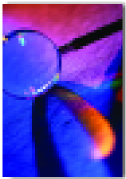

APPELLATE HIGHLIGHTS

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

COURT OF APPEALS CIVIL MATTERS

Under the Doctrine of Reasonable Expectations, the Party Preparing the Form Contract Must Have "Reason to Believe" the Consumer Would Not Have Agreed to a Challenged Contract Provision Had the Consumer Been Aware of its Presence in the Contract. The doctrine of reasonable expectations renders unenforceable certain provisions of standard form agreements when a party to the contract has reason to know that the other party would not have signed the contract had he known that it contained the particular provision. In the context of an insurance contract, jury instructions that failed to require the jury to find that the insurer had reason to know that the insured would not have agreed to the exclusion in question were improper. *State Farm Fire & Cas. Ins. Co. v. Grabowski*, 1 CA-CV 05-0494, 1/30/07.

Disability Need Not Be the Sole Cause for Resignation of an Applicant Seeking an Accidental-Disability Pension. An applicant's accidental disability need not be the sole cause of his resignation in order to receive accidental-disability pension benefits pursuant to the Public Safety Personnel Retirement System, A.R.S. § 38-841 et seq. *Parkinson v. Guadalupe Pub. Safety Ret. Local Bd.*, 1 CA-CV 06-0238, 1/30/07.

Adjacent Property Owner Alleged Sufficient Specific Harm Peculiar to Itself and Different From That of the General Public to Have Standing to Challenge a Zoning Decision. In Arizona, a person "aggrieved" by a zoning decision of a legislative body or board may appeal that decision by special action to the superior court, but to have standing to bring such an action, a plaintiff must allege "particularized harm" resulting from the decision – an "injury in fact, economic or otherwise." The owner of an apartment building adjacent to a proposed development alleged sufficient specific harm different from that of the general public given that the proposed development project across the street from the presently existing apartment complex came close to tripling the existing density, doubling the existing mass, and dropping previously required landscape specifications. *Center Bay Gardens v. City of Tempe*, 1 CA-CV 05-0460, 1/30/07.

Stringent Expert Witness Pleading Requirements of A.R.S. § 12-2603 Contains No Exceptions for Informed Consent Cases. In the context of medical malpractice cases, A.R.S. § 12-2603(B) requires the plaintiff to proffer an affidavit setting forth the factual basis for the claim, the breach of duty, and the manner in which the breach caused the claimant's damages. There is no exception in the context of informed consent cases, and thus an affidavit that simply stated that a doctor must inform a patient of risks of surgery (and that failure to do so is a breach of the applicable standard of care) did not suffice. *Gorney v. Meaney*, 2 CA-CV 06-0075, 1/31/07.

Courts Have Jurisdiction to Determine Whether a Utility Has a Right to Make Use of a City's Public Streets and Rights-of-Way Without a Proper Franchise. Although the Arizona Corporation Commission ("ACC") has broad and pervasive jurisdiction over public service corporations, that jurisdiction arises after the public utility has secured its rights and privileges. The superior court has jurisdiction to consider a dispute between a public utility and a city where the utility had not obtained a proper franchise from the City when the action was filed and where the action did not involve regulatory authority exclusive to the Commission. *City of Bisbee v. Arizona Water Co.*, 2 CA-CV 06-0106, 2/8/07.

Court of Appeals Lacks Jurisdiction Where Complaint Is Voluntarily Dismissed. Court of Appeals lacks jurisdiction from an appeal taken from a final judgment that results from a dismissal of one or more claims without prejudice. Where a complaint has been dismissed by stipulation, neither party is an "aggrieved party." *Osuna v. Wal-Mart Stores, Inc.*, 2 CA-CV 06-0039, 2/8/07.

A Defamatory Letter Sent to Parent Corporation of Party to Litigation Is Protected By the Absolute Judicial Privilege. The absolute judicial privilege applies to communications to non-parties who have a sufficiently close or direct relationship to the proceeding, even if they are not parties. Whether a non-party has a sufficiently close or direct relationship to the proceedings to trigger the absolute judicial privilege must be determined on a case-by-case basis. Where a non-party parent company had a close and direct relationship to the underlying litigation, the absolute judicial privilege protected a party's communication made to the chief executive officer of the parent corporation during litigation with its subsidiary. *Hall v. Smith*, 2 CA-CV 06-0137, 2/8/07.

Mother Who Pleaded Guilty to Misdemeanor Child Abuse for Accidental Death of Her Son and Later Sued for Wrongful Death May Dispute That Her Negligence Was a Cause of the Boy's Death and May Explain Why She Accepted the Guilty Plea. Although A.R.S. § 13-807 precludes a defendant convicted in a criminal proceeding from subsequently denying the essential allegations of the criminal offense in a civil proceeding brought by the state or the victim against the criminal defendant, that statute does not apply where the convicted criminal defendant subsequently initiates a civil action as the plaintiff. A criminal guilty plea does not provide a basis for common law issue preclusion in a subsequent civil suit because the question of guilt is not actually litigated. *Picaso v. Tucson Unified Sch. Dist.*, 2 CA-CV 05-0174, 2/13/07.

Insurance Company Could Have Accepted Policy-Limits Settlement Offer Notwithstanding Bankruptcy. Where an insurance company initially denies coverage by relying on information from the insured, and then later accepts coverage, estoppel may apply in a subsequent bad faith action depending on the reason for the change in the coverage position. Where an injured passenger sued the defendant-driver, the fact that the defendant-driver had filed bankruptcy would not preclude an insurance company from accepting a settlement offer (although the offer may have to be approved by the bankruptcy court). Thus, an insurance company could not defend its refusal to accept a policy-limits settlement offer in the context of a subsequent bad faith action on the ground that the bankruptcy precluded it from accepting the offer. *Acosta v. Phoenix Indem. Ins. Co.*, 2 CA-CV 06-0116, 2/14/07.

The Criminal Estoppel Statute Does Not Necessarily Preclude a Criminal Defendant From Raising an Affirmative Defenses in a Subsequent Civil Action. Pursuant to A.R.S. § 13-807, a defendant convicted in a criminal proceeding may not deny the essential allegations of the criminal offense in a civil proceeding brought by the state or the victim against the criminal defendant. That statute does not apply to affirmative defenses that do not deny an essential allegation of the criminal offense of which the defendant was adjudicated guilty. *Williams v. Baugh*, 2 CA-CV 06-0128, 2/20/07.

COURT OF APPEALS CRIMINAL MATTERS

A trial court errs by suppressing evidence from a DUI-related traffic stop where the reasonable suspicion for the stop was the defendant's left-hand turn properly

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initiated from a left-hand turn lane yet resulting in a turn made after crossing the center of the intersection into other than the median or leftmost lane of the intersecting street. Although the language of A.R.S. § 28-751(2) requires a driver turning left to turn, "[i]f practicable," into the "left lane immediately available" in the street onto which he or she is turning, such language does not mean that the turn need not be made to the median lane, or that the turn need not be initiated at or before traversing the center of the intersection itself. Given the additional language of the statute requiring a driver to make the turn "from the left of the center of the intersection," the most reasonable interpretation of the relevant language of the statute is that a driver must begin their left turn sometime before crossing the center of the intersection, and must turn into the median lane of the intersecting street, unless for some reason the median lane is unavailable. In other words, the driver may not proceed so far into the intersection that one of the through lanes, instead of the median lane, becomes the lane "immediately available" because doing so would require the driver to actually cross the center of the intersection before beginning their turn, which is implicitly prohibited by the plain language of the statute. While it is noteworthy that in a similar reasonable suspicion/suppression case the Court of Appeals in *Livingston* had interpreted language in A.R.S. § 28-729(1) requiring a driver to stay within a single lane of travel "as nearly as practicable" to be an express legislative intent to avoid penalizing a brief, momentary and minor deviation outside a marked lane, the lower court's ruling in the case at hand was based upon the interpretation of the plain language in § 28-751, rather than upon a factual determination of whether a turn into the median lane had been "impracticable." *State v. Cuevas*, 2 CA-CR 06-0157, 2/15/07.

The 1997 amendment to A.R.S. § 13-107(E) extending or tolling the running of the seven-year statute of limitations for specific serious criminal offenses enumerated under A.R.S. § 13-604 until the discovery of the actual offender's identity applies to crimes committed before 1997 where the offender's identity was not discovered until more than seven years after their commission. Although Division Two of the Arizona Court of Appeals recently held in *Taylor* that the applicable limitations period is the one in existence at the time of the offense, and that the period begins to run upon the discovery of the offense and not upon the discovery of the offender such that the prosecution of an offense commencing *after* the applicable seven-year period is time barred, Division One held that the application of the 1997 amendment to cases with an unexpired limitations period does not constitute an impermissible retroactive or *ex post facto* application of the law. Retroactive legislation does not violate the *Ex Post Facto* Clause of the U.S. Constitution merely because it adversely affects the legal positions of criminal defendants. Rather, it prohibits the enactment and application of a statute that: (1) punishes as a crime an act previously committed that was not a proscribed offense at the time of its commission, (2) makes the punishment for a specific crime greater than it was at the time of its actual commission, or (3) deprives one charged with a crime of any defense available at the time of its commission. Although the U.S. Supreme Court has held in *Stogner v. California,* 539 U.S. 607 (2003), that a law enacted after the expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution, it also held that neither its decision in *Stogner* nor the *Ex Post Facto* Clause itself would "prevent the State from extending time limits for the prosecution of future offenses, or for prosecutions not yet time barred." Moreover, the Arizona Supreme Court has held that a statute is not impermissibly retroactive if it is merely procedural and does not affect a vested substantive right. As a defendant's right to raise a statute of limitations defense does not actually vest until the statutory period has run, the retroactive application of A.R.S. § 13-107(E) to crimes committed before 1997 for which the limitations period had not yet run would not impair a vested substantive right. *State v. Gum*, 1 CA-CR 06-0683 PRPC,

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.apltwo.ct.state.az.us).

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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 Feb. 8, 2007*:

Klay Kohl, Sr. and Georgia Kohl v. City of Phoenix, 1 CA-CV 05-0087, CV-06-0358-PR (Mem. Dec.)

Issues Presented

1. Is the City's decisional process for selecting those few intersections on which to expend its limited traffic signal funds each year—and the necessary product of that process (a decision *to* signalize a few intersections and *not* to signalize the other candidate intersections)—absolutely immune?
2. Plaintiffs challenge the validity of some small criteria involved in the City's decisional process. If Plaintiffs cannot demonstrate that using Plaintiffs' criteria would have led the City to install a signal, is the City entitled to summary judgment on absolute immunity for lack of proximate cause? Or is the only proximate cause question whether "the City breached its duty to keep its streets reasonably safe for travel when it failed to install a signal at the … intersection and, if it did, whether that breach proximately caused" the accident, as the court of appeals indicated?

State of Arizona v. Rodney Joseph Gant, 2 CA-CR 00-0430, CR-06-0385-PR (Opinion)

Issue Presented

Did the court of appeals contravene the United States Supreme Court's decisions in *Thornton v. United States* [, 541 U.S. 615 (2004)] and *New York v. Belton*, [101 S. Ct. 2860 (1981),] and this Court's decision in *State v. Dean*, [206 Ariz. 158 (1983),] by holding that a warrantless automobile search incident to the recent occupant's arrest is unconstitutional absent proof of actual danger to the arresting officers and actual risk of destruction of evidence?

State v. Maurico Morales, 1 CA-CR 05-0408, CR-06-0374-PR (Mem. Decision)

Issue Presented

"Did the trial court improperly accept the reported 'stipulation' concerning Appellant's prior convictions and probation status?"

The Arizona Supreme Court accepted review or jurisdiction of the following issues on Mar. 13, 2007*:

State of Arizona v. Karen Marie Hansen aka Karen Marie Kennedy, CR-06-0459-PR 1 CA-CR 05-0520 (Opinion)

"Is Appellant's obligation to make restitution payments stayed pursuant to Rule 31.6 of the Arizona Rules of Criminal Procedure while her appeal is pending, or, as the Court of Appeals held, must she continue to make restitution payments pursuant to A.R.S. §13-804(D)?"

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

3/6/07.

A trial court erroneously suppresses evidence discovered as the result of or flowing from a probation-mandated polygraph examination where the probationer failed to invoke his Fifth Amendment right against self-incrimination at the time of the examination. Although sexual offense probationers are generally required to submit to polygraph testing as a condition of probation, they must invoke their Fifth Amendment right against self-incrimination at the time of the examination or probation-related interview in order to preserve it. Though the State cannot use involuntary or compelled statements against a criminal defendant, under the U.S. Supreme Court's holding in *Minnesota v. Murphy,* 465 U.S. 420 (1984), a defendant's failure to invoke the Fifth Amendment right in such situations is not excused when revocation of probation is not threatened for remaining silent, and *Miranda* warnings are not given because probation-related interviews and testing are not custodial in nature. On the other hand, if there is evidence in a particular case that a criminal defendant was required to waive his Fifth Amendment privilege as a condition of probation, or that the invocation of the privilege was threatened to result in their revocation, suppression of evidence derived from probation-related interviews or polygraph testing would be required under *Murphy. State v. Levens*, 1 CA-CR 05-0969, 2/20/07.

COURT OF APPEALS MENTAL HEALTH MATTERS

72-Hour Notice Requirement in A.R.S. § 36-536(A), Addressing Involuntary Treatment for Mental Disorders, Must Be Strictly Complied With and Cannot Be Waived. An individual facing a hearing to undergo involuntary inpatient/outpatient mental health treatment must, pursuant to A.R.S. §36-536(A), receive 72 hours notice and "[t]he notice provision of this section cannot be waived." This statutory provision against waiver of the 72-hour notice period applies to the hearing itself and to appellate proceedings. *In Re MH2006-000023*, 1 CA-MH 06-0004, 2/13/07.

A Patient Has the Power to Waive Attendance at an Involuntary Treatment Hearing. Although A.R.S. § 36-359 (2003) provides that "[t]he patient and his attorney shall be present" at a hearing to determine whether an individual must undergo involuntary medical treatment, a patient may waive the right to be present at a hearing if the waiver is given knowingly and intelligently. *In Re MH 2006-000749*, 1 CA-MH 06-0015, 2/13/07.

Trial Court Could Stay Proceedings Applicable to an Individual Adjudicated a Sexually Violent Person and Civilly Committed for Treatment When That Person Was Later Convicted of a Crime and Sentenced to Prison. Although Arizona's Sexually Violent Person's ("SVP") Act does not specifically provide for the situation in which a sexually violent person, after being civilly committed under the Act, is subsequently arrested and incarcerated on criminal charges, the trial court had the discretion to stay, rather than dismiss, the otherwise applicable SVP proceedings pending the criminal incarceration. *In Re the Commitment of Robert Flemming*, 2 CA-MH 05-0005-SP, 2/21/07.

COURT OF APPEALS TAX MATTERS

City Must Refund Transaction Privilege Tax Collected From a Business Located in an Area Not Properly Annexed. Where a city failed to comply with the procedures required by Arizona's annexation statutes, an attempted annexation did not become final. Because the City lacked the necessary jurisdiction to undertake the annexation, it had to refund taxes collected from a business within the proposed annexation. *Copper Hills v. Arizona Dep't of Revenue*, 1 CA-TX 05-0007, 2/15/07. AZ AT

* indicates a dissent

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May 2 . . . . . 12:15 p.m. to 1:15 p.m.
(1 MCLE hour)
Courtroom Series—Cross-Examination
Maricopa County Superior Court Room 309

May 3 . . . . . 9:00 a.m. to 12:15 p.m.
(3 MCLE hours, including 3 hours ethics)
E-Filing
ASU

May 4 . . . . . 9:00 a.m. to 12:15 p.m.
(3 MCLE hours)
Supreme Court Review
ASU

May 9 . . . . . 12:15 to 1:15 p.m.
(1 MCLE hour)
Courtroom Series—Closing Arguments
Maricopa County Superior Court Room 309

May 10 . . . . . 9:00 a.m. to 4:00 p.m.
(5 MCLE hours)
Medical Malpractice Case: The Annual Exam
Sheraton, Tucson

May 11 . . . . . 9:00 a.m. to 12:15 p.m.
(3 MCLE hours, including 3 hours ethics)
Legal Ethics Can Be Fun
Chaparral Suites, Scottsdale

May 15 . . . . . 10:00 a.m. to 11:00 a.m.
(1 MCLE hour)
Employee Overtime: Determining Who Is "Exempt" and "Non-Exempt"
Telephone seminar

May 16 . . . . . Noon to 2:00 p.m.
(2 MCLE hours)
Personal Injury Settlement: To Structure or Not To Structure?
Webcast, State Bar Boardroom
and Live, Phoenix

May 16 . . . . . 3:30 p.m. to 5:00 p.m.
(1 MCLE hour, including 1 hour ethics)
Book Club—*Chant of Jimmy Blacksmith*
Bentley Projects, Phoenix

May 17 . . . . . 9:00 a.m. to 12:15 p.m.
(3 MCLE hours, including 3 hours ethics)
Clay Jenkins as Teddy Roosevelt
Orange Tree Resort, Scottsdale