



APPELLATE HIGHLIGHTS

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

SUPREME COURT CIVIL MATTERS

Immunity Statute Applies to City's Administrative Decision Not to Install a Traffic Light. Arizona Revised Statute § 12-820.01 affords the City of Phoenix immunity in connection with deciding not to place a traffic signal at an intersection. The process the City used to make that decision involved an exercise of an administrative function involving the determination of fundamental governmental policy. *Kohl v. City of Phoenix*, CV-06-0358-PR, 6/8/07.

SUPREME COURT CRIMINAL MATTERS

A trial court does not err in admitting statements by a defendant regarding the deaths of homicide victims when the State properly establishes the corpus delicti for the murders through both DNA evidence and proof that one of the victim's property was actually found in the possession of the defendant, despite the fact that medical experts originally believed that the cause of death for both victims was a drug overdose. The corpus delicti doctrine ensures that a defendant's conviction is not based solely upon an uncorroborated confession or incriminating statement such that in homicide cases the State must show that the alleged injury to the victim was in fact caused by criminal conduct rather than by suicide or accident. However, only a reasonable inference of the corpus delicti is required before an incriminating statement may be considered as evidence of guilt, and such inference may be based upon circumstantial evidence alone. *State v. Morris*, CR-5-0267-AP, 6/18/07

A trial court does not interfere with a defendant's right to testify in the penalty phase of a capital trial by properly advising a defendant that they should consider their lawyer's advice in making

the decision to testify or not, or that by testifying they may be subject to cross examination which may bring forth information that may not present them in a positive light, or that their testimony may allow rebuttal testimony or other evidence by the State which may damage their case for leniency. **Insufficient evidence exists to support the (F)(3) "grave risk of death to another" aggravator under A.R.S. § 13-703 when the person alleged to have been at risk is outside of the of the actual "zone of danger" of the murderous act.** *State v. Tucker*, CR-05-0162-AP, 6/13/07.

COURT OF APPEALS CIVIL MATTERS

Superior Court May Reopen Divorce Decree to Determine Whether Further Relief Under Rule 60 Was Appropriate. A party may reopen a property settlement agreement under ARIZ.R.CIV.P. 60(c) because the decree must expressly refer to the court's approval of the property disposition, and it is that term of the decree—the court's approval—that is being reopened. *Breitbart-Napp v. Napp*, 1 CA-CV 05-0557, 5/24/07.

Evidence of Manner of Death Is Admissible to Prove Damages in Wrongful Death Claim But Only Insofar as Relevant to the Survivor's Own Mental Anguish. In a wrongful death action, evidence of the manner of death may not be introduced to show the decedent's pain and suffering, however, such evidence may be relevant to a surviving plaintiff's own mental anguish resulting from the death. *Girouard v. Skyline Steel, Inc.*, 1 CA-CV 06-0093, 5/29/07.

An Estate Should Be Valued, for Abatement Purposes, Not as a Fixed Amount at Date of Death, But as Finally Distributed From the Estate. Under Arizona's probate code, a decedent's estate is not

fixed at the time of his or her death, but rather, includes property existing at that time and throughout the administration of the estate. Accordingly, whether a devise has abated (*i.e.*, whether a testamentary legacy is reduced because the estate's assets are insufficient to pay debts and other legacies) depends upon the value of the assets as finally distributed from the estate, not their value at the time of death. *In Re Estate of Goldman*, 2 CA-CV 2006-0138 5/30/07.

A Decedent's Heir Has a Right to Redeem a Tax Lien on Decedent's Real Property, and a Tax Lien Purchaser Must Properly Join and Serve the Heir as a Defendant in a Foreclosure Action in Order to Foreclose the Heir's Right to Redeem. Under A.R.S. § 42-18151, a tax lien may be redeemed by, among others, "the owner" or "any person who has a legal or equitable claim in the property." Because an heir succeeds to the ownership interest of a decedent by operation of law in Arizona, an heir qualifies to redeem under this statute. As a result, an heir must be joined in an action to foreclose all rights to redeem a tax lien, and a tax lien holder seeking to foreclose such redemption rights must at a minimum conduct a diligent search to locate heirs. *Roberts v. Robert*, 1 CA-CV 06-0530, 5/31/07.

Post-Judgment Motion Styled as an "Objection" Failed to Extend Appeal Time. A party against whom the superior court entered judgment filed an "Objection to Defendant's Final Judgment and Order Dismissing Claim," which argued that the superior court's judgment was "overbroad." An appeal taken from an order denying the objection was untimely because the objection was not one of the motions enumerated in ARCAP 9(b) that extends the time to file a notice of appeal, the objection failed to cite the appropriate rules for such a motion, and the trial court did not state it was treating the objection as such a motion. Judge Vasquez filed a dissent. *Burkhamer v. State of Arizona*, 2 CA-CV 2006-0124, 5/31/07.

Given Evidence in Particular Case, Corporate Directors Not Liable on Theories of Principal-

Agency Liability for Fraud, Aiding and Abetting, Conspiracy, and Constructive Fraud. Corporate directors may not be considered to have an imputed principal-agency relationship with a chief executive officer subjecting them to liability for the CEO's acts merely by virtue of their status as board members. There must be evidence of a "personal agency relationship" between the primary tortfeasors on the one hand, and defendants on the other hand. Aiding and abetting liability requires evidence sufficient to show the defendants' awareness of the tortious conduct. Conspiracy requires clear and convincing evidence of an actual "conspiratorial agreement." *Dawson v. Withycombe*, 1 CA-CV 06-0043, 6/5/07.

Paternity Statutes Do Not Apply to a Wrongful Death Proceeding. The requirements of the paternity statutes do not apply in a wrongful death proceeding. Consequently, it does not follow that an alleged father cannot establish paternity with sufficient evidence from the mere lack of a DNA test or some other presumption of paternity that would apply under the paternity statutes. When the issue is properly raised, however, the plaintiff bears the burden of proving the capacity to sue under the wrongful death statutes. *Aranda v. Cardenas*, 2 CA-CV 2006-0178, 6/6/07.

De Facto Officer Doctrine Applies to Judicial Officers Acting Under Color of Defective Appointment. The "de facto officer" doctrine applies to judicial officers. That doctrine gives validity to actions taken by an officer under color of election or appointment that would otherwise be void because of an unknown defect or irregularity regarding the power of the officer to act. *Estate of Garner v. Schindler*, 1 CA-CV 06-0258, 6/7/07.

City Providing Emergency Medical Services Is Performing a Governmental Function and Therefore Entitled to Qualified Immunity. The Legislature's grant of immunity to municipalities and towns providing emergency medical services in A.R.S. § 9-500.02(A) did not violate the Arizona Constitution. The provision of emergency medical services

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is a governmental—rather than proprietary—activity. *Smyser v. City of Peoria*, 1 CA-CV 05-0202 6/12/07.

Arizona’s “Revocation By Divorce” Statute, A.R.S. § 14-2804, Does Not Apply to an Irrevocable Trust Created for a Spouse, Notwithstanding the Fact That the Marriage Was Void Due to the Spouse’s Concurrent Marriage to Another Woman. In the trusts context, Arizona’s “revocation by divorce” statute, A.R.S. § 14-2804, provides generally that divorce or annulment of marriage, including a declaration of invalidity, revokes any revocable disposition of property made by the divorced person to the former spouse. It does not revoke a trust that became irrevocable at the time of a spouse’s death, even if it is later determined that the marriage was invalid. A declaration of invalidity does not relate back to the time before the trust became irrevocable. *In re Pabst Rodriguez*, 1 CA-CV 06-0383, 6/14/07.

Superior Court May Utilize Spousal Maintenance Guidelines If the Court’s Maintenance Award Is Consistent With the Factors Set Forth in A.R.S. § 25-319(B). In arriving at the duration and amount of spousal maintenance in a dissolution proceeding, the Superior Court may use the Maricopa County Superior Court Spousal Maintenance Guidelines if the factors the court relies on are consistent with A.R.S. § 25-319. *Cullum v. Cullum*, 1 CA-CV 06-0038, 6/19/07.

Reasonable Expert Witness Fees Under Rule 68(d) Are Not Limited to Fees Paid to Experts for Testifying at Trial. The offer of judgment rule, ARIZ.R.CIV.P. 68, allows the trial court to award reasonable expert witness fees to an offeror if the judgment finally obtained is more favorable than the offer. Such reasonable expert witness fees need not be limited to

the time the expert spent testifying at trial. *Levy v. Alfaro*, 1 CA-CV 06-0141, 6/19/07.

A Party Who Has Voluntarily Dismissed Its Amended Complaint With Prejudice Is Not an Aggrieved Party as to its Voluntarily Dismissed Claims for Purposes of Appeal. A party can contest on appeal only those portions of the trial court’s orders that were decided against the party, and thus may not contest on appeal claims that were voluntarily dismissed. A party has two choices when it believes the trial court has unduly limited its claims: (1) continue to litigate the remaining claims and ultimately appeal all of the rulings; or (2) abandon the surviving claims and immediately appeal the trial court’s adverse rulings. *Harris v. Cochise Health Systems*, 2 CA-CV 2006-0193, 6/19/07.

Jury Trial Unavailable for Violation of Municipal Ordinance Regulating Nude Dancing. A jury trial right exists when either (1) the crime charged has a common-law antecedent that guaranteed a right to a jury trial at the time of statehood, or (2) Article 2 Section 24 of the Arizona Constitution, Arizona’s analog to the Sixth Amendment, affords such a right. Neither the common law nor the Constitution afforded a defendant a right to a jury trial where the defendant had been charged with violating various ordinances regulating how and where a dancer may dance nude in an adult service business. The three charges were all misdemeanors punishable by no more than 6 months imprisonment. *Crowell v. Jejna*, 1 CA-CV 06-0430, 6/21/07.

COURT OF APPEALS CRIMINAL MATTERS

The State’s consent is not required before a Defendant in a misdemeanor DUI may waive their statutory right to jury trial under A.R.S. § 28-1381(F). A

plain reading of the statute compels the conclusion that only a defendant is entitled to a jury trial, and that the State legislature implicitly excluded the State from exercising a jury-trial right by providing the right to the defendant only. *Phoenix v. Ybarra*, 1 CA-SA 07-0029, 6/21/07.

A.R.S. § 13-501 requiring juveniles charged with specific crimes be tried as adults does not violate due process under either the Arizona or U.S. Constitution because juveniles do not have a constitutional right to be adjudicated in the juvenile system, nor do they have a right to be afforded notice and a right to be heard *before* being tried as an adult. **The imposition of a natural life sentence upon a juvenile defendant convicted of first-degree murder is not unconstitutional under the Eighth Amendment prohibition against cruel and unusual punishment because it is not “grossly disproportionate” to the gravity of the offense committed.** *State v. Eggers*, 2 CA-CR 2005-0320, 6/29/07.

Due to statutory drafting imperfections a defendant who has been convicted of attempted sexual conduct with an 11-year-old (or younger) victim under A.R.S. § 13-1405 (the sexual conduct with a minor statute) is illegally sentenced under A.R.S. § 13-604.01 (the dangerous crimes against children sentencing statute) because, despite the specific reference in A.R.S. § 13-1405 to A.R.S. § 13-604.01, § 13-604.01 does not provide a sentence for attempted sexual conduct with a minor under the age of 12. *State v. Gonzalez*, 2 CA-CR 2007-0040-PR, 6/28/07.

A lawful warrantless strip search is transformed into an illegal intrusion beyond the body’s surface requiring a warrant pursuant to the U.S. Supreme Court’s holding in *Schmerber v.*

California when an officer handles an object protruding from, and extending into an arrestee’s anal cavity. Applicable State and federal law requires that the State must generally secure a warrant before a law enforcement officer may intrude beyond the body’s surface. However, if exigent circumstances exist, or the object itself is in plain view and identifiable [as evidence of a crime or contraband] no warrant may be required. Otherwise, the constitutional basis for a search that reaches inside a person’s body is probable cause. *State v. Barnes*, 2 CA-CR 2006-0191, 6/20/07.

COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS

Division One Reaffirms “Positional-Risk” Doctrine for Unexplained Employee Falls. In the workers’ compensation context, if the claimant can show that the injury happened in the course of employment, a presumption arises under the “positional risk” doctrine that the injury is compensable. Accordingly, if an injury results from an unexplained fall occurring at work, injuries resulting from the fall are compensable. *Sunland Beef Co. v. Indus. Comm’n of Ariz.*, 1 CA-IC 06-0046, 5/29/07.

COURT OF APPEALS JUVENILE COURT MATTERS

In a severance case involving a mentally handicapped parent, the lower court’s determination that further services would be futile justifying severance was upheld despite the fact that the original case plan was for reunification, and ADES had substantially failed to comply with the Juvenile Court’s order for services to be provided to the parent because experts and other witnesses had specifically testified at the severance trial that such efforts would be futile, that the parent would require ongoing assistance and supervision in parenting the child, and that the child would be in danger if left to the parent’s care. *Venessa H. v. ADES*, 1 CA-JV 06-0086, 6/12/07.*

Prepaid educational fees constitute an “economic loss” for the purposes of restitution in a juvenile adjudication where the victim is unable to attend classes

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In July 2007, each Division of the Court of Appeals began placing 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.

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SUPREME COURT PETITIONS

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due to the harm suffered as the result of a juvenile's delinquent conduct. Pursuant to *State v. Wilkinson* restitution in juvenile case is appropriate for losses that (1) are economic, (2) would not have occurred but for the juvenile's delinquent conduct, and (3) are directly caused by delinquent conduct (e.g. not consequential damages). *In Re Andrew C.*, 1 CA-JV 06-0079, 6/21/07.

COURT OF APPEALS SPECIAL ACTION

Division One Holds That a Notice of Claim Is a Public Record. A Notice of Claim is a public record. There is a general presumption in favor of disclosure of public records, and the burden of showing a probability that specific, material harm will result from disclosure (thus justifying an exception to the usual rule of full disclosure), is on the party that seeks non-disclosure rather than on the party that seeks access. *Phoenix Newspapers v. Jane Doe*, 1 CA-SA 07-0099, 6/12/07.

Special Education Records Are Not Protected in Their Entirety by the Medical Records Privilege and Not Protected by an Educational Records or a Special Educational Records Privilege. The medical records privilege statute, A.R.S. § 12-2292, protects from disclosure communications "related to physical or mental health" maintained for "purposes of patient diagnosis or treatment." Special education records, with few exceptions, are not privileged medical records because they are maintained for the purposes of developing an education plan, not for diagnosis or treatment. Various other state and federal statutes—A.R.S. § 15-541, the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, and the Disabilities Education Act, 20 U.S.C. §§ 1401-1482—may create certain confidentiality rights that courts should consider as a factor before ordering production, but the statutes do not create an independent privilege for educational records. *Catrone v. Miles*, 1 CA-SA 06-0277, 6/26/07.

COURT OF APPEALS TAX MATTERS

Individual Customer Lacks Standing to Challenge Arizona's "Tourism Tax." Arizona's tourism

The Arizona Supreme Court accepted review or jurisdiction of the following issues on May 23, 2007*:

Farris v. Advantage Capital Corp., CV 07-0114-CQ

Whether a fraudulent transfer action under A.R.S. §44-1001 *et seq.*, which seeks to void the transfer of real property, is an action "affecting title to real property" within the meaning of the *lis pendens* statute, A.R.S. §12-1191, where the action is brought by a creditor of the transferor to make the real property available for the collection of a debt or judgment.

Jana Waldren and State of Arizona v. George Waldren, CV 07-0019-PR, 1 CA-CV 04-0466 (Opinion)

Whether statutorily non-modifiable spousal maintenance awarded pursuant to A.R.S. §§ 25-317.G and 25-319.C is subject to modification or termination through application of Rule 60(c)(5), ARCP.

State v. Jacob Price, CR-06-0435-PR, 1 CA-CR 04-0508 (Opinion)

1. At sentencing, the trial court found that Defendant was a 'danger to the community,' based primarily on the court's finding that Defendant committed a separately charged murder for which he had been previously tried and acquitted by a jury. The court of appeals affirmed, but for a different reason—the 'danger to the community' finding was found to be supported by Defendant's 'judicial record,' including the nature of the current crimes as well as prior juvenile offenses. Can an inherently factual aggravating finding of 'danger to the community' be found on the basis of either of these grounds without a jury using a reasonable doubt standard pursuant to *Blakely v. Washington*?
2. On the aggravated assault counts, Defendant requested a lesser-included jury instruction for disorderly conduct. The court denied the motion, reasoning that Defendant's all-or-nothing misidentification defense precluded consideration of a lesser included offense, and the appellate court affirmed on the same ground. Does this ruling create a published conflict with this Court's recent decision in *State v. Wall*, which holds that a lesser included offense jury instruction should be given whenever supported by the evidence, regardless of the defenses presented?

State Farm Ins. Cos. v. Premier Manufactured Sys., Inc., CV 06-0338-PR, 1 CA-CV 04-0465 (Opinion)

Whether, in an action for strict products liability, an assembler/seller of a defective component that is assembled into its secondary product for sale to consumers is jointly liable with the manufacturer of the component and/or any and all other entities in the chain of distribution to a consumer injured by its failure such that it cannot minimize or eliminate its liability to a consumer by having the trier of fact apportion "fault" between it and the manufacturer pursuant to A.R.S. §12-2506?

Olin Taylor and John Adrian-Johnson v. Hon. Michael Cruikshank and Hon. Gun Aragon, Pima County Superior Court Judges; State of Arizona, CV-07-005-PR, 2 CA-SA 06-0067 & 2 CA-SA 06-0078

(Consolidated) (Opinion)

Please note that the Petition seeking review of this opinion does not separately set forth issues. The parties discuss, and arriving at the correct disposition in this case necessitates discussing, these issues:

1. A.R.S. § 13-107(E) (1997) tolls the limitation period for "serious offenses as defined in A.R.S. § 13-604" when the identity of the suspect is unknown. Does that statute apply to offenses not time-barred when the amendment was enacted?
2. Is the limitation period of the 1978 version of A.R.S. § 13-107(B), as amended in 1985, triggered on the date that the State knew or should have known an offense occurred, or is the limitation period tolled until the State discovers the identity of the assailant, based on the language of the statute, its history, and the purpose behind statutes of limitations?


Terry Goddard, Monica Goddard, Office of the Attorney General v. Hon. Kenneth Fields; George H. Johnson; Johnson International, Inc., Real Parties in Interest, CV 07-0096-PR, 1 CA-SA 06-0114 (Opinion)

Did the court of appeals erroneously conclude that the Arizona Attorney General is not entitled to high-level executive immunity for allegedly defamatory statements made in a press release announcing the filing of a civil-enforcement lawsuit?

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

tax, A.R.S. §§ 5-839 and 5-840, is an excise tax, rather than a sales tax, meaning that the tax burden falls directly on the business activity of the vendor and not on the customer. A consumer thus lacks standing to bring suit challenging the tax because the consumer is not the actual taxpayer. *Karbal v. Arizona Department of Revenue*, 1 CA-TX 06-0010, 5/24/07. **A.R.S. § 42-5028 Does Not**

Extend Personal Liability for Unpaid Corporate Transaction Privilege Taxes to Corporate Officers or Directors. Sole owners, officers and directors of a defunct corporate defendant are not responsible persons for purposes of payment of the corporation's taxes in connection with a collection action filed by the Arizona Department of Revenue. The term "person," as defined in A.R.S. §

42-5001(8) and as used in A.R.S. § 42-5028, does not include a corporation's officers or directors because such office holders are not listed in A.R.S. § 42-5001(8), and because there is no Arizona statute that places an affirmative obligation on such individuals to pay a corporation's transaction privilege taxes. *ADOR v. Action Marine, Inc.*, 1 CA-TX 06-0006, 6/5/07. 

* indicates a dissent