

# appellate highlights

by Donn Kessler and Patrick C. Coppen

## COURT OF APPEALS CIVIL MATTERS

Arizona's antitrust statutes allow indirect purchasers of allegedly price-fixed goods to seek damages directly from persons accused of price-fixing even though the plaintiffs did not purchase the goods directly from the defendants, rejecting *Bunker Glass Co. v. Pilkington, PLC*, 1 CA-CV 01-0046, 3/28/02 ... Clarifying the law for liability of common carriers, the Court of Appeals: (1) **Rejected the highest standard of care for common carriers in favor of the standard of reasonable care;** and (2) **Reversed the trial court by holding that on the facts of this case the doctrine of *res ipsa loquitur* could apply.** In addressing the latter issue, the court held that in applying the first element for *res ipsa*, a plaintiff need not rule out every conceivable explanation other than negligence and conflicting expert testimony concerning the cause of the accident precludes summary judgment. *Lowrey v. Montgomery Kone, Inc.*, 1 CA-CV 00-0299, 3/26/02 ... **A.R.S. § 25-408(d) does not require a court to award attorney's fees as a sanction for failure of a parent to give notice of a move out-of-state.** Rather, a court can hold the parent who fails to give notice accountable by other means, including ordering them to go to a parenting class. *In re Marriage of Woodworth*, 1 CA-CV 01-0164, 3/26/02 ... **The Public Records Act, A.R.S. § 39-121, did not require the City of Mesa to release 911 audio tapes having broadcast value where the city had met its burden to show countervailing interests in not releasing the tapes and had released transcripts of the call, allowing the public to find out what government was up to.** Once the government puts forward such an interest, the party seeking access must then demonstrate what purpose further access would serve. *A.H. Belo Corp. v. Mesa Police Dep't*, 1 CA-CV 00-0200, 3/26/02\* ... **The determination of a "home state" for purposes of initial jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, A.R.S. §§ 25-1001 to -1067 (Supp. 2001), is not limited to having the child be a resident of the state for the period of six consecutive months before commencement of the custody proceeding.** Rather, the child must reside in the state for six consecutive

months at any time within six months before the commencement of the proceeding. The Court also held that the best interests test did not apply to determine initial jurisdiction if a state met the statutory requirement for home state and had not declined jurisdiction. However, a home state court could determine that it was an inconvenient forum based on some factors, including the child's best interests. *Welch-Doden v. Roberts*, 1 CA-SA 01-0246, 3/21/02 ... **A trial court can release a trustee from liability on approval of a distribution of trust assets and termination of the trust relationship.** In addition, approval of attorney's fees for the trustee's counsel was appropriate where there was no actual conflict of interest and the attorneys only had a duty of fairness and impartiality to the beneficiary, which duty had not been breached. *In re CVR 1997 Irrevocable Trust*, 1 CA-CV 01-0283, 3/19/02 ... **A choice of law provision in an employment contract does not preclude application of Arizona's wage and treble damages provision under A.R.S. §§ 23-350, 23-352 and 23-355, because such statutes represent a fundamental state policy that overrides the choice of law clause under the Restatement of Contracts, § 187.** No Arizona statute or case permits parties to contractually preclude application of those statutes and thereby waive any claim for treble damages under A.R.S. § 23-355 when they are otherwise warranted. The statute represents a strong or fundamental public policy because it is meant to protect employees from the oppressive use of superior bargaining power by employers, whether or not that power is used in a given case, by encouraging employers to settle wage dispute without litigation and to punish them for acting unreasonably and in bad faith. *Swanson v. The Image Bank*, 2 CA-CV 2001-0069, 3/14/02 ... **The open enrollment tuition policies found in A.R.S. § 15-816.01 do not apply to high school students living in a community school district that was not within a high school district.** Thus, a high school district had to enroll these students as tuition-paying students with the community school district then paying the tuition and being entitled to a portion of state funds for tuition reimbursement. *Ruth Fisher Elementary School District v. Buckeye Union*

*High School District*, 1 CA-CV 01-0133, 3/12/02 ... A contractor who was unlicensed at the time of entering into the contract was barred from seeking reimbursement for contract damages for the services rendered after obtaining licensure. The contractor was held not to have substantially complied with the licensing statute because the Registrar of Contractors had not contributed to the lack of licensing and the contractor had not shown financial responsibility during the unlicensed period and the court would not create a judicial exception from the statute prohibiting payment to the contractor based on ratification. *Crowe v. Hickman's Egg Ranch, Inc.*, 1 CA-CV 00-0410, 3/12/02\* ... **For tax purposes, billboards fixed to property remained personalty based on a modified reasonable person test—whether a reasonable person, based on all the relevant circumstances, would believe the billboards were part of the real estate.** *Arizona Dep't of Revenue v. Arizona Outdoor Advertisers, Inc.*, 1 CA-TX 99-0012, 3/7/02 ... **An industrial commission claim was barred by *res judicata* where the claimant did not present any new, additional or previously undiscovered condition and causal relationship to work but only new evidence supporting a prior denied claim.** *Lovitch v. Industrial Commission*, 1 CA-IC 01-0053, 3/7/02.

## COURT OF APPEALS CRIMINAL MATTERS

The trial court correctly suppressed a statement by the defendant that he was involved in the transportation and possession of drugs for sale where there was no independent evidence separate from the confession to warrant a reasonable inference the defendant was involved in sales of drugs. The possession of a small quantity of drugs was insufficient given the nature of the charges. *State v. Flores*, 1 CA-CR 01-0280, 3/28/02 ... Balancing Fifth and Sixth Amendment rights, a witness who had

**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](http://www.supreme.state.az.us/opin)) and the Court of Appeals ([www.state.az.us/co](http://www.state.az.us/co)).**

already pled guilty to a crime can still assert his Fifth Amendment rights against self-incrimination through the date for the filing of a timely petition for post-conviction relief, barring the defendant from requiring the witness to testify in the defendant's behalf. The trial court also correctly denied a "mere association" instruction where the court instructed the jury that the defendant could not be found guilty by mere presence at the crime scene and to be guilty as an accomplice the jury must find he intended to facilitate the crime. *State v. Rosas-Hernandez*, 1 CA-CR 01-0153, 3/28/02.

**COURT OF APPEALS  
JUVENILE MATTERS**

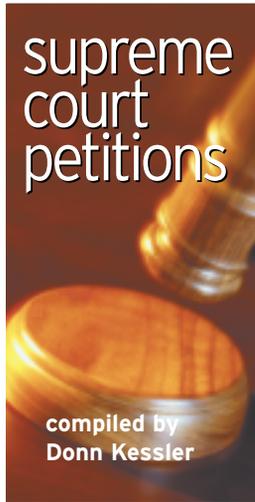
A Superior Court in a dependency matter abuses its discretion by denying an incarcerated parent's repeated requests to see his infant child when it lacks an evidentiary basis to find it was not in the child's best interest to be taken to the jail by his grandparents or any evidence concerning visitation facilities at the courthouse. A parent's right to companionship, care, custody and management of his or her children is a fundamental constitutional

right that does not evaporate simply because the parent has not been a model parent or has lost temporary custody to the state in a dependency action. A parent should be denied the right of visitation only under extraordinary circumstances because it is generally presumed it is in the child's best interest to have visitation with the non-custodial parent. **The fact of incarceration does not, by itself, render visita-**

**tion inappropriate** or against the child's best interests. *Michael M. v. Arizona Dep't of Economic Security*, 2 CA-JV 2001-0076, 3/19/02. ▴

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\* indicates a dissent



The Arizona Supreme Court accepted review or jurisdiction of the following issues on the date indicated\*:

**March 19, 2002**

*State of Arizona v. Davis*, CR-01-0423-PR

"Should Tony receive a new trial on Counts 1 and 4 because the trial court's instructions: improperly amended Count 1, which resulted in a duplicative charge and the possibility that the verdict for that count was not unanimous; and/or improperly amended Count 4, as well as gutting Tony's alibi defense?"

"Should this Court remand this case for resentencing without the application of A.R.S. § 13-604.01 because Tony's sentences are cruel and unusual under the federal and Arizona Constitutions?"

*State v. Casey*, No. CR-01-0223 PR

"Whether the jury instruction on self-defense was an incorrect

statement of the law and improperly shifted the burden of proof?”

**April 23, 2002**

***State v. Thompson, CR-01-0435-PR***

“Did the court of appeals err by holding that A.R.S. § 13-1101(1), defining premeditation, is unconstitutionally vague as judicially construed by this Court?”

“Whether the elimination of ‘actual reflection’ from the definition of premeditation obliterates any meaningful distinction between first-degree murder and second-degree murder, rendering the statute unconstitutionally vague.”

***State v. Evenson, CR-01-0438-PR***

“When the Arizona Legislature enacted A.R.S. § 13-3513 as a criminal statute targeting content-based publications, did the U.S. Constitution and/or the Arizona Constitution require the Legislature to conduct hearings and receive substantial and compelling evidence that such publications, being distributed through news racks, were actually causing real and substantial harm to minors?

“Can a publisher who offers a newspaper through vending machines subsequently be charged and convicted of a crime where there is no evidence or finding that any minor, in 33 years of similar publications, has ever viewed, purchased or been exposed to the publisher’s newspaper?”

“Does A.R.S. § 13-3513 violate the due process clause of the U.S. and Arizona Constitutions by criminalizing actions that are unconstitutionally vague and void of identifiable, clearly defined ‘contemporary state standards’?”

“Does a fine of \$166,400 levied against publisher for offering newspaper through coin operated news racks violate the Eighth Amendment prohibition against excessive fines and the first amendment rights of speech and press?”

***Hullett v. Cousin, CV-01-0407-PR***

“Did the Court of Appeals err in ruling that A.R.S. § 44-1005 is dispositive as to the intent of the limited partners in an action for fraudulent transfer under A.R.S. § 44-1004?”

“Did the Court of Appeals err in determining that a partnership’s distribution was a transfer resulting in insolvency under A.R.S. § 44-1005 due to a nine year old contingent claim?”

***Medasys Acquisitions Corp. v. SDMS, P.C., CV-02-0045-PR***

“Does the arcane rule precluding punitive damages in rescission actions have any current, valid purpose in Arizona given the merger of courts of law and equity?”

“Does correct application of the election of

remedies doctrine to the underlying action, in which fraudulent misconduct by Medasys was found by both judge and jury, preclude a punitive damages award?”

***State of Arizona v. Hickman, CR-01-0424-PR***

“Should this Court, in light of the recent Supreme Court decision in *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), reconsider and overrule the ‘automatic-reversal’ rule adopted in *State v. Huerta*, 175 Ariz. 262, 855 P.2d 776 (1993)?”

***Hernandez v. State of Arizona, CV-01-0437-PR***

“Whether a Notice of Claim filed pursuant to A.R.S. § 821.01 for the purposes of making a demand and attempting to settle a claim against the State of Arizona is an offer to settle a disputed claim prohibited from admission into evidence by Rule 408, Arizona Rules of Evidence, at the trial of the matter.” ▲

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