APPELLATE HIGHLIGHTS

by Hon. Donn Kessler, Arizona Court of Appeals, Div. One, Thomas L. Hudson, Osborn Maledon PA, and Patrick C. Coppen, Esq., Tucson

APPELLATE HIGHLIGHTS NEWS

This is the last month that will feature the work of **Judge Donn Kessler**, who is "retiring" from the column after five years' work. He has served the magazine and readers in remarkable ways, and we will miss his monthly contribution.

Joining the column is **Thomas Hudson**. He 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.

Besides his extensive experience, Thom brings another resource to bear on the column: a blog (Web log) called AzAPP, which provides summaries (and more) of all published civil decisions from the two divisions of the Arizona Court of Appeals and the Arizona Supreme Court.

AzAPP is maintained by Osborn Maledon PA's appellate group, and special thanks are due to fellow AzAPP contributors **Jean-Jacques Cabou, Ronda R. Fisk, Meghan H. Grabel, Sara Greene, Mark P. Hummels, Daniel L. Kaplan, Diane M. Meyers, Jason J. Romero** and **Keith Swisher**.

Patrick Coppen continues his good work for the column, now writing all of the summaries of criminal law decisions. Many thanks to Pat for his great work and dedication.

SUPREME COURT CIVIL MATTERS

The Supreme Court declines to revisit comity holding in Gila River System decision. The Supreme Court considered, but denied, an untimely motion for reconsideration filed by the San Carlos Apache Tribe. The McCarran Amendment did not deprive the Globe Equity court of jurisdiction to enforce and interpret the 1935 consent decree. *In re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, WC-02-0003-IR, 5/3/06 … **Supreme Court affirms the decision to remove a state legislator from office for campaign spending violations.** The provision of the Citizens Clean Elections Act, A.R.S. § 16-942, which provides for sanctions for violations of the campaign finance laws, including fines, criminal sanctions and, for serious cases, removal from office is constitutional. The Arizona Clean Elections Commission could remove Rep. David Burnell Smith from office for violating the campaign finance laws. *David Burnell Smith v. Arizona Citizens Clean Elections Comm'n*, CV-06-0021-PR/A, 5/3/06 … **A party who claims to be a tenant in common with a former spouse may bring a separate civil action to obtain relief from the dissolution decree when the decree failed to mention or did not dispose of the property at issue.** *Dressler v. Morrison*, CV-05-0119-PR, 3/26/06 … **The firefighter's rule does not bar an off-duty firefighter from suing the person whose negligence caused the accident injuring the firefighter.** *Espinoza v. Schulenburg*, CV-05-0158-PR, 3/16/06 … Given a misunderstanding resulting in immunity for a former judge from lawyer discipline, **the Supreme Court reduced the suspension of an attorney for having a romantic involvement with that judge who she appeared before.** *In re Dean*, SB-05-0135-D, 3/16/06 … **An automobile lessee does not have a claim under the Magnuson–Moss Warranty Act, 15 U.S.C. §§ 2301-2312, because there was no qualifying sale of the vehicle for purposes of that act.** A sale to the dealer for resale does not so qualify under the Act. **Nor does the lessee have a claim under Arizona's "Lemon Law,"** A.R.S. §§ 44-1261-1267, because under that act the consumer must have the right to transfer title back to the manufacturer. Only the owner of the vehicle or holder of title could so transfer title. *Parrot v. DaimlerChrysler Corp.*, CV-05-0104-PR, 3/15/06.

SUPREME COURT CRIMINAL MATTERS

A sentence of 20 consecutive 10-year sentences for a criminal defendant convicted of 20 separate counts of sexual exploitation of a minor does not violate the Eighth Amendment's violation against cruel and unusual punishment. Under A.R.S. § 13-3552, and the applicable statutory sentencing scheme making the offense a dangerous crime against children, the possession of each image of child pornography is a separate offense for which consecutive sentences must be imposed for each conviction, without possibility of probation, early release or pardon. Although the Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishments," in non-capital cases review is limited to a proportionality-type review in which a reviewing court must determine whether the legislature "has a reasonable basis for believing that a particular sentence or sentencing scheme advances the goals of its criminal justice system in any substantial way." Moreover, **under applicable Eighth Amendment analysis the focus is usually limited to the sentence imposed for each specific crime, and not on the length of cumulative or consecutive sentences** for a particular defendant. *State v. Berger*, CR 05-0101-PR, 5/10/06 … **Unless the defendant has knowingly, voluntarily and intelligently waived the right to a jury trial with respect to aggravating factors, the defendant's comment during a plea colloquy does not relieve the State of its obligation under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to prove to a jury any fact that increased the penalty for a crime beyond the prescribed statutory maximum beyond a reasonable doubt.** *State v. Brown (McMullen)*, CR-05-0263-PR, 3/16/06.

COURT OF APPEALS CIVIL MATTERS

A negligent infliction of emotional distress claim is a separate injury to a second victim not subject to the "each person" limitation in insurance policy. Because NIED claims require proof of physical injury that results from emotional distress, these claims are separate from the injury to the accident victim in an accident. Such injuries result from the accident, not solely from the injury to the other person. Accordingly, an NIED claim filed by a relative who was in the zone of danger does not fall under the "each person" policy limit of the party who was directly injured in an automobile accident. *State Farm v. Connolly*, 1 CA-CV 05-0400, 5/4/06 … In determining the amount of credit for "net income taxes" paid to another state under A.R.S. § 43-1071(A), **the term "the taxpayer's entire income upon which tax has been imposed" means Arizona taxable income.** *Stearns v. Arizona Dep't of Revenue*, 1 CA-TX 04-0006, 3/30/06 … **A person complaining to the Board of Legal Document Preparers about a document preparer is entitled to absolute common-law immunity for the statements in his complaint**. *Sobol v. Marsh*, 1 CA-CV 05-0199, 3/30/06 … **A person complaining to the State Bar of Arizona about a legal document preparer whom the complainant claims is engaging in the unauthorized practice of law is entitled to absolute immunity for his complaint.** *Sobol v. Alarcon*, 1 CA-CV 04-0720, 3/30/06 … **The annulment of a child's marriage before she would have otherwise been emancipated revives the child's unemancipated status, rekindling a parent's child support obligation.** *State ex rel. Dep't of Econ. Sec. v. Demetz*, 1 CA-CV 05-0148, 3/28/06 … **In upholding the denial of a real estate license, the superior court did not err in: (1) denying a change of venue to Yuma County** for the convenience of witnesses when there was no need for an evidentiary hearing or trial de novo; (2) **refusing to hold an evidentiary hearing because the appellant did not provide specific information about what testimony he would introduce** to show the agency decision was not supported by substantial evidence, was contrary to law, was arbitrary or capricious or was an abuse of discretion. *Curtis v. Richardson*, 1 CA-CV 04-0827, 3/23/06 … **In a workers' compensation-related case involving a**

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 April 20, 2006*:

State of Arizona v. Thomas Otis Baird, 1 CA-CR 05-0119 PRPC (CR 05-0403-PR) (Order)

1. Is Baird entitled to relief under the principle of law set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), when the issue is raised for the first time in a timely filed ["of-right"] petition for post-conviction relief?
2. Did the trial court err in finding that its sentencing determination of an aggravated sentence was not fundamental error?

The Arizona Supreme Court accepted review or jurisdiction of the following issues on May 23, 2006*:

The Forty-Seventh Legislature of Arizona; The Arizona State Senate; The Arizona House of Representatives; Ken Bennett, individually and as President, Arizona State Senate; and James P. Weiers, Individually and as Speaker of the House of Representatives, v. Janet Napolitano, Governor of Arizona; Arizona Department of Administration and William Bell, Director; and Arizona State Personnel Board and Jeff Grant, Chair, CV 06-0079-SA

Issue Presented by the Legislature

Under the Constitution, if a bill "contains several items of appropriations of money," the Governor may veto "one or more of such items." This Court has defined "appropriation" to mean setting aside a certain sum of money for a specific object, with authorization to spend it. The Governor item-vetoed four lines of text from a bill. The vetoed text added a category of employees who are exempt from the State Merit System. Does part of a bill that adds to the list of positions exempt from the merit system constitute an "item of appropriation of money"?

Issues Presented by the Governor

1. Should this Court exercise discretionary special action jurisdiction to again consider the scope of the Governor's constitutional item-veto authority? Or do principles of standing and judicial restraint dictate that the Court decline such jurisdiction given that (i) none of the votes on HB 2661 were nullified (all votes were counted, and the Bill was transmitted to the Governor in the normal course), and (ii) Petitioners have refused to seek a veto override, or to otherwise avail themselves of their legislative remedies to challenge the subject item-veto, because Petitioners by express resolution, seek to force this Court to rule on the scope of the Governor's veto authority.
2. *[Only if the Court decides to exercise special action jurisdiction:]* Whether the Governor properly exercised her item-veto authority when she item-vetoed an amendment to A.R.S. § 41-771 that, if enacted, would have exempted State employees at a pay grade of 24 or above from the State Merit System, thereby requiring increased State payments to departing employees for accrued annual leave.

Suzanne Tyman v. Hintz Concrete, Inc., an Arizona Corporation; Haines Construction, Inc., an Alaska Corporation; Suzanne Tyman v. New Song United Methodist Church, a non-profit Arizona corporation, 1 CA-CV 05-0165, 1 CA-CV 05-0352

When a plaintiff files a complaint naming specific and fictitious defendants within the statute of limitations, then files an amended complaint and serves it on newly discovered defendants within the 120-day period allowed by Rule 4(i) of the Arizona Rules of Civil Procedure, does Rule 15(c) require dismissal of the newly discovered defendants?

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

police officer who is injured in a joint operation with another law enforcement agency, a trial court erred in denying summary judgment pursuant to A.R.S. § 23-2022 when the injured officer accepts compensation benefits for his work-related injury. Such acceptance effectively waives his right to exercise an option to sue employers or any co-employee acting within the scope of their employment. *Callan v. Bernini (Pimber)*, 2 CA-SA 05-0085, 3/22/06 … In a city land annexation matter the proposed annexation will comply with the contiguity requirements of A.R.S. § 9-471(H) if: (1) the land to be annexed adjoins the exterior boundary of the annexing city or town for at least 300 feet, (2) the land is at least 200 feet in width at all points excluding rights-of-way and roadways; and (3) the distance from the existing boundary of the annexing city or town to the furthest point of the annexed land where it adjoins the city or town is no more than twice the maximum width of the annexed land. However, **if the proposed annexation includes state trust land that under A.R.S. § 9-471(A) requires the written approval of the State Land Commissioner and the selection board established by A.R.S. § 37-202, a municipality may not use the prior approval from the State Land Department for a later annexation.** *Cornaman Tweedy v. Casa Grande*, 2 CA-CV 05-0159, 3/15/06 … **A county employee merit system commission has jurisdiction to hear an appeal of an employee's alleged coerced or constructive resignation without a written order of dismissal.** Although A.R.S. § 11-356(A) allows dismissal "only by written order," and A.R.S. § 11-356(B) permits an appeal of such a written order, the language of the statute is not a jurisdictional requirement for appeal. *LaWall v. Pima County Merit System Comm'n*, 2 CA-CV 05-0140, 3/15/06 … **The common-fund doctrine does not apply to permit the shifting of fees between a wrongful death statutory plaintiff and statutory beneficiary when both participated in the non-class action and the benefits could not be traced accurately to the statutory plaintiff's counsel nor could fees be shifted with some precision.** *Valder Law Offices v. Keenan Law Firm*, 1 CA-CV 05-0217, 1 CA-CV 05-0358 (consolidated), 3/09/06 … **For purposes of summary judgment, a defendant who gave eight prescription pills to a friend who had only requested one pill owed a duty to a mutual friend who later died after ingesting the drugs.** *Gipson v. Kasey*, 1 CA-CV 05-0119, 3/02/06 … **A contractor did not substantially comply with the licensing requirement of A.R.S. § 32-1151 when it submitted a bid on a contract while its application for a license was pending because it knew it was violating the statute when it submitted its bid.** *Arizona Comm. Diving Serv., Inc. v. Applied Diving Serv., Inc.*, 1 CA-CV 05-0082, 3/02/06.

COURT OF APPEALS CRIMINAL MATTERS

A trial court does not err in refusing to instruct a jury that driving on a suspended license ("DSL") is a lesser-included offense of aggravated DUI on a suspended license. Although **the test for determining whether an offense is lesser-included is whether it is by nature always a**

constituent part of the greater offense or whether the charging document itself describes the lesser offense though the lesser does not always make up a constituent part of the greater offense, driving on a suspended license is not an inherent constituent part of aggravated DUI because under A.R.S. § 28-3473(A) a DSL charge requires driving on a "public highway" while a person's driving privilege is suspended, revoked, canceled or refused before the crime can be committed, and an aggravated DUI under § 28-1383(A)(1) is committed merely while driving, even on a private road, while impaired by any drug pursuant to § 28-1381(A)(1). **A DOC "pen pack" that fails to include certified copies of a defendant's prior conviction(s) is not insufficient to prove priors for sentence enhancement purposes** as long as other appropriate documentary evidence, such as certified copies of DOC documents linking the defendant to the prior(s), is offered supporting the prior(s). *State v. Robles*, 2 CA-CR 05-0014, 5/25/06… **An individual who is married yet not living with or engaging in sexual activity with their spouse does not meet the definition of "spouse" under the previous language of A.R.S. § 13-1401(a) (now requiring consent) to raise the marital defense in a sexual assault prosecution**. *State v. Machado*, 2 CA-CR 04-0362, 5/10/06 … **The attorney–client privilege protects communications between city officials allegedly seeking legal advice dealing with alleged public misconduct by the officials and a former city attorney when the attorney did not advise the officials that he did not represent them or that the communications were not privileged.** *State ex rel. Thomas v. Schneider (Hanna)*, 1 CA-SA 05-0022, 3/30/06 … **A trial court erred in finding two prior felony convictions based on a stipulation by counsel without complying with ARIZ.R.CRIM.P. 17.6,** regardless of whether the agreement to the prior convictions is by an admission by the defendant or a stipulation by counsel. *State v. Gastelum*, 1 CA-CR 04-0661, 3/23/06* … **The City of Phoenix prostitution ordinance is not unconstitutional under *Lawrence v. Texas***, 539 U.S. 558 (2003). There is no protected constitutional fundamental liberty or privacy interest in engaging in commercial sexual activity, even in private, and the ordinance is rationally related to legitimate public interests in banning prostitution. However, **the assessment of a fee to take a criminal appeal violates A.R.S. § 22-373 and ARIZ. CONST. art. 2, § 24.** *State v. Freitag*, 1 CA-CR 04-0770, 3/14/06.

COURT OF APPEALS JUVENILE MATTERS

A juvenile court did not err in finding two juveniles incompetent and not restorable to competency to participate in juvenile proceedings by relying in part on an expert who used the juvenile incompetency standard and an adult competency assessment tool developed for adult criminal adjudications along with other competency evaluation methods. Juvenile incompetency pursuant to A.R.S. § 8-291(2) does not require an underlying disease, defect or disability. *In re Hyrum H.*, 1 CA-JV 05-0101, 1 CA-JV 05-0102 (consolidated), 3/07/06.

* 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.apltwo.ct.state.az.us).

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