appellate highlights

by Hon. Donn Kessler, Arizona Court of Appeals, Div. One, and Patrick C. Coppen, Esq., Tucson

SUPREME COURT CIVIL MATTERS

Under the Fourth Amendment, a city may not constitutionally require its firefighters to undergo random, suspicionless drug testing. The city's special needs did not justify the firefighters' legitimate expectations of privacy where there was no evidence of any problem of drug use by its firefighters. *Peterson v. City of Mesa*, CV-03-0100, 1/27/04 … A cause of action for legal malpractice that occurred in the course of criminal litigation accrues only when the criminal matter has been completely terminated, including direct appeals, any proceedings involving Rule 32 petitions and any retrials or post-conviction proceedings following retrials. *Glaze v. Larsen*, CV-02-0375-PR, 1/14/04 … A trial court should determine the reasonableness of a stipulated judgment entered into under a *Morris* agreement without considering the effect that the underlying litigation might have had on the real estate brokers' licenses. *Parking Concepts v. Tenney*, CV-02-0439-PR, 12/14/04.

COURT OF APPEALS CIVIL MATTERS

A release and covenant not to sue signed by a race car driver who was later injured in a car crash at a raceway were express contractual assumptions of risk and did not come within the purview of Arizona Constitution, art. 18 § 5, requiring that the defense of assumption of the risk was a question of fact for a jury. *Phelps v. Firebird Raceway, Inc.*, 1 CA-CV 03-04040, 1/29/04 … A layman who files what may be an invalid deed of trust on a debtor's residence because the deed of trust was not signed by the debtor's spouse who jointly owned the residence cannot be liable for filing an invalid lien under A.R.S. § 33-420(A) unless the layman knows or has reason to know the deed is invalid. Such knowledge cannot be presumed on the theory that every person is presumed to know the law. *Pence v. Glacy*, 1 CA-CV 02-0520, 1/29/04 … The Maricopa County Board of Supervisors can establish procedures to exempt property from the application of county ordinances and to determine the applicability of state statutes prohibiting county regulation of land used for general agricultural purposes. The parking of non-accessory vehicles on land most of which was used for agricultural purposes was not entitled to exemption under A.R.S. § 11-830 prohibiting counties from regulating the use or occupation of land in excess of five contiguous commercial acres used for agricultural or certain other purposes. *Raven Rock Constr. LLC v. Board of Supervisors*, 1 CA-CV 03-0270, 1/29/04 … A county does not have statutory authority under A.R.S. § 12-1113 to condemn a mere leasehold interest in a building where the condemnor is not also seeking to acquire or has not acquired the underlying fee simple interest in the property. *Orsett/Columbia Limited Partnership v. Superior Court*, 1 CA-SA 03-0171, 1/29/04 … The court of appeals has jurisdiction to decide whether a trial court erroneously granted summary judgment where the notice of appeal was only from an order denying Rule 60(c) relief from the minute entry granting summary judgment and the opening brief argued that the granting of summary judgment, not the denial of Rule 60 relief, was improper. The trial court erred in granting summary judgment solely because the plaintiff did not timely respond to the summary judgment motions where a review of the motions show that the movants were not entitled to judgment as a matter of law. Moreover, where the plaintiff had actively litigated the case prior to the withdrawal of his counsel, he cannot be deemed to have abandoned the case by failing to respond to the summary judgment motions. *Schwab v. Ames Constr.*, 1 CA-CV 03-0123, 1/27/04 … A lawyer is not immune as a matter of law from a claim for intentional interference with contractual relations if the lawyer, representing a third party, enters into a *Damron/Morris* agreement on a manufactured claim of bad faith. *Safeway Ins. Co. v. Guerrero*, 1 CA-CV 02-0661, 1/27/04 … Even in a competitive marketplace, Article 15, § 14 of the Arizona Constitution requires the Arizona Corporation Commission to determine fair value of Arizona property owned by public service corporations and to consider such value in establishing just and reasonable rates. Moreover, the Commission may not allow competitive market forces to set those rates. The introduction of competition in the electric distribution market does not violate property rights of public service corporations under Article 15, § 7 of the Arizona Constitution. *Phelps Dodge Corp. v. Arizona Elec. Power Coop. Inc.*, 1 CA-C 01-0068, 1/27/04 … A Medicaid applicant was not entitled to have possible liability insurance proceeds be considered as resources as of the date of the accident in order to obtain Medicaid (Arizona Long Term Care System) benefits because the applicant did not have a right to liquidate or control the proceeds at the time of the accident. In reviewing an administrative decision, the trial court applied the correct standard of review by determining whether the agency director's decision, not the administrative law judge's decision, was supported by substantial evidence. *Smith v. Arizona Long Term Care Sys.*, 1 CA-CV 03-0262, 1/22/04 … To qualify for an award of attorney's fees in a marital dissolution proceeding under A.R.S. § 25-324, a litigant need not show that he or she is unable to pay the litigant's attorney's fees. Rather, the party need only show that there is a relative financial disparity of income and/or assets between the parties. Upon such a showing, the party with less assets is eligible for consideration for an award of such fees. *Magee v. Magee*, 1 CA-CV 03-0199, 1/8/04 … A defendant's community supervision period on an earlier conviction cannot continue to be served while the defendant is incarcerated for a later conviction. *State v. Cowles*, 1 CA-HC 02-0013, 1/08/04 … Although under A.R.S. § 38-532, a non-classified employee need not exhaust his or her administrative remedies, a discharged *classified* county employee must exhaust the county's merit system administrative procedures provided by A.R.S. §§ 11-351 through 11-356 before filing a civil action against the county for wrongful discharge or breach of contract. Though the statute creates a cause of action against an employer for whistleblower retaliation, and the failure to make reference to a statutory basis for a cause of action is not fatal to a claim, a classified public employee who has a claim that is subject to a merit system administrative procedure must pursue the claim through that procedure. However, an employee may still file a cause of action in superior court asserting retaliation claims under A.R.S. § 38-532 or for wrongful discharge or breach of contract under the Arizona Employment Act that were neither completely resolved nor precluded by the administrative process. In a defamation case involving newspaper publication of information, consent to the release of the information through publication is a complete defense. *Millenaux v. Graham County*, 2 CA-CV 03-

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).

SUPREME COURT PETITIONS FOR REVIEW ARE ON PAGE 59.

0130, 1/06/04 … Failure of persons to appeal a Registrar of Contractors' order requiring a contractor to correct work does not bar the persons from suing the contractor for damages under the exhaustion of administrative remedies doctrine. However, A.R.S. § 32-1153, prohibiting an unlicensed contractor from suing to collect compensation for work, does not authorize the persons suing the contractor to seek restitution. *Bentivenga v. Powers Steel and Wire Prods.*, 1 CA-CV 03-0226, 12/31/03 … Pursuant to A.R.S. § 11-861(A), a county has the authority to adopt via county ordinance wheelchair access requirements for single-family home builders promulgated by a national organization or association and conducted for the purpose of developing appropriate building codes even though the organization did not title the requirements as a "building code" and such requirements had not been adopted by the largest city in the county. Such an ordinance does not violate the Privacy Clause, article II Sec. 8 of the Arizona Constitution, because homeowners do not have the "right to be completely free from governmental regulation of the use and occupancy of their real property," and such building codes affecting the exercise of a homeowner's personal, private and aesthetic choices are a proper exercise of police power. Nor is equal protection implicated because the building code ordinance serves a legitimate state interest. *Washburn v. Pima County*, 2 CA-CV 03-0107, 12/19/03 … Notwithstanding the abolition of joint and several liability, when the alleged fault of multiple tortfeasors causes a single accident and the same injuries, and plaintiffs have already recovered and received their full compensatory damages in a prior action against one named tortfeasor, a subsequent suit against remaining tortfeasors is barred by the principles of satisfaction of judgment, collateral estoppel and public policy. Any further recovery from previously nonjoined tortfeasors would result in an impermissible double recovery or unjust enrichment because the original tortfeasor has fully satisfied the judgment, as long as the judgment in the first action encompasses an award for all injuries sustained by the plaintiff. *Bridgestone/Firestone v. Naranjo*, 2 CA-CV 03-0009, 12/10/03 … The Federal Fair Housing Amendment Act (FHAA) does not prevent a homeowner's association from enforcing against a residential group home for the elderly a restrictive covenant requiring that a residential vehicle be kept in a garage or other enclosure, unless a reasonable and necessary accommodation is required under the circumstances precluding enforcement. Under 42 U.S.C. § 3604, it is unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap" of that person, or of a person residing in or intending to reside in the subject dwelling or associated thereto. Discrimination under the FHAA includes a refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford handicapped persons an equal opportunity to use and enjoy housing. Under the FHAA the initial burden of showing a necessity for an accommodation is on its proponent. The burden then shifts to the person committing the alleged discrimination. *Cimarron Foothills Community Ass'n v. Kippe*, 2 CA-CV 03-0048, 12/10/03.

COURT OF APPEALS CRIMINAL MATTERS

Due process is not violated by trying DUI defendants on alternate theories that they were either the driver of a vehicle or had been a passenger in the vehicle in temporary and actual physical control as required by A.R.S. § 28-1381, despite the grand jury being advised of only one theory that a defendant was the driver. Although a conviction based on a charge not made before the grand jury violates due process, evidence presented before the grand jury and at trial supported conviction under A.R.S. § 28-1381 because it established that defendant had either driven or been in actual physical control of the subject vehicle. A passenger who grabs the steering wheel of a moving car and alters its movement has assumed actual physical control for the purposes of Arizona's DUI statutes. *State v. Rivera*, 2 CA-CR 01-0445, 1/30/04 … A person accused of drag racing in violation of A.R.S. § 28-708(A) is not entitled to a jury trial. *Derendal v. Griffith*, 1 CA-CV 03-0380, 1/27/04 … Arizona's statutory scheme does not allow a trial court to apply the doctrines of sentence entrapment or sentence manipulation to reduce a defendant's sentence below the mandated sentencing range prescribed by the legislature. Sentencing entrapment occurs when a defendant who is predisposed to commit a minor or lesser offense is entrapped into committing a greater offense with greater punishment; sentencing factor manipulation occurs when the government engages in improper conduct that effectively increases a defendant's sentence. Arizona case law and statutes preclude judges from departures outside the applicable statutory sentencing range absent a constitutional violation. Law enforcement officers do not breach their duty or violate the constitution by failing to arrest a defendant based on only minimum evidence for probable cause before a defendant commits other crimes given both the quantum of evidence required for conviction and the discretion afforded the government to determine the scope of its own investigation in a particular case. Moreover, although a pre-indictment delay may offend due process when a defendant shows the prosecution intentionally delayed proceedings to gain a tactical advantage over or to harass a defendant resulting in actual prejudice, the U.S. Supreme Court in *United States v. Lovasco* specifically rejected a constitutional requirement that a state file charges immediately upon sufficient evidence of guilt. *State v. Monaco*, 2 CA-CR 02-0466, 1/22/04 … If a trial court enters a judgment of acquittal pursuant to A.R.CRIM.PRO. 20 based on insufficient evidence at the close of the state's case, constitutional protection against double jeopardy precludes review or reversal of that ruling on appeal. However, a trial court's judgment of acquittal entered after a guilty jury verdict may be reviewed for an abuse of discretion and reversed without violating double jeopardy because reversal would merely reinstate the jury verdict and no new fact finding would be necessary. Following a jury verdict, a trial court may not grant acquittal based on insufficiency of the evidence, which may only be properly raised after jury verdict in a motion for new trial. *State v. Wilson*, 2 CA-CR 03-0151, 1/16/04.

COURT OF APPEALS JUVENILE MATTERS

A.R.S. § 8-533(B)(10), providing that a court may terminate the parent–child relationship on the basis that the parent had had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause, does not require a court to find that the prior termination was on the same statutory ground as the current petition to terminate. The state must make reasonable efforts to provide reunification services where the basis for termination is under A.R.S. § 8-533(B)(10). Where an appellate court does not make a finding whether such services were provided but terminates the parent's rights, an appellate court will presume that the juvenile court made every finding necessary to support the severance if reasonable evidence supports the order. In this case, there was evidence that rehabilitative measures would have been futile. *Mary Lou C. v. Arizona Dep't of Econ. Sec.*, 1 CA-JV 03-0046, 1/27/04.

* indicates a dissent

supreme court petitions

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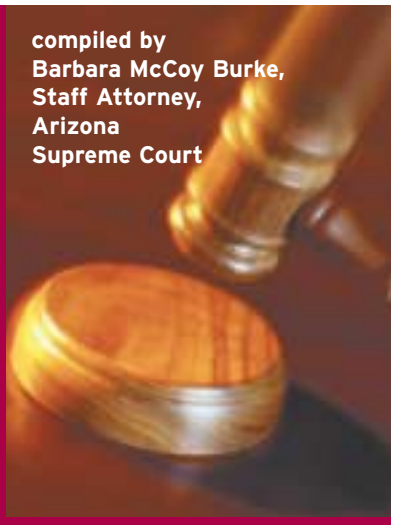

The Arizona Supreme Court accepted review or jurisdiction of the following issues on Feb. 10, 2004*:

State v. Aguilar, CR-03-0332-PR, 1 CA-CV 02-0576-PR (mem. decision)
"Whether the scope of the aberrant emotional propensity exception codified in Rule 404(c) encompasses violent sexual assaults against adults, as well as sex-related crimes against children."

Arizona Water Co. v. Arizona Dep't of Water Resources, CV-03-0321-PR, 1 CA-CV 02-0276 (Opinion)
The Petition filed by the Arizona Department of Water Resources was granted, as was the cross petition filed by the Arizona Water Company. The issue in the Department's Petition is:

- "Does the 1980 Groundwater Management Act ('Groundwater Code') require the Director of the Arizona Department of Water Resources to impose mandatory conservation requirements directly on all persons receiving groundwater from municipal water providers within the state's five active management areas, or does the Code give the director discretion to regulate individual users as may be appropriate?"

The Arizona Water Company's cross petition presents the issue of:

- "Whether the Department in determining a municipal provider's compliance with the Department's total gallons per capita per day program may include in its calculations Colorado River water delivered through the Central Arizona Project?"

Aileen H. Char Life Interest et al. v. Maricopa County et al., CV-03-0348-PR, 1 CA-TX 02-0003; 1 CA-TX 02-0013 (mem. decision)
"1. Did the Court of Appeals improperly ignore the tax court's findings of fact?
2. Did the Court of Appeals improperly ignore this Court's prior decisions in tax discrimination cases and require proof that no Arizona decision has every required?"

American Pepper Supply Co v. Federal Ins. Co., CV-03-0290-PR, 1 CA-CV 00-0549 (Opinion and mem. decision)
"1. Is an insurer required to establish the contract defense of misrepresentation in a first-party insurance claim by a preponderance of the evidence or the heightened standard of clear and convincing evidence?
2. Should the trial court's summary judgment ruling in favor of Federal on the claim of bad faith be affirmed?"

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