

# appellate highlights

**ARIZONA SUPREME COURT CIVIL MATTERS—Under A.R.S. § 40-101, Corporation Commissioner is ineligible to hold office** because, as a registered securities salesperson licensed to a registered securities dealer, he was subject to the Commission's regulation.\* *Jennings v. Woods/West*, CV-98-0586-SA, 6/9/99...**Three-year/five-mile restrictive covenant between doctor and medical group, strictly construed, is unreasonable, overbroad, and unenforceable.** *Valley Med. v. Farber*, CV-97-0488-PR, 6/18/99... **Jeep passenger's injuries arose out of another's use or occupancy of a vehicle and are excluded under auto exclusion of homeowner's policy.** *Allstate v. Johnston*, CV-98-0424-PR, 6/18/99...**County sheriff may serve process on a non-Indian on the reservation.\*** *State v. Zaman*, CV-98-0135-PR, 6/18/99

**ARIZONA SUPREME COURT WORKERS' COMPENSATION MATTERS—Exclusivity doctrine does not bar employees' suit for breach of employment contract to supplement workers' comp benefits** after each developed work-related illness. *Stoecker v. Brush Wellman*, CV-98-0361-PR, 7/1/99

**ARIZONA SUPREME COURT CRIMINAL MATTERS—Statutory time limits for filing post-conviction relief petitions in capital cases that conflict with Rule 32 provisions violate separation of powers and are invalid.** *State v. Brown/Miles*, CV-98-0547-SA, 6/4/99...**Single aggravating factor of pecuniary gain justified death penalty** although prosecutors' opinions disfavoring death are relevant non-statutory factors; **aberrant behavior was not proved**; objection to prosecutor's policy to seek death where one aggravating factor existed was waived.\* *State v. White*, CR-96-0716-AP, 6/10/99...**Single aggravating factor that murder was especially cruel justified death penalty**; mental illness is not necessarily impairment for mitigation; youth was slightly mitigating but **cost of death penalty and time on death row are not.** *State v. Clabourne*, CR-97-0334-AP, 6/18/99...**Omission of lesser-included reckless manslaughter**

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**instructions is fundamental error** requiring reversal and new trial when specific intent was key issue. *State v. Valenzuela*, CR-98-0267-PR, 6/18/99...**When defense is mistaken identity, second-degree murder instruction and instruction that premeditation requires reflection not required**; prior act evidence showed opportunity, intent, and identity; **weight of polymerase chain reaction evidence is for jury**; cruelty and prior serious offense justify death penalty. *State v. Adams*, CR-97-0471-AP, 6/18/99...**Harmless error does not apply to court's failure under § 13-702 to state what factors it considered in aggravation/mitigation** and the reasons for aggravate/mitigated sentence, but **substantial compliance is enough.\*** *State v. Harrison*, CR-98-0381-PR, 6/18/99...**Parole eligibility restrictions in §§ 13-604 and 13-604.02, as amended in 1997, do not apply retroactively** to a prisoner sentenced before the amendments. *State v. Murray*, CR-98-0202-PR, 6/18/99...**A defendant who did not object to co-defendant's plea agreement should seek post-conviction relief rather than appeal**; allowing defendant to refuse to cooperate with mitigation specialist upheld; refusal did not show incompetence; **poor post-murder physical health and execution expense are not mitigating.** *State v. Kayer*, CR-97-0280-AP, 6/29/99...**Trial judge cannot bifurcate a trial, here for aggravated DUI, allow a defendant to plead guilty or stipulate to prior convictions** that are elements of the charged offense, withhold knowledge of the plea or stipulation **and submit only the remaining elements to the jury.** *State v. Galati, Root*, CV-98-0558-PR, 7/8/99

**ARIZONA COURT OF APPEALS CIVIL MATTERS—Third-party bad faith claim for car rental company's failure to settle accrued when trial court entered judgment for plaintiff on negligence claim** against the driver who caused plaintiff's injuries, not when the rental company refused to pay the claim. *Uyleman v. Rentco*, 1 CA-CV 98-0517, 6/10/99...**Dispute over a trust instrument is not a contractual dispute for purposes of awarding attorney's fees** under § 12-341.01(A). *Moore v. Kieber*, 1 CA-CV 98-0077, 6/15/99...**Ex-wife may seek to enforce dissolution decree award of one-half of husband's non-disability military retirement pay even if he reduced those benefits to receive more disability benefits.** *Harris v. Harris*, 1 CA-CV 98-0501, 6/15/99... **Misdemeanor violation of § 13-3623 child abuse statute does not involve moral**

**turpitude requiring jury trial;** potentially grave consequences of conviction are not severe or universal. *Bazzanella v. Tucson City Court*, 2 CA-CV 98-0235, 6/17/99...**Nevada marriage by an underage person is voidable** and ratified by continued cohabitation; **husband waived objection to legality of marriage by filing petition for dissolution.** *Medlin v. Medlin*, 1 CA-CV 98-0592, 6/17/99...**Adoptive parents presented enough evidence of confidential or fiduciary relationship with defendant adoption agency to withstand directed verdict and are entitled to instruction on constructive fraud;** jury should consider breach of duty claim; no error in directed verdict based on *alter ego* theory. *Taeger v. Catholic Family*, 1 CA-CV 97-0536, 6/17/99...**Doctor whose congenital eye problems prevented him from profitably practicing medicine was not "disabled"** under occupational disability policies. *Radkowsky v. Provident Life*, 1 CA-CV 98-0480, 5/18/99...**State indemnification of manager-employee's losses due to liability for sexual harassment is not unconstitutional** or against public policy if he acted within the scope of authorization; **indemnification is barred for acts found to be felonies**, even if no conviction occurred, unless State knew of employee's propensity. *State v. Heinze/Schallock*, 1 CA-CV 92-0410, 6/29/99...**Occupants waived their right to a jury trial on a forcible entry and detainer complaint** by failing to request one; sale under a tax levy and **transfer of title via an IRS district director's deed is a sale "by virtue of an execution"** covered by § 12-1173.01(A)(4). *Mason v. Cansino*, 2 CA-CV 98-0222, 6/29/99...**Major long-term emotional disturbances** diagnosed as post-traumatic stress disorder **support a claim for negligent infliction of emotional distress;** defense evidence of **later remedial measures was irrelevant and not admissible to deter inadvertent punitive damage award.**

*Monaco v. HealthPartners*, 2 CA-CV 98-0218, 6/30/99...**Arizona has specific jurisdiction over Nevada casino in personal injury suit by Arizonans for accident in Arizona** due to casino's purposeful solicitation of Arizona business; Arizona's dramshop liability rather than Nevada's immunity law applies. *Williams v. Lakeview*, 1 CA-CV 98-0548, 7/1/99...**A family member insured is entitled to coverage both under the liability and underinsured motorist provisions of a single policy,** despite the policy's attempt to exclude UIM coverage. *Taylor v. Travelers*, 1 CA-CV 98-0445, 7/6/99...**A real estate tax lien cannot attach to property after the property was placed in RTC receivership;** later sale of lien was invalid; **court may award attorney's fees for a redemption action to two parties even if the fees were paid by only one.** *PLM Tax v. Denton*, 1 CA-CV 98-0666, 7/7/99...**Recreational use statute does not immunize defendants from liability when victim was not injured by a condition of the land but by equipment** temporarily placed and negligently supervised and thus victim was not a recreational user. *Smith v. Board of Regents*, 1 CA-CV 98-0627, 7/8/99...**Negligent financial management claims by prospective adoptive parents against adoption agencies were not an occurrence** within comprehensive general liability policy's coverage; reasonable expectations doctrine did not stop the insurers from denying coverage. *Baker v. Truck Ins. Exch.*, 1 CA-CV 98-0446, 7/8/99...**Statutory administrative procedure for employee with whistle-blower wrongful termination claim is permissive,** not mandatory. *Walters v. Maricopa*, 1 CA-CV 98-0691, 7/13/99...**A.R.S. §§ 11-603 and 11-604 authorize reimbursing county supervisor's travel expenses incurred in performing special duties;** in suit to recover monies paid, county must name other board members as defendants. *LaPaz v. Upton*, 1 CA-CV 98-

0607, 7/13/99...**Licensed insurance adjusters** retained by insurer to investigate insured's fire loss **owed no separate duty to the insureds.** *Meineke v. GAB*, 1 CA-CV 98-0623, 7/13/99...**Home buyer's real estate agent has no duty under § 32-2153 to disclose her client's financial circumstances to the seller** and is not liable for the buyer's failure to close escrow.\* *Lombardo v. Albu*, 1 CA-CV 98-0113, 7/13/99...**Acceptance of a Rule 68 offer of judgment** does not liquidate unliquidated tort damages and **does not trigger pre-judgment interest;** if offer of judgment is silent on post-judgment interest, judgment bears statutory rate of interest. *Welker v. Yogerst*, 1 CA-CV 98-0172, 7/15/99

**ARIZONA COURT OF APPEALS CRIMINAL MATTERS—When the jury cannot reach a verdict on kidnapping but convicts of unlawful imprisonment, latter is an acquittal of both kidnapping and felony murder** predicated on kidnapping, barring retrial.\* *Ryan v. State/Arrellano*, 1 CA-SA 99-0011, 6/3/99...**When judge declares mistrial over defendant's objection, but without manifest necessity, retrial violates double jeopardy.** *Jones v. State/Kiger*, 1 CA-SA 99-0070, 6/10/99...**Continued detention after traffic stop for drug-sniffing dog's arrival was not unreasonable under totality of circumstances when officer smelled fabric softener and had seen defendant switch cars twice;** further questioning not necessary to uphold stop. *State v. O'Meara*, 2 CA-CR 98-0468, 6/15/99...**Disorderly conduct by reckless display of firearm requires proof that victim was in repose before the conduct and is not a lesser-included offense of aggravated assault;** no error to give flight instruction when suspect's slow driving was attempt to dispose of evidence. *State v. Cutright*, 1 CA-CR 98-0463, 6/17/99...**Driving on a suspended license under § 28-3473 is not a lesser-included offense to**

**aggravated DUI** under § 28-1383(A) because former requires actual driving on public highway; no error to deny mistrial after officer conversed with jurors outside courtroom. *State v. Brown*, 1 CA-CR 98-0622, 6/22/99

**ARIZONA COURT OF APPEALS JUVENILE MATTERS—Order awarding parents of child victim restitution for lost wages** resulting from victim's medical visits and court hearings **affirmed**. *In re Erika V.*, 1 CA-JV 98-0254, 6/17/99...**Court may take judicial notice of county's population** for purposes of applying § 13-3111; **state cannot use juvenile's prior adjudication to impeach his credibility** despite language of art. 4 pt 2 § 22 (3). *In re Anthony H.*, 1 CA-JV 9822-0258, 7/1/99...**Mandatory suspension of driving privileges or denial of license under § 28-3320 is not unconstitutional** under rational basis test. *In re Brandon H.*, 1 CA-JV 98-0225, 7/20/99...**Judge must give juvenile written notice of every probationary term** that may later form the basis for a probation violation finding. *In re Richard M.*, 1 CA-JV 98-0182, 7/15/99

**ARIZONA COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS—Section 23-1031's provision that workers' compensation benefits are suspended during a worker's incarceration is retroactive and constitutional.** *Aranda v. Classic Roofing*, 1 CA-IC 98-0113, 6/24/99...**Even if first injury claim was not closed on date of second injury, ALJ properly applied successive injury doctrine.** *Frito Lay v. Morgan*, 1 CA-IC 99-0012, 7/6/99

**COURT OF APPEALS TAX MATTERS—Use tax does not apply to overhead and independent research and development purchases,** or indirect costs, incurred on federal contracts. *Motorola v. ADOR*, 1 CA-TX 98-0009, 7/13/99

\* = indicates a Dissent