

appellate highlights

by Donn Kessler and Patrick C. Copen

SUPREME COURT CRIMINAL MATTERS

A defendant who requests a RAJI instruction waives his right to challenge the instruction under the invited error doctrine. The fact that the instruction appeared in RAJI was not relevant because the Supreme Court had stated it no longer qualifiedly approved RAJI instructions in 1996, prior to the instruction requested in this case. *State v. Logan*, CR-01-0053-PR, 9/6/01.

SUPREME COURT CIVIL MATTERS

A claim for punitive damages survives the death of the tortfeasor and can be pursued against the tortfeasor's estate. The tortfeasor's employer also can be held vicariously liable for punitive damages arising out of the tortious conduct of the deceased employee provided the employee acted in furtherance of the employer's business and within the scope of employment. *Haralson v. Fisher Surveying, Inc.*, CV-00-0006-CQ, 9/13/01.*

COURT OF APPEALS CIVIL MATTERS

Although the clear and unequivocal language of A.R.S. § 38-846 deprives an spouse of any right or claim to death benefits under the Arizona Public Safety Personnel Retirement System, the statute contains no language showing the legislature intended to deprive former spouses of any community interest they may have in the plan's retirement benefits. In addition, the anti-assignment provisions of A.R.S. § 38-850(C) do not bar the wife of a retired police officer from devising her interests in his retirement benefits to her parents through her estate because she was not a creditor of the employee. *Snyder v. Tucson Police Public Safety Retirement System Board*, 2 CA-CV 98-0126, 9/27/01 ... Reversing a summary judgment for the claimant to a car used to sell drugs where the claimant did not have any financial interest in the sale, Division Two of the Court of Appeals held that A.R.S. § 13-2314(G) applied where the defendant volunteered to perform the act for others who actually received financial gain. The court also held that a trial judge could consider hearsay evidence on summary judgment motions where the owner waived any objection by also using the hearsay and not moving to strike the State's hearsay evi-

dence. *In re 1996 Nissan Sentra*, 2 CA-CV 00-0162, 9/25/01 ... A Tempe ordinance prohibiting any alterations to existing billboards was held invalid as conflicting with A.R.S. § 9-462.02, prohibiting ordinances affecting existing property or use of property at the time the ordinance takes effect or reasonable repairs or alterations in the property used for an existing purpose. The property owner was entitled to summary judgment and to an award of attorneys' fees under A.R.S. § 12-348. However, because the constitutional issue was not reached, no fees were awardable under 42 U.S.C. § 1988. *City of Tempe v. Outdoor Systems, Inc.*, 1 CA-CV 00-0242, 9/25/01 ... The trial judge's excusing a juror was held prejudicial error where: (1) The trial judge only had permission from the parties to meet with the juror *ex parte* to determine if a family problem prevented her from continuing to serve, not to try to convince the juror to be excused; (2) A review of the videotape of the *ex parte* interview did not support the judge's conclusion that the juror was too emotionally wrought to continue to serve; (3) The presumption of prejudice from removing a juror applied even before the jurors began to deliberate; and (4) There was no sound basis to apply judicial discretion to excuse the juror because the trial judge insufficiently inquired as to the juror's alleged emotional distress. *Young v. Johnson*, 1 CA-CV 00-0159, 9/20/01 ... State statutes limiting indigent health care to emergency care for qualified aliens who entered the United States after August 22, 1996, were unconstitutional because they were inconsistent with federal immigration laws and there was no compelling state interest in imposing such a limitation. *Kurti v. Maricopa County*, 1 CA-CV 01-0055, 9/20/01 ... Reckless driving was a jury-eligible offense at common law, so the right to a jury trial was protected by Arizona Constitution art. 2, §§ 23-24. *Urs v. Maricopa County Attorney's Office*, 1 CA-CV 01-0144, 9/20/01 ... A.R.S. § 41-193(A)(2) authorized the Attorney General to provide legal representation to protect the interests of the Attorney General's office, but not to defend an assistant attorney general under a criminal investigation. *Steiger v. Woods*, 1 CA-CV 00-0081, 00-0084, 9/18/01 ... The failure of the Industrial Commission to respond to arguments raised to an administrative law

judge does not waive those arguments on appeal. A final award for an unscheduled disability is dispositive of a later claim only if the preclusion extends to a finding that the impairment from the industrial injury was an unscheduled disability. *Special Fund Division v. Tabor*, 1 CA-IC 99-0172, 9/11/01 ... Although a patent licensee has an implied duty to exploit patent rights, the directors and shareholders of the licensee have no such obligation absent evidence of interference with contract, actual fraud or contractual obligations. However, the directors and shareholders could be personally liable to other shareholders and employees for fraudulent purchase of securities based on misrepresentations and omissions by the defendants involving funding to the corporation that was never intended to be completed and the defendants allegedly forced the plaintiffs to later sell the stock at a depressed price. Direct claims also were properly alleged for allowing the stock to devalue, rendering stock options meaningless and loss of salary and employment if the relationship between the shareholder and the wrongdoers was either separate from the shareholder's status as a shareholder, the defendant had a duty to the shareholder beyond the plaintiff's shareholder status or the injuries sustained by plaintiffs were individual and not corporate in nature. Finally, the plaintiffs failed to properly allege a derivative claim on behalf of the corporation. *Albers v. Edelson Tech. Partners*, 1 CA-CV 00-0406, 9/4/01.

COURT OF APPEALS CRIMINAL MATTERS

Sexual conduct with a minor may provide the basis for a related conspiracy charge because, unlike adultery or bribery, the offense may be committed by the act of the defendant alone. The court also held that profile evidence is admissible to rebut specific attempts by the defendant to suggest innocence based on the particular characteristics described in the profile. The court also held that other acts evidence involving Internet conversation with other imaginary females created by the police was admissible to show the defendant's intent where the defendant places the issue of intent at issue. However, the trial court lacked jurisdiction under A.R.S. § 13-902(E) to impose lifetime probation for a preparatory offense of

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) and the Court of Appeals (www.state.az.us/co).

attempted sexual conduct with the minor. Finally, it could order registration as a sex offender pursuant to A.R.S. § 13-3821. *State v. Bass*, 2 CA-CR 00-0237, 9/26/01 ... A.R.S. § 28-1381(A)(3), prohibiting driving while dangerous drugs or metabolites were in the defendant's body, was void for vagueness as applied in this case where the driver had used a legitimate drug and did not know the drug would convert into an unlawful drug in his body. *State v. Boyd*, 1 CA-CR 00-0761, 9/25/01 ... A defendant is eligible for mandatory probation under A.R.S. § 13-901.01(A) where the State failed to allege and prove a prior conviction for possession of a dangerous drug. However, the trial court erred in terminating the probation rather than continuing it and imposing additional terms as required under A.R.S. § 13-901.01(E). *State v. Hensley*, 1 CA-CR 00-0508, 9/20/01* ... The trial court properly sentenced a defendant to prison rather than probation for pro-

moting prison contraband because A.R.S. § 13-901.01 did not apply to the offense of promoting prison contraband. *State v. Roman*, 1 CA-CR 00-0522, 9/18/01 ... The trial court erred in denying a challenge of a juror for cause where the juror stated that she would have a difficult or hard time rendering a fair and impartial verdict. Although the juror later stated that she could be fair and impartial based on how the criminal justice system worked, this was not a case in which the juror ultimately stated that she could follow the law. The court also questioned whether *State v. Huerta*, 175 Ariz. 262 (1993), providing that such an error requires automatic reversal even if the juror is later peremptorily struck, should be overruled in light of the contrary federal rule under *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). *State v. Ibanez*, 1 CA-CR 00-0821, 9/18/01 ... Applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court of Appeals held that absent waiver, a state

must prove to a jury that the defendant committed an offense while on pretrial release for another charge before a court can enhance the sentence under A.R.S. § 13-604. *State v. Gross*, 1 CA-CR 00-0269, 9/4/01.

COURT OF APPEALS JUVENILE MATTERS

The trial court erred by dismissing a private dependency action for lack of jurisdiction due to relocation of the petitioning parents out of state when the alleged dependent remains in Arizona and the parents were domiciled in Arizona when they filed the petition. *David S. and Paula S. v. Audilio S.*, 2 CA-JV 00-0066, 9/27/01.

* indicates a dissent

Donn Kessler is a Staff Attorney for the Arizona Supreme Court. Patrick Coppen is a sole practitioner in Tucson.

ARIZONA
BAR
CENTER
www.azbar.org

INTERESTED IN EMPLOYMENT WITH THE ARIZONA BAR CENTER?

Call our job hotline at (602) 340-7347 or visit our Web Site at www.azbar.org to learn about current vacancies and how to apply.



The State Bar of Arizona and the Arizona Bar Foundation are Equal Opportunity Employers

111 West Monroe, Suite 1800, Phoenix, Arizona 85003-1742
Phone: (602) 252-4804 Fax: (602) 271-4930