



## APPELLATE HIGHLIGHTS

by Hon. Donn Kessler, Arizona Court of Appeals, Div. One, and Patrick C. Coppen, Esq., Tucson

### SUPREME COURT CIVIL MATTERS

The standard for the Maricopa County Employee Merit System Commission's review of disciplinary action against an employee is limited to determine whether the action was arbitrary or taken without reasonable cause. The Commission may not reverse the employer's action on the grounds that it was so grossly disproportionate to the offense that it shocked a sense of fairness. If the discipline is within a permissible range, it is unlikely to be arbitrary and the Commission should not disturb it simply because it might be disproportionate to the alleged offense. *Maricopa County Sheriff's Office v. Maricopa County Employee Merit Sys. Comm'n*, CV 04-0046-PR, 9/21/05 ... The Pima County Law Enforcement Merit System Council's rule giving broad authority to the Council to revoke or modify the employer's disciplinary action is consistent with recognized merit system principles as provided by A.R.S. § 37-1003. The rule allows the Council to revoke or modify an action if it finds that there was not just cause for the decision either because the charges were not proven to the Council's satisfaction and/or in the Council's sole discretion the sanction was too severe. The Council had interpreted the rule to require the employer to prove its case by a preponderance of evidence and the statute did not require an arbitrary and capricious or any other specific standard of review. *Pima County v. Pima County Law Enforcement Sys.*, CV 04-0356-PR, 9/21/05 ... The coordinator/agent of a proposed sponsor of an event on the Courthouse Plaza in Prescott lacked standing to bring a First Amendment challenge to the county's requirement that the sponsor be a non-profit entity. In this case, the sponsor associated with the plaintiff was a non-profit entity and a different non-profit group was selected for the permit. *Bennet v. Brownlow*, CV 04-0215-PR, 9/9/05.

### COURT OF APPEALS CIVIL MATTERS

A trial court did not err in a negligent entrustment case by admit-

ting evidence of a defendant's post-accident conduct including flight from the scene of the accident and physical evidence indicating drug or alcohol impairment. Such evidence is relevant to the issue of whether the entrusted driver was competent to drive safely at the time of the accident. False statements concerning who was actually driving the vehicle causing the accident in such a case are also relevant. Issues not raised at trial regarding proof of each element of the tort are always waived for purposes of appeal, even for purposes of challenging a lower court's failure to direct a verdict on such a claim. Although circumstantial evidence may support an inference that an entrusting defendant had either actual or constructive knowledge of the entrusted driver's incompetence, such evidence must be both probative and affirmatively establish the claimed negligence. *Acuna v. Hampton, et al.*, 2 CA-CV 05-0049, 10/6/05 ... A trial court erred in entering summary judgment against a plaintiff in finding that their fraudulent transfer claim brought under the Arizona Fraudulent Transfer Act (A.R.S. §§ 44-1001 through 44-1010) was subject to property conveyance statutes. A transfer under the Act is broadly defined and includes any transaction in which a property interest was relinquished, even to a party with an equitable interest in the property. Moreover, the Act does not necessarily require proof of intent to fraudulently transfer, merely proof of circumstances listed under the Act, which may include situations in which real property is transferred to an equitable owner, yet a good faith purchaser of the asset from the debtor transferor cannot acquire an interest in the asset superior to that of the equitable owner or transferee. There is no good faith defense available to a debtor in a fraudulent transfer action brought under the Act. *Kauffmann v. M & S Unlimited, LLC*, 2 CA-CV 05-0037, 9/30/05 ... An arbitration provision in a contract to purchase a home that was subject to the Federal Arbitration Act could be enforced under state law even in a contract of adhesion if the clause

was not contrary to the plaintiff's reasonable expectations and was not substantively unconscionable. There was no record the plaintiffs thought there was no arbitration clause, the clause was not bizarre or oppressive and did not undercut the dominant purpose of the contract. Moreover, the clause was understandable and there was no evidence the plaintiffs would not have entered into the agreement if they knew the clause was included. There is no requirement that the clause be conspicuous or explicit to waive a jury trial nor need that waiver in this context be knowing and voluntary. The fact that there was a potential class involved and the arbitration fees might affect their ability to prosecute the case did not render the clause unenforceable when the plaintiffs did not present specific evidence as to their financial resources, the claimed damages were high, the fees were not disproportionately high compared to the damages and the fees could be deferred or reduced. In such case the plaintiffs did not meet their burden of proof that the fees would be prohibitively expensive. *Harrington v. Pulte Home Corp.*, 1 CA-CV 04-0576, 9/27/05 ... A trial court can allow telephonic testimony in a civil commitment hearing without violating the confrontation clause based on the need to expedite the hearing and where the testimony's reliability was otherwise assured. *In re MH 2004-001987*, 1 CA-MH 05-0007, 9/22/05 ... The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, applies to text messages sent to cell phones in the form of unsolicited advertisements. The statute did not violate the defendant's First Amendment rights. *Joffe v. Acacia Mortgage Corp.*, 1 CA-CV 02-0701, 9/20/05 ... Although a party is entitled to at least 10 business days' notice of a proposed deposition, the trial court can alter that time. A court can also sanction a party for the failure of a non-resident to appear at an ordered deposition when the party failed to obey or object to the order. The court also had authority to award attorneys' fees applied for after entry of a judgment

regardless of whether the judgment was final under ARIZ.R.CIV.P. 54(b). *National Broker Assoc. Inc. v. Marlyn Nutraceuticals, Inc.*, 1 CA-CV 03-0810 and 1 CA-CV 04-0534, 9/13/05 ... The trial court erred in granting summary judgment for a property owners' association on a claim that its distribution of excess assessments to members violated a statute prohibiting non-profit corporations from distributing assets. A fact question existed whether the funds were held in trust for its members, which would have permitted such payments to the members. *Harris v. Goldfield Property Owners Ass'n*, 1 CA-CV 04-0652, 9/6/05.

### COURT OF APPEALS CRIMINAL MATTERS

A court did not err in appointing a special prosecutor to handle a case when the special prosecutor was nominated by the original prosecutor who had a conflict of interest in the matter. As long as there was no independent basis to disqualify the special prosecutor, the disqualified prosecutor did not further participate in the matter and the court decided whether to appoint the prosecutor, the defendant was not denied any due process. *Vilalpando v. Regan*, 1 CA-CV 04-0775, 9/22/05 ... A defendant is not entitled to a jury trial on charges of misdemeanor assault. *Phoenix City Prosecutor's Office v. Klausner (Buford)*, 1 CA-SA 05-0118, 9/13/05 ... A defendant convicted of manslaughter and endangerment arising out of an accident in an intersection was not entitled to an intervening event instruction based on the other driver's speeding because a collision with the other vehicle was foreseeable given the defendant's illegal left-hand turn from the far right lane. The court also did not err in excluding evidence of the defendant's alleged characteristic to act prudently in life. Such evidence was not pertinent to whether the defendant acted in a reckless manner in this accident. Moreover, the defendant's .155 blood alcohol content and illegal turn showed that he acted recklessly. *State v. Vandever*, 1 CA-CR 04-0589, 9/13/05 ... An indigent defen-

dant has a constitutional right to choose a non-public attorney paid by private funds to represent him. Left unanswered was whether the defendant would be entitled to public funds to pay for such counsel. *Robinson v. Superior Court (Hotham)*, 1 CA-SA 05-0190 9/6/05 ... *Blakely v. Washington*, 124 S. Ct. 2531 (2004), applies to all Rule 32 of-right petitions not yet final on direct review when *Blakely* was decided. Moreover, a defendant's waiver of the right to a jury trial on the offense was not, by itself, a waiver of the right to have the jury determine aggravating factors under *Blakely*. *State v. Ward*, 1 CA-CR 04-0435-PR, 9/6/05 ... A court may try a defendant in absentia if the defendant knowingly decided to participate in the INS's voluntary departure procedure rather than to seek a hearing in immigration court, seek asylum or be voluntarily released to his own country. Moreover, the defendant's failure to keep in contact with his attorney or the court after returning to his own country also constituted a waiver to appear at trial. *State v. Superior Court (Blakely)*, 1 CA-SA 05-0124, 9/1/05 ... A.R.S. § 13-4426.01 provides that a victim or the victim's representative has a right to be heard in the sentencing penalty phase, but not the sentencing aggravation phase and that a victim's impact statement need not be disclosed prior to trial. The statute is not facially unconstitutional in not requiring such disclosure. As applied, it would be premature for the court to determine whether disclosure might be required because the defendant did not claim the victim's representative had information essential to an effective defense or cross-examination or which would be needed at an aggravation hearing. *State v. Superior Court (Foreman)*, 1 CA-SA 05-0001, 9/1/05 ... As long as one aggravating factor is *Blakely*-compliant or -exempt, "the 6th Amendment permits a sentencing judge to find and consider additional [aggravating] factors under A.R.S. § 13-702 (D) relevant to the imposition of a sentence up to the maximum prescribed" by law as long as the

additional factors are based upon reasonable evidence, including uncontested facts referenced in a pre-sentence report. For example, a trial court may properly find in aggravation that a particular defendant lacks remorse if they fail to acknowledge responsibility for their conduct although expressing sorrow for injuries suffered by a victim. Although the recently revised section 13-702(D) comports to the *State v. Martinez* holding, *Blakely* error in sentencing may still occur if a sentence is aggravated pursuant to that section, yet the defendant has no prior convictions and no aggravating factors are *Blakely*-compliant. Should a defendant's prior misdemeanor or felony convictions be used in aggravation, the record must show that the priors were found to be discrete aggravating factors, rather than a springboard to aggravate the sentence based upon an exclusive aggravating factor from their misdemeanor record. *State v. Molina*, 2 CA-CR 04-0222, 8/30/05 ... A trial court did not abuse its discretion in refusing a defendant's request to instruct the jury that it could conduct its own examination of the evidence and allow the jury to use a magnifying glass to examine fingerprints in the jury room. The evidence examination instruction was adequately covered by the instruction that the jury was to determine the facts from the evidence presented in the courtroom through testimony and exhibits. The trial court balanced the potential for jury confusion arising from the jury's use of a magnifying glass given its lack of training in distinguishing fingerprint dissimilarities and insignificant distortions with the jury's ability to still properly scrutinize dissimilarities on the fingerprint cards presented in evidence. *State v. Gomez*, 2 CA-CR 04-0108, 8/26/05 ... After a criminal defendant's original sentence is vacated in its entirety on appeal, the 90-day period for filing a petition for

## SUPREME COURT PETITIONS

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The Arizona Supreme Court accepted review or jurisdiction of the following issues on September 27, 2005\*:

*State of Arizona v. Emmet Darnell Wall*, 2 CA-CR 04-0020-PR (Mem. Decision) (CR 05-0089-PR)

"Does a defendant forfeit his right to a lesser included offense instruction when he has admitted taking action that assisted another's commission of an offense but denies knowing of the other person's intent to commit that offense and when there is evidence in the record to support the lesser offense?"

*Edward Powell et al. v. Thomas Washburn et al.*, 1 CA-CV 04-0370 (Mem. Decision) (CV 05-0186-PR)

"In a Dispute to Exclude Recreation Vehicles (RVs) from a Planned Development, governed by Covenants, Conditions and Restrictions (CC&Rs) does the maxim of contract construction that CC&Rs "Should be strictly construed in favor of free use of land" supercede the intent of the parties and other rules of contract construction?"

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



post conviction relief is 90 days following re-sentencing. *State v. Viramontes*, 2 CA-CR 04-0378-PR, 8/26/05 ... A trial court did not err in refusing to instruct a jury concerning a "justification to prevent child molestation defense" in a first-degree murder case because it was not reasonably and clearly supported by the evidence presented. The trial court did not violate the defendant's Sixth Amendment confrontation right in admitting the statement of a non-testifying co-defendant introduced solely to impeach a previously admitted statement of the co-defendant used by the defense for exculpatory purposes. *State v. Ruggiero*, 2 CA-CR 04-0063, 8/10/05.

### COURT OF APPEALS JUVENILE MATTERS

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Arizona is the "home state" of a child whose family was moving to another state when the state had filed a dependency petition. Although the child had actually already been removed from Arizona at the time the dependency petition was filed, Arizona remained the "home state" for purposes of the UCCJEA because the child had lived in Arizona since her birth including "at least six consecutive months immediately before the commencement" of dependency proceedings. Although Rule 42 of the Arizona Rules of Procedure for Juvenile Court provides that a juvenile court "may permit telephonic testimony or argument or video conferencing in any dependency, guardianship or ter-

mination of parental rights hearing," a juvenile court does not abuse its discretion in refusing to allow parents of alleged dependent children to participate in a contested dependency hearing by telephone where good cause does not exist for such appearance, especially where the parents have voluntarily left the state in defiance of a court order requiring their dependent children to remain. Due process is not violated by denying a telephonic appearance at a contested dependency hearing where the record reflects that the parents were properly served the dependency petition for the child, given notice of all hearings, were represented by counsel throughout and were repeatedly told by the court that their presence was required with their failure to appear possibly resulting in a dependency adjudication. *In re Billy G. and Bonny H.*, 2 CA-CV 04-0065 & 2 CA-CV 04-0066, 9/22/05 ... A court did not abuse its discretion in requiring a juvenile to pay restitution to a victim by including the amount by which the outstanding encumbrance on the victim's destroyed car exceeded its fair market value. *In re William L.*, 1 CA-CV 04-0206, 9/15/05. ¶

\* indicates a dissent

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