APPELLATE HIGHLIGHTS

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

SUPREME COURT CIVIL MATTERS

Acts of Part Performance Must Be "Unequivocally Referable" to an Alleged Oral Agreement to Exempt the Agreement from the Statute of Frauds. An oral partition agreement among tenants in common is for the sale of real property and thus comes within the scope of the statute of frauds, A.R.S. § 44-101(6). To remove an agreement from the statute of frauds under a theory of part performance, the alleged acts of part performance must be "unequivocally referable" to the alleged oral contract. Although called "part performance," the relevant acts need not be required by the oral agreement, but rather must be undertaken in reliance on the agreement. This relationship to the agreement must be clear from the acts alone without further explanation concerning the significance of the acts. *Owens v. M. E. Schepp Ltd. P'ship*, CV-07-0349-PR, 5/8/08.

Mail Delivery Rule Applies to the Filing of Notices of Claim Under A.R.S. § 12-821.01. Arizona's notice of claim statute, A.R.S. § 12-821.01, requires a party to serve public entities with a notice of claim before filing suit. The mail delivery rule applies to the filing of notices of claim, and thus absent contrary evidence, proof of mailing will establish that delivery occurred. If the addressee denies receipt, the presumption disappears and an issue of fact is created, but the fact of mailing retains evidentiary force. Chief Justice McGregor and Vice Chief Justice Berch dissented.* *Lee v. State*, CV-07-0293-PR, 4/25/08.

Corporate Officers Can Be Held Personally Liable for Failure to Remit Additional Charges Made to Cover Transaction Privilege Tax Under A.R.S. § 42-5028. Under § 42-5028, "a *person* who fails to remit any additional charge made to cover the [transaction privilege] tax or truthfully account for and pay over any such amount is, in addition to other penalties provided by law, personally liable for the total amount of the additional charge so made and not accounted for or paid over" (emphasis added.) Because the statutory definition of "person" is broad enough to include corporate officers, corporate officers can be held personally liable under A.R.S. § 42-5028. Justices Hurwitz and Bales dissented.* *Arizona Dep't of Revenue v. Action Marine, Inc.*, CV-07-0288-PR, 4/9/08.

SUPREME COURT CRIMINAL MATTERS

A trial court does not err (1) in denying a defense motion for change of venue when there is no showing that pretrial publicity will probably deprive the defendant of a fair trial; (2) by refusing to make a pretrial ruling that if the jury in a capital case decided against the death penalty whether the court would sentence the defendant to a life or a natural life sentence; (3) in denying a motion for mistrial for jury misconduct involving either alleged juror conversations about the case or the reading of newspapers by members of the jury after being admonished not to engage in either types of conduct when the defense fails to show prejudice, either actual or presumed. Nor does a trial court improperly coerce a penalty phase verdict in a capital case by merely responding to jury questions (after only three hours of deliberations) concerning the definition and responsibility of a hung jury by advising the jury, after consultation with counsel, to continue their deliberations to attempt to resolve any differences. A trial court does not violate a defendant's constitutional right to due process or improperly inhibit or impede their ability to communicate with counsel by requiring an accused to wear a "shock belt" under their shirt during trial, enabling security personnel to deliver an electric shock if an escape is attempted, when the State has legitimate safety/security concerns based upon a defendant's history of prior escape attempts. *State v. Cruz*, 05-0163-AP, 4/21/08.

A trial court does not err when it allows at a capital trial the admission of a confession made by a defendant after invoking their Sixth Amendment right to counsel at an earlier arraignment hearing when substantial evidence suggests that the defendant made a voluntary, knowing, and intelligent waiver of these rights by initiating contact with police for the purposes of making the confession, was properly *Mirandized* prior to the confession, and volunteers to answer additional police questions.

A court does not err by admitting during the penalty phase of a capital case threatening letters written to both prosecutor and prosecution witnesses by a defendant who is the proclaimed leader of hate group militia when the evidence is relevant to whether mitigation presented that the defendant's alleged militia involvement was benign and the result of mental health delusions sufficiently substantial to call for leniency (or a life rather than death sentence). *State v. Boggs,* CR-05-0174-AP, 4/9/08.

COURT OF APPEALS CIVIL MATTERS

The United States Supreme Court's Decision Requiring the Arizona State Land Department to Receive Compensation for Easements on State Land Trust Property for Public Highways Does Not Apply Retroactively. Arizona law previously held that the Arizona State Land Department was not required to receive compensation for easements granted for public highways. In *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458 (1967), the United States Supreme Court held that Arizona's Enabling Act required compensation for easements given for public use, but expressly declined to decide whether to invalidate earlier easements granted without compensation. Pursuant to the three-part balancing test announced in *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587 (1990), *Lassen* does not apply retroactively. *Mayer Unified Sch. Dist. v. Winkleman*, 2 CA-CV 2007-0126, 5/19/08.

School Voucher Programs That Provide Aid to Private Schools Violate the Arizona Constitution. Article IX, Section 10 of the Arizona Constitution (the "Aid Clause") prohibits any "appropriation of public money made in aid of … private or sectarian school[s]." School voucher programs pursuant to which the state disburses funds to a child's parent or guardian who may in turn "restrictively endorse" the payment to both sectarian and nonsectarian schools violate the Aid Clause. Applying the broad "true beneficiary theory," pursuant to which the children receiving the benefit of the vouchers would be characterized as the "true beneficiaries" of the school voucher programs rather than the institutions receiving the funds, would improperly nullify the Aid Clause. Such programs do not, however, violate Article II, Section 12 of the Arizona Constitution (the "Religion Clause") because they do not result in an appropriation of public money for, or an application of public money to, any religious worship, exercise, or instruction or to the support of any religious establishment. *Cain v. Horne,* 2 CA-CV 2007-0143, 5/15/08.

Failure To Use the Specified Method of Canceling a Contract

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.

Permits the Breaching Party an Opportunity to Cure. When a breach of contract occurs and the contract provides a specific procedure for cancellation, if the non-breaching party fails to follow that procedure, the breaching party may attempt to cure. In particular, where a land sale contract provides that cancellation for a material breach requires delivery of a written cancellation to either the escrow company or the breaching party, phone calls to both the escrow agent and buyer's agent to state that the deal was cancelled did not deprive the buyer of an opportunity to cure. *Queiroz v. Harvey*, 1 CA-CV 07-0309, 5/15/08.

Marital Community in

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 June 3, 2008*:

State v. Charles Eugene Smith, CR-08-0033, 1 CA-CR 06-0742 (Opinion), 217 Ariz. 308, 173 P.3d 472 (App. 2007)
"In *State v. Crawford*, 214 Ariz. 129, 149 P.3d 753, 755 (2007), the Arizona Supreme Court held that whether a foreign conviction constitutes a felony in Arizona for sentence enhancement raises an issue of law and "the defendant's admission of the prior conviction is of no consequence in that legal analysis." Did the court of appeals err in holding Smith's sentence could be enhanced with an invalid foreign conviction because he failed to object at sentencing?"

1800 Ocotillo, L.L.C. v. The WLB Group, Inc., CV-08-0057-PR, 1 CA-CV 07-0037 (Opinion), 217 Ariz. 465, 176 P.3d 33
Issue Presented by Petitioner WLB:
"Whether a contractual limitation on liability in a contract between a land surveyor and a land developer is an "assumption of risk" as that term is used in Arizona Constitution, Art. 18, § 5 so as to require a jury trial even in cases seeking recovery for only economic loss."
Issue Presented by Cross-Petitioner Ocotillo
"Whether it is void as against public policy of the State of Arizona to allow a licensed professional, such as WLB, to limit its liability for its own professional negligence through a limitation of liability/assumption of risk provision attached to the professional services contract? The Court of Appeals found that such limitation of liability provisions by certain types or classes of licensed professionals are not contrary to the public policy of the State of Arizona. Ocotillo petitions this Court to review the Court of Appeals' decision on that issue."

State of Arizona v. Marcel Barry Thomas, CR-08-0051-PR, 1 CA-CR 2005-0770 (Opinion with dissent), 217 Ariz. 413, 175 P.3d 71
Issue Presented:
"Did the court of appeals violate the plain language of A.R.S. § 13-604(W)(2)(a) and controlling Arizona Supreme Court authority by holding that a conviction qualifies as an historical prior felony conviction under subsection (a) only if the date that the defendant committed the prior offense precedes the date that the defendant committed the present offense?"

The Arizona Supreme Court accepted review or jurisdiction of the following issues on April 22, 2008*:

The Lofts at Fillmore Condominium Ass'n. v. Reliance Commercial Constr. Inc., CV 07-0416-PR 1 (Opinion)
Presented Issue:
"Whether a residential condominium association may bring a cause of action against a builder who causes construction defects."

The Court of Appeals and Respondent frame the issue as follows:
"Whether the exception to the privity requirement for a claim of breach of the implied warranty of habitability and workmanlike construction, set forth in *Richards v. Powercraft Homes,* 139 Ariz. 242, 678 P.2d 427 (1984), is limited to "homebuilder-vendors" and, if so, whether the exception should be expanded to non-vendor homebuilders on public policy grounds."

State of Arizona v. Hubert August Stummer and Dennis Allen Lumm, CR-07-0429-PR, 1 CA-CR 06-0874 and 1 CA-CR-06-0877 (Consolidated) (Opinion)
Presented Issues:
A. Petition for Review
"The court below held that A.R.S. §13-1422, restricting hours of operation of businesses offering sexually oriented material for rental or sale, was constitutional under Article 2, Section 6 of the Arizona Constitution. This ruling should be reviewed. It conflicts with a decision of Division Two on the same issue. *See Empress Adult Video and Bookstore v. City of Tucson,* 204 Ariz. 50, 59 P.3d 814 (App. 2002), (*review denied* 2003)."
B. Cross-Petition for Review
None specifically stated. The State asks the Court to accept its cross-petition for review to overrule *Empress* and resolve a conflict of law between opinions of the divisions of the appellate court.

Michael Cullen, et al. v. Koty-Leavitt Insurance Agency, Inc., et al., CV 07-0402-PR, 2 CA-CV 2007-0020 (Opinion)
Presented Issues:
1. "Should Rule 8(a), ARIZ.R.CIV.P., be re-interpreted to overrule the notice pleading standard established by this Court?
2. Is it the exclusive province of this Court, given its rule-making power and precedents, to change the notice pleading standard?
3. Where a court acts as fact-finder on a motion to dismiss, may it disregard deposition testimony and a stipulation supplementing the allegations of the complaint?"
4. Does an insurer's unilateral decision to identify the named insured in a multi-vehicle policy preclude, as a matter of law, evidence of the reasonable expectations that other insureds would have portable underinsured motorist coverage?"

Tammy H. and Steven H. v. Arizona Department of Economic Sec. et al., CV 08-0026-PR, 1 CA-JV 07-0076 (Opinion)
Presented Issue:
"Whether the Court of Appeals misinterpreted the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963 (2000) and Rule 55(C), *Arizona Rules of Procedure for Juvenile Court* ["Rule 55(C)"] as requiring expert testimony on the ultimate issue of fact in a dependency proceeding which is whether continued custody of the child will likely result in serious emotional or physical damage to the child?"

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

Dissolution Action May Be Allocated a Share of the Increase in the Value of Husband's Separately Owned Business. Arizona law does not prohibit the apportionment of both profits and increased value of a separate property business where a portion of each resulted from the community's labor. A finding that the community has received a fair salary for the community's labor contributions to the separately held business also does not preclude apportionment of the increased value of the business. When the value of separate property is increased during the marriage, the burden is on the spouse claiming the increase as separate property to prove the increase is the result of the inherent value of the property itself and not the product of the work effort of the community. The presumption that all earnings during the marriage are community in nature may be overcome only by clear and convincing evidence to the contrary. *Rueschenberg v. Rueschenberg*, 1 CA-CV 07-0300, 5/13/08.

A.R.S. § 12-820.02 Provides Immunity to Public Entities for Negligently Granting Approvals, but Not for Negligently Providing Information. A.R.S. § 12-820.02 provides immunity for "approvals" issued by county employees absent intent to injure or gross negligence. County officers who had allegedly negligently told a homeowner who had inquired that he could build a fence across an easement so long as it was gated and the gate was kept unlocked did not "approve" the fence within the meaning of the immunity statute, but rather provided information. Because the county officials were providing information, and not giving "approval," they were not entitled to immunity under § 12-820.02. *Watson v. Apache County*, 1 CA-CV 07-0327, 5/6/08.

A One-Year Statute of Limitations Applies to an Oral Contract for Unpaid Wages. A.R.S. § 12-541(3) requires that actions "[f]or breach of an oral or written employment contract" be brought within one year. That statute is not limited to agreements affecting a term of employment or altering or limiting the at-will presumption from which an employee could state a claim for termination of employment; it also applies to a claim for breach of an oral contract relating to a bonus. A.R.S. § 12-541(5) requires that actions for "liabilit[ies] created by statute" be brought within one year. To the extent a claim for unpaid wages brought under A.R.S. § 23-355 is considered a statutory claim, a one-year statute of limitations likewise applies. *Redhair v. Kinerk, Beal, Schmidt, Dyer & Sethi, P.C.*, 2 CA-CV 2007-0107, 4/30/08.

The Act of Drag Racing Does Not Automatically Constitute an Intentional Tort for Purposes of "Acting in Concert" and Joint Liability Under A.R.S. § 12-2506(D)(1). Pursuant to A.R.S. § 12-2506(F)(1), "acting in concert" requires a conscious agreement to commit an intentional tort. An act will only qualify as an intentional tort if the actor desired to cause the consequences that resulted, or was substantially certain that they would result from his or her actions. The mere act of drag racing does not constitute an intentional tort, and thus does not give rise to joint liability under A.R.S. § 12-2506(D)(1). *Mein v. Cook*, 1 CA-CV 06-8081, 4/24/08.

Where a Claimant Has Demonstrated Open, Visible, Continuous, and Unmolested Use of Land, the Claimant's Use Is Presumed to Be Under a Claim of Right and Without Permission. Where a claimant has shown uncontested open, visible, continuous, and unmolested use of land for the limitations period, the use will be presumed to be under a claim of right. In that circumstance, the burden is upon the owner to show that the use was permissive. Permissive use may be either express or implied, and if permission is given, any subsequent use presumptively remains permissive. *Spaulding v. Pouliot*, 2 CA-CV 2007-0108, 4/23/08.

Corporate Principal Is Not Personally Liable for Aiding and Abetting Fraudulent Transfer from Defendant Corporation. Although a corporate principal may be held personally liable under the trust fund doctrine for transferring corporate assets from an insolvent corporate entity in certain circumstances, such an officer may not be held personally liable under a theory of successor corporate liability and under the Uniform Fraudulent Transfer Act ("UFTA"). The UFTA does not provide for personal "aiding-abetting" liability for corporate officers or directors for their role in personally facilitating a fraudulent transfer. *Warne Investments, Ltd. v. Higgins*, 1 CA-CV 06-0410, 4/15/08.

Redistricting Commission's Congressional and Legislative Plan Does Not Violate the Arizona Constitution. In creating legislative districts, the Arizona Independent Redistricting Commission must follow a multipart constitutional plan which includes considering competitiveness. In connection with a challenge based on the constitutional administrative agency principles, a reviewing court must uphold the Commission's findings if they are supported by substantial evidence. Thus with respect to a competitiveness challenge, the issue is not whether the Commission failed to create competitive districts, but rather whether there is evidence that the Commission considered competitiveness before it finalized its legislative district. *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting*

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.

Commission, 1 CA-CV 07-0301, 4/10/08.

A Subsequent Purchaser of Commercial Property Can Sue for Breach of the Implied Warranty of Workmanship and Habitability Pursuant to an Express Assignment of that Warranty by the Original Owner. Warranties, like most other contractual rights, generally can be assigned. A seller of an apartment complex may expressly assign their implied warranties of workmanship and habitability relating to the complex. In that circumstance, the assignee may assert an implied warranty claim notwithstanding the lack of privity. *Highland Village Partners, L.L.C. v. Bradbury & Stamm Constr. Co.*, 1 CA-CV 07-0194, 4/8/08.

Statute of Limitations for Municipal Code Violations Relating to Billboards Runs from Date Violation Discovered. A.R.S. § 9-462.02(C) imposes a two-year limitations period for a municipality to issue a citation and file an action involving an outdoor advertising use or sign code violation. This limitations period runs from the date of actual discovery of the violation by the city, rather than the date the city knew or should have known of the alleged city code violations. Although a nonconforming land use (*i.e.*, a lawful use maintained after the date of a zoning ordinance prohibiting that use), is a vested property right that may not be subsequently impaired, adding a second face to a billboard results in losing what would otherwise be nonconforming use status. Because unlawful billboards are public nuisances, and proceedings to enforce the zoning ordinance are proceedings in equity, the superior court has discretion to fashion a remedy other than removal for violations. *City of Tucson v. Clear Channel Outdoor, Inc.*, 2 CA-CV 2007-0104, 4/2/08.

Maricopa County Superintendent Has Sole Statutory Authority Under A.R.S. § 15-308 To Offer Educational Services to Maricopa County's Homeless Children but Must Work Collaboratively with the County Board of Supervisors If County Monies Are Required. A.R.S. § 15-308(A) grants the County Superintendent the authority to "provide educational services of an accommodation school [for homeless children]." Subsection (B) however, states broadly that a "County may offer educational services to homeless children … through an accommodation school." Finally, subsection (C) places the "county board of supervisors" in control of the purse strings for any such accommodation school. Pursuant to these statutes, the legislature intended to authorize a collaborative effort between the Superintendent and the Board in providing educational services to homeless children. *Dowling v. Stapley*, 1 CA-CV 06-0503, 3/27/08.

A News Organization Does Not Waive the Reporter–Informant Privilege by Seeking a

Declaratory Judgment or Disclosing Some Information About an Informant, and a Trial Court Does Not Violate a Party's Due Process Rights by Conducting an *In Camera* Review of a News Reporter's Declaration Regarding the Identity of a Source. Where a news organization broadcasts a story based on documents that were subject to a court's confidentially order, whether a trial court may constitutionally preclude further broadcasts of the story depends upon whether the news organization's information came from a source outside the litigation. Assuming that the reporter-informant privilege is waivable, a news organization does not waive the privilege by intervening in an action to continue broadcasting a story based on allegedly confidential documents. A news organization also does not waive the privilege by disclosing partial information regarding a source so as to allow a court to determine the source of documents. The trial court may also, without violating a party's due process rights, conduct a two-step process pursuant to which it conducts an *ex parte* review of a declaration concerning the source of the documents before deciding whether to hold an *in camera* evidentiary hearing. *Flores v. Cooper Tire and Rubber Co.*, 1 CA-CV 06-0655, 3/25/08. Judge Snow dissented.*

COURT OF APPEALS CRIMINAL MATTERS

Following remand for a new sentencing after an appeal **at the retrial before a new jury of the penalty phase in a capital case, both the State and defense are entitled to present the new jury with factual information relevant to the underlying crime and both aggravating and mitigating circumstances relevant to the jury assessing or determining whether substantial mitigating circumstances exist to call for leniency** or the imposition of a life sentence rather than a death sentence. At the penalty phase, the trial court retains the discretion to determine the relevance of all proffered evidence, as well as the means by which such information may be presented to the jury, and the jury is constitutionally required to render an individualized assessment or determination of the appropriate penalty based upon both the character of the Defendant and the circumstances of the crime. This assessment is not mathematical, and should be made in light of the full facts of each case, including not only the circumstances of the offense, and a consideration of the quality and strength of all aggravating and mitigating factors. **Under Rule 19.1(d), ARIZ.R.CRIM.P., which establishes the procedure to be followed in the penalty phase of a capital trial, the State has the independent and affirmative right to present evidence relevant to the issue of mitigation, notwithstanding whether any mitigation evidence is presented** by the defense. *State v. Duncan/Prince*, 1 CA-SA 08-0042, 5/6/08.

A trial court may not admit evidence of two completely different criminal acts that are not part of the same transaction to establish a single criminal count in the indictment without taking appropriate remedial measures through jury instruction to ensure a unanimous jury verdict in a case in which the defendant proffers different factual defenses for each act. *State v. Klokic*, 1 CA-CR 05-0917, 4/29/08.

Due process requires that if a defendant is charged with a felony offense and of having a particular status (*e.g.*, being an undocumented immigrant) that initially makes her/him not entitled to bail under the Arizona Constitution, a final no-bail determination may only be made following a full hearing at which the State has the burden of proof and the defendant has both the right to counsel and to present evidence, as well as the right to cross-examine the State's witnesses. By allowing the holding of a criminal defendant without bail at the time of their initial appearance for a reasonable period while both parties are given the opportunity to prepare for full hearing on the no-bail determination, the competing interests of a Defendant's liberty and the State's need to ensure their presence at trial are properly protected. *Segura v. Cunanan v. State of Arizona*, 1 CA-SA 07-0179/0181, 4/24/08.

A trial court's suppression of blood evidence taken from a defendant driver after a serious accident resulting in death/injury will be affirmed when the blood evidence was taken without a warrant, and in the absence of probable cause to believe that the defendant driver was impaired by drugs or alcohol. Although A.R.S. §§ 28-1321 and 28-1388 respectively and validly authorize either a warrantless blood draw by police or for law enforcement to request a portion of a driver's blood drawn for medical purposes where probable cause exists to believe that a driver was impaired, **A.R.S. § 28-673 does not validly authorize the admission of blood evidence in a criminal prosecution.** Moreover, a statute cannot circumvent a firmly established constitutional right by conditioning the driving privilege on the relinquishment of a constitutional right. *State v. Quinn*, CR05-1123 (Amended), 4/18/08.

The imposition of a mandatory prison assessment of $1,000 under A.R.S. § 28-1382 on all individuals convicted of misdemeanor extreme DUI does not violate either the Due Process or Equal Protection Clauses of the state or federal constitutions, or the Eighth Amendment prohibition against cruel and unusual punishment or excessive fines. Under Arizona law **driving is a privilege and not a fundamental right, whereby Arizona courts will uphold the constitutionality of a DUI-related fine if it is rationally related to a legitimate governmental interest such as deterring impaired persons from driving,** or the Legislature's apparent policy that the costs of unlawful behavior, including the costs of prisons, be shared by those who engage in all types of wrongful or criminal acts, including misdemeanor offenses. The fact that an individual convicted of extreme DUI may not be sentenced to prison does not render the relationship between the transgression and the prison assessment so attenuated or unreasonable as to violate due process. Furthermore, **the $1,000 prison assessment imposed upon a person convicted of misdemeanor extreme DUI is not excessive within the meaning of either the Eighth Amendment, or Arizona's corresponding constitutional provision under Article 2, Sec. 15, because given the extreme seriousness of the offense itself, it does not exceed reasonable, usual, proper or just punishment, nor is it so disproportionate to the offense that it shocks the public sentiment or affront the judgment of reasonable people.** *State v. Russo*, 1 CA-CR 07-0299, 4/10/08.

A trial court does not err in granting a motion for new trial when it should have allowed a defendant charged with child molestation to submit character evidence at trial that he was sexually normal because a defendant's sexual normalcy, or appropriateness in interacting with children, is a character trait, and one that pertains to charges of sexual conduct with a child. Although the court had improperly denied the defendant's motion *in limine* to allow such evidence, reasoning that Rule 405(b), ARIZ.R.EVID., permitted proof of specific instances of conduct only when character trait or evidence of character is an "essential element" of the charge, claim or defense, a criminal defendant has a due process right to have a meaningful opportunity to present a complete defense which would include offering substantive evidence of good character (in the form of reputation or opinion testimony) from which a jury may infer that he did not commit the crime charged. *State v. Rhodes*, 1 CA-CR 06-0845, 4/3/08.

COURT OF APPEALS JUVENILE MATTERS

A juvenile court does not abuse its discretion when it concludes that the consent of a putative father is not required for the adoption of the putative father's purported biological child when the putative father fails to time-

ly register with the putative father registry within 30 days of the child's birth, as required by A.R.S. § 8-106.01 and had not established circumstances excusing his registering one day after the 30-day period. A.R.S. § 8-106.01 requires all putative fathers who wish to receive notice of and participate in adoption proceedings relating to a child they believe to be their own to "file a notice of a claim of paternity and of their willingness and intent to support the child to the best of their ability with the state registrar of vital statistics in the department of health services" "within 30 days after the birth of the child." If a putative father fails to file timely notice claiming paternity under the statute, or fails to prove by clear and convincing evidence that it was both not possible for him to file a notice of claim of paternity with the proscribed period and that the notice of claim of paternity was filed within 30 days after it became possible for him to file, consent is not required. *Marco C. v. Sean C. & Colleen*, 2 CA-JV 2007-0096, 5/5/08.

The statutory preferences contained in A.R.S. § 8-514(B) do not mandate placing a dependent child with an acceptable higher preference when the juvenile court determines that placing a dependent child with a lower statutory preference is actually in the child's best interests because of a longer attachment between the child and the familial placement, as well as the fact that the age of the placement parents was more appropriate for childrearing. *Antonio P. v. ADES*, 1 CA-JV 07-0149, 4/1/08.

COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS

An Uninsured Respondent Employer May Participate Through Separate Counsel in Workers' Compensation Proceedings. Although an employer that fails to obtain workers' compensation insurance shall not be entitled to the benefits of the workers' compensation laws during the period of noncompliance, A.R.S. § 23-907(A), such benefits do not include separate representation. Accordingly, an uninsured employer may participate in an administrative hearing concerning worker's compensation benefits through its own counsel. *Avila v. Industrial Commission*, 1 CA-IC 07-0016, 5/13/08.

COURT OF APPEALS MENTAL HEALTH MATTERS

The Anti-Marital Fact Privilege Under A.R.S. § 12-2231 Applies in Proceedings for Court-Ordered Treatment Initiated Under A.R.S. § 36-533. A.R.S. § 12-2231 generally commands that "[i]n a civil action a husband shall not be examined for or against his wife without her consent." The Arizona legislature did not exempt court-ordered treatment proceedings from the broad reach of the statute codifying Arizona's anti-marital fact privilege in civil actions. Court-ordered treatment proceedings are civil actions; A.R.S. § 12-2231 thus applies to proceedings under A.R.S. § 36-533. *In re MH 2007-000937*, 1 CA-MH 07-0017, 5/6/08.

A Court Must Ensure That a Patient Has Voluntarily, Knowingly and Intelligently Waived His Statutory Right to a Hearing to Contest Court-Ordered Mental Health Treatment. A mental health patient's waiver of the right to be present at a hearing or right to be represented by counsel is ineffective absent an express finding that the waiver is voluntary, knowing and intelligent. In the mental health case context, in which a patient's ability to voluntarily, knowingly and intelligently waive his rights is already suspect, due process requires a court to determine, either through a colloquy with a patient or by review of the record, whether a patient's waiver of a hearing concerning court-ordered treatment is voluntary, knowing and intelligent. *In re MH 2007-001275*, 1 CA-MH 07-0023, 4/8/08.

COURT OF APPEALS SPECIAL ACTION MATTERS

A Notice of Claim Setting Forth a Specific Amount for Which a Claim Can Be Settled Must Precede Any Legal Claim Against a Public Entity, Including Class Actions. Pursuant to A.R.S. § 12-821.01(A), all "[p]ersons who have claims against a public entity" must provide a notice of claim containing a specific settlement amount. The statute does not contain an exception for class actions. Accordingly, class action claims, like individual claims, cannot be maintained against a public entity unless the claimants first submit a notice of claim containing a specific settlement amount. *City of Phoenix v. Fields*, 1 CA-SA 07-0152, 5/6/08.

Arizona Court of Appeals Reaffirms State Land Commissioner's Appraisal Powers. Arizona's Enabling Act requires public lands to be appraised for true value before they may be sold at auction. The State Land Commissioner has the power to appraise state lands. The appraisal requirement is satisfied where the Land Department obtains a separate independent appraisal for state lands excluding certain rights of way that is subsequently used by the Commissioner to appraise those lands including the rights of way in a manner consistent with private land valuation. Appraising the rights of way and the larger parcel together recognizes true value and does not violate the Enabling Act or Arizona Constitution. *Northeast Phoenix Holdings, Inc. v. Winkleman*, 1 CA-SA 08-0011, 4/22/08.

** indicates a dissent*