BAR COMMUNITY

APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

A Claim Letter Sent to a Public Entity Containing Qualifying Language Regarding Damage Claims Fails to Satisfy the Requirements of Arizona's Notice of Claim Statute. Pursuant to A.R.S. § 12-821.01, any party wishing to bring a claim against a public entity must provide a notice of claim to the entity setting forth the factual basis for the claim and "a specific amount for which the claim can be settled and the facts supporting that amount." This language does not permit a claimant to include qualifying language that makes it impossible for a public entity to calculate the specific amount for which the claim will settle. *Deer Valley Unified Sch. Dist. v. Houser/McDonald*, CV 06-0275-PR, 2/26/07.

Supreme Court Has Concurrent, Not Exclusive Jurisdiction with the Courts of Appeals Over Actions Challenging the Certification of Signatures for a Ballot Measure and Such Actions Must, in the Future, Be Filed with the Relevant Court of Appeal. A.R.S. § 19-121.03(B), under which POC appealed the superior court's decision, provides that in actions challenging the certification of signatures for a ballot measure "[e]ither party may appeal to the supreme court within ten calendar days after judgment." However, statutes vesting appellate jurisdiction in the Court do not vest *exclusive* jurisdiction unless there is an express intention in the statute to do so. In the future, a party should file such actions in the court of appeals. *Fleischman v. Protect Our City/Paniagua*, CV 06-0333-AP/EL, 3/14/07.

Prevailing Party in a Civil Infraction Proceeding Brought by a City May Recover Attorneys' Fees. Pursuant to A.R.S. § 12-348(A)(1) a court shall award fees to any party that prevails in a "civil action brought by the state or a city, town or county against the party." That provision applies to a "civil infraction" hearing brought by a city seeking to enforce its code. The exemption to attorneys' fee awards set forth in Subsection (H) applies to "proceedings brought by a city or town or county … pursuant to traffic ordinances or to criminal proceedings," not civil infraction proceedings. *William Wayne Roubos, et al. v. Hon. Leslie Miller*, CV 06-0181-PR, 3/20/07.

SUPREME COURT CRIMINAL MATTERS

Although a Superior Court in Arizona may still apply *State v. Donald* and reinstate a plea offer upon a finding of ineffective assistance of counsel as to the plea itself in a post-conviction proceeding, **a Superior Court may not order reinstatement of an expired plea offer at the pretrial level upon a mere finding that defense counsel in a particular case engaged in excusable neglect by failing to convey the offer to their client prior to its expiration.** Even if it may be assumed that a failure to timely communicate a plea before it expires constitutes deficient performance by defense counsel, at the pretrial level it is impossible to determine whether such a failure may actually be prejudicial because the outcome of the case is still pending, and applicable federal (*Strickland v. Washington*) and Arizona law require both deficient performance and resulting prejudice. *State v. Rayes/Renaga*, CR 06-0303-PR, 3/20/07.

COURT OF APPEALS CIVIL MATTERS

Statute Preventing Unlicensed Contractors from Bringing Civil Actions Does Not Apply to Administrative Proceedings. Pursuant to A.R.S. § 32-1153, an unlicensed contractor may not bring a civil action to collect for work performed. That provision does not prevent an unlicensed subcontractor from filing an administrative complaint with the Registrar of Contractors for a licensed contractor's failure to pay the subcontractor. *Twin Peaks Constr., Inc. v. Weatherguard Metal Constr., Inc.*, 2 CA-CV 06-0095, 2/27/07.

A Subcontractor Is Required to Arbitrate a General Contractor's Indemnity Claim Against It Where the Subcontract Expressly Incorporates "General Conditions," Which in Turn Incorporate the Arbitration Provision of the Prime Contract Between the General Contractor and the Homeowners. Where a prime contract contained an arbitration provision requiring all claims or disputes between the parties "arising out of or relating to the" contract or "the breach thereof" to be decided by arbitration, and a subcontract incorporated general conditions that incorporated the arbitration provision of the prime contract, the subcontract incorporated the arbitration provision. No specific word or phrase, such as a specific reference to arbitration, is required to incorporate an arbitration provision by reference. *Weatherguard v. D. R. Ward*, 1 CA-CV 05-0247, 2/27/07.

State Employee's Due Process Right to Adequate Notice Was Violated When Board Upheld His Termination on Grounds Not Alleged in Dismissal Notice. In the context of a post-termination hearing for a state employee, a hearing officer may not rely on conduct never alleged by the agency before the post-termination hearing. If the agency wants to rely on additional grounds other than those in the notice of charges, it must set forth with reasonable specificity the amended factual basis and the statutory grounds for its decision in its Notice of Dismissal or a supplemental notice sufficiently in advance of the post-termination hearing to allow the employee the opportunity to prepare his defense. *Carlson v. Arizona State Pers. Bd., et al.*, 1 CA-CV 06-0110, 3/6/07.

Judicial Immunity Extends to Employee of Court's Conciliation Services. Judicial immunity is not limited to judges; officers serving the judiciary are immune from suit where such immunity is required to ensure principled and fearless decision-making by that officer. An employee of conciliation services who prepared a report for the superior court in connection with a petition to modify a child's parenting schedule is entitled to judicial immunity in connection with an action alleging that the report violated the parent's Free Exercise rights by allegedly being "intentionally designed to ensure that [the daughter] attended the Church of Jesus Christ of Latter Day Saints." *Burk v. State of Arizona*, 1 CA-CV 06-0029, 3/6/07.

Tavern Held Exempt from Dramshop Liability When Drunk Driving Accident Occurred After Tavern Staff Confiscated Drunk Patron's Car Keys and Drove Her Home. Where a bar patron became intoxicated and drove erratically in the parking lot, the tavern fulfilled its duty of care under the dram shop laws by separating the patron from her vehicle and arranging for, and providing, safe transportation to the patron's residence. The patron's decision to later retrieve her vehicle while still intoxicated was unforeseeable and extraordinary and thus constituted a superseding, intervening event of independent origin that negated any

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negligence on the part of the tavern or its employees. *Patterson v. Thunder Pass, Inc.*, 1 CA-CV 06-0421, 3/8/07.

Superior Court May Award Costs and Expenses, But Not Attorneys' Fees, Incurred Before and in the Course of a Prior Appeal to Party Who Failed to Request Costs and Fees in the Prior Appeal. A party who fails properly to assert a claim for attorneys' fees in the Court of Appeals pursuant to ARIZ.R.CIV.APP.P. 21 may not subsequently seek fees incurred in the appeal on remand. Under Rule 21(a), however, a request for costs incurred is permissive, not mandatory; failure previously to request these costs, therefore, does not bar the superior court from later awarding these costs after remand. *Parker v. McNeill*, 1 CA-CV 06-0139, 3/08/07.

Statute That Allows Potential Jurors 75 Years or Older to Opt Out of Jury Service and Statute That Protects Prospective Juror's Statements Asking to Be Excused from Jury Service for "Mental or Physical" Reasons Held Constitutional. The juror-exemption statute, A.R.S. § 21-202(C), which allows a person 75 or older to opt out of jury service does not violate the due process and fair jury trial rights guaranteed by the Arizona Constitution. Subsection (B)(1) of the statute, which protects medical information provided by potential jurors seeking an exemption for a mental or physical condition, does not violate the Arizona Constitution's requirement that justice in all cases be administered openly. *Stewart v. Carroll*, 1 CA-CV 06-0240, 3/13/07.

The "Sham Affidavit" Rule Does Not Necessarily Apply to Later Deposition Testimony. The sham affidavit rule states that when a party's affidavit is submitted to defeat summary judgment and contradicts the party's own deposition testimony, it should be disregarded in deciding the motion. Whether a former party's/witness' prior sworn statement or affidavit can be contradicted by subsequent deposition testimony to defeat summary judgment must be examined on a case-by-case basis because greater weight is afforded deposition testimony. Subsequent deposition testimony that contradicted a prior sworn statement could be considered in connection with an opposition to a motion for summary judgment where the subsequent deposition was not taken in response to a motion for summary judgment and was not apparently directed at thwarting the purposes of ARIZ.R.CIV.P. 56. *Allstate Indem. Co. v. Ridgely*, 2 CA-CV 06-0164, 3/15/07.

A Court May Not Certify an Attorney Fee Claim as a Final Judgment Pursuant to Rule 54(b) in Advance of a Related Judgment Regarding the Merits. Rule 54(g), ARIZ.R.CIV.P., which governs the procedure for claiming and being awarded attorneys' fees, expressly precludes a determination on an attorney fee request prior to a decision on the merits. Rule 54(b) does not authorize certification of a type of final judgment—a judgment on an attorney fee claim preceding a decision on the merits—that is expressly forbidden in Rule 54(g). *Kim v. Mansoori*, 2 CA-CV 06-0069, 3/23/07.

SUPREME COURT PETITIONS

compiled by Barbara McCoy Burke
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The Arizona Supreme Court accepted review or jurisdiction of the following issues on Mar. 13, 2007*:

State of Arizona v. Karen Marie Hansen aka Karen Marie Kennedy, 1 CA-CR 05-0520; CR-06-0459-PR (Opinion)
"Is Appellant's obligation to make restitution payments stayed pursuant to Rule 31.6 of the Arizona Rules of Criminal Procedure while her appeal is pending, or, as the Court of Appeals held, must she continue to make restitution payments pursuant to A.R.S. § 13-804(D)?"

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

COURT OF APPEALS CRIMINAL MATTERS

The *Williams/Jennings* "knew or had reason to know" mens rea requirement in an aggravated DUI case (involving elements of committing a DUI while drivers license was either "known" to be suspended or the driver had "reason to know" of the suspension) is not necessarily satisfied by mere evidence that the Department of Motor Vehicles (MVD) mailed the notice of license suspension to the defendant's last known address of record. Although pursuant to A.R.S. § 28-448(A) Arizona drivers are required to notify MVD of any change of address within 10 days of moving or changing mailing addresses, and service of a Notice of Suspension is complete on mailing pursuant to A.R.S. § 28-3318 with a rebuttable presumption arising that an aggravated DUI defendant received notice of the suspension, a defendant driver may successfully rebut the presumption by appropriate evidence, including personal testimony, whereby a conviction is proper only if the State proves beyond a reasonable doubt to a reasonable fact-finder through additional substantial evidence that the defendant actually knew or should have known that his license was suspended at the time of the subject aggravated DUI. *State v. Cifelli*, 1 CA-CR 06-0331, 4/5/07.

A defendant may be held liable for violating A.R.S. § 17-309(A)(1) & (17) (governing hunting out of season or outside the designated hunting area and the subsequent transportation of wildlife unlawfully taken outside a licensed area) even though they have no culpable mental state. In Arizona, it is well settled that the legislature may enact laws imposing criminal liability regardless of whether the perpetrator had any particular mental state, and A.R.S. § 13-202(B), together with Arizona case law interpreting same, allows for strict liability offenses as long as there appears to be a clear legislative intent not to require a particular mental state for the commission of the crime. *State v. Hon. Slayton/Remmert*, 1 CA-SA 06-0208, 3/30/07.

In a prohibited possessor of a weapon case, a trial court does not err in failing to give a requested jury instruction defining prohibited possession (regarding actual or constructive control of the weapon(s) in issue) even if an identical instruction was previously approved in *dicta* by the Arizona Court of Appeals in *State v. Tyler.* For the State to prove the elements of prohibited possession of a weapon, it merely must prove that the defendant was a prior felon and that they had actual or constructive possession of a firearm. Moreover, in such a case **a trial court does not err in failing to grant a defense Rule 20 ARIZ.R.CRIM.P. or directed verdict motion in a prohibited possessor case where substantial direct and/or circumstantial evidence is presented that the defendant had constructive or joint dominion or control over the weapon in issue found in the trunk of his vehicle even though the firearm belonged to or was purchased by a third party who could legally possess it and the weapon was arguably being merely transported in the vehicle**. *State v. Cox*, 2 CA-CR 05-0272, 3/29/07.

The Sixth Amendment to the U.S. Constitution entitles a criminal defendant to competent representation, yet it does not guarantee a defendant "counsel of choice" or even a meaningful relationship with their attorney, and a mere factual dispute between a defendant and appointed counsel about a defendant's own motion for substitute counsel at the time of trial does not require reversal and new trial. In deciding a defendant's motion for substitute counsel **under *State v. Torres*, a trial**

court need not conduct an in-depth factual inquiry, yet merely inquire on the record as to the basis of the request and consider several non-inclusive factors in as follows: (1) whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict, (2) the timing of the motion itself, (3) any inconvenience to trial witnesses, (4) the time period elapsed between the [indictment for the] alleged offense and trial, (5) the proclivity of the defendant to change counsel; and (6) the quality of counsel requested to be removed. *State v. Paris-Sheldon*, 2 CA-CR 06-0015, 3/15/07.

COURT OF APPEALS JUVENILE MATTERS

Although a Juvenile Court may automatically transfer a juvenile to adult court if the juvenile has passed the age of 14 if only one of various statutory factors is met regarding the level of the alleged offense, or based upon the juvenile's criminal history, **under A.R.S. § 8-327 a Juvenile Court in Arizona may transfer a juvenile who is 13 years old or younger only after a transfer hearing at which the Juvenile Court must make a two-part finding by a preponderance of the evidence before transfer is appropriate: (1) that there is probable cause to believe both that the offense was committed and the juvenile before the Court actually committed the offense, and (2) that the interests of public safety would best be served by the transfer of the juvenile for criminal prosecution.** In considering whether the transfer would best serve the interests of public safety, A.R.S. § 8-327(D) states that the Court must consider 10 factors. *In re Edgar V.*, 1 CA-JV 05-0205, 3/27/07.

A.R.S. § 13-502, which sets forth the legal standard for insanity in criminal cases and assigns a clear and convincing burden of proof to the individual asserting the defense of guilty except insane, is applicable in juvenile delinquency proceedings where a juvenile asserts an insanity defense. Although A.R.S. § 13-502 does not expressly apply to juveniles accused of delinquent acts, the Arizona legislature has required under A.R.S. § 8-201 that Juvenile Courts define delinquent juvenile behavior with reference to adult offenses substantially described in Title 13 of the Arizona Revised Statutes. Because the boundaries of adult criminal culpability are defined by statutory defenses set forth in Title 13, such defenses, as defined and/or limited by statute, are applicable to juvenile delinquency matters. Moreover, in applying the defense, **a Juvenile Court does not err in finding a juvenile delinquent in a case involving an alleged aggravated assault against a corrections officer where expert testimony supported its finding that the juvenile knew their conduct was wrong** because, pursuant to A.R.S. § 13-502, the mere existence of a mental disease or defect alone does not support a finding of guilty except insane. *In re Natalie Z.*, 2 CA-JV 06-0049, 3/23/07.

Pursuant to A.R.S. § 9-533(B)(4), and the Arizona Supreme Court's decision in *Michael J. v. ADES*, a Juvenile Court may sever parental rights based upon a felony sentence "of such length that the child will be deprived of a normal home for a period of years," and a Juvenile Court does not abuse its discretion in finding that a six-year prison term is an appropriate basis for severance. Although the Juvenile Court pursuant to *Michael J.* must respectively find by clear and convincing evidence that the State has proven at least one statutory factor supporting severance, and by a preponderance of the evidence that the severance would be in the child's/children's best interest, all relevant factors need to be considered as part of the severance inquiry, and there is no threshold or bright-line level of evidence under any individual factor considered which either compels or forbids severance in a particular case, with such cases decided based upon their own particular facts. *Christy C. v. ADES*, 1 CA-JV 06-0142, 3/20/07.

COURT OF APPEALS MENTAL HEALTH MATTERS

Doctor's Finding of Mental Retardation Is an Insufficient Basis to Order Involuntary Mental Health Treatment. By statute, "mental disorder" is defined to exclude "[c]onditions that are primarily those of drug abuse, alcoholism or mental retardation." A.R.S. § 36-501(26)(a). The diagnosis of "mental retardation," as opposed to "mental disorder," is an insufficient basis under A.R.S. § 36-539(B) to order involuntary treatment. *In Re MH 2006-000490*, 1 CA-MH 06-0013, 3/22/07.

***** indicates a dissent

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