

appellate highlights

by Donn Kessler and Patrick C. Coppen

SUPREME COURT CRIMINAL MATTERS

Vacating the defendant's conviction for sexual abuse, the Arizona Supreme Court held that **impeachment of the defendant by prior felony convictions more than 10 years old under Arizona Rule of Evidence 609(b) requires the State to show that the prior offense involved dishonesty or a false statement, that its probative value substantially outweighs its prejudicial effect and admission of such remote convictions amounts to an exceptional circumstance.** Recounting a list of factors that could be used to determine the prejudice/probative value balance, the Court held that **the centrality of the defendant's credibility alone is insufficient to substantially outweigh the prejudicial effect of the remote convictions.** Other factors that should be considered include the remoteness of the conviction, the nature of the prior felony, the length of the former imprisonment, the age of the defendant, the defendant's conduct since the prior offense, the impeachment value of the prior offense, the importance of the defendant's testimony, the centrality of the defendant's credibility and the similarity between the past and present crimes. *State v. Green*, CR-99-0569-PR, 8-27-01*.

SUPREME COURT CIVIL MATTERS

A class action seeking tax refunds may include class members who have not filed individual refund claims because the class representative's timely exhaustion of the administrative remedy, for the entire class, makes clear the grounds for the claim. Nothing in A.R.S. § 42-118(E) expressly precludes use of the class device as a means to exhaust administrative remedies with the Department of Revenue. Because the filing of a class claim for refund is appropriate, such a filing tolls the statute of limitations for the class representative and all other putative class members whose claims were not time-barred at the time of the filing of the class claim.

Arizona Department of Revenue v. Ladewig, CV-00-0242-PR, 8-29-01.

COURT OF APPEALS CIVIL MATTERS

The seller of a piece of commercial property has a duty to disclose any latent defects in the property actually or imputedly known by the seller despite the presence of an "as is" clause in the contract. **Failure to make such a disclosure of a fact basic to the transaction may make the seller liable for negligent nondisclosure of facts when the buyer is precluded by the seller from discovering those latent facts.** Furthermore, a party fails to preserve for appeal the issue of an "as is" instruction where the party tells the trial court he could live with no such instruction being given. The court also held that **knowledge of the defect by the seller's agent could be imputed to the seller**, and the collateral source rule precluded evidence of the buyer's settlement with the manufacturer of the defective pipe. *S Development Corp. v. Pima County Management Co.*, 1 CA-CV-00-0347, 8-30-01* ... Distinguishing decisions of Division One of the Court of Appeals, Division Two held that **a widow who is the beneficiary of her husband's life insurance policy paid for by his employer may lack an interest in one-half of the insurance proceeds and be liable to reimburse the estate on a constructive trust theory where the widow transferred all of the community stock to the employer in return for the insurance benefits.** The Court reasoned that because the husband died intestate, half of the stock belonged to the estate and not his widow, so that the widow may have mistakenly assigned the estate's shares for half of the insurance proceeds. The matter was returned to the trial court to determine if the estate could prove the elements of a constructive trust. *In re Estate of James I. Fishman*, 2 CA-CV-00-0065, 8-30-01 ... **Maricopa County did not have to prepare an informational report and sample ballot for a second**

override election in the same fiscal year. *Washington Elementary Sch. Dist. No. 6 v. Maricopa County*, 1 CA-CV-00-0281, 8-30-01 ... **Arizona's taxation scheme whereby state and local governmental employees' contributions to mandatory retirement plans are not included in their Arizona gross income but federal employees' contributions are so included does not violate 4 U.S.C. § 111 because it does not discriminate against the federal employees based on the source of the compensation.** Division One also ruled that as to pre-1991 taxpayers, the trial court properly denied class status concerning those whose refund claims were denied and that the class could not include those who did not file individual claims as dictated by *Arizona Department of Revenue v. Dougherty*, 198 Ariz. 1 (Ct. App. 2001). The court noted *Dougherty* was pending before the Arizona Supreme Court. The day after this decision was issued, the Arizona Supreme Court vacated *Dougherty* on the class issue. See discussion of *Arizona Department of Revenue v. Ladewig* in this issue of the Appellate Highlights. *Kerr v. Arizona Department of Revenue*, 1 CA-TX-00-0023, 8-28-01 ... **The statute of limitations begins to run on a third-party insurance bad faith claim from the date the Morris agreement and dismissal of the underlying tort action become final despite the pendency of the insurer's declaratory judgment action, at least where the Morris agreement is premised on the insurance company's alleged misconduct in investigating the claim and refusing to defend the insured and not misconduct in the declaratory judgment action.** *Manterola v. Farmers Ins. Exch.*, 2 CA-CV-00-0108, 8-28-01 ... **A.R.S. § 12-820.02(A)(1), providing partial immunity to police officers from liability for failing to retain an arrested person in custody, does not apply to a decision by police officers to transfer custody to another jurisdiction, but only decisions to release the person from custody.** Thus, a plaintiff suing the police for the wrongful death of a prisoner in which custody was transferred to another jurisdiction need only

show that decision to transfer rather than seek medical assistance was negligent, not grossly negligent. *Calnimpewa v. Flagstaff Police Dep't*, 1 CA-CV-00-0552, 8-28-01 ... A.R.S. §§ 16-824 to -828, regulating the system for selecting party representatives of political parties who are entitled to continuing ballot access status, are mandatory in nature and do not unconstitutionally infringe on First Amendment associational rights. The statutes in question restrict who may serve as legislative district, county and state party officers, dictate where and when the state committee meeting must be held, that the party elect precinct committeemen pursuant to the statute and direct the composition of the state committee. *Arizona Libertarian Party v. Schmerl*, 1 CA-CV-00-0335, 8-16-01 ... Affirming a summary judgment for the plaintiff, Division One held that a foreign judgment should be recognized and enforced in Arizona under RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §§ 481-482, providing such a judgment is conclusive unless the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process, the defendant did not receive notice of the proceedings in sufficient time to enable him to defend, the judgment was obtained by fraud, and the cause of action or the judgment is repugnant to the public policy of the United States or of the state where recognition is sought. The court found the defendant's allegations and averments were insufficient to meet those standards. The court also affirmed the denial of the defendant's Rule 56(f) motion to postpone consideration of summary judgment where the defendant was seeking disclosure of documents relating to the foreign proceedings and there was no allegation he could not have used discovery procedures in the foreign proceeding to set aside the judgment. The defendant spouse's separate property was not held to be liable for the debt. Finally, due process did not preclude entry of a judgment enforceable against their community

property where the spouse was joined in the domestication action and was provided an opportunity to contest enforcement of the judgment against the community property but provided no evidence the judgment debt was only a separate obligation of her spouse. *Alberta Securities Comm'n v. Ryckman*, 1 CA-CV-00-0440, 8-7-01 ... A.R.S. § 35-196.02, prohibiting use of public funds for abortions, does not violate the right to privacy under the Arizona Constitution, Art. 2, § 8, the privileges and immunities clause of Arizona Constitution, Art. 2, § 13, and is not a special law in violation of Arizona Constitution, Art. 4, Part 2, § 19(13). *Simat Corp. v. AHCCCS*, 1 CA-CV-00-0334, 8-7-01.

COURT OF APPEALS CRIMINAL MATTERS

Persons trained and certified in phlebotomy are legally qualified to draw blood to determine alcohol concentration and drug content without the supervision of a physician, physician's assistant or registered nurse for purposes of Arizona's driving under the influence statutes. *State v. Olcavage*, 1 CA-SA-01-0130, 8-30-01 ... The trial court did not err in refusing to give an entrapment defense instruction where the defendant did not show that at the time of the origination of the idea of his selling drugs to a private detective that detective was working as a law enforcement agent. The fact the detective agency had previously worked with law enforcement agencies on cases was insufficient to show an agency relationship here. *State v. Hernandez*, 1 CA-CR-00-0763, 8-14-01 ... A Frye test is not required to determine the admissibility of a urine screening test for drugs where the defendant did not challenge the acceptance of such test in the relevant scientific community but only the accuracy of the test itself. Furthermore, the court did not have to decide whether a chemical analysis of a person's blood, breath or urine

is required to convict a person under A.R.S. § 28-1381(A)(3) because the drug screen in this case was sufficient because the State only had to prove the presence of a drug or its metabolite and not any particular quantity of drugs in the body. Finally, driving while having a drug or its metabolite in the body is not a conviction for personal drug use under A.R.S. § 13-901.01, entitling the defendant to probation. *Wozniak v. Galati*, 1 CA-SA-01-0097, 8-9-01.

COURT OF APPEALS JUVENILE MATTERS

The State has proven a juvenile was delinquent for fleeing from a law enforcement vehicle without having to show the officer's marked vehicle used its siren to chase the juvenile where the officer used his flashing lights and white "takedown" lights and it was not reasonably necessary to use the siren because of the lack of any other traffic. *In re Joel R.*, 2 CA-JV-01-0004, 8-21-01 ... A court may reinstate earlier charges dismissed under a plea agreement where a juvenile successfully moves to vacate the plea of delinquency because of the unconstitutionality of the underlying statute, the juvenile has not completed the terms of his plea agreement and the agreement provides dismissed charges will be reinstated if either party is allowed to get out of the agreement. *In re Alex M.*, 1 CA-JV-00-0219, 8-16-01 ... A.R.S. §§ 8-302(B) and 13-501(B), vesting exclusive authority in a prosecutor to determine whether juveniles in specified circumstances will be tried as adults, do not violate the separation of powers doctrine or the juvenile's due process rights. *Andrews v. Willich*, 1 CA-SA-01-0072 and 01-0109, 8-16-01. ▀

* indicates a dissent

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