

ANNOUNCEMENTS

On October 11th, the supreme court published for comment proposed changes related to court reporting. A copy of the *per curiam* order was included in the weekly mailout.

CRIMINAL

Navarro v. State [**sufficiency of the evidence**] There was substantial evidence to support appellant's convictions for aggravated robbery, residential burglary, theft of property, and first-degree murder. [**defense of mental disease or defect**] A jury is entitled to believe the testimony of the State's expert witness over that of the appellant's and to determine whether a criminal defendant has proven an affirmative defense by a preponderance of the evidence. The Supreme Court is not inclined to change its standard for reviewing a jury's verdict on the issue of mental disease or defect. [**jury selection**] The Supreme Court will not mandate the use of the enhanced juror list. [**evidentiary ruling**] The trial court did not abuse its discretion when it denied appellant's request to edit a video, which showed appellant being handcuffed and arrested after he confessed to murder. In affirming the trial court's actions, the Supreme Court noted that the depiction of the appellant on the video was not similar to an individual appearing in a courtroom wearing prison clothing and shackles. The Court further explained that the jurors would not have been surprised to see the appellant being handcuffed and arrested on the video after he had confessed to committing a murder. (Storey, W.; CR 06-549; 10-4-07; Imber).

Adkins v. State [**Sex Offender Registration Act**] Failure to register as a sex offender in accordance with the Sex Offender Registration Act is a strict liability offense. [**admission of evidence in sentencing phase**] Character evidence, which may not be admissible during the guilt phase of a trial, may be admissible during the sentencing phase of a trial. (Keith, T.; CR 06-1082; 10-4-07; Glaze).

Dunn v. State [**sufficiency of the evidence**] There was substantial evidence to support appellant's first-degree murder conviction. [**search and seizure; standing**] Appellant, who made no showing that he was an "overnight guest" at the victim's home at the time that the search occurred, and who failed to establish that he owned, leased, or maintained control over the victim's residence, lacked standing to challenge the search of the residence. [**luminol testing**] Because adequate follow-up testing was conducted confirming the presence of human blood, the trial court did not err in denying appellant's motion to exclude the results from the luminol testing and the motion to suppress any evidence obtained as a result of the testing. (Chandler, L.; CR 07-96; 10-4-07; Hannah).

Perry v. State [**evidentiary ruling**] Appellant sought to have his mother read a statement that he had written to the victim's family during the sentencing phase of the trial. The trial court correctly excluded this evidence as inadmissible hearsay. [**jury instructions**] The trial court erred by instructing the jury on felony manslaughter as a lesser-included offense of capital-felony murder. (Sims, B.; CR 07-107; 10-4-07; Brown).

Brown v. State [**sufficiency of the evidence**] There was substantial evidence to support appellant's conviction for second-degree sexual assault. [**continuance**] Appellant requested a continuance because one of his witnesses, a state police investigator, was unable to attend the trial. Appellant asserted that the individual was an essential witness because she had investigated the victim's allegations and could testify regarding inconsistencies in the victim's statements. Appellant's motion was denied. The Court of Appeals held that the trial court abused its discretion when it denied appellant's motion. The appeals court noted

that: (1) appellant was diligent in his request for a continuance; (2) the unavailability of the witness was beyond appellant's control; (3) the appellant was willing to have the trial the week before or the week after the scheduled trial date; and (4) the State admitted that it would not be prejudiced by a continuance. The Court of Appeals concluded that the trial court held appellant to a higher standard than is normally required to obtain a continuance and that the trial court denied appellant the opportunity to present relevant, exculpatory, and noncumulative evidence. (Humphrey, M.; CACR 06-1374; 10-24-07; Griffen).

Misenheimer v. State [**habitual-offender status**] Appellant stole a vehicle in Pulaski County. Two days later he was involved in a high-speed chase through Pulaski County and Saline County. Appellant pleaded guilty to five felony charges in Pulaski County stemming from these events and was sentenced. Criminal charges were also filed against the appellant in Saline County. After the proceedings in Pulaski County, the information in Saline County was amended to request that appellant be sentenced as a habitual offender. Appellant asserted that he could not be sentenced as a habitual offender because the events in Pulaski County and Saline County constituted a continuous criminal episode stretching across two counties. The trial court rejected appellant's argument and the Court of Appeals concluded that the trial court made no error in sentencing appellant. Specifically, the appeals court held that appellant's actions were not a continuing course of conduct. The Court explained that appellant's crimes involved multiple acts, victims, and locations. Additionally, the Court noted that at least one of appellant's crimes had occurred on a different day. (Phillips, G.; CACR 07-79; 10-24-07; Marshall).

State v. Moreno [**State's right to appeal**] The State sought review of a circuit court's decision to grant the defendant's motion to suppress. The Supreme Court dismissed the State's appeal because the issue raised involved a review of the circuit court's application of the facts to a particular case rather than a review of the circuit court's interpretation of a criminal rule. Additionally, the Supreme Court concluded that the appeal was not proper because the issues involved did not have widespread ramifications on the interpretation of the state's criminal law. (Cottrell, G.; CR 07-327; 10-25-07; Danielson).

King v. State [**standard of review; circumstantial-evidence conviction**] To sustain a conviction based solely on circumstantial evidence, the circumstances must be consistent with the guilt of the accused and inconsistent with his innocence, and incapable of explanation on any other reasonable hypothesis than that of guilt. When the circumstances are of such a character as to fairly permit an inference consistent with innocence, they cannot be regarded as sufficient to support a conviction. (Fox, T.; CACR 06-1487; 10-31-07; Marshall).

Williams v. State [**sentencing; remand; mandate**] The trial court was required to implement the appellate court's mandate in light of its substituted opinion. Thus, the trial court did not err when it sentenced appellant in accordance with the appeals court's substituted opinion. (Proctor, W.; CACR 07-197; 10-31-07; Gladwin).

CIVIL

Millwood Sanitation v. Mattingly: [**easement/tax sale**] Easement created in favor of lot-holders cannot be levied against and cannot be extinguished by a tax sale. Purchaser of property in a tax sale acquired property subject to bill of assurance. (Wright, J.; CA 07-134; 10-3-07; Hart)

Kennedy Funding v. Shelton: [**foreclosure decree**] Circuit court was authorized to clarify a foreclosure decree more than 90 days after it was filed. The sale had not occurred, and there was an ambiguity in the decree. (Gilbert, M.; CA 06-1035; 10-3-07; Bird)

Bradley Ventures v. Farm Bureau: [**duty to defend**] A criminal plea agreement (from charge of arson to reckless criminal burning) does not preclude litigation in a subsequent civil case of the issue whether the individual intentionally started the fire. The issue of intentional act was not actually litigated to collaterally estop litigation of the issue. It would be unfair to the defendant to apply the offensive use of collateral estoppel when the defendant was not sufficiently motivated to challenge the issue in the earlier context. A guilty plea is not equivalent to a criminal conviction that has been actually litigated. (Piazza, C.; SC 06-1494; 10-4-07; Danielson)

Hyden v. Circuit Court: **[judgment/vacate]** Attorney presented order to judge representing that no response had been filed to a motion and the time had run. The attorney was mistaken and a response had been filed. Court properly granted motion to vacate. Rule 60 allows vacating a judgment for a misrepresentation and this includes an inadvertent misrepresentation involving no moral wrongdoing. (Proctor, W.; SC 06-1328; 10-4-07; Hannah)

Pulaski County v. Arkansas Democrat: **[foia]** Emails were properly released under the FOIA after the court conducted an *in camera* review of their content. Intervenor waived any privacy rights when she emailed a county employee on a county computer. (McGowan, M.; SC07-669; 10-4-07; Gunter)

Potter v. City of Tontitown: **[preliminary injunction]** Court's order incorporated its reasons from the bench which were specific on the issues of likelihood of success on the merits and irreparable harm. (Smith, K.; SC 07-161; 10-4-07; Gunter)

Rymor Builders v. Tanglewood Plumbing: **[bench trial/motion to dismiss]** In deciding motion to dismiss in a bench trial, court should not evaluate the witnesses' credibility. When determining whether the plaintiff has made a prima facie case, credibility is not before the court. Assessing credibility is done by the judge when acting as the fact finder at the conclusion of all proof. (Fox, T.; CA 06-1430; 10-10-07; Marshall)

Baysinger v. Biggers: **[prescriptive easement]** Easement by prescription was not established because there was no evidence that use of the easement was adverse or hostile. (Clawson, C.; CA 07-99; 10-10-07; Pittman)

Winn v. Winn Enterprises: **[valuation of partnership interests]** Court erred in applying a discount to the fair value of the partnership because of a lack of marketability and for being a minority interest. (Anthony, C.; CA 06-1375; 10-10-07; Glover)

Housely v. Hensley: **[discharge of promissory note]** Evidence did not establish the tender of all payments or an accord and satisfaction of the full obligation under the terms of the note. (Clawson, C.; CA 07-111; 10-10-07; Gladwin)

Francis v. Protective Life Ins.: **[notice of appeal/faxed judgment]** The judgment was entered on the day that the faxed copy was filed and not when hard copies were submitted several days later. The fact that the interest rate on the judgment was changed on the hard copies did not change the result because the change was merely a clerical correction to cite the correct interest rate. This change was a *nunc pro tunc*. (Patterson, J.; SC 07-206; 10-11-07; Imber)

Zolliecoffer v. Post: **[election challenge]** Circuit court lacked subject-matter jurisdiction to consider a pre-election challenge filed post-election. (Patterson, J.; SC 07-194; 10-11-07; Hannah)

Stromwall v. Van Hoose: **[illegal exaction/rule 23.2]** Payments by the City of Springdale for membership in the Arkansas Municipal League's Legal Defense Program and payment by the city to settle a lawsuit were not illegal exactions as membership is authorized by statute. Plaintiff could not represent the class of unincorporated associations because she failed to sustain her burden to show that Springdale was an adequate representative of the class. (Smith, K.; SC 06-1111; 10-11-07; Corbin)

Georgia Pacific v. Carter: **[class certification]** Court erred in granting class certification because common issues do not predominate over individual issues. In a class action involving toxic-tort claims, where the injuries occur over time, and the legal issue is creating a private nuisance, it is the interference with the owner's use of the property rather than the tortfeasor's act that is critical. The injury to the individual landowner's predominate. (Gibson, B.; SC 07-101; 10-11-07; Danielson)

Huffman v. Landers Ford: **[conversion]** Court properly granted directed verdict denying submitting issue of punitive damages to the jury because defendant committed conversion under a claim of right based on belief there was a valid contract. Committing conversion does not present a submissible claim for punitive damages without more, such as evidence that the defendant intended to violate plaintiff's rights or to cause her damage. (McGowan, M.; CA07-157; 10-24-07; Gladwin)

Pambianchi v. Howell: **limitations**] Court did not err in determining that limitations period had expired in the absence of a formal motion. Defense was raised in answer and complaint on its face was filed outside of limitations period. (Gibson, B.; CA 06-1239; 10-24-07; Pittman)

Game and Fish Commission v. Mills: **[prohibition]** Suit against Commission could proceed in White County as circuit court was not wholly without jurisdiction to determine that venue was proper in the county. The contention that a writ of prohibition lies because of expiration of the limitations period is not jurisdictional. (Mills, W.; SC 07-227; 10-25-07; Glaze)

IBAC Corp v. Becker: **[preliminary injunction]** Injunction was improperly granted because Rule 65's notice requirements were not met. (Dennis, J.; SC 07-252; 10-25-07; Gunter)

Running M Farms Inc. v. Farm Bureau: **[attorneys fees]** Court properly assessed attorneys fees based on factors set out in *Phelps v. U.S. Credit Life Ins.* It did not base its decision solely on the terms of the contingency fee contract. (Johnson, K.; SC 07-212; 10-25-07; Glaze)

DOMESTIC RELATIONS

John David Rawe, Jr. v. Christa S. Rawe: **[visitation; relocation]** Appellant lives in Arkansas and appellee lives in Australia. The trial court entered a visitation order that the Court of Appeals said was “the best it could [do] in a very unfortunate situation....[T]he parties do not merely live in different cities or different states, but rather they live on different continents.” Although the appellant argued on appeal that his visitation with their son was “minimal to the point of being negligible,” the Court said it afforded him substantial periods of visitation, both in Arkansas and in Australia. The Court also found that the trial court’s decision to allow the appellee to relocate to Australia was not clearly erroneous. The Court was unable to consider other issues the parties raised because of their failure to follow procedural rules in appealing. (Hannah, C.; No. CA06-1063; 10-3-07; Glover)

Bill Baldrige v. Susan L. Baldrige: **[divorce; marital property]** The issue was the validity of a quitclaim deed by appellant’s father dated March 8, 2002, conveying a tract of land to the appellant and appellee as husband and wife. A subsequent deed from appellant’s father conveyed the same property to appellant alone. The trial court found that the property was marital property and divided it equally between the parties. The appellant and his father contended that a deed conveying the property to the husband and wife was never delivered. In affirming the trial court, the Court of Appeals said that a deed is inoperative unless a valid delivery occurs. A presumption of a valid delivery attaches when a deed is recorded, but the presumption is rebuttable. But in a proceeding to cancel a deed, on the theory of non-delivery or otherwise, the proof must be clear, cogent, and convincing. Here, the deed was recorded and appellant failed to meet his burden to rebut the presumption of a valid delivery. Therefore, the trial court’s finding was affirmed that the acreage was subject to equitable division because it was marital property. (Clawson, C.; No. CA06-1453; 10-10-07; Miller)

Lori (Morehouse) Lawson v. James E. Morehouse: **[child support]** Res judicata did not bar modification of the original child support amount in this third appeal of the case. No order for child support is final given that such orders may be modified based upon changed circumstances. However, the law-of-the-case doctrine does apply. In this case, the trial court was limited to an amount of child support previously awarded, since the case had been remanded for the court to supply written findings to support a deviation from the chart. The court erred in further reducing the amount of support it had previously ordered. That issue was not entirely reopened on remand, so the amount of support should not have been reduced an additional amount. The Court of Appeals modified the award to reflect the amount the trial court had previously ordered, which its finding on remand justified. (Lineberger, J.; No. CA06-1386; Robbins)

Jorge L. Hernandez v. Margaret L. Hernandez: **[marital property–unequal division]** On the appellee’s cross-appeal, the Supreme Court affirmed the trial court’s unequal division of stock proceeds because it was clear that the court had considered factors set out in Ark. Code Ann. § 9-12-315 (a)(1)(A)(I)-(ix)(Repl. 2002). A circuit court is not required to list each factor in the order, nor to weigh all factors equally. The specific enumeration of factors within the statute does not preclude a circuit court from considering other relevant factors, where exclusion of other factors would lead to absurd results or deny the intent of the legislature to allow for the equitable division of property. Here, the court equally divided marital property

except for the stock proceeds at issue here. The trial court calculated the gain on the stock and awarded the appellee the amount that was proportionate to the length of the parties' marriage and the appellant's employment with his firm. The Supreme Court affirmed this award of a proportional share to her. The appellant's appeal was dismissed as not timely filed. (Williams, L.; No. SC07-343; 10-25-07; Imber)

PROBATE

Valda Stokan, et al. v. The Estate of Marjorie Cann, et al.: **[intestate succession]** The trial court correctly applied probate code provisions about intestate succession in determining how to distribute an estate worth about \$700,000. The trial court held that under A.C.A. § 28-9-214(6), the decedent's inheriting class consisted of her grandparents, uncles and aunts—all deceased—and their living descendants—including her first cousins and descendants of her deceased first cousins. To determine how much each would receive, the court applied §§ 28-9-204 and -205. The trial court found that the decedent had 16 living first cousins and 7 first cousins who predeceased her but left descendants. The court therefore divided the estate into 23 shares with each surviving first cousin to take per capita and the descendants of each predeceased first cousin to take per stirpes, dividing one share proportionally among them. The Court of Appeals noted that the "modified per stirpes intestacy scheme in Arkansas is unusual." But it is complex, the Court said, and the statutes are clear. The trial court correctly made the per capita distribution of the decedent's estate at the first-cousin level. (Brantley, E.; No. CA06-996; 10-31-07; Marshall)

Bryan K. Smith v. Danny Thomas, et al.: **[guardianship—termination]** The maternal grandparents have had a guardianship of their 4-year-old grandson since his mother's death when he was about five months old. He was born out of wedlock and the appellant biological father never lived with the mother. The father tried to get custody at the time the guardianship was granted. The court found at that time that he was a college student who had had only limited contact with the child and that he lacked the stability necessary to have custody. Within a few months of that order, the appellee grandparents tried to limit the father's visitation and he counter-petitioned to terminate the guardianship. After a hearing, the trial court found, again, that the father could not provide the child with stability because he was still a full-time student and was employed full time. In 2006, the appellant petitioned to terminate the guardianship. He had married, was no longer a student, and was employed full time. He had completed some parenting classes and had visited the child regularly. The child was thriving in the care of his grandparents. The trial court found that, even though the appellant was "qualified" to parent his child, his best interests dictated that he remain with his guardians. The Court of Appeals said that the primary consideration in deciding whether to terminate a guardianship is best interest of a child and that the trial court's decision was not clearly erroneous. Because the case does not involve the initial selection of a guardian, the natural-parent preference set out in the statute is inapplicable. Secondly, case law has equated termination of a guardianship to a change in custody between natural parents. Since the child has thrived in the care of his guardians, it was not clearly erroneous for the trial court to deny termination of the guardianship. The trial court was affirmed. (Collier, L.; No CA06-1343; 10-31-07; Hart)

EIGHTH CIRCUIT

Brockinton v. City of Sherwood: **[civil rights/warrants]** Summary judgment to law enforcement officials in civil rights action claiming Fourth and Fourteenth Amendment violations is affirmed. Negligent failure to conduct adequate investigation is not a violation of due process. District court did not err in determining investigator was entitled to qualified immunity, as actions or inactions did not rise to level of recklessness that shocks the conscience. County sheriff was also properly granted qualified immunity on failure to train or supervise claim and supervisor cannot be held individually liable where no underlying constitutional violation. Official capacity claims failed because the individual liability claims failed. Officer who sought search warrant and arrest warrant could have reasonably believed probable cause existed to support warrants. Plaintiff failed to allege sufficient facts to support conclusion that investigation into ownership interests was reckless and thus releasing boat was not violation of due process. Police chief cannot be held liable under supervisory liability theory. (E.D. Ark.; 06-3293; 10-4-07)