



APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

A Violation of ARCAP 8.1(c), Which Governs Expedited Election Appeals, Is Not a Jurisdictional Defect. Arizona Rule of Appellate Procedure 8.1(c) requires appellants in expedited election matters to file a copy of the notice of appeal and other materials in the appellate court “[n]ot later than the next business day after filing the notice of appeal in the superior court.” In contrast to the requirement that an appeal be timely filed, the failure to timely file a copy of the notice of appeal in accordance with Rule 8.1 does not deprive the court of jurisdiction to hear an expedited election appeal. *Bee v. Day et al.*, CV 08-0199-AP/EL, 8/22/08.

Residential Homebuyers May Bring Suit for Breach of the Implied Warranty of Workmanship and Habitability Against a New Home Builder Who Is Not Also the Vendor of the Home. A builder who is not also the vendor of a new home impliedly warrants that construction has been done in a workmanlike manner. The implied warranty arises from construction of a new home, regardless of the identity of the vendor. A homeowners’ association may bring an action against a builder for breach of the implied warranty, despite the lack of privity between the parties; a vendor/vendee relationship is not necessary. *Lofts at Fillmore Condo. Ass’n v. Reliance Commercial Constr., Inc.*, CV 07-0416-PR, 8/19/08.

The Indian Child Welfare Act Requires Qualified Expert Testimony Regarding the Likelihood of Future Harm to the Child, But Such Testimony Need Not Parrot the Language

of the Statute. Pursuant to the Indian Child Welfare Act, before a state court judge may order foster care placement of an Indian child, the judge must make “a determination, based on clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(e). Because the statute is forward looking (relating to the likelihood of future harm to the child), expert testimony solely referring to past harms does not satisfy the statute; the expert testimony must address the likelihood of future harm. However, the statute does not require that an expert recite the specific language of § 1912(e). *Steven H. and Tammy H. v. Arizona Dep’t of Econ. Sec.*, CV 08-0026-PR, 8/19/08.

Signatures on a Nominating Petition That Provide Only a Post Office Box Address Are Not Invalid as a Matter of Law. Arizona law requires that a nominating petition be divided into four columns: “signature; printed name; actual residence address or description of place of residence, city, town or post office; and date of signing.” A.R.S. § 16-315(A)(4). However, a signature indicating only a post office box address is not invalid per se. Instead, if challenged, such a signature loses its presumption of validity, and the proponent must demonstrate to the trier of fact that the challenged signature is of a qualified elector. *Jenkins v. Hale*, CV 08-0208-AP/EL, 8/19/08.

Restitution Statute Requires Consideration of Any Benefits Conferred on Victim When

Determining Criminal Restitution for Violations of Contractor Licensing Statutes. Although A.R.S. § 13-603(C) requires restitution to victims “in the full amount of the [victims’] economic loss,” courts determining such losses must also take into account any value conferred on the victim. In determining the restitution appropriate for contracting without a license in violation of A.R.S. § 32-1151, a court should determine the victim’s actual economic loss rather than simply the amounts paid to the unlicensed contractor. *Town of Gilbert Prosecutor’s Office v. Downie*, CV 07-0300-PR, 8/4/08.* Justice Hurwitz separately concurred. Chief Justice McGregor dissented.

SUPREME COURT CRIMINAL MATTERS

In a capital homicide case remanded for re-sentencing following federal habeas corpus review, a trial court errs in instructing the jury regarding the issue of gratuitous violence, which may be used to establish that a murder in issue was committed in an especially heinous or depraved manner [an available statutory aggravator under A.R.S. § 13-703(F)(6)]when it includes a “less violent alternative” instruction. Such an instruction is generally fraught with inherent error because the violence that attends a murder committed with any particular weapon or modality usually depends on the manner in which the weapon is used rather than the nature of the weapon itself. The essential issue in gratuitous violence cases, therefore, is not the type of weapon used or that could have been used, yet rather whether a defendant “continues to inflict violence after he knew or should have known that a fatal action had occurred.” Moreover, with such an issue involving gratuitous violence based upon an allegation that a defendant could have used a less violent alternative (i.e., weapon or modality) to inflict death, it is difficult to establish that the defendant possessed the necessary state of mind such that he not only

intended to inflict greater harm or violence than necessary, yet actually considered and then rejected the “less violent” alternative. *State v. Wallace*, CR 05-0149-AP, 8/22/08.

Although a defendant may be prejudiced when he does not receive adequate pretrial notice regarding aggravating circumstances alleged by the State under *State v. Cropper*, appropriate notice is given when a defendant receives notice through the State’s disclosure months before the commencement of guilt proceedings and formal notice of aggravators seven months before sentencing. Moreover, it is not error in such a case remanded for re-sentencing following appeal for the trial court to deny a defendant’s motion to re-empanel the original jury despite the fact that a defendant may be limited in his ability to present relevant evidence for mitigation purposes due to the unavailability of witnesses, especially when the court grants a defense motion to limit evidence presented by the State to only that evidence that is relevant to the alleged aggravating factors. **It is not inappropriate for a judge in a capital case to death qualify a jury through the use of *Witherspoon* and *Morgan*-related jury voir dire rather than through the use of a requested questionnaire, especially when the court allows both the State and defense to voir dire prospective jurors on the issue through questions related to the death penalty, and further allows counsel to question individual jurors who did not express reservations about the death penalty.** Though a defendant generally has a due process right to confront witnesses presented in aggravation at the sentencing phase of a capital case under *State v. McGill* (which holding does not apply to reliable hearsay used to rebut mitigation evidence), **no violation of the Sixth Amendment occurs in a capital case when the State uses guilt phase transcripts of an unavailable witness specifically related to alleged aggravating**

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factors and the defense had an opportunity to cross-examine the declarant at the earlier proceeding with a defense interest or motive similar to that which the defense has during the sentencing phase of trial or at resentencing. In addition, even if tainted evidence related to an unproven or un-noticed aggravator is allowed to be heard by the resentencing jury, there is no error when a reviewing appellate court is convinced beyond a reasonable doubt that the alleged tainted evidence was superfluous and could not have affected the verdict. Despite the fact that in *State v. Andriano* the Arizona Supreme Court found that the trial court in that case did not err by giving a sentencing instruction to the jury that the death penalty should be applied in those first-degree murder cases "above the norm of other first degree murders," the Supreme Court did not hold or direct that other Arizona courts must give such an instruction in capital cases. In capital cases involving offenses alleged to have occurred before August 1, 2002, in which the Arizona Supreme Court is required to conduct an independent review of aggravating and mitigating circumstances as well as the propriety of the death sentence, the Arizona Supreme Court considers the quality and strength, and not simply the number, of aggravating and mitigating factors. In reviewing alleged gratuitous violence evidence in support of establishing in

aggravation pursuant to A.R.S. § 13-703(F)(6), in order to properly establish the especially heinous or depraved aggravator the State must prove that not only was more violence inflicted on the victim than was necessary to kill them, yet that the defendant continued to inflict violence after he knew or should have known that a fatal action had already occurred prior to the infliction of unnecessary violence. In such independent review cases, in which there is limited aggravation evidence and strong mitigation evidence, any doubt regarding the propriety of the death sentence imposed will be resolved in favor of a life sentence. As such, a defendant's sentence may be reduced in those cases subject to independent review in which mitigation evidence presented is unique in its depth and breadth and includes a substantial record of not only severe neglect, yet highly compelling evidence of the mental, physical, sexual and emotional abuse suffered by a defendant throughout childhood. *State v. Bocharski*, CR 06-0295-AP, 8/8/08.

COURT OF APPEALS CIVIL MATTERS

An Attorneys' Fees Award Arising from a Lawsuit Against a Husband Relating to His Premarital Conduct Is a Premarital Separate Debt, Even Though the Attorneys' Fees Were Incurred After the Marriage. Arizona's community property statutes provide that the

community is liable for the premarital separate debts of one spouse to the extent of that spouse's contribution to the community. Treating the costs imposed for defending premarital conduct as a separate postmarital debt would expand the liability of the community for premarital activities beyond that authorized by statute. *Arab Monetary Fund v. Jafar Hashim and Maryam Salass, husband and wife*, 1 CA-CV 07-0550, 8/12/08.

Arizona's Notice of Claim Statute Is Satisfied When a Claimant Provides the

Government with a Definite and Exact Amount for Which the Government's Liability Can Be Satisfied and an Explanation of How Past Events Have Harmed the Claimant. Arizona's notice of claim statute provides that "[t]he claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount." As long as the claimant states a definite and exact amount, and the government may completely satisfy its liability by paying that sum, the claim letter satisfies the sum certain requirement. As for facts supporting the amount, the notice of claim statute only requires "a recitation of how past events harmed the claimant and led to his offer." A demand letter satisfies this requirement by explaining the nature and circumstances of the injury and disclosing medical records. *Yollin v. Glendale*, 1 CA-CV 07-0513, 8/5/08.

A Petition Circulator's Affidavit Must Indicate That the Printed Names and Addresses Were Printed in the Circulator's Presence.

Notwithstanding the sample affidavit in A.R.S. § 19-112, the statute requires that affidavits accompanying signature sheets for a referendum petition include language affirming the name and address of each elector was printed in the presence of the elector and the petition circulator on the date indicated. However, a lack of strict compliance only invalidates signatures of a referendum petition if the statute expressly dictates that result; otherwise, it simply destroys the presumption of

validity. Because § 19-122(C) does not expressly state that a failure to comply strictly will result in the invalidation of signatures, a party may demonstrate that the printed names and addresses were written in the presence of the elector and circulator. *Harris v. City of Bisbee*, 2 CA-CV 2007-0160, 8/4/08.

Process Under the Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments Need Not Be Followed Before Tribal Court Judgment May Be Given Preclusive Effect.

Arizona courts have traditionally recognized tribal court judgments as a matter of comity. The Arizona Rules of Procedure for the Recognition of Tribal Court Civil Judgments, adopted in 2000, did not change that. Accordingly, the superior court may properly recognize (and gives preclusive effect to) a tribal court judgment even though it has not been filed with the superior court pursuant to those rules. *Beltran v. Harrab's Arizona Corporation*, 2 CA-CV 2007-0169, 7/31/08.

Water Owners Can Have Standing for Conversion Claim Concerning Water That Has Become Personal Property.

A water company may assert a conversion claim in connection with water flowing through the water company's pipes that is diverted. Although the law usually treats water as real property, water qualifies as personal property when possession and control of the specific water at issue has been taken. By demonstrating that it provides water service to the pipe from which the water is diverted, a water company makes the requisite showing of possession and control. *Strawberry Water Co. v. Paulsen*, 1 CA-CV 06-0442, 7/29/08.

Company May Be Held Liable for Aiding and Abetting an Employee's Breach of Fiduciary Duty Against Another Employer, Which May Also Warrant Punitive Damages.

A title company intending to hire a key employee from a competitor aids and abets the employee's breach of fiduciary duty to the competitor by being aware of and providing assistance with the key employee's improper soliciting of the competitor's employees and

agreeing to indemnify the key employee if the competitor sues. Such conduct may warrant punitive damages. But any such award may not exceed the constitutional limits permitted by due process considerations. *Security Title Agency, Inc. v. Pope*, 1 CA-CV 07-0272, 7/29/08.

A Homeowners' Association May Not Properly Record a Lis Pendens Under A.R.S. § 12-1191(A) in Connection with an Action to Enforce the CC&Rs Where the Action Would Not Expand, Restrict, or Burden the Property Owner's Rights as Bestowed by Virtue of the Title to the Property. A party may only record a lis pendens under A.R.S. § 12-1191(A) if it affects real property. A lawsuit affects a right incident to title if any judgment would expand, restrict, or burden a property owner's rights as bestowed by virtue of that title. A homeowners' association's claim for injunctive relief against a homeowner for failure to maintain the lot does not affect title, nor does a request for self-help remedies that would allow the association to recover expenses from the homeowner if the homeowner fails to comply with court ordered injunctive relief. *Santa Fe Ridge Homeowners' Assoc. v. Bartschi*, 1 CA-CV 07-0792, 7/29/08.

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Although a defendant's renewal of a motion to sever trials pursuant to Rule 13.4(c), ARIZ.R.CRIM.P., preserves the severance issue for appeal purposes, such a renewal does not

preserve the issue for a codefendant when the codefendant did not join in the renewal of that motion or renew his own prior motion to sever. The renewal of a motion to sever by a particular defendant who previously joined or filed their own motion to sever before the trial of multiple defendants is not an unnecessary formality. Rule 13.4(c) requires that a defendant's motion to sever trial from other defendants must be not only made at least 20 days before trial, yet if denied, renewed during trial at or before the close of the evidence. If a motion to sever is not properly renewed during trial, it is waived for the purposes of direct appeal. A trial court must order separate trials when the issue of severance is properly raised or renewed at trial if fairness so requires. In making such a determination after a motion to sever is renewed, the trial court must consider a number of factors that trial events can bring into sharper focus such as any antagonism between the respective defenses or the prejudicial impact that certain evidence admitted against one defendant may have on another. *State v. Flythe*, 2 CA-CR 2007-0157, 8/25/08.

Arizona's constitutional prohibition of polygamy does not violate a criminal defendant's federal First Amendment right to free exercise of religion. The Free Exercise Clause of the First Amendment made applicable to the states through the Fourteenth Amendment provides: "Congress shall make no law respecting an establishment of religion, or pro-

hibiting the free exercise thereof." Although the right to establish or believe a certain religion is absolute, the practice of such religion through the performance or abstinence from physical acts or conduct for religious reasons is not, such that a state through its constitution or legislation may proscribe conduct related to a religion's practice without violating the First Amendment. Moreover, the U.S. Supreme Court has declined to extend protection of the Free Exercise Clause to the practice of polygamy. Furthermore, the prosecution of an adult male who enters into a celestial (rather than a legal) marriage with a minor does not violate the defendant's substantive due process rights under the 14th Amendment because the right to enter into a celestial marriage with a minor who may subsequently consent to sexual relations is not a fundamental right, unlike that of sexual activity between consenting adults. Finally, in a case involving alleged sexual conduct with a minor brought under A.R.S. § 13-1405(A), an individual who enters into a plural marriage with a minor is not entitled to a defense of sexual conduct with a minor on the grounds that the minor is his spouse pursuant to A.R.S. § 13-1407(D) because a celestial marriage does not make a minor child in such a relationship a "spouse" for the purposes of invoking the defense. The term "spouse" as defined is not vague as it is unambiguously defined under A.R.S. § 13-1401(4) as "a person who is legally married and cohabitating". As such, a celestial marriage contracted in Arizona is not valid for the purposes of the defense in issue because parties to the marriage are unable to obtain a valid marriage license under Arizona law. *State v. Fischer*, 1 CA-CR 06-0682, 8/5/08.

A trial court errs by failing to declare a mistrial after the polling of the jury and related investigation reveals that a particular juror did not agree with the verdict for specific reasons rather than due to a general or unexpressed reservation leading the court to return the jury to deliberation. When a polled juror

does not agree with the verdict, Rule 23.4, ARIZ.R.CRIM.P., provides that "the court may direct [the jury] to retire for further deliberations or they may be discharged." **Error related to the mistrial issue is obvious in cases in which the trial court determines following additional deliberations that the questioning juror changed or more solidified their vote or verdict even though they still held essentially the same doubts about evidence presented at trial that led them to initially disagree with the verdict during the first polling.** However, it is noteworthy that in *State v. Hernandez*, Division One of the Arizona Court of Appeals found that a trial court did not err in finding a verdict to be unanimous when the objecting juror did not wish to discuss their initial reservation and upon further limited investigation determined from the juror that his verdict was guilty with no expression of reservation. However, in *State v. McCrimmon* the Arizona Supreme Court identified circumstances that may give rise to a finding of jury coercion, including circumstances in which a reluctant juror is singled out by the trial court, is given the clear message that their indecision was unacceptable, and not informed that their inability to find guilt beyond a reasonable doubt could disaffirm the verdict. In like manner, jury coercion may occur in situations in which individual jurors express reservations during polling, and the trial court has direct or individual contact with the juror expressing reservations about the verdict, whereby a trial court should refrain from further re-polling as to particular counts or communicating with an individual member of the jury regarding their verdict and either enter a mistrial or return the jury for further deliberation because such contact "is pregnant with possibilities for error" such as improperly focusing attention on the juror expressing reservation about the verdict(s) which may lead to pressure from other members of the jury during additional deliberations allowed under Rule 23.4. *State v. Rodriguez-Rosario*, 1 CA-CR 06-0966, 7/31/08. *****

* indicates a dissent

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