# appellate highlights

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## SUPREME COURT CIVIL MATTERS

Irrigation districts have authority to provide electricity to customers outside their established districts and within APS service territory because such sales are necessary or incidental to irrigation of arid land where it was undisputed that such sales generated money to reduce the costs of irrigation water to district members. To make such sales, the districts do not have to acquire APS' property or plants. *Hohokam Irrig. and Drainage Dist.*, CV-02-0091-PR, 2/28/03 … The payment of a previously unknown and unasserted claim that rendered a partnership insolvent when the partnership transferred assets to pay such claim should be disregarded under the Uniform Fraudulent Transfer Act, A.R.S. § 44-1005, if the claim was time-barred at the time of transfer. *Hullett v. Cousin*, CV-01-0407-PR, 2/24/03 … An excess carrier who stated it had counsel review an underlying claim in demanding the primary carrier settle that claim within the primary policy limits did not waive the attorney–client privilege so as to require the excess carrier to disclose its privileged communications with counsel. *Twin City Fire Ins. Co. v. Burke*, CV-01-0262-PR, 2/18/03.

## SUPREME COURT CRIMINAL MATTERS

The decision in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2438 (2002), holding that a jury must decide whether aggravating circumstances exist in capital cases, does not apply retroactively to cases that had become final. *Ring* does not apply to Rule 32.2 petitions of post-conviction relief from judgments before *Ring* taken after all direct appeals had been exhausted. *State v. Towery*, CR-02-0031-PR, 2/26/03.

## COURT OF APPEALS CIVIL MATTERS

A city policy of random, suspicionless drug testing of firefighters was not an unreasonable search and seizure under the Fourth Amendment or the Arizona constitutional prohibition of unreasonable searches and seizures. Ariz. Const. art. 2, § 8 is no broader than the Fourth Amendment as to searches and seizures for drugs. *Peterson v. City of Mesa*, 1 CA-CV 02-0016, 2/25/03* … An owner of a residential structure is a person injured under A.R.S. § 32-1131(3) who is eligible to make a claim against the Arizona Residential Contractors Recovery Fund if the owner occupies or intends to occupy the home as a residence when the contract is entered into with the contractor or when the claim arises, not when the claim is filed or the administrative hearing is held. *McMurren v. JMC Builders, Inc.*, 2 CA-CV 2002-0022, 2/25/03 … The Department of Revenue's prior acceptance of or failure to challenge deductions in prior audits and the taxpayers' reliance thereon did not estop the Department of Revenue from reducing the deductions or requiring the taxpayer to substantiate the deduction in a new audit because the Department's positions were not truly inconsistent and the taxpayer did not suffer a substantial detriment from the alleged change in position. In addition, the Department had authority to adjust the assessments by recalculating the land value deductions after issuing proposed assessments and its initial acceptance of the land value deduction did not place the burden of proof on the Department that the deductions were incorrect. *Arizona Joint Venture v. Arizona Dep't of Revenue*, 1 CA-TX-02-0010, 2/24/03 … A homeowners association's restrictions on solar energy devices were unenforceable under A.R.S. § 33-439(A) because they effectively prohibited homeowners from installing or using such devices. *Garden Lakes Community Ass'n v. Madigan*, 1 CA-CV 00-0570, 2/18/03 … Arizona Supreme Court Rule 123 did not protect the Maricopa County Probation Department from producing its investigative files on an employee subject to discipline. The employee could waive his privacy rights as to his own records, the investigative file was not a pre-decision document concerning court policy that was protected by the rule and the department could give no explanation how its investigation would be hindered by release of the file once it had obtained statements from witnesses. *London v. Broderick*, 1 CA-CV 01-0605 and 1 CA-SA 02-0037, 2/18/03 … An auto insurance policy did not require the parties to arbitrate whether the insured had corroborated a "miss and run" claim under A.R.S. § 20-259.01(M) where the policy subjected to arbitration only whether the insured was legally entitled to collect damages and the amount of damages. Although the insured's excited utterances to police did not amount to corroboration of the claim, an accident reconstructionist report did meet the statutory requirement of corroboration. *Scrubbs v. State Farm Mut. Auto. Ins. Co.*, 1 CA-CV 02-0166, 2/18/03 … A molestation claim against a church brought more than two years after the victim reached majority was time-barred where the evidence did not show the victim had repressed memory of the incident,

## supreme court petitions

**compiled by Barbara McCoy Burke, Staff Attorney, Arizona Supreme Court**

The Arizona Supreme Court accepted review or jurisdiction of the following issues on Mar. 28, 2003.*

*State v. Donald Gene Dean*, CR-02-0427-PR
"Did the court of appeals violate the standard of appellate review when it ignored the trial court's findings of fact? Was the court of appeals wrong on the law?"
[The case concerned whether a search was incident to Dean's arrest even though he attempted to evade the search of the vehicle and the discovery of contraband in his vehicle by parking his jeep and running into the house as soon as he was confronted by a police officer. The court ruled that the search was incident to his arrest and was constitutionally sound.]

*Jose E. Valdez, a single man v. State of Arizona*, CV-02-0411-PR 1
"Was it reversible error to instruct the jury that it could award a plaintiff both hedonic damages and pain and suffering damages when those damages were duplicative?"

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

but only cognitive avoidance, which was not an involuntary inability to remember the incident. *Watson v. Roman Catholic Church of the Diocese of Phoenix, Inc.*, 1 CA-CV 01-0500, 2/13/03 … A trial judge abused his discretion in dismissing claims two years after an earlier judge granted a motion in limine for failure to disclose evidence. Characterizing the dismissal as one for non-disclosure, the trial court should have held an evidentiary hearing to determine if the client had been at fault for failure to disclose. The two-year delay from the order in limine, resulting from an intervening appeal on other grounds, was too severe a sanction. *Zimmerman v. Shakman*, 1 CA-CV 02-0012, 2/11/03 … In determining the fair value of dissenting shareholders' stock, a court can include appreciation of the value based on the asset sale from which the shareholders were dissenting and should not consider discounts to the value based on the minority shareholders' lack of control or limited marketability of shares in a closely held corporation. *Pro Finish USA, Ltd. v. Johnson*, 1 CA-CV 02-0091, 2/6/03 … Disagreeing with the Ninth Circuit Court of Appeals, the Court of Appeals held that a judgment that is vacated on appeal as part of a settlement is not a basis for collateral estoppel in later litigation between the same parties. *Campbell v. SZL Properties, Ltd.*, 1 CA-CV 01-0050, 2/4/03 … Product liability actions will not be expanded by courts to hold successor corporations liable where those successor corporations were not involved in placing the product into the stream of commerce. *Winsor v. Glasswerks PHX, Ltd.*, 1 CA-CV 01-0395, 2/4/03.

## COURT OF APPEALS CRIMINAL MATTERS

A defendant's conviction for burglary was reversed where the trial court had admitted a co-defendant's interview statement to defense counsel after the co-defendant had refused to testify. The admission violated the defendant's Sixth Amendment right to confront witnesses against him because a statement against penal interest is not a firmly rooted hearsay exception and the statement was not at least as reliable as evidence admitted under a firmly rooted hearsay exception. *State v. Bronson*, 1 CA-CR 02-0186, 2/25/03 … A defendant who had earlier pled guilty to disorderly conduct was not entitled to probation on a later drug-related offense under A.R.S. § 13-901.01 because the earlier plea was to a violent offense even though the State had dropped all charges of dangerousness in obtaining the plea agreement. The State did not have to inform the defendant of all the consequences of his earlier plea, only the immediate consequences of the plea. *Montero v. Foreman*, 1 CA-SA 02-0337, 2/27/03 … The statutory definition of "premeditated" and the jury instruction to that effect are not constitutionally void for vagueness and not unconstitutional as applied where no instruction was given that premeditation can include instantaneous successive thoughts. *State v. Zamora*, 1 CA-CR 01-0469, 2/18/03* … A church was required to produce to a grand jury documents that it claimed were protected by the attorney–client privilege. The privilege in the criminal context, A.R.S. § 13-4062(2), is not as broad as that in the civil context under A.R.S. § 12-2234. *Roman Catholic Diocese of Phoenix v. Superior Court*, 1 CA-SA 03-0002, 2/7/03.

## COURT OF APPEALS JUVENILE MATTERS

Two juveniles' involuntary participation in Drug Court as a special term of standard probation did not violate their constitutional rights to due process because if they violated such a term they would have sufficient notice of an alleged violation and have an opportunity to participate in any hearing on the alleged violation. Nor was there any Fifth Amendment violation based on requirements the juveniles would have to discuss with probation officials their conduct on probation, in part because the Drug Court would not use such statements to enhance any sentence. Finally, involuntarily requiring juveniles to participate in Drug Court while adults could refuse to participate did not violate equal protection because such a requirement was rationally related to rehabilitation, any participation would be based on individual circumstances and the juveniles might not know their own best interests. *In re. Miguel R. and In re. Jose J.*, 1 CA-JV 02-0016 and 1 CA-JV -02-0072, 2/25/03.

* indicates a dissent