APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

Insureds May Assign Claims for Professional Negligence Against Their Insurance Agent to Third Parties. When an insurance agent negligently fails to advise the customer of relevant insurance which later exposes the insured to an uncovered claim, the customer may assign the claim for professional negligence against insurance agents. *D. Jere' Webb v. Gittlen, et al.*, CV-07-0127-PR, 1/10/08.

An Insurer May Not Reduce Underinsured Motorist Coverage Based on the Insured's Receipt of Workers' Compensation Benefits. Under the Uninsured Motorist Act only the "total applicable liability limits" may be deducted from Underinsured Motorist ("UIM") benefits. Worker's compensation, while a form of casualty insurance, is not a form of liability insurance and thus cannot be considered in determining the amount of UIM coverage available to an insured. *Cundiff v. State Farm Mut. Auto. Ins. Co.*, CV-07-0057-PR, 1/10/08.

COURT OF APPEALS CIVIL MATTERS

Arizona's Qualified Immunity Statute, A.R.S. § 12-820.02(A)(1), Applies When a Plaintiff Alleges That the State Failed to Properly Maintain and Communicate an Individual's Criminal History, and Thus Failed to Retain the Individual in Custody. A.R.S. § 12-820.02(A)(1) immunizes a public employee's "failure to make an arrest or … retain an arrested person in custody." Where the alleged failure to notify the county probation department of an arrest that clearly violated the arrestee's probation terms, which allegedly resulted in a vehicle collision that caused death and injuries due to the driver by not being taken into custody, a county jail official is entitled to immunity under this statute. *Greenwood v. State*, 1 CA-CV 07-0155, 1/22/08.

Owner Conveying Real Property to Another May Reserve for Itself Commercial Groundwater Rights Associated With the Property. Arizona's bifurcated system of allocating water rights differentiates between groundwater (which is not appropriable and may be pumped by the overlying landowner, subject to the doctrine of reasonable use) and surface water (which is subject to the doctrines of prior appropriation and beneficial use). A reservation of water rights is a right to use of the water, not an ownership interest in the actual source of the water. With respect to percolating groundwater, water rights may be severed and transferred apart from the associated real property. *Davis v. Agua Sierra Res., LLC*, 1 CA-CV 06-0806, 1/15/08.

A University Professor Acts Within the Scope of His Employment If His Acts Were Incidental to His Work for the University Even If His Motive for Acting Was Personal. Arizona's notice-of-claim statute, A.R.S. § 12-821.01, requires that claims against public employees acting within the scope of employment first be filed with a representative of the entity within one hundred eight days after the cause of action accrues. A claim against a professor for tortious interference with business relationships and expectancies that arose from the professor's comments to a student's dissertation committee is subject to the notice of claim statute even though the comments were also allegedly motivated to benefit the professor's private company. *Dube v. Desai*, 2 CA-CV 2007-0084, 1/11/08.

A Party Moving for Summary Judgment Must at Least "Point Out" to the Trial Court, by Reference to Relevant Evidentiary Materials, That the Non-Moving Party Has No Evidence to Support Its Affirmative Defenses. Where the moving party will not bear the ultimate burden of proof at trial, the moving party must point out by reference to discovery materials that the non-moving party is missing evidence needed to support an essential element of its claim or defense. If the moving party is successful in discharging its initial burden of production, the non-moving party must produce sufficient evidence to create a genuine issue of material fact for trial. *National Bank of Arizona v. Thruston*, 1 CA-CV 06-0718, 1/10/08.

The "Hindsight Rule" Does Not Apply to a Products Liability Claim of Defective Warning. Under the so-called "hindsight rule," a jury should evaluate the need for a warning in a products liability case based on the current knowledge of potential risks. The "hindsight rule" does not apply to products liability cases based on an alleged defective warning. *Powers v. Taser Int'l, Inc.*, 1 CA-CV 06-0545, 12/31/07.

COURT OF APPEALS CRIMINAL MATTERS

A trial court does not abuse its discretion by delaying designation of a Class-6 open-ended offense after a defendant's probationary term has expired in order to consider behavior that occurs before a defendant has filed a motion to designate their offense. Although under the amended language of A.R.S. § 13-702(G), **a trial court has authority to designate any class-6 felony not involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument as a misdemeanor**, it also has the discretion to delay its designation of a class 6 felony until the termination of probation or later filing of a motion by a defendant to designate the offense. Moreover, due process does not require that such an offense be designated at the time probation expires, provided that the offense is designated within a reasonable time after a motion to designate is filed. Given both the amended language of A.R.S. § 13-708(G) allowing a court to consider a defendant's "history and character" when making a designation, as well as the fact that the Arizona legislature in a similar statute intended that a trial court retain jurisdiction over a criminal defendant until all probation related restitution is paid pursuant to A.R.S. § 13-805, the legislature must have also intended that a trial court may consider events and circumstances that arise between the end of the probationary period and the designation hearing. *State v. Soriano*, 2 CA-CR 2007-0061, 1/30/08.

A trial court errs when it imposes an enhanced sentence under A.R.S. § 13-604(W)(2)(a) based upon its determination that a prior felony conviction constitutes an "historical prior felony conviction" merely because it carried with it a term of mandatory imprisonment, yet did not precede in time the relevant offense for which enhancement is sought by the State. **The underlying offense upon which a prior conviction is based must always precede in time the offense for which a defendant is presently charged in order to be legally considered as an historical prior under A.R.S. § 13-604(W)(2) for sentencing enhancement purposes.** Section 13-604(W)(2) defines four different types of felony convictions as "historical prior felony convictions" and may include the seriousness of the past offense as well as the time that has elapsed between that offense and the later offense for which a defendant is charged. The first subcategory of "historical prior felony convictions," includes "[a]ny prior felony conviction" for six types of designated felony offenses regardless of how much time has elapsed since the conviction and sentence imposed. The second defines class two or three felonies as "historical prior felony convictions" if the offense resulting in the prior conviction "was committed within the 10 years preceding the date of the present offense." The third type of

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historical prior pertains to generally less serious felonies, defining class four, five or six felonies as "historical prior felony convictions" if the offense resulting in the conviction "was committed within the five years immediately preceding the date of the present offense." The fourth designates *any* conviction "that is a third or more prior felony conviction" as an historical prior for sentence enhancement purposes. It is noteworthy that the relevant time periods for both the second and third types of prior historical felonies only begin to run following release from prison and parole supervision if a subject defendant was sentenced to prison for the prior offense(s). *State v. Thomas*, 1 CA-CR 05-0770, 1/29/08.

A.R.S. § 13-907, which permits felony convictions to be set aside, yet to still be used in subsequent prosecutions, is not unconstitutionally void for vagueness because it is clear and unambiguous. While A.R.S. § 13-907 provides in pertinent part that "every person convicted of a criminal offense, may upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to … have the judgment of guilt set aside," the statute still specifically provides that even though the conviction has been set aside, it "may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions," including the game and fish department, or used by the department of transportation just "as if the judgment of guilt had not been set aside." Moreover, there is no abuse of discretion in denying a motion to continue a sentencing hearing at which a prior historical felony may be considered for sentence enhancement purposes when the record in a given case reflects that the defendant or defense counsel failed to exercise due diligence in preparing for the hearing. *State v. Barr*, 1 CA-CR 06-0293, 1/29/08.

Statements made to a registered nurse by an alleged victim of sexual assault for the purpose of medical diagnosis or treatment at the time a sexual assault related medical examination is conducted are admissible at trial as an exception to the hearsay rule under Rule 803(4), ARIZ.R.EVID., as long as there is no Sixth Amendment Confrontation Clause issue (i.e., the victim testifies at trial and is subject to cross examination), the purpose of the examination is to look for injury, rather than gather evidence for law enforcement, and the nurse uses the victim's statements to determine the extent of injury for the purposes of diagnosis and/or treatment. Such statements, although technically hearsay are inherently reliable if related to medical diagnosis and treatment, because a victim under such circumstances is motivated to "give reliable information to further necessary treatment." Before such statements may be admitted at a trial, Arizona Courts must apply a two-part test in determining admissibility under this exception: (1) whether "the declarant's apparent 'motive … [was] consistent with receiving medical care'"; and (2) whether it was "reasonable for the physician to rely on the information in diagnosis or treatment.'" In general, such statements are admissible if they are relevant to diagnosis or treatment. However, statements recounting what transpired prior to the sexual assault and related to identifying an assailant are not admissible unless directly related to medical diagnosis and treatment of the victim. *State v. Lopez*, 2 CA-CR 2006-0036, 1/22/08.

COURT OF APPEALS JUVENILE MATTERS

A Juvenile Court abuses its discretion by awarding restitution to a victim over a year after the juvenile's disposition hearing, when the disposition order did not address the victim's right to restitution, and, although the victim had timely submitted documentation of his restitution request to the prosecutor, the prosecutor failed to file a restitution claim on the victim's behalf either before or at the disposition hearing. *In re Michell G.*, 2 CA-JV 2007-0014, 1/10/08.

A Juvenile Court errs in finding that children subject to the Indian Child Welfare Act ("ICWA"), 24 U.S.C. §§ 1901-1963, are dependent as to their parents under A.R.S. § 8-201(13)(1) when a qualified expert does not opine that the parents continued custody of the children would likely result in serious emotional or physical damage. *Steven H. and Tammy H. v. ADES*, 1 CA-JV 07-0076, 1/3/08.

* indicates a dissent

SUPREME COURT PETITIONS

compiled by Barbara McCoy Burke, Staff Attorney, Arizona Supreme Court

The Arizona Supreme Court accepted review or jurisdiction of the following issues on Jan. 8, 2008*:

State of Arizona v. Patricia A. Barnes, CR-07-0227-PR, 2 CA-CR 2006-0191 (Opinion), 159 P.3d 589 (Ariz. Ct. App. 2007):
Is a search warrant required to seize evidence lawfully discovered in plain view hanging out of a Defendant's body cavity?

James Lee, individually and as surviving husband of Teresa Lee; Kyung Hee and Tae Gun Kim, children of Hyeon Bai Kim and Kyung Nim Bea Kim, deceased, CV-07-0293-PR, 1 CA-CV 06-0145 (Opinion), 161 P.3d 583 (Ariz. Ct. App. 2007):

1. Where A.R.S. § 12-821.01(A) and A.R.C.P. Rule 4.1(h) only require that notices of claim against the State be delivered to the Attorney General, did the court of appeals err in holding as a matter of law that mailing is inadequate delivery?
2. Where plaintiffs proved that their notice of claim against the State was mailed to the Attorney General, can the State, as a matter of law, escape liability by alleging it has no record of receipt?"

Town of Gilbert Prosecutor's Office v. Honorable Margaret H. Downey, CV-07-0300-PR, 1 CA-SA 07-0078 (Opinion with dissent), 162 P.3d 669 (Ariz. Ct. App. 2007):
The Court of Appeals determined this Court's holding in *State v. Wilkinson (Porter)*, 202 Ariz. 27, 39 P.3d 1131 (2002), established a *per se* rule that *all* payments made to an unlicensed contractor are automatically forfeitable as restitution, regardless of whether there is any evidence of "economic loss," and regardless of whether the result would be a windfall to the victim. 2007 WL 2108505 at ¶14.

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

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.appeals2.az.gov).

In July 2007, each Division of the Court of Appeals began placing PDF versions of memorandum decisions filed after July 1, 2007, on each Division's respective Web site. Memorandum decisions will remain on each court's site for approximately six months. Posting is only for informational purposes and does not constitute "publication" of the memorandum decisions as precedential authority or allow them to be cited in any court except as authorized by the rules of the Arizona Supreme Court.

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