APPELLATE HIGHLIGHTS

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

COURT OF APPEALS CIVIL MATTERS

Surety Is Liable for Fiduciary Breach by Principal Resulting from Failure to Repay Funds Misappropriated from Estate Prior to the Inception of the Suretyship. A conservator has a duty to account for and pay over any funds owed to the Estate during the term of the suretyship, and an insurer protecting against a potential fiduciary violation may be held liable for harm to the estate caused by a conservator's fiduciary breach. A conservator, having engaged in fiduciary malfeasance, has a continuing duty to recover misappropriated or mismanaged assets, which duty continues into the period of the suretyship. *Estate of Pacheco v. Hartford Fire Ins. Co.*, 2 CA-CV 2007-1035, 9/22/08.

An Independent Appraiser May Change His Opinion About a Property's Value After He Has Issued an Initial Appraisal Report. When parties agree to be bound by an independent appraiser, they implicitly agree to be bound by standard appraisal practices. This means they are bound to the appraiser's final appraisal, which may or may not be the first appraisal, because appraisers must and do revise erroneous appraisals. *Chapman v. The Westerner*, 2 CA-CV 2008-0023, 9/22/2008.

Lien Holder's Use of Regular U.S. Mail Rather Than Certified Mail to Serve a Notice of Intent to Foreclose Does Not Deprive a Court of Jurisdiction to Hear a Tax Lien Foreclosure Action. A.R.S. § 42-18202(A) requires service of the notice of intent to foreclose on a tax lien by certified mail. However, the failure to send by certified mail, instead of regular mail, does not deprive the court of jurisdiction to hear a foreclosure action, particularly if the property owner does not dispute receiving notice of the action. A.R.S. § 42-18101(B) provides that an "insubstantial failure to comply" with the tax lien statutes "does not affect the validity of" a tax lien foreclosure. *Dupont v. Reuter*, 1 CA-CV 07-0299, 9/11/08.

A City Is Not Entitled to Absolute Immunity When No Actual Decision Is Made on Legislation. When a city orders further study of carbon monoxide (CO) levels in a channel, but takes no other steps to warn swimmers or to limit boating traffic (which is presumably the source of CO), the city is not entitled to legislative immunity under A.R.S. § 12-820.01. A city's failure to act prior to a death caused by CO poisoning is not a legislative decision meriting immunity if the city lacks evidence that it made an actual decision regarding whether to enact an ordinance. Ordinances enacted *after* the death cannot be considered in determining whether a city is immune. *Tostado v. City of Lake Havasu*, 1 CA-CV 07-0678, 9/9/08.

A Personal Representative Lacks Standing Under A.R.S. § 46-456 to Bring a Claim in an Individual, Rather Than a Representative, Capacity. A.R.S. § 14-3108(4) of the Probate Code permits a personal representative from bringing an action for financial exploitation of a vulnerable adult pursuant to A.R.S. § 46-456 on behalf of the estate, even though the personal representative was appointed more than two years after the decedent's death. However, the Adult Protective Services Act (APSA) does not provide a cause of action for the individual claims of a personal representative. A personal representative thus lacks standing to bring a claim in an individual capacity under APSA. *Wyttenbach v. Wyttenbach*, 1 CA-CV 07-0012, 8/26/08.

Firefighter Rule Applies to Negligence Action by Survivors of Slain Police Officers. The "firefighter's rule" bars tort actions by public safety employees for injuries sustained as a result of the negligence that creates the very need for their employment. It applies when a firefighter's presence at a rescue scene results from the firefighter's on-duty obligations as a firefighter. It also covers actions for injuries to on-duty police officers. But the rule has exceptions, including the so-called "independent negligence exception," which turns on whether the negligently created risk which resulted in the plaintiff's injury was the reason for the officer being at the scene in his professional capacity. If the actor's negligence is not independent of the actor's conduct that caused or contributed to the emergency that in turn caused the injury or death of the police officer, the independent negligence exception does not apply. *White v. State*, 1 CA-CV 07-0496, 8/26/08.

In a Medical Malpractice Case Involving Res Ipsa Loquitor and Multiple Defendants, the Plaintiff Must Identify Which Defendant Controlled the Injury-Causing Instrumentality. In a res ipsa loquitor case, the plaintiff is not required to exclude all other possible causes of the injury, but must show that the defendant's negligence was the most probable cause. Res ipsa loquitor is thus inapplicable when multiple defendants were in control of the injury-causing instrument at the time of negligence and an inference can be made that one *or both* caused the plaintiff's harm. *Sanchez v. Tucson Orthopaedic Inst., P.C.*, 2 CA-CV 2007-0170, 8/25/08.

COURT OF APPEALS CRIMINAL MATTERS

There is a right to negotiate a plea agreement if both the state and defendant choose to do so, and a trial court may not add procedural hurdles to the exercise of that right (such as a timeliness requirement) which improperly serve as a basis for the court to forego its exercise of individualized consideration of the negotiated plea on its merits before accepting or rejecting it. However, when a trial court extensively discusses with counsel its basis for rejecting a plea (including both the fact that a defendant had previously committed a similar crime as that charged and that the danger defendant's actions posed to the community) it does *not* abuse its discretion. To raise *Hickman* error on appeal related to a trial court's failure to strike a member of the jury venire for cause due to perceived or expressed prejudice, **a criminal defendant must actually use an available peremptory strike to cure the trial court's alleged error in denying a challenge for cause or the issue is waived**. *State v. Rubio*, 2 CA-CR 2007-0020, 9/19/08.

A trial court commits fundamental error by failing to instruct the jury regarding a defendant's specific burden of proof for the affirmative defense of self-defense because such a failure not only takes from a defendant a right essential to their defense, yet is of such magnitude that a defendant could not possibly have received a fair trial. In Arizona, a defendant's burden of proof when asserting the self defense or justification affirmative defense is plainly defined by A.R.S. § 13-205 as a preponderance of the evidence. The failure of a Court to properly inform the jury as to this burden of proof leaves a jury uninformed of the vital concept of the defendant's burden as to his asserted affirmative defense. *State v. Valverde*, 1 CA-CR 07-0696, 9/16/08.

A trial court does not commit fundamental error in a first-degree murder case by instructing the jury to consider manslaughter only if it finds the defendant not guilty of the lesser-included offense of second-degree murder or could not agree on that offense instead of instructing the jury to consider both second-degree murder and manslaughter simultaneously. In *State v. LeBlanc* the Arizona Supreme Court held that a jury must first either find a defendant not guilty of the greater offense or be unable to agree on a verdict as

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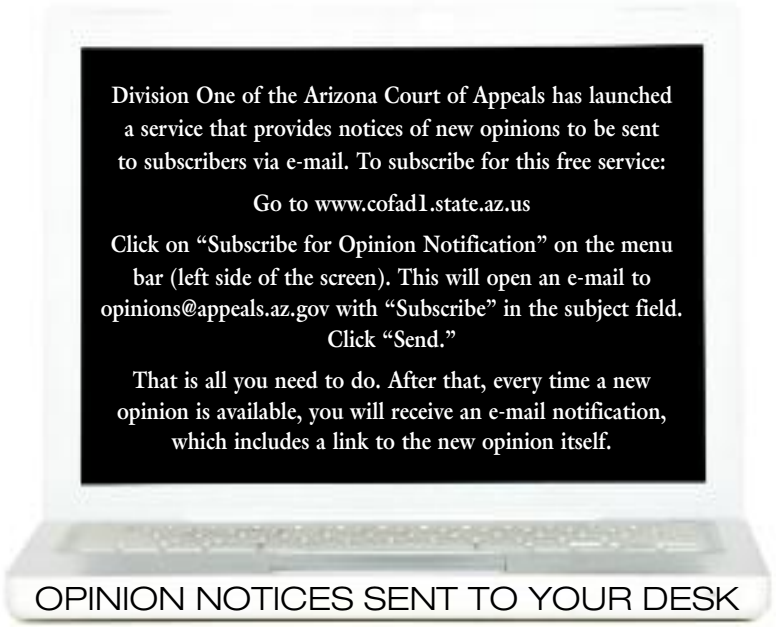

to the greater offense after reasonable efforts to do so before considering a lesser-included offense. Although the offense of manslaughter has an unusual relationship to second-degree murder such that sometimes it is required that a defendant have actually committed second-degree murder in order to be found guilty of manslaughter under A.R.S. § 13-1103(A)(2), when a trial court properly explains that sudden-quarrel or heat-of-passion manslaughter includes elements of second-degree murder, and further instructs a jury in such a case not to disregard the definition of manslaughter in considering the greater offense of second-degree murder by instructing it to consider all of the jury instructions and to refrain from picking out one instruction or part of one and ignoring the rest, it does not err. *State v. Garcia*, 2 CA-CR 2007-0156, 9/3/08.

A reviewing superior court errs by inconsistently applying its finding that a due process violation occurred in a lower court DUI prosecution and conviction involving the State's failure in the City Court case to comply with applicable Department of Health Services regulations requiring consecutive breath tests be administered following a deprivation period within 5-10 minute period, and the State's subsequent failure to provide the defendant with a sample of her breath for independent testing as required under applicable Arizona law. In this case the Arizona Court of Appeals held that given the State's due process violation as to the improper breath test administered using the Intoxilyzer 5000 device and subsequent failure to provide a sample for independent testing that the Superior Court had erred by inconsistently reversing the defendant's conviction as to a A.R.S. § 28-1381(A)(2) charge (driving with a blood-alcohol content of less than 0.08 within two hours of driving), yet upholding the defendant's conviction as to the § 28-1381(A)(1) charge (driving while under the influence of alcohol and impaired to the slightest degree) because **given the due process violation, the improper breath tests results should not have been admitted in evidence to establish the impairment element under A.R.S. § 28-1381(A)(1).** It is noteworthy that when a party seeks to challenge through special action a mixed issue of fact and law, the reviewing appellate court will presume that any missing portion of the factual record required to resolve the issue would support the lower Court's findings. *Lyon v. State of Arizona*, 2 CA-SA 2008-0015, 8/27/08.

COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS

Care Provided by a Spouse to an Injured Claimant in the Marital Home That Does Not Involve "Medical" Services or "Skilled" Care, Is Not Compensable "Other Treatment" Under Worker's Compensation Statute. A.R.S. § 23-1062(A) provides that "every injured employee shall receive medical, surgical and hospital benefits *or other treatment*, nursing, medicine, surgical supplies, crutches or other apparatus, . . . reasonably required . . . during the period of disability." (Emphasis added.) "Other treatment," includes only "services" of a medical type and not those that would normally be rendered by a spouse during marriage. Judge Kessler dissented. *Carbajal v. Indus. Comm'n of Arizona*, 1 CA-IC 07-0054, 8/26/08.*

COURT OF APPEALS MENTAL HEALTH MATTERS

A Petition for Involuntary Treatment Requires Two Physicians to Submit Affidavits and Give Testimony Concerning the Patient's Mental Health and Need for Treatment. A.R.S. § 36-533(B) requires two physician affidavits to be submitted with a petition for court-ordered treatment. But testimony at a hearing may cure an otherwise defective affidavit as long as it satisfies all of the statutory requirements for involuntary treatment by clear and convincing evidence. Those requirements include, among others, that a physician testify (1) after a "personal evaluation" of the patient, (2) about the physician's "opinion[ ] concerning whether the patient is, as a result of mental disorder, a danger" to herself or others, and (3) about "whether the patient requires treatment." *In re MH 2007-001236*, 1 CA-MH 07-0025, 8/26/08.

COURT OF APPEALS TAX MATTERS

A Company Providing Outsourced Directory Assistance to Telecommunications Companies Is Not Itself Engaged in the Telecom-munications Business for Purposes of a Statutory Exemption to the Arizona Transaction Privilege Tax. Pursuant to A.R.S. § 42-5061(B)(3), income is exempt from the Arizona transaction privilege tax ("TPT") when it is derived from the sale of tangible personal property consisting of enumerated telecommunications equipment that is sold to a business classified under the telecommunications classification. To be classified under the telecommunications classification, a business must "transmit[ ] signs, signals, writings, images, sounds, messages, data or other information of any nature by wire, radio waves, light waves or other electromagnetic means if the information transmitted originates and terminates" within Arizona. A.R.S. § 42-5064(E). A company that provides directory assistance information that is transmitted to telephone customers, but does not actually transmit the information itself in the sense relevant to the statute, does not qualify as a telecommunications business. *Excell Agent Servs., L.L.C. v. Arizona Dep't of Rev.*, 1 CA-TX 07-0003, 9/4/08.

COURT OF APPEALS JUVENILE MATTERS

After a permanency hearing has commenced in a juvenile dependency proceeding under A.R.S. § 8-862(A) a party to that proceeding is not precluded from filing a petition to terminate parental rights pursuant to A.R.S. § 8-533 because § 8-533 (A) specifically states that "Any person or agency that has a legitimate interest in the welfare of a child … may file a petition for the termination of the parent-child relationship." Furthermore, the statute does not expressly prohibit the filing of a termination petition after a permanency hearing has begun in an ongoing dependency proceeding. Finally, the plain meaning of the language employed by the legislature under A.R.S. § 8-532 suggests that a petition for termination may still be filed after a permanency hearing has commenced because it does not expressly prohibit a party from doing so. *Bobby G. v. ADES*, 2 CA-JV 2008-0009, 9/30/08.

* indicates a dissent

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 Sept. 23, 2008*:

City of Phoenix; City of Phoenix Employees' Retirement Sys. Board v. Fields, Mary Ann Perez et al., CV-08-0159-PR, 1 CA-SA 07-0152, 2008 WL 1796039 (App. 2008)

Issues Presented:

1. Are potential class claimants required to do the impossible by setting forth in their pre-suit notice of claim a specific amount for which the case can be settled, when, at the time notice was required to be given, the class has not been established, the class members have not been identified, the damages are impossible to quantify, and no court has certified the class or approved a settlement?
2. Does the court of appeal's decision thwart class action relief against public entities, an outcome this Court clearly found unacceptable in *Andrew S. Arena v. Superior Court,* 163 Ariz. 423, 788 P.2d 1174 (1990)?

Arizona Minority Coalition for Fair Redistricting et al. v. The Arizona Independent Redistricting Comm'n et al., CV-08-0161-PR, 1 CA-CV 07-0301 (Opinion), 2008 WL 962905 (App. 2008)

Issues Presented:

1. Whether the Commission must 'favor' or merely 'consider' competitiveness in drawing legislative district lines.
2. Whether the Commission must include all of the constitutional redistricting goals, including competitiveness, in the district maps prepared in phase two or whether it may defer consideration of those goals to a later phase.
3. Whether the Commission must make objective findings of significant detriment to the other constitutional goals when rejecting more competitive redistricting plans.
4. Whether the findings of the trial court are entitled to review under the clearly erroneous standard."

Presented to, but not decided by, the Court of Appeals (per Respondents):

1. Whether the trial court failed to follow the Court of Appeals' mandate in *Redistricting I* by improperly finding alternate plans superior to the Commission's adopted plan; substituting its judgment about the wisdom of the Commission's legislative choices; and elevating the importance of competitiveness.
2. Whether the trial court's finding that Hispanic voters were 'packed' into District 14 to prevent creation of a competitive district was not supported by the record or clearly erroneous.

State of Arizona v. Hon. Bethany G. Hicks, CV-08-0174-PR, 1 CA-SA 08-0072 (Order)

Issue Presented:

When the State prosecuted Durnan on felony charges, it complied with the constitutional duty that it owes to indigent criminal defendants by appointing, at its own expense, a private attorney to defend him. Durnan was convicted, but the conviction was overturned for ineffective assistance of counsel. Can the State be held liable for Durnan's attorney's negligence in these circumstances?

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

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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.

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