APPELLATE HIGHLIGHTS

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The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continually. Readers may visit the sites for the Supreme Court (www.supreme.state.az.us/opin), the Court of Appeals, Div. 1 (www.cofad1.state.az.us) and Div. 2 (www.apltwo.ct.state.az.us).

Detailed summaries of selected cases and other court news may be found at **www.azapp.com**

SUPREME COURT CIVIL MATTERS

Relation Back Doctrine Does Not Apply Where Plaintiff Does Not Show Mistake. Adding new parties to an action pursuant to an amendment of a pleading under ARIZ.R.CIV.P. 15(c) relates back to the date of the original complaint for statute of limitation purposes if the defendants "knew or should have known that, but for a mistake concerning the identity of the proper party, they would have been named in the original action." Rule 15(c)(2) provides for relation back when defendants knew or should have known of a mistake within the limitations period plus the period provided by ARIZ.R.CIV.P. 4(i) for service of the summons and complaint. For purposes of determining "mistake," the proper inquiry is "whether, in a counter-factual, error-free world, the action would have been brought against the proper party." The critical information is what the plaintiff knew or thought he knew at the time of the original pleading. *Tyman v. Hintz Concrete, Inc.*, CV 06-0008-PR, 12/15/06.

SUPREME COURT CRIMINAL MATTERS

A criminal defendant does not waive his double jeopardy claim by failing to seek special action review following a trial court's rejection of his already accepted guilty plea, and may raise the issue in such a case on direct appeal following trial and conviction. This procedural requirement would provide a less robust guarantee that such double jeopardy claims would be considered on their merits as special action review is discretionary. Moreover, it makes little sense to impose such a procedural limitation on those seeking to assert their fundamental constitutional protection against double jeopardy when the law imposes no similar limitation on appellate review of most other claims of pretrial error. *State v. Felix*, 2 CA-CR 05-0131, 12/26/06.

In a misdemeanor DUI prosecution under A.R.S. § 28-1381 the existence of a prior DUI conviction is not an element of the crime itself, yet was meant by the Arizona legislature as a sentence enhancer such that Rule 19.1(b), ARIZ.R.CRIM.P., bars any mention of the prior conviction at trial except as permitted by the rules of evidence. The language of A.R.S. § 28-1381 is clear whereby the actual elements of the offense are expressed in subsection A, while subsection E specifically states that all prior convictions for violating A.R.S. §§ 28-1381 thru 1383 are "for the purpose of classification and sentencing." Had the legislature meant to make DUI priors in prosecutions under Sec. 28-1381 an element of the crime it would have changed the operative language in the new statute (formerly A.R.S. §§ 28-692, 692.01 & 28-2882), which became effective in 1997 and was later amended in 1998. *Robbins v. Darrow/State*, 1 CA-SA 06-0195, 12/19/06.

A criminal defendant may use the procedures available under Rule 10.2, ARIZ.R.CRIM.P., to disqualify a judge to whom a single issue in a case is assigned, yet who is not the judge assigned the overall responsibility for the case itself. The language of Rule 10.2 does not specify whether its application is limited to a judge to whom the entire case is assigned, or to a judge to whom a discrete part of the case is assigned. Although "any provision relating to disqualification of judges must be given strict construction to safeguard the judiciary from frivolous attacks upon its dignity and integrity and to ensure the orderly function of the judicial system," Rule 10.2 entitles a party to a peremptory change of judge as a matter of right, and interpreting the rule as applying only to a judge to whom an entire case is assigned would unnecessarily abrogate an important right. Because a preliminary proceeding in a criminal case may be dispositive of an entire case, there is no reason to limit Rule 10.2's application to trials when other proceedings may be equally important. *Bolding v. State*, 2 CA-SA 06-0085, 12/19/06.

A trial court errs in a DUI-related prosecution by precluding a State's witness from using certain words and terms to describe a defendant's performance on field sobriety tests (FSTs). The results of FSTs are admissible as relevant evidence of a defendant's impairment, and police officers who administered such tests to a given defendant may not only testify about a defendant's performance on such tests, yet that the FSTs were administered "in an attempt to determine whether [a defendant] was intoxicated" or impaired while driving their vehicle or in actual physical control thereof. Words generally associated with the administration of FSTs and related testimony do not, in themselves, suggest a scientific basis for such tests or lend to such tests unwarranted scientific credibility. Rather than preclusion of such testimony, FST-related testimony is more efficiently and fairly monitored within the context of its actual presentation at trial by defense objections and cross-examination. However, trial courts should not be deterred by this decision from placing appropriate boundaries on FST-related testimony at trial. *State v. Cordova*, 2 CA-SA 06-0083, 12/27/06.

In a case in which criminal charges are pending against an individual imprisoned in another jurisdiction, a prisoner may demand transfer to Arizona under the Interstate Agreement on Detainers Act (IAD) such that compliance triggers certain time limits related to transfer of the prisoner and their ultimate prosecution for such charges. However, **a trial court commits reversible error when it improperly concludes that a prisoner has substantially complied with the IAD Act and dismisses the State's indictment for failing to timely try a defendant.** In an IAD-related action, codified in Arizona under A.R.S. § 31-481, there are three interested parties: the prisoner, the sending state and receiving state. Though the purpose of the IAD is "to encourage the expeditious and orderly" transfer of the prisoner and resolution of pending charges through the adoption of uniform cooperative procedures, the IAD is not one-sided and imposes requirements upon both the government and a prisoner. Rule 8.3, ARIZ.R.CRIM.P., establishes speedy trial time limits for any person incarcerated outside Arizona and provides in relevant part that Arizona officials shall take action "as required by law" to obtain custody of the out of state prisoner within 90 days of receipt of a written request, and that within 90 days after taking custody of the prisoner, the prisoner be brought to trial. However, to substantially comply with the statute a request must be more than a mere correspondence from the prisoner to the assigned judge and include the following information and/or requirements: (1) a written request for final disposition of pending charges which includes the place of their current

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imprisonment; (2) a copy of the request must be sent to the warden having custody of the prisoner; (3) the prisoner must cause the request to be delivered to the prosecutor and appropriate court of the receiving state by registered or certified mail, return receipt requested; and (4) the prisoner's request must be accompanied by a certificate of the out-of–state official having custody of the prisoner and must include certain specific information including their term of imprisonment, time served and time remaining to be served, good time credit earned and date of parole eligibility with any parole agency decisions regarding the prisoner. Although strict compliance with AID is not required, substantial compliance is still necessary, with the burden of showing substantial compliance on the prisoner. Substantial compliance with the AID mandates that the information provided by the prisoner satisfy the purpose of the statute and its requirements. The required information need not be in any particular form, yet the required information must have been provided in some form to merit dismissal in a particular case for failure to comply with the Act. *State v. Galvez*, 1-CA-CR 05-1229, 12/19/06.

COURT OF APPEALS CIVIL MATTERS

A Nonprofit Organization May Lease Its Property to Another Nonprofit Organization Without Forfeiting Its Tax Exempt Status on the Property. Pursuant to A.R.S. §§ 42-11107 and 42-11121, a nonprofit corporation exempt from federal income tax under 26 U.S.C. § 501(c)(3) is entitled to a tax exemption for property "not used or held for profit." One § 501(c)(3) organization may lease property to another § 501(c)(3) organization and qualify for the tax exemption where the charitable organization leasing the property puts it to charitable use. *Volunteer Center of Southern Arizona v. Staples*, 2 CA-CV 06-0084, 11/29/06.

Liability Under the Adult Protective Services Act Does Not Require a Direct Caregiver-Patient Relationship. The Adult Protective Services Act, A.R.S. § 46-451 et seq., does not require a direct caregiver-patient relationship for a duty to arise under the statute. Serving a company with a complaint does not count as service with respect to an individual who is not employed by the company at the time of service and who has not authorized the company to accept service. Summary judgment in favor of a parent does not constitute *res judicata* with respect to subsidiaries (not in privity with the parent) that were dismissed from the action without prejudice before summary judgment was entered. Where a party does not have a full and fair opportunity to litigate an issue, including due to procedural irregularities, or where controlling facts or legal principles have changed significantly since the prior judgment, collateral estoppel does not apply. *Corbett v. Manorcare of America, Inc.*, 2 CA-CV 05-0160, 11/29/06.

Statute of Frauds Does Not Apply to Partnership Agreements Calling for the Transfer of Land. The Statute of Frauds does not preclude a claim for constructive trust resulting from the breach of a fiduciary duty under a partnership agreement. Depending on the circumstances (and in accordance with the approach adopted by Corbin), the statute of frauds may not apply to contracts for the conveyance of real property between and among partners and partnerships. To the extent this holding conflicts with *Johnson v. Gilbert*, 127 Ariz. 410, 621 P.2d 916 (App. 1980), it is overruled. *Turley v. Ethington*, 2 CA-CV 06-0070, 11/29/06.

Judicial Proceeding Defamation Privilege Does Not Apply to Publication of a Web site "News Advisory" That Included Material Previously Provided to Administrative Agency in Connection With Appeal. The common law privilege applicable to judicial proceedings did not protect republication of a "news advisory" on a website, which included material that had been previously provided to the United States Forest Service in connection with an administrative appeal. Failure to raise a defense based on a constitutional privilege constituted waiver where it was first raised in a post-verdict motion. *Chilton v. Center for Biological Diversity, Inc.*, 2 CA-CV 05-0115, 12/06/06.

Under *Logerquist*, a Biomechanics Expert May Testify Concerning the Likelihood That Physical Injury Could Result From a Collision, Without the Scientific Basis of His Opinion First Being Subjected to a *Frye* Hearing. Under *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000), a *Frye* examination is required when an expert witness reaches a conclusion by deduction from the application of novel scientific principles, formulae, or procedures developed by others. It is inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research. Accordingly, where a biomechanical expert provided opinions based on a "combination" of deductive reasoning based on accepted physics principles and inductive reasoning from his own personal research and calculation, a *Frye* hearing was not necessary. Troubled that no *Frye* hearing was required in this case, the Court of Appeals noted that "the time may have come for the Arizona Supreme Court to reconsider *Logerquist*." *Lohmeier v. Hammer*, 1 CA-CV 05-0764, 12/12/06.

SUPREME COURT PETITIONS

compiled by Barbara McCoy Burke
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The Arizona Supreme Court accepted review or jurisdiction of the following issues on Jan. 10, 2007*:

State of Arizona ex rel. Andrew P. Thomas v. Hon. Douglas L. Rayes/Maricopa County Superior Court, Respondent; and Anthony James Reynaga, Real Party in Interest, 1 CA-SA 06-0006; CV 06-0303 (Opinion)
Issue Presented
"When it is undisputed that a criminal defendant's Sixth Amendment right to effective assistance of counsel was violated because his appointed counsel never informed him of the existence of a plea agreement before it expired, can the trial court remedy the obvious prejudice by ordering reinstatement of the plea agreement so the defendant can have an opportunity to decide whether to accept the plea, or is that remedy beyond the court's remedial powers under separation of powers principles?"

Stanley Griffis v. Pinal County and Phoenix Newspapers, Inc., 2 CA-CV 06-0052; CV 06-0312-PR (Opinion)
Issue Presented
"Can a former Pinal County Manager unilaterally declare 90 County-owned email records that he created and received on County computers, while he was under investigation for alleged abuse of office, "personal" and thereby wholly avoid disclosure or *in camera* review under the Public Records law?"

**Unless otherwise noted, the issues are taken verbatim from either the petition for review or the certified question.*

The Doctrine of Primary Jurisdiction Does Not Preclude a County From Pursuing Alleged Environmental Violations After the Appropriate Administrative Agency Has Had an Opportunity to Determine the Matter. Neither exhaustion of remedies principles nor the doctrine of primary jurisdiction barred an enforcement action initiated by a county for alleged violations of environmental regulations after the Arizona Department of Environmental Quality had conducted inspections but found no violations. Preemption principles may, however, have precluded the County from acting depending upon the scope of its power to act left intact by the State. *Coconino County v. Antco*, 1 CA-CV 05-0674, 12/19/06.

COURT OF APPEALS JUVENILE MATTERS

Mother's Affidavit Sufficient to Defeat Summary Judgment in Proceeding to Terminate Parental Rights. In context of a proceeding to terminate the parental rights of the mother on the basis of the mother's history of substance abuse and her child's nine-month out-of-home placement, statements from mother's affidavit regarding actions by both ADES and mother raised disputes of material fact. Judge Espinosa, in dissent, found the case to be a "close" one, but concluded that the "merely conclusory and self-serving" assertions by the mother's affidavit were insufficient to defeat the motion for summary judgment in view of the sufficient, unrefuted evidence that justified the ruling of the juvenile court. *Margaret H. v. Arizona Dep't of Econ. Sec.*, 2 CA-JV 05-0087, 12/21/06.

COURT OF APPEALS SPECIAL ACTION MATTERS

A Remand for Redetermination of Ownership Interests in Property in a Divorce Proceeding Revives a Litigant's Right to Notice a Peremptory Change of Judge. Pursuant to ARIZ.R.CIV.P. 42(f)(1)(E), a party's right to a peremptory change of judge revives upon a remand to the trial court for "a new trial on one or more issues" (if it has not already been used). A remand for a redetermination constituted a "new trial" on one or more issues where on remand a commissioner would be required to apply the proper legal presumption and to provide the respondent with an opportunity to present evidence rebutting that presumption. This contrasts with a remand for "further proceedings" that do not require any "de novo redetermination." *Smith v. Smith*, 2 CA-SA 06-0075, 12/7/06.

* indicates a dissent