BAR COMMUNITY

APPELLATE HIGHLIGHTS

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COURT OF APPEALS CIVIL MATTERS

Division of a Community's Interest in Pension Rights That Have Not Yet Matured Should Occur If and When the Pension Is Paid Out. Under community property law principles, where a community interest in a pension has matured but the pensioner desires to continue working past the maturity date, division of the pension should be based on present value of the matured pension, with the payoff either in a lump sum paid in full or in installments beginning immediately. The fact that a pensioner could *elect* to withdraw benefits early does not mean the pension has matured. Division of unmatured pensions should occur "if, as, and when" the pension is paid out. *Boncoskey v. Boncoskey*, 1 CA-CV 06-0289, 9/25/07.

A Principal May Be Responsible for an Independent Contractor's Breach of the Peace When Repossessing a Motor Vehicle Under the Self-Help Repossession Statute. A finance company that hired a repossession company to act as an independent contractor and repossess an automobile under Arizona's self-help statute could be liable for the repossession company's alleged trespass under the non-delegable duty doctrine. The finance company could also be held liable for alleged civil rights violations under 42 U.S.C. § 1983. Although a § 1983 claim requires state action, state action might exist where an officer arrives at the scene with the repossessor, gives the impression that law enforcement supported the action, and intimidates the property owner from exercising his or her right to resist the repossession. *Rand v. Porsche Fin. Servs*, 1 CA-CV 06-0636, 9/18/07.

Arizona's Utility Relocation Reimbursement Statute Does Not Require the Department of Transportation to Reimburse Cities for Relocation of Utility Lines Necessitated by State Highway Construction. Arizona Revised Statute § 28-7156 provides, in relevant part, that the Arizona Department of Transportation "*may* authorize reimbursement to a city, town or county" for the cost of adjusting or relocating a utility facility under specified circumstances. Under that statute, ADOT has discretion, but is not obligated, to reimburse localities for utility relocation. *City of Chandler v. Arizona Dep't of Transp.*, 1 CA-CV 05-0631, 9/18/07.

Spousal Maintenance Award Must Account for Undisputed Facts Concerning True Earning Capacity; Award of Anticipated Social Security Should Be Offset by Spouse's Own Anticipated Benefits. The trial court could award wife indefinite spousal maintenance where the husband was the sole bread winner during a lengthy marriage. However, the trial court could not calculate the maintenance amount as though husband could work forty hours per week for fifty-two weeks each year where he did not have the type of job that permitted that type of work. A spousal maintenance award to wife that included one-half of husband's anticipated social security benefits should be offset by wife's own anticipated social security benefits. *Leathers v. Leathers*, 1 CA-CV 05-0573, 9/13/07.

Statute of Limitations Governing Settlement of a Partnership Account (Not Statute of Limitations for Action on a Debt Based on Written Contract), Applies to a Claim Seeking a Declaratory Judgment Regarding a Limited Partner's Failure to Make Payments to a Limited Partnership. Arizona's six-year breach of contract statute of limitations applies to a the alleged breach of a subscription agreement relating to a partnership. However, for a declaratory judgment action similar in substance, timing and purpose to an accounting action for settlement of a partnership account, Arizona's four year statute of limitations governing partnership settlement applies. Under that statute, the cause of action does not accrue until the cessation of partnership dealings. *La Canada Hills Ltd. P'ship v. Kite*, 2 CA-CV 2006-0159, 9/10/07.

Expert Testimony on Apportionment of Fault Is Inadmissible Under Rule 704. Testimony by an expert in a construction defect case concerning the percentages of fault among various parties constitutes an improper legal conclusion barred by Arizona Rule of Evidence 704. *Webb v. Omni Block, Inc.*, 1 CA-CV 06-0200, 9/6/07.

COURT OF APPEALS CRIMINAL MATTERS

A trial court may err in granting a motion to preclude the use of a physician's incriminating statements for grand jury purposes when the statements were made in the course of an investigation by the Arizona Medical Board regarding alleged sexual misconduct by a physician in the course of dispensing medical treatment. **Statements by a physician made in response to an investigation by the Arizona Medical Board are not absolutely privileged and are therefore admissible in grand jury or other criminal proceedings when the Board determines that a criminal violation involving the delivery of health care may have occurred.** While patient information and records obtained by the Board and any "records or reports kept by the board as a result of the investigation procedure" are absolutely privileged and not available to the public pursuant to A.R.S. § 32-1451.01(C), and hospital and peer review records and testimony/proceedings relating to such records are also "not available to the public" and mandated by A.R.S. § 32-1451.01(E) to "be kept confidential by the [b]oard", A.R.S. § 32-1451(O) actually requires that if the board determines that a criminal violation may have occurred in the course of medical treatment or the delivery of health care, that evidence of such violations be made available to the appropriate criminal justice agency for its consideration. However, in such cases a trial court may be required to determine if the physician subject to criminal prosecution by the State was given immunity from the use of his statements for prosecution by the Medical Board, or if such statement(s) were made while the physician was receiving treatment as a patient, whereby such statements may be independently privileged as physician–patient records pursuant to A.R.S. § 13-4062 (4). *State v. Ditsworth/Patel*, 1 CA-SA 07-0065, 9/6/07.

In a case in which a defendant uses a false name and social security number to open bank accounts, obtain credit cards and contract for utility services, including cable television services, while a lack of intent to permanently deprive another of property acquired by misrepresentation is not a valid defense to a theft related charge under A.R.S. § 13-1802 because a victim need not suffer a financial loss in order for theft by misrepresentation to occur, **a person cannot commit unlawful possession**

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of access devices to bank accounts under A.R.S. § 13-2316.01(A) if the person obtains the devices in the name of an alias, but for their own use, and uses the devices only to access their own accounts rather than the accounts of another person. *State v. Sharma*, 1 CA-CR 06-0062, 8/30/07.

A trial court errs in ordering an unemployed indigent criminal defendant to pay attorney assessment fees based upon income imputed to the defendant due to a court's perception that a defendant is "able-bodied" and could be expected to earn minimum wage upon their release from prison. Financial resources used in calculating a defendant's ability to pay to offset the cost of legal services cannot include imputed income. Under Rules 6.4 and 6.7, ARIZ.R.CRIM.P., as well as A.R.S. § 11-584 a court must make factual findings that a defendant actually has financial resources that enable the defendant to make such payments, and that the defendant is able to pay the amounts ordered without incurring substantial hardship to the defendant or to his family. *State v. Taylor*, 1 CA-CR 06-0193 PRPC & 1 CA-CR 06-0194 PRPC (Consol.), 8/28/07.

A trial court does not err in dismissing a criminal defendant's felony charges with prejudice when the State fails to comply with the speedy trial provisions of either Article III or Article IV of the Interstate Agreement of Detainers (IAD). The IAD, codified under Arizona law as ARS Sec. 31-481, is an interstate compact adopted by this state, the federal government and 47 other states to provide uniform standards for transferring prisoners incarcerated in one state (ie. the sending state) to a different state (*i.e.,* the receiving state) where there are outstanding charges pending against the prisoner. Under Article III(a), the prisoner must send a notice both to the prosecutor and the court in the receiving state informing them where he is imprisoned and requesting final disposition of the outstanding charges. The notice must also include a certificate by an official from the sending state that includes: the prisoner's term of commitment, the amount of time already served and any time remaining (including both any good time earned, as well as both parole eligibility and parole board decisions). After the prisoner forwards the documentation to the appropriate prison official where the prisoner is incarcerated in the sending state, the prison official "shall promptly forward [it]" to the prosecutor and court in the receiving state by registered or certified mail, return receipt requested, whereafter, if the receiving state does not try the prisoner within 180 days it must dismiss the outstanding charges against the prisoner with prejudice pursuant to A.R.S. § 31-481, art. V(c). On the other hand, Article IV of the IAD applies when the prosecutor in the receiving state presents "a written request for temporary custody … to the appropriate authorities in the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment … shall have duly approved, recorded and transmitted the request." Thereafter, any trial made possible by Article IV must be commenced within 120 days of the arrival of the prisoner in the receiving state, or the court must dismiss the outstanding charges with prejudice as well. **In cases in which both Articles are invoked and different time limits apply, the best rule is to compute the period of delay under each Article to determine whether either has been violated.** *State v. Almly*, 1 CA-CR 06-0471, 7/31/07.

COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS

"Friction and Strain" Rule Applies to Injuries Arising From Workplace Assault. To be compensable under the workers' compensation statutes, an injury must both arise out of and be sustained in the course of employment. Assault-related injuries are generally compensable when the altercation arises out of a work-related dispute. Under the "friction and strain" rule, even if the subject of the dispute is unrelated to work, the assault is compensable if the work of the participants brought them together and created the relations and conditions which resulted in the clash. *PF Chang's v. Indus. Comm'n of Ariz.*, 1 CA-IC 06-0073, 8/16/07.

COURT OF APPEALS TAX MATTERS

A "Construction Manager" Is Taxable as a "Prime Contractor" for Purposes of Arizona's Transaction Privilege Tax, But Cannot Be Taxed for Amounts It Received to Pay Other Contractors on Behalf of Project Owners. Arizona imposes a transac-

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tion privilege tax on a "prime contractor's" gross income derived from the business of prime contracting. Subcontractors who work for a taxable prime contractor are not taxed. A construction manager that enters "into contracts with the Schools to personally or through its supervision of others build or alter structures" is a contractor for purpose of A.R.S. § 42-5075(M)(2). Where such a construction manager also agrees to do certain tasks and is compensated for doing so, "both in the construction management fee and payments to reimburse it for costs it incurred," it is also a prime contractor under A.R.S. § 42-5075(M)(6). However, with respect to amounts paid to trade contractors as merely a conduit between the schools and the trade contractors, a construction manager may not be taxed as a prime contractor. *ADOR v. Ormond Builders, Inc.*, 1 CA-TX 06-0005, 9/11/07.

COURT OF APPEALS JUVENILE MATTERS

A Juvenile Court properly defers an advisory hearing on a new delinquency petition after a juvenile has been recently found to be incompetent on an earlier delinquency petition because under A.R.S. § 8-291.01 "[a] juvenile shall not participate in a delinquency proceeding if the court determines that the juvenile is incompetent to proceed." Although the language of Juvenile Court Rules 28(A) and (C) require a Juvenile Court to conduct an advisory hearing within 30 days of the filing of a delinquency petition to advise both the juvenile and their parent or guardian of the charges in the petition and the juvenile's constitutional rights, this time limit may be extended by other Juvenile Court Rules, including Rule 17(B), which excludes time for an examination and competency determination, and during any time the juvenile is incompetent. *Alexandria M. V. McClennen/State*, 1CA-SA 07-0169, 9/18/07.

In a case involving aggravated assault against a teacher or school employee pursuant to A.R.S. § 13-1204, **the placement of water from a urinal into an unsuspecting person's drink is a prohibited "touching" under A.R.S. § 13-1203(A)(3) constituting the required base assault.** Although § 13-1203 provides that a person commits assault by "[k]nowingly touching another person with the intent to injure, insult or provoke such person," the legislature did not define "touching." However, under the common law, the former offense of battery, now incorporated in the offense of assault, could be committed through an application of force to the person of another either by the aggressor himself, or by some substance which the aggressor puts in motion and comes in contact with the victim. *In Re P.D.*, 1 CA-JV 07-0057, 9/4/07.

***** indicates a dissent