appellate highlights

by Donn Kessler and Patrick C. Coppen

SUPREME COURT CIVIL MATTERS

An administrative law judge's findings of fact were sufficient to justify excusing the employee from complying with the requirement of A.R.S. § 23-908(D) to forthwith report an accident and any resulting injury to his employer. The judge found the employee testified credibly he delayed reporting the accident with the hope it would heal on its own, thus showing the employee had no way of knowing a compensable injury had occurred. *Douglas Auto & Equip. v. Industrial Comm'n of Arizona*, CV-01-0239, 4/30/02 … **A defendant who actively participated in pre-arbitration discovery and disclosure sufficiently participated in good faith so as not to waive his right to appeal from an adverse arbitration award where he did not physically appear at the arbitration hearing, no subpoena had been issued for his appearance, he had not promised to appear and his attorney appeared and defended at the hearing.** *Lane v. City of Tempe*, CV-01-0142-PR, 4/24/02 … Disapproving of *Kowske v. Life Care Ctrs. of America, Inc.*, 176 Ariz. 535 (App. 1993), to the extent it suggests accrual of a cause of action occurs in medical malpractice cases before a plaintiff is put on reasonable notice to investigate whether the injury is attributable to negligence, the Supreme Court held, *inter alia,* **the statute of limitations in a medical or dental malpractice action does not begin to run as a matter of law when the patient knew she was injured. Rather it accrues when the facts of the injury reasonably put her on notice to investigate whether the injury was likely attributable to the fault of her health care provider.** The Court also held that **a physician and a patient are in a fiduciary relationship calling for frank and truthful information from the provider. Fraud practiced to conceal a cause of action will prevent the running of the statute of limitations until the concealment is or should have reasonably been discovered.** *Walk v. Ring*, CV-01-0090-PR, 4/24/02 … **A city did not violate A.R.S. § 19-141(A) by failing to mail publicity pamphlets 10 days before the start of early voting for its general election.** In addition, the city's charter amendment changing the mayoral term from two to four years was not unconstitutional as a special law. *Sherman v. City of Tempe*, CV-01-0287-PR, 4/12/01.

SUPREME COURT CRIMINAL MATTERS

Clarifying *State v. Fulminante*, 161 Ariz. 237 (1988), the Supreme Court held that it did not intend that a special standard or test of admissibility be applied to determine whether a defendant could introduce evidence that a third person committed the crime charged only when the evidence had an inherent tendency to connect the other person to the crime. Rather, the test for admissibility is governed by whether the evidence is relevant under Arizona Rule of Evidence 401, meaning the effect the evidence has upon the defendant's culpability, rather than on the third party's culpability. *State v. Gibson*, CR-01-0045-PR, 5/1/02.

COURT OF APPEALS CIVIL MATTERS

An employee who voluntarily chose to become an independent contractor shortly before massive layoffs were announced was not entitled to 60-day notice of the layoffs or remedies as an affected employee under the Worker Adjustment and Retaining Notification Act, 29 U.S.C. § 2102(a), even though the employer had kept him on the payroll until the end of the month and the day the notice was given. *Shannon v. Computer Assocs. Int'l, Inc.*, 1 CA-CV-01-0321, 4/30/02 … **Pursuant to the Commerce Clause, Arizona had to apportion the amount of transaction privilege taxes imposed on gross receipts from a railroad's transporting copper concentrate from Arizona to New Mexico and then to smelters located in Arizona. However, Arizona statutes do not permit the apportionment of such taxes, and a court cannot order such apportionment without statutory authority.** *Southern Pacific Transp. Co., Inc. v. State of Arizona*, 1 CA-TX-00-0024, 4/25/02 … **A workers' compensation claimant's high/low agreement with a third-party tortfeasor was an unauthorized settlement that required the Fund's prior approval.** This is because A.R.S. § 23-1023(c) provides that a compromise for less than the compensation and benefits provided refers to the amount of benefits that could be paid. **The settlement was also an artful contrivance because it was kept secret from the trial judge and the Fund,** and the Fund was not informed of the trial against the employer and third party. *Stout v. State Compensation Fund*, 1 CA-CV-01-0079, 4/25/02 … **Where an employment manual and policies provide repeated disclaimers that the employee is at-will and is not entitled to any disciplinary procedures, the employer is entitled to a judgment as a matter of law on breach of contract and wrongful termination claims where the employer did not abide by its disciplinary proceedings.** Judge Weisberg dissented, finding a fact issue based on the employer's course of conduct. *Roberson v. Wal-Mart Stores, Inc.*, 1 CA-CV-00-0555, 4/23/02* … **Under A.R.S. §§ 5-503(I) & (J), requests for written money judgments for child support arrearages must be made within three years of the date of emancipation of the youngest child who is the subject of a child support order. Emancipation occurs on a child's 18th birthday or on the term of the support obligation if support is extended beyond the age of majority and terminates on the date of graduation;** pursuant to A.R.S. § 25-503(J), **if emancipation is disputed, A.R.S. § 503 requires that its language be construed liberally to effect its intention to diminish the limitations period** for collecting child support arrearages. *State of Arizona v. Huskie*, 2 CA-CV 2001-0057, 4/18/02 … **A.R.S. § 23-392, providing for payment of overtime compensation to law enforcement agents after completion of 40 hours in a one-week cycle, controls payment of overtime compensation.** A.R.S. §11-251(38), providing that counties may provide overtime compensation to employees consistently with the Fair Labor Standards Act, does not apply. *Pijanowski v. Yuma County*, 1 CA-CV-00-0482, 4/2/02 … **The parties to a premarital agreement (classifying income earned during the marriage as separate income) fraudulently transferred assets where, after a decision had been rendered by the Industrial Commission against one of the spouses,**

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).

The Arizona Supreme Court accepted review or jurisdiction of the following issues on May 22, 2002.*

***Estate of Norma McGill v. Albrecht*, CV-02-0058-PR**
"Does the Adult Protective Services Act, A.R.S. § 46-455, et seq., create a cause of action for negligent medical care of a vulnerable adult or does a claimant have to show something in addition to medical malpractice to pursue a claim?"

***Leland v. Halstead*, CV-02-0061-PR**
"1. Did the Court of Appeals err in its finding that Erika was not a "guest" and as such, A.R.S. § 11-1025 does not apply.
"2. Did the majority of the Court of Appeals err in concluding the negligence claim was waived."

***Jackson v. Chandler*, CV-02-0060-PR**
"The primary issue decided by the court of appeals was whether the grant of summary judgment was based on a misconstruction of Arizona's choice-of-law principles. A subsidiary issue was whether the trial court erred in refusing to find that the defendants' conduct in the year preceding the statute's running estopped them from asserting the limitations defense in the first place."

***State of Arizona v. Hernandez*, CR-02-0067-PR**
"1. Was Trial Counsel Ineffective for Making the Ultimate Decision on [the] Less[er]-Included Charge of Manslaughter Without Consulting Client?
"2 .Is A Decision on a Lesser-Included Offense Strategic for Counsel or Inherently Personal and Fundamental to the Defendant?
"3. Would the Manslaughter Instruction Have Made a Difference by Allowing the Jury to Find Second Degree in a Sudden Quarrel? (Manslaughter)?"

***In re Thomas M. Connelly*, SB-02-0055-D**
The Supreme Court has reframed the issues as follows:
"1. What standards are to be applied in determining what constitutes a reasonable fee?
"2. When a lawyer and client agree to arbitration over fee disputes, should disciplinary proceedings begin before the arbitration proceeding concludes?
"3. Did the Disciplinary Commission act appropriately in substituting is finding as to the amount of a reasonable fee?"

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

the parties modified the agreement so that such income was community property. *State v. Wright*, 1 CA-CV-00-0482, 4/2/02 … **A.R.S. § 12-821, providing for a one-year statute of limitations on actions against public entities, applies to suits for inverse condemnation against a public entity.** The statute supersedes *Maricopa County Mun. Water Conservation Dist. v. Warford*, 69 Ariz. 1 (1949). *Flood Control Dist. of Maricopa County v. Gaines*, 1 CA-SA 01-0186, 4/2/02.

COURT OF APPEALS CRIMINAL MATTERS

Pursuant to A.R.S. § 13-901.01(E), a trial court must impose additional terms to a defendant's probation when the defendant violates his original probation terms. Reducing probation to one year does not suffice under the statute. *State v. Hylton*, 1 CA-CR 01-0632, 4/30/02 … Under the Arizona Supreme Court's holding in ***Pool v. Superior Court*, the Double Jeopardy Clause of the Arizona Constitution, Article II, Sec. 10, bars retrial if a mistrial is granted due to intentional, knowing or reckless prosecutorial misconduct giving the state an advantage (such as to avoid impending acquittal) causing prejudice to a criminal defendant,** rather than conduct that is merely the result of simple mistake, negligence or minor impropriety. Although **a pattern of prior misconduct by a particular prosecutor might help establish the requisite state of mind for double jeopardy to be applicable in a given case, such a prior pattern is inapplicable in cases involving, at worst, a single misstep at the beginning of trial.** *State v. Korovkin*, 2 CA-CR 2001, 4/30/02 … **ARIZ.R.CIV.P. 6(a) and ARIZ.R.CRIM.P. 1.3, providing that the last day of a period to act shall not be a Saturday, Sunday or legal holiday, did not apply to an automatic drivers' license suspension for DUI under A.R.S. § 28-1385.** *State v. Cabrera*, 1 CA-CR-01-0226, 4/23/02 … **Pursuant to A.R.S. § 13-901.01(E), a defendant who violates probation cannot reject further probation where incarceration is not an alternative. Instead, the trial court must continue the probation and add additional terms.** *State v. Tousignant*, 1 CA-CV-01-0418, 4/9/02 … Although under the U.S. Supreme Court's holdings in *Chimel and Belton* a warrantless search of the automobile of a recently arrested occupant for officer safety and evidence preservation purposes does not violate the Fourth Amendment, **the automobile exception to the general warrant requirement does not apply to cases where police initiate contact (confronting an individual or signaling confrontation) with a criminal defendant *after* she or he exits the vehicle. However, if police attempt to initiate contact by either confronting or signaling confrontation, a vehicle's occupant cannot avoid application of the *Belton* created automobile exception by exiting the vehicle** when officers are seen or approach. *State v. Gant*, 2 CA-CR-2000-00430, 3/29/02.

COURT OF APPEALS JUVENILE MATTERS

The failure to conduct an evidentiary hearing on whether the police interrogation of a student in a school office was a custodial interrogation requiring *Miranda* warnings and whether it was voluntary required reversal of the order denying suppression of the confession and a remand for an expedited evidentiary hearing. Courts should use an objective test to determine if a reasonable person would have considered themselves in custody, evaluating the facts concerning the interrogation, police conduct, the nature of the questioning, as well as a child's perception, vulnerability, age, maturity, experience with police and the absence of the child's parents. *In re Jorge D.*, 1 CA-JV- 01-0045, 4/9/02. ◣

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

* indicates a dissent