APPELLATE HIGHLIGHTS

by Thomas L. Hudson, Osborn Maledon PA, and Patrick C. Coppen, Esq., Tucson

COURT OF APPEALS CIVIL MATTERS

First-in-the-Field Doctrine Does Not Require the Arizona Corporation Commission to Award a CC&N to an Existing Utility Company Over a Start-Up Company. The-first-in-the-field doctrine entitles a utility able, willing, and holding a certificate of convenience and necessity to extend its service to new customers who reside in the field of the utility's existing service area. Arizona does not follow this doctrine. Accordingly, the Arizona Corporation Commission may award a certificate of convenience and necessity to a start-up company that had not previously provided service in the pertinent area. *Arizona Water Co. v. Arizona Corp. Comm'n*, 1 CA-CV 07-0167, 3/13/08.

Claimant Who Contracts for the Rights of the Insured Pursuant to a *Morris* Agreement May Assert the Insured's Equitable Estoppel Claims. Pursuant to *United Service Automobile Association v. Morris*, 741 P.2d 246 (Ariz. 1987), an insured may assign its rights under an insurance policy to a party making a claim in exchange for a stipulated judgment and covenant not to execute the judgment against the insured. Such an agreement assigns the insured's right to assert equitable estoppel against the insurer where the insurer delays for approximately eighteen months before notifying the insured that it is reserving its rights to deny coverage. *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcontinental Ins. Co.*, 1 CA-CV 07-0215, 3/13/08.

Public Acceptance of a Common Law Dedication of Land May Be Established by General Public Use. A deed dedicating strip of land for public use may by itself be insufficient to dedicate property for public use where there is no formal acceptance and the deeds of adjacent parcels do not reference the dedication. However, public acceptance of a dedication may be established by use. *Lowe v. Pima County*, 2 CA-CV 2006-0212, 3/13/08.

Buyer's Failure to Fund Escrow on Date Called for in Purchase Contract Was Material Breach in Light of Time of the Essence Clause. A property purchaser's failure to deposit the full escrow amount in escrow until one business day after the date specified in the contract amounts to a material breach where the contract includes a time of the essence clause. The purchase contract situation is different from the lease context discussed in *Foundation Dev. Corp. v. Loehmann's, Inc.*, 788 P.2d 1189 (Ariz. 1990), where a slight delay in payment may not constitute a material breach due to the potential for a forfeiture of an equitable interest. *Mining Inv. Group, LLC v. Roberts*, 1 CA-CV 06-0684, 3/11/08.

The Statutory Valuation Date for Condemned Property Under A.R.S. § 12-1123 Does Not Always Represent the Date of the Taking for Purposes of Determining Just Compensation Under the Fifth Amendment. Although A.R.S. § 12-1123 provides that condemned property is to be valued as of the date of the summons, that statute does not trump the constitutional requirement that a party receive just compensation as of the date of a taking. Although the taking date may be the date of the summons or initiation of the suit in some circumstances, when the date on which the government actually takes possession of the property becomes too distant from that date, the trial court must determine the actual date of the taking and the value of the property on that date. *City of Scottsdale v. CGP-Aberdeen, L.L.C.*, 1 CA-CV 07-0304, 3/6/08.

Liquidated Damage Provisions in Cooperative Marketing Association Marketing Agreement Are Enforceable Under A.R.S. § 10-2016(D), Without Regard to Reasonableness or Actual Damages. A.R.S. § 10-2016(D) expressly permits liquidated damage provisions in cooperative marketing association marketing agreements. In light of this specific statute, a liquidated damage provision in a marketing agreement should be construed in accordance with the terms of the agreement without regard to the common-law principles otherwise applicable to liquidated damages provisions. *United Dairyman of Arizona v. Rawlings*, 1 CA-CV 06-0753, 2/28/08.

Where Real Property Is Transferred by Affidavit of Succession Outside of Formal Probate Pursuant to A.R.S. § 14-3971, a Subsequent Purchaser of the Property Who Relies Upon the Affidavit Takes Title Free and Clear of Any Other Person's Interest in the Estate. Under Arizona's probate code, real property can be transferred by affidavit outside of formal probate when the value of the real property is less than $75,000. To qualify, the affidavit must meet the requirements of A.R.S. § 14-3971(E). When those requirements are met, the statute protects anyone who later purchases the real property, regardless of the propriety of the sale. The statute provides a cause of action against those who fraudulently transfer real property using an affidavit, but it does not provide heirs any recourse against subsequent purchasers. The statute also does not require subsequent purchasers to inquire into the propriety of the transaction or the authority of the person entering into it. *Dometri v. Lind*, 1 CA-CV 07-0072, 2/26/08.

Arbitration Agreements Do Not Conflict with the Elder Abuse Statute, and Are Not Voided by the Unavailability of Designated Arbitration Firm. Although the American Arbitration Association ("AAA") no longer arbitrates disputes between patients and healthcare facilities per pre-dispute arbitration agreements, an arbitration agreement that specified the AAA would conduct the arbitration was not void. Under A.R.S. § 12-1503, a party may apply to the court to have a replacement arbitrator appointed if the designated arbitrator is unable to act. The Arizona Adult Protective Services Act, A.R.S. § 46-455, does not prevent a party from voluntarily waiving a right to a jury trial, and thus a pre-dispute arbitration agreement with

Thomas L. Hudson is a member at Osborn Maledon PA, where his practice focuses on civil appeals and appellate consulting with trial lawyers. He can be reached at thudson@omlaw.com, and is ably assisted with this column by Osborn Maledon PA's appellate group, which maintains AzAPP. AzAPP contributors include **Jean-Jacques Cabou, Michael S. Catlett, Sharad Desai, Ronda R. Fisk, Sara Greene, Mark P. Hummels, Jason J. Romero, Keith Swisher, Robert T. Weeks** and **Kristin L. Wright.**

Patrick Coppen is a sole practitioner in Tucson.

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 Feb. 12, 2008*:

Phoenix City Prosecutor's Office v. Hon. Gloria Ybarra/Lander, CV-07-0265-PR, 1 CA-SA 07-0029 (Opinion)
The plain, unambiguous language of both Rule 18.1(b) and Section 13-3983 conditions a criminal defendant's attempted jury trial waiver on the State's consent. Despite this plain language, the court of appeals exempted misdemeanor DUI defendants from obtaining the State's consent, elevating the jury trial rights of these defendants above all other defendants. Was this anomalous result error?

Hal Owens v. M. E. Schepp Limited Partnership, CV-07-0349-PR, 1 CA-CV-0162 (Opinion with dissent)
Part performance that is "unequivocally referable" to an oral contract is recognized as an exception to the Statute of Frauds. Here, the Court of Appeals held that oral explanations by the proponent of the exception could be used to determine whether the part performance alleged was "unequivocally referable" to an oral contract. The question presented is whether consideration of evidence other than the act of part performance was error.

State of Arizona v. Ann Mavinee Leenhouts, CR 07-0319-PR, 2 CA-CR 06-0280 (Mem. Decision)
1. Whether the court erred in requiring the trial to proceed on the same day defendant was arraigned on a superseding indictment which modified an essential element of the original charge.
2. Whether the court erred in permitting testimony by state's witnesses concerning the contents of material documents which were not admitted in evidence.
3. Whether the court erred in overruling defendant's motion for mistrial on the basis of improper material testimony from a state's witness.
4. Whether the court erred in granting the state's *in limine* motion to preclude defendant from presenting evidence in support of her properly noticed justification defenses.

Issues presented but not decided by the Court of Appeals:
Whether the trial court's rush to trial violated defendant's fundamental right to notice under the Sixth Amendment to the U.S. Constitution.

State v. Juan Perez Gonzales, CR-07-0370-PR, 1 CA-CR 06-0569 (Mem. Decision) (Partial Concurrence, Partial Dissent)
A.R.S. §13-3401(36)(b) defines threshold amount of cocaine as a "weight" of nine grams. The evidence did not sufficiently establish that the aggregate weight of the cocaine exceeded the statutory threshold amount of nine grams, because there was no evidence that the cocaine powder could not be separated from the licodaine powder "without a chemical process" pursuant to §13-3401(39). Therefore, the trial court erred when it denied Gonzales' motion for judgment of acquittal on Count VII, Possession of Narcotic Drug for Sale (Cocaine).

The Arizona Supreme Court accepted review or jurisdiction of the following issues on Mar. 19, 2008*:

First American Title Insurance Co. v. Action Acquisitions, L.L.C. And FREE FOR NOW L.L.C., CV-07-0412-PR, 1 CA-CV 06-0782 (Opinion), 169 P.3d 127 (Ariz. Ct. App. 2007)
1. Did the court of appeals misinterpret Exclusion 5 of the Policy, which excludes coverage for any loss "resulting from … [f]ailure to pay value for [the] Title?
2. Did the court of appeals err in applying the correct insurance policy interpretation rules and in failing to consider the insureds' expectations as well as the relevance of the insureds' knowledge of the bid price, which led to the sale being overturned?

State v. Enis John Cheramie, III, CR 08-0001-PR, 2 CA-CR 2006-0319 (Opinion with dissent)
1. Where Appellant was charged with transportation of a dangerous drug for sale, and where the trial court directed a verdict of acquittal as to the "for sale" element of that offense, did submission of the lesser charge of possession of a dangerous drug to the jury deprive Appellant of his constitutional right to notice of the charge against him?
2. Should this Court accept review of the court of appeals' Opinion in this case where this Court has not determined whether possession of a dangerous drug can be a lesser included offense of transportation of a dangerous drug for sale, and where the majority and the dissent in the Opinion rely on conflicting Arizona case law on the issue?

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

a long term health-care facility may be enforced. *Matthews v. Life Care Centers of America, Inc.*, 1 CA-CV 07-0228, 2/21/08.

A Relocating Parent May Move Up to 100 Miles from Her Physical Location with a Child as of the Date of the Court Order or Written Agreement Granting Custody or Parenting Time. Under A.R.S. § 25-408(B) (2007), a parent granted joint custody or parenting time is entitled to at least 60 days' advance written notice before the other parent may "[r]elocate the child more than one hundred miles within the state." Under § 25-408(E), if a parent awarded joint custody or parenting time relocates the child with court permission, the miles of the court approved relocation may not be considered when determining whether a subsequent relocation is more than 100 miles within the state. The 100-mile condition should be measured from the relocating parent's physical location with the child as of the date of the court order or written agreement granting custody or parenting time to both parents. *Thompson v. Thompson*, 1 CA-CV 07-0048, 2/21/08.

COURT OF APPEALS CRIMINAL MATTERS

Under A.R.S. § 13-901.01 if the State does not allege that a probationer has refused to participate in drug treatment, the superior court makes no such finding at the violation hearing, and such a finding would not have been supported by the evidence, a disposition court in a Proposition 200 drug offense case errs in revoking an individual's probation and ordering a prison sentence. *State v. Vaughn*, 1 CA-CR 06-0878/CR 06-0881 (Consol.), as amended by Order filed 3/31/08.

A trial court properly precludes the admission of blood evidence in a DUI-related criminal proceeding when the evidence was taken without a warrant, and in the absence of probable cause to believe the defendant was impaired. A.R.S. § 28-673 (2001) (the license revocation statute) does not authorize the use of blood evidence in a criminal prosecution when the blood was not obtained with a proper warrant, or if there was not probable cause to believe at the time of the blood draw that the driver caused a motor vehicle accident that resulted in serious physical injury. It is the State's burden to establish the admissibility of blood tests it seeks to introduce in a criminal prosecution. *State v. Quinn*, 1 CA-CR 05-1123, 3/25/08.

Police have reasonable suspicion to stop a vehicle when they observe items changing hands between an occupant of the vehicle and a pedestrian late at night in an area known for high levels of drug-related activity and the pedestrian quickly leaves the scene upon seeing the officer. It is possible for a combination of individually innocent factors to combine to create a reasonable suspicion under a totality of the circumstances in a given case. In addition, a trial court does not err in admitting an expert opinion going to the ultimate issue that drugs possessed by a defendant were for sale, rather than for personal use because under both Rule 704, ARIZ.R.EVID., expert opinion is not excludable merely because it embraces an ultimate issue of fact, and the Arizona Supreme Court has held that a police officer's expert testimony concerning whether drugs were possessed for sale is admissible. *State v. Fornof*, 2 CA-CR 2007-0091, 3/25/08.

Under A.R.S. § 13-107(E), a trial court errs by dismissing serious crimes such as kidnapping and sexual assault as being time-barred when the identity of the perpetrator was discovered more than seven years after the criminal conduct occurred, yet the 1997 amendment of A.R.S. § 13-107 (the criminal statute of limitations) adding subsection (E) tolled or extended the limitations period. *State v. Aguilar*, 2 CA-CR 2007-0126, 3/19/08.

A criminal defendant charged with misdemeanor trespass is not entitled to a jury trial because such right did not exist at common law prior to Arizona statehood, and the penalty for such an offense is not sufficiently severe to require a jury trial. The mere possibility of a future sentencing enhancement (should a defendant re-offend) is not sufficient to make an offense serious for the purposes of giving a defendant a constitutional right to jury trial. *State v. Willis*, 1 CA-CR 07-0270, 3/11/08.

COURT OF APPEALS JUVENILE MATTERS

Although a juvenile court abuses its discretion when it considers only exhibits or documentary evidence (without testimony subject to cross-examination to determine the sufficiency of the evidence supporting alleged grounds for termination) at a termination hearing at which a parent fails to personally appear, such error may be harmless in nature in the context of a particular case in which cross-examination would not have made a difference in the outcome. Rule 66(D)(2) ARIZ.R.PROC.JUV.CT., provides that a Juvenile Court may proceed with termination of parental rights if a parent fails to appear at a termination adjudication hearing. However, a parent still has fundamental constitutional rights entitling both representation by counsel at all proceedings, as well as the right of their counsel to conduct cross-examination related to the sufficiency of the evidence at termination proceedings. A parent's non-appearance cannot constitute a constructive waiver of their right to counsel or to contest the sufficiency of evidence presented unless they have been specifically informed that they could lose such rights by failing to appear. *Manuel M. v. ADES*, 2 CA-JV 2007-0071, 3/25/08.

A juvenile court does not err in barring evidence regarding a child born to parents during termination proceedings because the central issue in a termination action is whether the child(ren) in issue, rather than the parent(s), "would derive an affirmative benefit from termination or incur a detriment by continuing the relationship," and such evidence related to the later-born child is not relevant to such a determination regarding earlier-born children. A juvenile court does not err in denying a parents' motion to dismiss termination petition in a case in which no finding of dependency had been made because an ongoing dependency action does not preclude ADES from filing a termination petition under A.R.S. § 8-533, rather than under later enacted A.R.S. § 8-862, as long as reasonable efforts were made to provide services to the child(ren) and the child(ren)'s parent(s) because, unlike dependency proceedings initiated under § 8-862, there are no procedural prerequisites to filing a termination petition under A.R.S. § 8-533. *Kimu P. v. ADES*, 1 CA-JV 06-0238, 3/20/08.

COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS

Gunshot Wounds Suffered by Off-Duty Police Officer Acting To Save the Life of a Friend May Be Compensable Under Workers' Compensation Benefits. An injury arises out of employment if it results from a risk of employment or is incidental to the discharge of duty. Courts consider a number of factors in determining whether the injury results from a risk of employment, including whether the employment causes an increased risk of exposure to injury and whether the risk was created by the position in which the employment placed the employee. Where a police department's code of conduct required an officer to "act in an official capacity," if he observed an incident that required police action even while off duty, an officer who was shot when assisting a friend off duty suffered a compensable injury even though the officer acted out of mixed motives (a desire to help his friend and based on his police training). *Lane v. City of Tucson*, 2 CA-IC 2007-0007, 3/26/08.

A.R.S. § 23-1028 Only Prevents a Workers' Compensation Claimant From Receiving Those Benefits Obtained Fraudulently. Where a workers' compensation claimant was found guilty under A.R.S. § 23-1028 for making false statements in order to obtain temporary partial disability benefits, the claimant could only be denied those benefits obtained by fraud. The statute does not require that a claimant forfeit other benefits not fraudulently obtained. *Obregon v. Industrial Comm'n of Arizona*, 1 CA-IC 07-0020, 2/28/08.

COURT OF APPEALS SPECIAL ACTION MATTERS

Temporary Orders of the Family Court Issued as Result of Resolution Management Conference May Not Address Contested Issues of Fact. In the context of a Resolution Management Conference (RMC), the purpose of which is to encourage the resolution of family law cases using non-adversarial means of alternative dispute resolution, a court may not enter temporary orders over a party's objection or resolve disputed issues of fact absent agreement of the parties. If issues remain after an RMC, the court must set an evidentiary hearing not later than thirty days thereafter to resolve the remaining issues, unless the parties agree to a different timeframe or procedure. *Villares v. Pineda*, 1 CA-SA 07-0238, 3/6/08.

* indicates a dissent

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.appeals2.az.gov).

Each Division of the Court of Appeals places PDF versions of memorandum decisions filed after July 1, 2007, on each Division's respective Web site. Memorandum decisions will remain on each court's site for approximately six months. Posting is only for informational purposes and does not constitute "publication" of the memorandum decisions as precedential authority or allow them to be cited in any court except as authorized by the rules of the Arizona Supreme Court.

Detailed summaries of selected cases and other court news may be found at www.azapp.com.