

appellate highlights

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SUPREME COURT CIVIL MATTERS

Arizona's Sexually Violent Persons Act, A.R.S. §§ 36-3701 *et seq.*, comports with the substantive due process requirements of *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Kansas v. Crane*, 534 U.S. 407 (2002), by imposing proper procedural and evidentiary standards and sufficiently narrows the class of persons subject to civil

commitment. It is sufficient if the statutes require the State to prove dangerousness from a mental impairment rather than simply voluntary behavior. The statutes require a finding that the mental disorder makes the person likely to engage in acts of sexual violence, which means that such future acts are highly probable. The term "makes" means the disorder impairs or

overpowers the ability to control conduct. *In re Leon G.*, CV-01-0062-PR and CV-01-0063-SA, 12/16/02 ... Where there was no coordination of benefits clause, expenses for medical services needed to treat an injury were "actually incurred" by an insured under and covered by the terms of his automobile insurance policy even if the expenses were paid by the

insured's HMO and the insured could not be liable for the covered expenses under A.R.S. § 20-1072. *Samsel v. Allstate Ins. Co.*, CV-01-0158-PR, 12/12/02* ... A statutory beneficiary in a wrongful death action has a fiduciary duty not to settle claims against defendants without notifying and obtaining the consent of other known statutory beneficiaries even if the family tie was between the other beneficiaries and the decedent. *Wilmot v. Wilmot*, CV-02-0130-PR, 12/5/02.

COURT OF APPEALS CIVIL MATTERS

A.R.S. § 33-812(A)(3) does not require a trustee on a foreclosed deed of trust to apply excess sale proceeds to pay property taxes on the property before paying such proceeds to junior lienholders. *Hanley v. Pearson*, 1 CA-CV 02-0217, 12/26/02 ... A.R.S. § 12-2602, requiring a plaintiff to disclose a preliminary expert opinion for claims brought against licensed professionals, does not violate either equal protection or separation of powers. The statute was rationally related to a legitimate

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supreme court petitions

The Arizona Supreme Court accepted review or jurisdiction of the following issues on Jan. 7, 2003.*

Joseph R. Godoy v. The Honorable Howard Hartman, Judge of the Pima County Superior Court and the State of Arizona, Real Party in Interest, CV 02-0390-PR, 2 CA-SA 02-0113

"Whether the right to a preemptory change of judge is renewed after the State receives an adverse ruling from the judge on a motion for remand to the grand jury."

State of Arizona v. Kenneth Dale Meinhardt, CR 02-0300-PR, 1 CA-CR01-0448 and 1 CA-CR 01-0468 (consolidated)

"Must the trial court make a specific finding that the defendant's failure to disclose was in bad faith before precluding witnesses as a discovery sanction? Was preclusion a proper sanction in this case, where the failure to disclose was clearly in bad faith?"

Jeffrey L. Andrews v. Leslie W. Blake, CV 02-0233-PR, 1 CA-CV 01-0363

"1. Shall Arizona recognize the Corbin Rule that strict compliance with the time or manner of exercising an option to buy real property is excused if (a) the delay was short; (b) the delay did not prejudice the Landlord; and (c) the option holder made valuable improvements to the property in reliance on the option. Subsumed in this question is whether *Monihon v. Wakelin*, 6 Ariz. 25, 56 P.2d 735 (1899), rejected the Corbin rule and limited equitable relief from the strict time and manner of exercising an option to cases where the optionor also is completely free of negligence, and if so, whether *Monihon* should be reexamined.

2. Does an agreement on safe-harbor means of giving notice of exercise of an option nullify timely written notice actually received by other means?"

Elizabeth K. Hays v. Superior Court/Honorable Richard Gama, Respondent; and Donald T. Hays, Real Party in Interest, CV 02-0316-PR, 1 CA-SA 02-0157

"Whether the trial court may impose a sanction against a party to a domestic relations case when the sanction is contrary to the best interests of the party's minor child."

Duane Lynn v. The Honorable Peter C. Reinstein; Richard Glassel; State of Arizona, CV 02-0435-PR, 1 CA-SA 02-0309

"Does any provision of the United States Constitution prohibit a crime victim, as a person with limited party status and not a mere witness, from exercising a fundamental state constitutional and statutory right to make, without elaboration, an independent recommendation to the jury as to the appropriate sentence, during the penalty phase of a capital sentencing proceeding?"

Kenneth J. Proksa, et al. v. Arizona State School for the Deaf and the Blind, et al., CV-02-0388-CQ; CIV 02-412 TUC-WDB

"1. May the Arizona Legislature statutorily change the terms of a "permanent" employee's employment without providing for offer, acceptance or assent and consideration?

2. Did Plaintiffs' acceptance of the yearly contracts between 1993 and 2001 effect an assent to the modification of the terms of their employment that required no additional consideration?"

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

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), the Court of Appeals, Div. 1 (www.cofad1.state.az.us) and Div. 2 (www.apftwo.ct.state.az.us).

state interest in precluding frivolous suits and did not conflict with or engulf the Supreme Court's rule-making powers. *Bertleson v. Sacks Tierney PA*, 1 CA-CV-01-0527, 12/26/02 ... The cost of removing mold and replacing part of a structure would be covered under an insurance policy if the mold resulted from water used to extinguish a fire in the structure. The policy covered risks of accidental direct physical loss to the property but excluded losses resulting from or caused by mold. *Liristis v. American Home Family Mut. Ins. Co.*, 1 CA-CV-00-539, 12/26/02 ... A self-storage facility's apartment used as a manager's apartment was not a class-four property used solely as leased or rented property for residential use. The apartment was not available for public occupancy, and the taxpayer required the manager to live on site for the business' purposes. *U-Stor Bell v. Maricopa County*, 1 CA-TX-01-0013, 12/26/02 ... Under Arizona's Lemon Law, A.R.S. § 44-1265(B), a party can be considered a prevailing party for purposes of attorney's fees if he settles the claim after filing the complaint and even if the fee agreement with his attorney is contingent in nature. However, the superior court still has the discretion to determine if the fees requested were reasonable. *Moedt v. General Motors Corp.*, 1 CA-CV 02-0038, 12/24/02 ... A police officer has reasonable grounds to believe an impaired driver has actual physical control of a vehicle where the driver has parked the car to sleep off the effect of impairment and has the apparent ability to start and move the vehicle. The driver can then have his or her license suspended for refusing a breathalyzer test. *Potter v. Arizona State Dept. of Transp.*, 1 CA-CV 02-0078, 12/24/02 ... Neither statutes, regulations nor a lease permit the State Land Department to prohibit a lessee from extracting leaseable minerals from mineral tailings. *Peeples, Inc. v. Arizona State Land Dept.*, 1 CA-CV 02-0408, 12/24/02 ... Arizona's racketeering and forfeiture statutes, A.R.S. §§ 13-2301 *et seq.* and 13-4301 *et seq.*, do not constitutionally infringe on free speech by permitting the State to seize the royalties for a book written by a person who has violated the racketeering statutes. The proceeds of such a

book are traceable to the racketeering violation when the book is about the party's life of crime since "but for" the racketeering violations there would have been no royalties. *State v. Gravano*, 1 CA-CV 02-0025, 12/24/02 ... A homeowners association violated the federal and state fair housing acts, 42 U.S.C. § 3604(f)(1) and A.R.S. § 41-1491.19(A), by refusing to provide a reasonable accommodation to allow a family to buy a home where one of the children in the home was disabled, but under 35 and the association's covenants prohibited the anyone under 35 from living in the community. *Canady v. Prescott Canyon Estates Homeowners Ass'n*, 1 CA-CV-02-0138, 12/20/02 ... An administrative law judge and the industrial commission erred in dismissing a claimant's request for a hearing as untimely where the insurer had closed the claim and mailed the notice of claim status to the wrong address. The time to request a hearing does not begin to run until the carrier re-mails the notice to the last known address, even if the claimant earlier learns of the status of his claim by having a prescription refused. *Jaramillo v. Indus. Comm'n*, 1 CA-IC-02-0021, 12/12/02 ... The "Final Judgment Accrual Rule" does not necessarily control in a legal malpractice case in which the underlying case that is the basis for the malpractice suit has been settled. Summary judgment is not appropriate on the statute of limitations defense when issues of fact remain as to when the underlying cause of action actually accrued. In cases where it is alleged the professional's services have failed to produce the desired result or may have brought an adverse result, it is often the rule that the question of accrual is for the jury. *Althaus v. Penn-America Ins.*, 2CA-SA 2002-0107, 12/12/02 ... A surety company may not generally maintain or assign a cause of action for legal malpractice against its principal's attorney whom it did not engage except in cases involving collusion and fraud. *Capitol Indemnity v. Fleming*, 2CA-CV 2001-0114, 12/10/02.

COURT OF APPEALS JUVENILE MATTERS

A juvenile was properly required to pay restitution for personal property removed from a vehicle he conceded he had under his control knowing the car was stolen even though the juvenile claimed the property had been removed before he took control of the vehicle. *In re Andrew A.*, 1 CA-JV-01-0073, 12/10/02.

* indicates a dissent