuse to provide the dentist with: (1) the name of the complainant or allow the dentist an opportunity to address the board where the board invited the doctor to appear; and (2) an immediate post-suspension hearing with a prompt decision after that hearing. *Dahnad v. Superior Court*, 1 CA-SA 01-0262, 12/11/01 ... A Coconino County ordinance prohibiting the enlargement or extension of a nonconforming use precluded moving a structure from the place the structure occupied when it became a nonconforming use to another location on the same property. *Jones v. County of Coconino*, 1 CA-CV 01-0148, 12/6/01 ... In affirming the dismissal of a complaint based on a contractual forum selection clause, Division One held *inter alia*: (1) the forum selection clause was not a contract of adhesion because it was approved by and could be changed by club membership and was not the result of uneven bargaining power and applied automatically to all club members; and (2) the clause was not the result of unfair bargaining and did not deprive the plaintiff of his or her day in court simply by requiring suits to be filed in Idaho and because some witnesses and the horse were located in Arizona. *Bennett v. Appaloosa Horse Club*, 1 CA-CV 01-0027, 12/6/01.

COURT OF APPEALS CRIMINAL MATTERS

Accepting special action jurisdiction from an order vacating an earlier order terminating the defendant's sex offender registration as part of a guilty plea, Division One denied relief, holding that sex offender registration under A.R.S. § 13-1821(A) lasts for the life of the registrant. *Fisher v. Superior Court*, 1 CA-SA 01-0245, 12/31/01 ... While Arizona's definition of *premedita-*

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tion is unconstitutionally vague under *State v. Thompson*, 34 P.3d 382 (Ct. App. 2001), the jury instruction used was constitutional because it did not include a reference that premeditation could be as instantaneous as successive thoughts of the mind. *State v. Cecil*, 1 CA-CR 01-0504, 12/24/01 (Judge Weisberg concurring in the result) ... A trial court did not abuse its discretion in denying Spanish-speaking defendant-requested translations of State's disclosure because he failed to show the translation *was reasonably necessary*. In determining whether a particular defendant's request constitutes "raw material" integral to building an effective defense, the trial court must consider on a case-by-case basis what is reasonably necessary for preparation of an effective defense. The court also held the defendant's equal protection rights were not violated because "language" is not a proper basis to establish "national origin" suspect classification for applying strict scrutiny and the trial court's decision not to require translation of all disclosure and court documents was rationally related to legitimate government interests. *Calderon-Palomino v. Nichols*, 2 CA-SA 01-0107, 12/20/01 ...A.R.S. § 22-424 does not violate a defendant's due process rights to obtain exculpatory evidence (an independent blood test) by omitting felony DUI from the list ofailable offenses. The defendant was given the right to obtain the test while incarcerated. *Van Herreweghe v. Superior Court*, 1 CA-SA 01-0251, 12/11/01.

COURT OF APPEALS JUVENILE MATTERS

For purposes of determining delinquency by disturbing the peace: (1) the throwing of a soda can is a "gesture" under A.R.S. § 13-2904(A)(3); and (2) the yelling of racial slurs at an African American were fighting words and not constitutionally protected. *In re John M.*, 1 CA-JV 01-0091, 12/24/01.

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* indicates a dissent