



APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

Pre-Election Review Authority Does Not Extend to Ballot Initiatives Allegedly Violating the “Revenue Source Rule.” Pursuant to A.R.S. § 19-122(C), the Court may enjoin the placement of an initiative on the ballot if it is “not legally sufficient.” This phrase has been construed to refer only to defects in form, lack of the requisite number of valid signatures and failure to follow prescribed procedures. It does not give the Court pre-election review authority to consider challenges made under the Arizona Constitution’s “Revenue Source Rule,” ARIZ. CONST. art. 9, § 23. *League of Arizona Cities and Towns v. Brewer*, CV 06-0286-AP/EL, 11/08/06.

COURT OF APPEALS CIVIL MATTERS

Underinsured Motorist Insurance Coverage Can Be Offset by Injured Driver’s Workers’ Compensation Benefits. Contrary to earlier case law holding that a provision in an insurance policy reducing uninsured motorist coverage by workers’ compensation benefits is invalid and against public policy, an insurer may offset UIM coverage by the insured’s workers’ compensation benefits so long as the insured is not deprived of full recovery. *Cundiff v. State Farm Mut. Auto. Ins. Co.*, 2 CA-CV 05-0209, 10/27/06.

Cap on Tax Lien Interest Upheld. Under A.R.S. §§ 42-18114 and 42-18153, a tax lien purchaser may charge a property owner redeeming its tax lien interest on the amount paid by the purchaser. Although A.R.S. § 42-

18114 is unclear as to when interest begins to accrue on the purchase of a tax lien certificate, § 42-18053(A) establishes a maximum rate of simple interest of 16 percent on all tax delinquencies. Tax liens must also be sold to the lowest bidder. The statutes preclude a method of calculation that would exceed the 16 percent cap. *Ulan v. Pima County Bd. of Supervisors*, 2 CA-CV 05-0069, 10/31/06.

Reporting an Alleged Crime to the Police Is Absolutely Privileged as a Communication Related to a Judicial Proceeding. Police reports are absolutely privileged—rather than conditionally privileged—because they are communications preliminary to a proposed judicial proceeding. Requiring crime victims to rely on the defense of qualified immunity would discourage reporting of criminal activity. Arizona’s Victim’s Bill of Rights entitles putative crime victims to absolute immunity when they complain to the police. *Ledvina v. Cerasani*, 2 CA-CV 05-0035, 10/31/06.

University Students Can State a Claim Under “Nearly Free Education” Constitutional Provision Against Board of Regents for Tuition Increase. Article 11, section 6 of the Arizona Constitution provides that university instruction “shall be as nearly free as possible.” Although the

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SUPREME COURT PETITIONS

compiled by **Barbara McCoy Burke**
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The Arizona Supreme Court accepted review or jurisdiction of the following issues on Nov. 28, 2006*:

State v. John David Crawford, 1 CA-CR 04-0999, CR 06-0205-PR (Mem. Decision)

Issue Presented

The “sealed” federal prior felony conviction of mail theft does not qualify as a historical prior.

William Wayne Roubos, Derrick Stephen DeNomme and K TTL Enterprises-Pacific Beach Club, Inc. v. City of Tucson, 2 CA-SA 05-0080, CR 06-0181-PR (Opinion)

Issues Presented

- (1) Do summary civil infraction proceedings constitute “civil actions” for purposes of awarding attorneys’ fees under A.R.S. § 12-348(A)(1)?
- (2) Alternatively, are they exempted under § 12-348(H)(8)?

State v. Jeffrey Gastelum, 1 CA-CR 04-0661, CR 06-0149-PR (Opinion) (Dissent)

Issue Presented

Post trial, the parties stipulated that Appellant had two prior felony convictions for sentencing enhancement purposes, and Appellant, who was present, did not object. In light of Appellant’s failure to timely object and his burden, under *State v. Henderson*, 210 Ariz. 561, 115 P.3d 601 (2005) to affirmatively demonstrate fundamental error and actual prejudice, did the court of appeals violate *Henderson* by vacating Appellant’s sentence on sheer speculation that it was “conceivable that Defendant was unaware of his rights or did not intend to forego them”?

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

Legislature is absolutely immune from claims made under this provision, such a claim may be alleged against the Board of Regents. *Kromko v. Arizona Board of Regents*, 1 CA-CV 04-0250, 11/14/06.

Statute of Repose Bars Contractor’s Contract-Based Claims Against Its Subcontractors, But Not Contractor’s Common Law Indemnity Claims Against Its Subcontractors. A statute of

repose, A.R.S. §§ 12-552(A), (C), bars actions “based in contract” or “based on implied warranty arising out of the contract” filed more than nine years after substantial completion of a home. The statute applies to claims for contract and warranty claims. A.R.S. §§ 12-552(A), (C). It also bars contractual indemnity claims, but not a contractor’s common-law indemnity claim against its subcontractors. *Evans Withycombe, Inc. v. Western Innovations, Inc.*, 1 CA-CV 04-0196, 11/14/06.

Tender and Loss Causation Rules in Securities Actions Brought Under Arizona Law Clarified. A party may not obtain appellate review of an adverse partial summary judgment ruling by having all remaining claims dismissed without prejudice, regardless of whether the trial court's ruling includes "Rule 54(b)" language. In an action for true rescission under A.R.S. § 44-2001(A), a plaintiff may substitute tender by purchasing and delivering the securities to the defendant before trial. But mere sale on the open market will not suffice. Because true rescission is not a damages remedy, a plaintiff need not prove loss causation in order to obtain rescission of a securities transaction under A.R.S. § 44-2001(A) or the common law. However, a plaintiff must generally prove loss causation to obtain damages in a securities action brought under either A.R.S. § 44-1991(A)(1) or (3). An exception applies if the plaintiff claims "rescissory damages" and there is a showing of sufficient equitable reasons for having the tender requirement waived. *Grand v. Nacchio, McMaster; and Qwest Commc'ns*, 2 CA-CV 06-0033, 11/24/06.

COURT OF APPEALS CRIMINAL MATTERS

A trial court errs in precluding proof of a prior sexual offense conviction as usually required by Rule 19.1(b), ARIZ.R.CRIM.P., until after the entry of a jury verdict of guilt in a trial for sexually violent assault because **under A.R.S. § 13-1423 (the Sexually Violent Assault Statute), an historical prior felony trial court is actually an element of the offense itself** and is not merely a sentence enhancement factor. *State v. Talamante*, CA-SA 06-0193, 11/14/06.

Although Rule 31.6, ARIZ.R.CRIM.P., states that "[a] sentence to pay a fine or restitution shall be stayed pending appeal," it must be harmonized with the relevant criminal sentencing restitution statutes (A.R.S. § 13-603(C), requiring restitution ordered to "be paid to the clerk of the court for disbursement to the victim," and A.R.S. § 13-804(D), which states that such ordered payments are not stayed pending an appeal and may be held pending the outcome of an appeal), such that **for the duration of the appeal a defendant must continue to pay the ordered restitution to the relevant Clerk of Court, yet the Clerk shall hold the payments pending the outcome of the appeal.** *State v. Hansen*, CA-CR 05-0520, 11/16/06.

A trial court errs in failing to dismiss a criminal prosecution for sexual assault-related charges on statute of limitations grounds when the pre-1997 version of A.R.S. § 13-107 applies and the State was unable to determine the identity of the perpetrator of the crime within the applicable seven-year limitations period, even if the identity of the perpetrator is later determined after techno-

logical advances or through Arizona law enforcement's ultimate use of national databases. Arizona follows the minority view that criminal statutes of limitation are jurisdictional, and constitute a legitimate limitation upon the power of the sovereign to act against the accused which must be construed liberally in favor of criminal defendants and against the prosecution consistent with U.S. Supreme Court authority. Although **the Arizona legislature amended the statute in 1997 to include new subsection (E) providing for a tolling of the statute while the identity of the perpetrator is unknown**, both applicable law and the history of the Arizona criminal statute of limitations statute itself compels such a result in this type of case. *Taylor/Johnson v. State of Arizona*, 2 CA-SA 06-0075, 11/30/06.

In an aggravated DUI prosecution, the admission of a defendant's prior convictions and license suspension through certified or other appropriate records without testimony does not violate the Sixth Amendment confrontation clause because they are not testimonial in nature (kept or created solely for the purpose of prosecution) and fall within the business records exception previously approved as not precluded for prosecution purposes by the U.S. Supreme Court in both *Crawford* and *Davis*. *State v. King*, 2 CA-CR 05-0256, 11/21/06.

COURT OF APPEALS JUVENILE MATTERS

When a juvenile is previously adjudicated delinquent for a misdemeanor, subsequently violates probation, and is pending disposition, **the unauthorized removal of an electronic monitoring device and departure from Court-ordered home detention constitutes the offense of Escape in the Third Degree under A.R.S. § 13-2502(A) because the juvenile is considered to be in actual or constructive custody for "a misdemeanor" as required by the statute.** *In RE Brittany Y.*, 1 CA-JV 06-0067, 11/16/06.

COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS

Res Judicata Precludes Reduction of Worker's Compensation Benefits Absent Petition for Rearrangement by Insurer. In the context of a hearing requested by the employee to determine whether the employee's physical condition or earning capacity has changed after a benefit award has become final, an administrative law judge ("ALJ") may not find the employee's earning capacity has increased absent a petition for rearrangement filed by the employer or carrier pursuant to A.R.S. § 23-1044(F). Absent such a petition, *res judicata* principles preclude an ALJ from reducing a petitioner employee's workers' compensation benefits. *Meiners v. University of Arizona*, 2 CA-IC 06-0005, 10/27/06.

Projected Earnings From a Job a Worker's Compensation Claimant Has Not Yet Performed May Not Be Considered in Determining Claimant's Average Monthly Wage. In setting a claimant's average monthly wage, an administrative law judge ("ALJ") should not consider prospective wages from an employer for whom the claimant had not yet begun to work. A.R.S. § 23-1041 establishes the presumptive average monthly wage as equal to the amount of wages actually received by the claimant during the thirty days prior to her industrial injury. Although an ALJ has broad discretion to use an expanded wage base when the presumption would not adequately reflect the claimant's earning capacity, it is too speculative to base earning capacity upon projected earnings from a job the claimant has not yet performed. *Morse v. Industrial Comm'n of Arizona*, 1 CA-IC 06-0011, 11/7/06.

COURT OF APPEALS SPECIAL ACTION MATTERS

Change of Venue for Claims Brought Against a County Is Governed By A.R.S. § 12-411(B). In cases involving a county as a party opponent, the other party may request change of venue to "some other county" per A.R.S. § 12-408. For purposes of determining the "other county," courts should look to A.R.S. § 12-411(B) and determine "the most convenient county ... to which the objections of the parties do not apply or are least applicable," rather than A.R.S. § 12-401 (governing the venue that would have been proper initially) or A.R.S. § 12-407(A) (which requires a transfer "to the most convenient adjoining county"). *Yarbrough v. Super. Ct. (Roberts Enters., Inc.)*, 2 CA-SA 06-0070, 11/6/06.

* indicates a dissent

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), the Court of Appeals, Div. 1 (www.cofad1.state.az.us) and Div. 2 (www.apitwo.ct.state.az.us). Detailed summaries of selected cases and other court news may be found at www.azapp.com