APPELLATE HIGHLIGHTS

by Thomas L. Hudson, Osborn Maledon PA, and Patrick C. Coppen, Esq., Tucson

SUPREME COURT CIVIL MATTERS

Rule 68 Sanctions May Be Awarded in Favor of Landowner Based on Offer of Judgment in Condemnation Case. Under ARIZ.R.CIV.P. 68, an offeree who declines an offer of judgment and fails ultimately to obtain a more favorable judgment "must pay, as a sanction, reasonable expert witness fees and double the taxable costs … incurred by the offeror after making the offer." In condemnation actions, A.R.S. § 12-1128(A) states, "Costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides, in the discretion of the court." Although A.R.S. § 12-1128(A) gives trial courts discretion to apportion costs among the parties in condemnation actions, the mandatory cost-based sanctions under Rule 68 still apply. *Salt River Project Agric. Improvement and Power Dist. v. Miller Park, L.L.C.*, CV-07-0207-PR, 2/14/08.

Standard Form Insurance Policy Treats the Loss from a Series of Thefts by a Single Employee as One "Occurrence." A standard clause in a commercial crime insurance policy designed to protect an employer from employee theft stated the insurer will pay up to $50,000 for each "occurrence" of loss, which means "all loss caused by, or involving, one or more 'employees,' whether the result of a single act or series of acts." Under that clause, a series of thefts by a single employee counts as one occurrence. *Employers Mut. Cas. Co. v. DGG & Car, Inc.*, CV-07-0280-PR, 2/14/08.

SUPREME COURT CRIMINAL MATTERS

Under Article 2, Sec. 22, of the Arizona Constitution, individuals charged with a crime may generally be released on bail, except under limited circumstances including when they are charged with a felony offense after already being admitted to bail on a separate or preceding felony offense, and the proof of their guilt or the evidence supporting the charge is great. **A person released on "their own recognizance" for a felony offense has been "admitted to bail" for the purposes of the Article 2, Sec. 22, Arizona constitutional limitation on bail eligibility for a subsequent felony offense.** Although the Arizona Constitution does not define what "admitted to bail" means, at the time Arizona adopted Article 2, Sec. 22, the Arizona Supreme Court had interpreted the term "bail" to include release on one's own recognizance. Furthermore, former Arizona Rule of Criminal Procedure 236 provided that a defendant "if bailable shall be released on bail either on his own recognizance or on the undertaking of sureties." Finally, it is noteworthy that the publicity pamphlet published by the Secretary of State at the time of the 1970 amendment indicated that the purpose of the amendment was to prevent criminals from continuing to commit new felony offenses while awaiting trial on a earlier felony charge. This is borne out by a contemporary Arizona Court of Appeals decision which identified the purpose of the amendment as being to avoid the "revolving door" scenario in which an offender continues to commit crimes while released on bail. *Heath v. Hon. W. Kiger,* CV-07-0222-PR, 2/21/08.

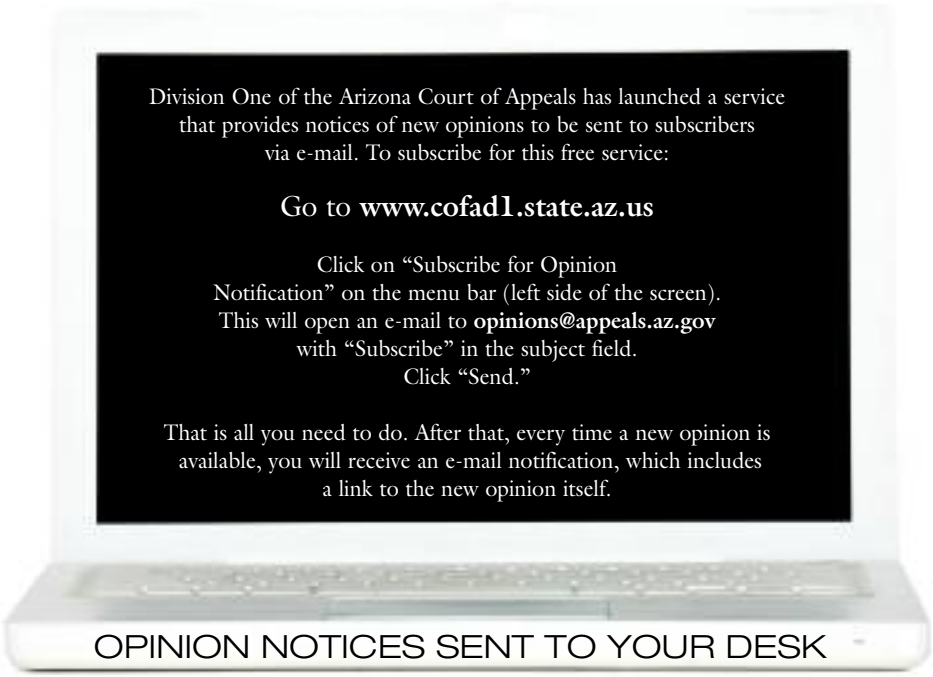
Under Article 2, Sec. 24, of the Arizona Constitution, an individual charged with a misdemeanor offense involving sexual motivation is entitled to trial by jury because the Arizona legislature has determined that misdemeanor crimes involving sexual motivation are serious offenses by exposing those charged to the possibility of sex offender registration, which is a severe potential consequence applied uniformly to all persons convicted of such an offense. Possible registration as a sex offender is such a grave consequence that it reflects an implicit legislative determination that misdemeanor offenses involving an allegation of sexual motivation are "serious" in nature. Arizona Courts have construed Article 2, Sec. 24, as guaranteeing the right to a jury trial in criminal prosecutions which are serious in nature, as opposed to petty or non-serious crimes. *Fushek v. State of Arizona*, CV 07-0251, 2/14/08.

In a first-degree murder case involving a previously unsolved homicide in which DNA evidence was ultimately used to identify the perpetrator of the crime, a court does not abuse its discretion by allowing admission of such evidence even though it may have changed somewhat over time due to technical limitations of testing methods used, insufficient samples or environmental degradation. Moreover, a medical examiner's incomplete or conflicting recollection of a chain of custody of such evidence goes to the weight of the evidence, rather than its admissibility. **Under A.R.S. § 13-703(F)(2), a first-degree murder conviction may be statutorily aggravated when a defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, which may include a prior sexual assault found to be dangerous in nature,** because such a crime involving the "use or exhibition of a deadly weapon or dangerous instrument" within the meaning of A.R.S. § 13-604(G) is necessarily one that involves the use or threat of violence. **Under A.R.S. § 13-704(B), an individual convicted of first-degree murder committed before Nov. 23, 1992, who is given the death penalty must be given the option of choosing between lethal injection or lethal gas as the means of execution.** *State v. McCray*, CR 05-0508, 2/14/08.

A superior court does not err by permitting an ex-spouse to testify to privileged marital communications at a re-sentencing hearing when the defendant waived the privilege by personally testifying about those communications at the time of trial. A witness who testifies about otherwise privileged marital communications, or denies having relevant communications with his spouse, waives the marital communications privilege with respect to those communications and may be impeached by their spouse's testimony. Moreover, once waived, whether at a former trial or otherwise, a defendant may not reassert the marital privilege. **Although criminal defendants have the constitutional "right to offer the testimony of witnesses, and to compel their attendance [at trial], if necessary, in order to present a defense," when such a witness intends to assert their Fifth Amendment privilege against self-incrimination, a trial court may excuse their attendance without violating the defendant's right to compulsory process** after conducting an *in camera* hearing and determining that the witness could legitimately refuse to answer essentially all relevant questions because the witness has a reasonable ground to apprehend danger to themselves for possible criminal prosecution. It is noteworthy that in such situations a trial court who has extensive knowledge of a case by hearing, for example, the state's entire case and a portion of the defendant's

Thomas L. Hudson is a member at Osborn Maledon PA, where his practice focuses on civil appeals and appellate consulting with trial lawyers. He can be reached at thudson@omlaw.com, and is ably assisted with this column by Osborn Maledon PA's appellate group, which maintains AzAPP. AzAPP contributors include **Jean-Jacques Cabou, Michael S. Catlett, Sharad Desai, Ronda R. Fisk, Sara Greene, Mark P. Hummels, Diane M. Meyers, Jason J. Romero, Keith Swisher, Robert T. Weeks** and **Kristin L. Wright.**

Patrick Coppen is a sole practitioner in Tucson.



case in chief, need not personally question the witness, hold a hearing, or even require the witness to be called to the stand. In a capital case in which a defendant is re-sentenced following appeal, **a re-sentencing court does not abuse its discretion in denying a Motion for Rule 11 Prescreening to Determine Competency if the sole basis of the motion is a defendant's own failure to cooperate in the gathering of mitigation** rather than their alleged incompetence. Moreover, at such a re-sentencing or sentencing proceeding **a criminal defendant does not have a constitutional or statutory right to present residual doubt, because residual doubt as to a defendant's actual guilt is not an appropriate mitigating factor for consideration under A.R.S. § 13-703(G).** *State v. Harrod*, CR 05-0461, 2/14/08.

COURT OF APPEALS CIVIL MATTERS

City Does Not "Actually Control" a State Roadway for Purposes of Establishing Liability for Failing to Keep It Safe by Merely Offering Design Suggestions. Under A.R.S. § 28-332(A), exclusive control and jurisdiction over state highways and state routes vests in the department of transportation. Although a city may assume joint liability for failure to keep a roadway safe even absent the existence of an intergovernmental agreement, a city that participated in design meetings regarding solutions for traffic problems at an intersection did not exercise actual control over the intersection. Before a city may be held liable for actual control of a roadway it must assume responsibility for the planning or design or it must actually participate in maintaining or operating it. *State of Arizona v. City of Kingman*, 1 CA-CV 06-0797, 2/14/08.

Indirect Injury from Court Ruling Does Not Give Standing to Appeal. Where a probate court has ordered multiple beneficiaries to pay the costs of an investigation associated with their accusations of elder abuse by another potential heir (allegations which if true would have prevented the potential heir from inheriting from the estate), an appeal by one of the beneficiaries does not give that party standing to challenge the adverse ruling against the non-appealing beneficiaries. This is true even if the appealing beneficiary may receive less from the estate due to an agreement with the non-appealing beneficiaries to share attorneys' fees in connection with the probate. However, an heir is only required to pay the costs of an elder abuse investigation if the heir raised the issue with malice, which requires that the primary purpose in raising the elder abuse claim was other than to protect the adult or the estate. *Friedman v. Burgess*, 1 CA-CV 06-0723, 2/12/08.

Doctor Providing Prescriptions Over the Internet Without Examining Patients May Be Disciplined. Whether or not a physician has patients in Arizona, an Arizona license is sufficient for the Arizona Medical Board (the "Board") to exercise jurisdiction in discipline matters. Where a doctor admitted that she did not examine patients before issuing prescriptions over the internet, the Board had the discretion to discipline the physician by imposing a Decree of Censure, 5 years of professional probation, a $10,000 civil penalty, and a suspension of her license of no more than 12 months to terminate upon her completion of various ethics courses. *Golob v. Arizona Medical Board*, 1 CA-CV 07-0006, 2/5/08.

Dismissal of Personal Injury Matter Appropriate as a Sanction for a Rule 26.1 Violation. Under Ariz. R. Civ. P. 37(d) a trial court may impose serious sanctions, including dismissal, for a knowing failure to timely disclose damaging information. Due process must be afforded a litigant before any case is dismissed as a discovery sanction, and an evidentiary hearing must be held. Where such due process has been afforded, a plaintiff involved in a multi-vehicle car wreck who failed to disclose an earlier collision that may have caused the alleged damage could have the case dismissed as a sanction. *Rivers v. Solley*, 1 CA-CV 07-0100, 2/05/08.

Arizona's Public Records Request Statute Requires Prompt Production; Bad Faith Denial of Access to Records May Entitle Requesting Party to Attorneys' Fees and Costs. Pursuant to A.R.S. § 39-121.02(B), if the court finds that the custodian of public records acted in bad faith, or in an arbitrary or capricious manner, in response to a public records request, the superior court may award the requesting party attorneys' fees. Records subject to disclosure are to be produced "promptly" under A.R.S. § 39-121.01(D))(1), and failure to timely produce records is deemed a denial of access. *Phoenix New Times v. Arpaio*, 1 CA-CV 05-0768, 2/5/08.

Modification of a Real Estate Option Contract That Extends the Life of an Option Is a Material Modification That Must Be in Writing Under the Statute of Frauds. A modification to a contract that was required to be in writing by the statute of frauds must also be in writing. An extension to an option contract must be in writing under the Statute of Frauds where the parties had made time of the essence by setting an expiration date for the option. *Best v. Edwards*, CV 06-0770 (2/1/08).

County Board of Supervisors May Not Discipline Classified Employees of Other County Officers. Under A.R.S. § 11-409 certain county officers are empowered to appoint employees to perform the work of their offices. In turn, A.R.S. § 11-356(A) provides that an employee's "appointing authority" is authorized to discipline the employee under the merit system. The Board of

Supervisors and its agent, the county manager lack the authority under these statutes to discipline Sheriff's Office employees, and the legislature gave them no other discipline authority. Only the sheriff may discipline employees of his office. *Hounshell v. White*, 1 CA-CV 06-0730, 1/29/08.

Parent's Child Support Obligation for a Post-Majority Child Continues While Child Is Making a Sincere Effort to Graduate from High School. Under A.R.S. §§ 25-320(F) and 25-501(A), if a child reaches the age of majority while the child is attending high school, support must continue to be provided while the child is actually attending high school. Whether a child is "actually attending" high school should be decided on a case-by-case basis after considering factors such as (1) whether the child is regularly present in class; (2) the reasons for any absences; and (3) whether the child is taking affirmative steps in pursuit of an education. *State of Arizona v. David C. Lee*, 1 CA-CV 06-0810, 1/29/08.

Limitation-of-Liability Clauses in Personal Service Contracts Are Not Void as Against Public Policy, but a Jury Must Decide Their Enforceability. Provision in contract for surveying, engineering and landscape architecture services that limited the service provider's liability for negligence to the amount paid under the contract is not void as against public policy under either A.R.S. § 10-2234 (which states that shareholders of a professional corporation remain liable for negligence), or A.R.S. § 32-1159 (which renders void indemnity clauses in construction contracts that completely exonerate liability). However, Art. 18, Sec. 5, of the Arizona Constitution also requires juries to decide the enforceability of limitation-of-liability clauses. *1800 Ocotillo, L.L.C. v. The WLB Group, Inc.*, 1 CA-CV 07-0037, 1/29/08.

An Expert Opinion Affidavit Under A.R.S. § 12-2602 Is Not Necessary for a Vicarious Liability Claim Against a Licensed Professional. Simply because an employer is liable under the respondeat superior doctrine does not mean the employee has no liability. The doctrine makes *both* the employee and the employer liable. A preliminary expert affidavit under A.R.S. § 12-2602, which requires such affidavits for negligence claims against licensed professionals, is not necessary when the defendants are liable only by respondeat superior (rather than their own negligence). Evidence of workers' compensation benefits and carrier's lien on any recovery was properly excluded in a negligence action. Offer of judgment sanction cannot be imposed when plaintiff's workers' compensation carrier with a lien greater than the amount of the offer does not consent to the offer of judgment. *Warner v. Southwest Desert Images, LLC*, 2 CA-CV 2007-004, 1/28/08.

COURT OF APPEALS CRIMINAL MATTERS

A criminal defendant's three convictions for both sale and transfer of a narcotic drug for a total of six convictions violate double jeopardy when the convictions are based on only three drug transactions because A.R.S. § 13-3408 merely states one crime that may be committed in several different ways (*i.e.,* sale, transfer, or sale or transfer of a narcotic drug). Nothing in the statute suggests that the legislature intended to create multiple crimes where a single act occurs. Multiplicity for double jeopardy purposes occurs when an indictment charges a single crime or offense in multiple counts raising the potential for multiple punishments for the same offense. The principles of double jeopardy bar multiple punishments for the same offense. **If a defendant is convicted more than once for the same transaction or offense, his double jeopardy rights are violated even if he receives concurrent sentences for the same offense** because potential adverse collateral consequences may not be ignored, including the fact that the presence of two convictions for the same basic offense may subject a defendant to a greater or enhanced sentence under a recidivist statute, or delay a defendant's eligibility for parole. *State v. Brown*, 2 CA-CR 2007-0071, 2/29/08.

Minor scuffling occurring in arrest situations may be sufficient to constitute resisting arrest under A.R.S. § 13-2508. Under the statute, a person commits resisting arrest by intentionally preventing or attempting to prevent a peace officer acting under color of official authority from effecting an arrest by: (1) using or threatening to use physical force against the officer or another, or (2) using any other means creating a substantial risk of causing physical injury to the officer or another. Moreover, the statute does not require a substantial risk of physical injury when physical force is used or threatened by an arrestee. As such, those who use physical force against police officers attempting to arrest them are not entitled to engage in "minor scuffling." *State v. Lee*, 1 CA-CR 05-0668, 2/12/08.

A sentencing court errs under A.R.S. § 13-604 when it sentences a defendant to an enhanced sentence based on an historical prior felony conviction when the offense upon which the historical prior was based actually occurred after the crime(s) for which a defendant is sentenced. In order to be an historical prior felony conviction for enhancement purposes, the statute requires that the commission of the prior felony offense and conviction thereof precede in time the commission of the offense with which a defendant is presently charged, convicted and sentenced. *State v. Thomas*, 1 CA-CR 05-0770, amended by order filed 2/26/08.

In a prosecution for bigamy under A.R.S. § 13-3606, the state need not prove that a marriage license was recorded to show that a defendant "knowingly married" another in violation of the statute because the requirement that a marriage license be filed and recorded is directed at the official who solemnizes a marriage, and not the parties to the marriage. **Under A.R.S. § 13-603, the victims of the offense of bigamy are entitled to appropriate restitution for economic losses suffered as the direct result of the unlawful marriage, including annulment related fees, and both travel expenses and loss wages related to testifying at trial.** Victims of bigamy may include both an actual and putative spouse because the elements of the offense itself involve unlawful interaction with all persons concerned or their property. However, **a restitution order is illegal if proceedings are held without the presence of counsel for the defense** because a restitution hearing is a criminal proceeding, and the right to counsel at all criminal proceedings is guaranteed by both the Sixth Amendment of the U.S. Constitution, and Art. 2, Sec. 24, of the Arizona Constitution. *State v. Guadagni*, 2 CA-CR 2006-0251, 2/29/08.

A person commits burglary of a vehicle under A.R.S. § 13-1506 by either entering or remaining unlawfully in an open or locked vehicle for the purposes of committing any theft or felony therein, or by making entry into any part of a motor vehicle by means of a manipulation key or master key with the intent to commit any theft or felony. *State v. Hamblin*, 2 CA-CR 2007-0166, 2/6/08.

In a Proposition 200 case involving personal possession of a drug, a disposition court errs in revoking probation when the State fails to allege and the court fails to find at the probation violation hearing that the probationer refused to participate in drug treatment because mandatory probation imposed under A.R.S. § 13-901.01 may only be revoked if the court finds the probationer actually "refused to participate in drug treatment." Allegations made by the State that the probationer absconded from probation, refused to report as required for drug testing, and/or used drugs based upon dismissed criminal charges are insufficient to establish the required finding for revocation that the probationer "refused to participate in drug treatment" unless supported by appropriate evidence. *State v. Vaughn*, 1 CA-CR 06-0878/CR06-0881 (Consol.), 2/14/08.

A trial court does not err in finding that a sentence for transportation of methamphetamine for sale under A.R.S. § 13-3407

is a "flat time" sentence consistent with a plea agreement and A.R.S. § 13-712(A) requiring such sentences for those convicted of particular methamphetamine related offenses despite an inconsistency with A.R.S. § 13-3407(F), which suggests that early release may be available for such offenders under A.R.S. § 41-1604.07. In amending A.R.S. § 13-3407, the Arizona Legislature specifically intended to stiffen the penalties for specific methamphetamine-related crimes, and unambiguously directed under A.R.S. § 13-3407(E) that a person sentenced for violation of A.R.S. § 13-3407 would be sentenced to a "flat time" sentence under A.R.S. § 13-712. *State v. Hasson*, 1 CA-CR 07-0219, 2/26/08.

A presiding criminal judge for an Arizona Superior Court does not exceed his or her authority by holding a consolidated hearing involving cases over which they are not assigned to resolve an ancillary issue common to all cases involving a budget-related reduction in privileged visiting hours in violation of jail inmates' Sixth Amendment right to access to counsel because a superior court judge has inherent authority to conduct such proceedings and issue such orders as are necessary to complete the administration of justice. **However, a court exceeds its authority in such a case by granting injunctive class-style relief to all inmates in a particular county's jail system (rather than granting each case individualized consideration), and in failing to narrowly tailor the remedy so as to limit the intrusion on a county sheriff's statutory authority** under A.R.S. § 11-441 to establish appropriate visitation hours at their jail. In such cases, a court should (1) determine whether a constitutional violation has actually occurred, and, if so, (2) devise a remedy that has no greater impact than necessary on a county sheriff's authority to manage the jail, possibly providing at this stage an opportunity for the sheriff to submit a reasonable proposal for the court's consideration. *Arpaio v. Hon. A. Baca/Washington, et al., Real Parties in Interest*, 1 CA-SA 07-0267, 2/26/08.

COURT OF APPEALS JUVENILE MATTERS

Rule 28(C)(7)(a), Ariz.R.P. Juv.Ct., does not compel a juvenile court to accept a minor's admission to a delinquency petition immediately when the minor voluntarily admits the allegations at the advisory hearing because under Rule 28(E) it "may defer acceptance of the plea until the time of disposition. Moreover, to interpret Rule 28 to require mandatory acceptance at the time of admission would deprive the state of its right to seek transfer of the juvenile for adult prosecution in an appropriate case under both A.R.S. § 13-501 and Rule 34(A) Ariz.R.P.Juv.Ct. *In re Reymundo F.*, 2 CA-JV 07-0036, 2/27/08.

A juvenile court commits reversible error in giving a best interests jury instruction when the instruction is misleading and suggests that if there was evidence presented of an "adoptive placement" or that the child is "adoptable" there is nothing more for the jury to consider as to what the best interests of the child may be. Under applicable law a parent has the constitutional right to the care, control and custody of their children. Before parental rights may be terminated, the Arizona Department of Economic Security must prove by clear and convincing evidence that there is a statutory basis for termination and by a preponderance of the evidence that the termination or severance is in the best interests of the child. Though a jury may find that severance is in a child's best interests if the child is found to have an adoptive placement or to be adoptable, a jury is not required to do so. A jury may conclude that notwithstanding such evidence, severance would not be in the best interests of the child because of some other circumstance(s). *Lawrence R. v. ADES*, 1 CA-JV 06-0228, 2/26/08.

COURT OF APPEALS MENTAL HEALTH MATTERS

Rule 404(c) Does Not Bar the Admission of Relevant Prior Act Evidence in Sexually Violent Person Act Cases. In the context of a petition to civilly commit an individual under Arizona's Sexually Violent Person Act ("SVP"), A.R.S. §§ 36-3701 and -3717, the State may introduce evidence of an individual's prior incidences concerning inappropriately touched females. Ariz. R. Evid. 404, which precludes the use of prior act evidence to prove specific conduct in conformity with character, does not apply where the evidence is introduced to show the existence of a mental disorder that makes it likely the individual will commit future acts of sexual violence. *In re Commitment of Jaramillo*, 2 CA-MH 2007-0002-SP, 1/25/08.

COURT OF APPEALS SPECIAL ACTION MATTERS

A Court May Find a Relocating Parent in Contempt for a Failure to Comply With a Grandparent's Visitation Rights. Although A.R.S. § 25-409(F) automatically terminates a grandparent's visitation rights if the child has been adopted or placed for adoption, a grandparent's statutory visitation rights do not automatically terminate upon a child's relocation. Additionally, although a relocation that is not contested by the non-relocating parent may not be challenged by a grandparent under A.R.S. § 25-408, the grandparent's visitation, as ordered, remains in place after the relocation unless otherwise modified by the superior court after hearing. Where a grandparent has a right to visitation, both the grandparent and the court have the authority to enforce that continuing visitation through contempt proceedings under A.R.S. § 25-414(A)(1) even though the parent may choose to relocate the child, and through its inherent power to issue contempt orders. *Munari v. Hotham/Winiarski*, 1 CA-SA 07-0268, 2/19/08.

COURT OF APPEALS TAX MATTERS

Avionics Software Installed In Flight Computers on Commercial Aircraft Can Be Included Within the Aircraft's Valuation for Purposes of an Airline's Personal Property Taxes. In valuing and taxing airline companies, the Arizona Department of Revenue (the "Department") is statutorily required to determine the full cash value of each airline's "flight property" in use in the state. Under A.R.S. § 42-14251(6) (2006), "flight property" broadly means all airline company aircraft used in the state except aircraft that are permanently removed from operations. "Aircraft" is statutorily defined as "any device that is used or designed for navigation or flight through the air." *Id.* § 42-14251(2). Arizona statutes require the full cash value of flight property to be determined, in part, by the capitalized acquisition cost of the "airframes," which include every component of an airplane with the exception of the airplane's power plant. "Airframes" necessarily include avionics software installed on airplanes at the time of purchase, and thus the Department should include the software in its valuation. *Southwest Airlines Co. v. Arizona Department of Revenue*, 1 CA-TX 07-0002, 1/29/08.

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.

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

* *indicates a dissent*