

APPELLATE UPDATE

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ANNOUNCEMENTS

On February 22, the supreme court published for comment a proposal to change the speedy trial rule. The proposal came from the Trial Judges Section and was endorsed by the Criminal Practice Committee. The comment period ends April 1, and the proposal was included in the mailout. Also, the court adopted, effective immediately, three rules changes: 1. Ban questions by jurors in criminal cases; 2. What constitutes the record in an appeal from district court; and 3. Permit the state to recoup the cost of indigent transcripts when a defendant subsequently retains private counsel.

On February 22, the supreme court adopted Administrative Order Number 19 – Access to Court Records. The effective date is July 1, 2007, but the portions requiring redaction of pleadings is not effective until January 1, 2009. A copy of the *per curiam* order was included in the mailout.

Reminder: Submission deadline for administrative plans is July 1, 2007.

CRIMINAL

Jackson v. State [**rape-shield statute**] The trial court correctly excluded testimony related to the victim's prior sexual conduct because such testimony was not relevant to the charges against the appellant and was in violation of the rape-shield statute. The exclusion of testimony under the rape-shield statute did not violate the appellant's constitutional rights. [**closing argument**] The trial court did not err when it refused to grant a mistrial or give the jury an admonishment based on comments made by the prosecutor during closing argument. (Langston, J.; SCCR 06-842; 2-1-07; Corbin).

State v. Smith [**Rule 37**] The defendant, who received less than the maximum sentence for the crime for which she was convicted, failed to establish that she suffered prejudice based upon her attorney's actions during the sentencing phase of the trial. Additionally, the trial court's order failed to include a finding that trial counsel's actions were prejudicial to the defendant. Thus, the trial court erred when it granted the defendant's Rule 37 petition. (Proctor, W.; SCCR 06-253; 2-1-07; Imber).

State v. Burnett [**expungement**] The trial court erred when it entered an order granting the defendant's request to have his criminal record sealed because a judgment and commitment order that imposed a prison sentence upon the defendant was entered, and because the defendant was not sentenced under one of the statutes that specifically provided for expungement of his record. (Simes, L.T.; SCCR 06-581; 2-1-07; Gunter).

Wright v. State [**sufficiency of the evidence; arson**] There was substantial evidence to support the appellant's conviction for arson. [**hearsay testimony; excited-utterance exception**] The trial court properly concluded that testimony from the victim's mother regarding statements made by the victim to her while a traumatic event was occurring was admissible pursuant to the excited-utterance exception to the hearsay rule. The trial court abused its discretion when it permitted the victim's co-workers to testify about statements made to them by the victim. However, the Supreme Court declined to reverse the appellant's conviction based upon the admission of the improper testimony because it concluded that the co-worker's testimony was cumulative in nature and the error was harmless. (Griffin, J.; SCCR 06-774; 2-1-07; Danielson).

Aikens v. State [**Ark. R. Crim. P. 32.1**] Rule 32.1 of the Arkansas Rules of Criminal Procedure provides that the circuit clerk shall provide juror questionnaires to defendants upon request. Neither Rule 32.1 nor the applicable statutes authorize that a fee may be charged for providing the questionnaires to the defendants. Thus, the trial court erred when it denied appellant's request for a refund of a \$3.00 fee charged by a bailiff to the appellant for providing the juror questionnaires to him. (Humphrey, M.; SCCR 06-928; 2-8-07; Brown).

Wyles v. State [**sufficiency of the evidence; second-degree murder**] There was substantial evidence to support appellant's conviction for second-degree murder. Specifically, the jury could infer from the medical evidence and appellant's efforts to conceal his crime that he intended to commit second-degree murder. (Sutterfield, D.; SCCR 06-1031; 2-8-07; Imber).

Eaton v. State [**sufficiency of the evidence; theft by receiving**] There was sufficient evidence for the jury to determine that the appellant knew or had reason to know that the property, which she controlled and sold to a third party, was stolen. Thus, the trial court correctly denied appellant's directed-verdict motion. (Looney, J.; CACR 06-747; 2-14-07; Baker).

Anglin v. State [**sufficiency of the evidence; probation revocation**] Where appellant failed to timely appear for a drug test, was arrested and convicted of a DWI, failed to attend a group meeting, failed to call her supervisor, and failed to appear for an additional drug test, and where a psychological evaluation determined that appellant had the capacity to appreciate the criminality of her conduct and had the capacity to conform her conduct to the requirements of the law, there was sufficient evidence to support the trial court's conclusion that the appellant inexcusably failed to comply with the conditions of her probation. Therefore, the trial court did not err in revoking appellant's probation. (Hannah, R.; CACR 06-580; 2-14-07; Vaught).

Dilday v. State [**res judicata; double jeopardy**] In an earlier proceeding, the appellant was charged with making false insurance claims in violation of Ark. Code Ann. § 5-36-103 and Ark. Code Ann. § 23-66-502. These claims were dismissed. Thereafter, in the present litigation, the appellant was charged with violating Ark. Code Ann. § 5-36-103 for allegedly making false Medicaid claims. The crimes alleged, offenses charged, and the victims involved in the two matters are different. Thus, the trial court correctly concluded that the present prosecution was not precluded by *res judicata* or double jeopardy. (Proctor, W.; SCCR 06-976; 2-15-07; Hannah).

Jeffery Ridenhour 2004 Dodge Pickup VIN# 3D7KU26684G13975 v. State [**sufficiency of the evidence; forfeiture**] The State failed to establish by a preponderance of the evidence that the appellant's truck was being used to transport marijuana "for the purpose of sale or receipt" of the illegal substance. Thus, the trial court erred when it entered an order requiring forfeiture of appellant's vehicle. (Danielson, P.; CA 06-867; 2-28-07; Vaught).

CIVIL

Delt v. Bowers: **[negligence/duty/licensee]** At most, striking union member who was struck by car was a licensee, and union owed her only the duty to refrain from willful and wanton conduct. Summary judgment in favor of union was proper. (Wilkinson, N.; CA 06-759; 2-7-07; Robbins)

Adams v. Atkins: **[boundary]** Evidence supported trial court's finding that boundary was consistent with the surveys. **[attorney fees]** Because two existing surveys were consistent, there was no credible evidence to question the boundary line, and thus no justiciable issue. Therefore, an award of attorney's fees was proper to the prevailing party. (McCain, G.; CA 06-466; 2-7-07; Glover)

CJ Building Corp. v. Tract-10: **[prevailing party]** There can be only one prevailing party in an action for recovery of a money judgment. When both sides "score points," the party with the most points is the winner and entitled to costs. In this case, the party that received 75% of the money at issue is the prevailing party and the award of attorney's fee to it was not error. (Shirron, P.; SC 06-483; 2-8-07; Gunter)

Francis v. Protective Life Ins.: **[insurance application]** Car purchaser who also purchased credit life insurance was denied coverage because of misrepresentation of health in the application. Summary judgment was not in order on claim that insurances company was estopped to deny coverage because car dealer personnel who completed application were aware of purchaser's health problems. The communication between them could not be resolved via summary judgment. (Patterson, J.; CA 06241; 2-14-07; Robbins)

Deck House v. Link: **[consequential damages]** In this case, claim of damages for loss profits must be treated as a claim for consequential damages, and there is no evidence that party tacitly agreed to pay the claimed damages. **[tortious interference]** Claim is not actionable when the expectancy is subject to a contingency. (Epley, A.; CA06-264; 2-14-07; Griffen)

Recinos v. Zelk: **[wrongful death]** Once a personal representative is appointed, heirs at law of the decedent can no longer file a wrongful death action. (Marschewski, J.; SC 06-291; 2-15-07; Hannah)

Jones v. Huckabee: **[removal of criminal history]** Plaintiff's civil rights were not violated by the statutory procedure, which was followed, concerning his expunged criminal history. The statute does not require the records to be physically destroyed. Any misuse of arrest records is a criminal offense and the remedy is to pursue criminal charges. (Proctor, W.; SC 06-620; 2-15-07; Imber)

Malone v. Guynes: **[restrictive covenants]** Covenants did not violate rule against perpetuities or were not enforceable because of prior violations. (Garrett, R.; CA 06-462; 2-21-07; Pittman)

Burton v. Hankins: **[landlocked property/roadway]** County court's denial of roadway pursuant to 27-66-401 et seq., was proper because necessity was not shown. (Clawson, C.; CA06-411; 2-21-07; Miller)

Nash v. Hendricks: **[malpractice]** Summary judgment in favor of law firm was proper because plaintiff could not have prevailed on his underlying claim as it was bared by the *Feres* doctrine (U.S. is not liable under Federal Tort Claims Act for injuries to servicemen arising out of their service). (Moody, J.; SC06-968; 2-22-07; Hannah)

Pest Management v. Langer: **[arbitration]** Controversy over termite inspection and damage to house were subject to contract provision requiring arbitration of disputes. Contract was governed by the Federal Arbitration Act rather than the Arkansas Arbitration Act. (Clawson, C.; SC 06-748; 2-22-06; Hannah)

Miller v. Centerpoint Energy: **[wrongful death]** Wrongful death statute's limitations period of three years from the date of death applied, not the survival statute which is measured from the date of the negligent act giving rise to the injury. (Moody, J.; CA 06-668; 2-28-07; Bird)

DOMESTIC RELATIONS

Carl Crosby v. Carmen Crosby: **[visitation]** Setting visitation rights is a matter that lies within the sound discretion of the trial court. The main consideration is the best interest of the child. The Court of Appeals found that, in this case, the trial court was justified in ordering that the appellant father's two stepsons not be present when he exercised his visitation with his two daughters. The trial court was not obligated to find conclusively whether or not the children were sexually abused. The issue for the court was the nature of the visitation. The trial court had expressed that it was uncertain after an incomplete investigation exactly what had actually happened to the girls. Implicit in this finding was the court's credibility determination. The Court of Appeals affirmed the trial court. (Smith, P.; No. CA06-756; 2-7-07; Hart)

Patricia Suzanne Mathews v. John Steven Mathews: **[child support; UIFSA]** The Court of Appeals originally certified this case to the Supreme Court, which issued an opinion September 21, 2006. Upon appellant's petition for rehearing, the Supreme Court agreed that it erroneously had held that the provisions of UIFSA were inapplicable and it issued another opinion December 7, 2006, vacating its original opinion and remanding the case to the Court of Appeals. Upon remand, the Court of Appeals agreed with appellant's contention that the Supreme Court's holding that UIFSA applies to the case requires reversal of the circuit court's order. Rather than dismissing the case, the Court remanded for a disposition consistent with the opinion that the circuit court had erroneously failed to enforce UIFSA's registration requirements. The disposition rendered appellee's venue argument and appellant's direct appeal moot. (Maggio, M.; No. CA05-1090; 2-14-07; Griffen)

Vincent Ottice Simmons v. Dorothy Clemons Simmons: **[divorce; division of property; postnuptial agreement]** Postnuptial agreements should be analyzed under basic principles of contract law and are subject to close scrutiny to ensure they are fair and equitable, because they result from a confidential relationship between a husband and wife, not from those dealing at arm's length. When analyzed under contract law, the Court of Appeals concluded that the appellant's affidavit was not supported by legal consideration and did not contain mutual obligations. The parties' marriage of twenty-five years was not adequate consideration because past consideration will not support a current promise and is not adequate legal consideration. Regarding mutuality obligations, the Court found that no obligation or real liability was placed upon the appellee to do anything in consideration of appellant's promise to convey an interest in his Florida, non-marital property to her. The Court of Appeals reversed the trial court's decision finding the Florida land marital property and awarding a one-half interest to appellee, and remanded for an order consistent with the Court's opinion. (Vittitow, R.; No. CA06-303; 2-14-07; Bird)

Matthew Kevin Taylor v. Kristi Lynn Taylor: **[alimony; child support; marital property]** The appellant husband alleged that the trial court erred in awarding alimony to the appellee in calculating child support and in finding that the travel trailer in which he lived was marital property. The Supreme Court affirmed the award of alimony. Although appellant argued that alimony should not be awarded to compensate a parent who chooses to home-school her children and to remain unemployed, the Court found that the appellee's home-schooling her children was only one consideration by the trial court. The court also considered her role as at-home mother during the marriage and her lack of marketable skills or meaningful employment history. The Supreme Court also affirmed the circuit court's award of child support. Appellant argued that his income fluctuates from week to week, which is undisputed. The court determined his weekly take-home pay based upon the seven weeks he had been paid at his present job. Although he argued that seven weeks was not sufficient, he was arguing to calculate based upon only four weeks. On the final point, the Court reversed the trial court's finding that the travel trailer which appellant shared with his girlfriend was marital property because no evidence was presented to show that he owned it and appellee testified that she *thought* he owned it, but she did not know if he owned it outright. She said on cross examination that he had not provided her with the registration and had not told her anything about who owned it. No other evidence was presented about the ownership. (Epley, A.; No. SC06-441; 2-15-07; Brown)

Robert Glen Bishop v. Suzanne Bishop: **[divorce; support; property]** The Court of Appeals affirmed the trial court's denial of the appellant's petition for modification of alimony and child support. The court carefully considered the decreased income of the appellant and the needs of the appellee and the parties' child. The court's decision was within its discretion. However, the Court reversed, in part, the trial court's

decision about car payments. In the divorce, the appellee was awarded possession of a car, along with its indebtedness. She failed to make the payments and she eventually abandoned the car in the appellant's yard. Because the car was financed in his name alone, he continued to make the payments and after several months, he moved the court to find the appellee in contempt. He made nineteen payments on the car, seven of those before he moved for contempt. The Court of Appeals found that the trial court correctly concluded that the payments made before appellant filed for contempt were made voluntarily, and that decision was affirmed, but that the court erred in denying him reimbursement for car payments made after he filed the motion for contempt. That part of the order was reversed and remanded for the trial court to calculate the amount of reimbursement due the appellant for his post-motion car payments. (Spears, J.; No. CA05-996; 2-28-07; Marshall)

PROBATE DIVISION

Raymond Franklin Williams, et al. v. Randy Hall, et al.: **[confirmation of judicial sale of land]** Appellant brothers appealed from the trial court's refusal to set aside confirmation of a judicial sale of land which the appellants had inherited from their grandmother and which they held as tenants in common. The sale was ordered to satisfy an attorney's lien for representing only one of the grandsons in a will contest. The Court of Appeals reversed and remanded. The Court held that appellant Ricky Williams was not a party to the attorney-lien action and that he never had notice of the sale. He was denied due process. Actual notice of the proceeding does not validate defective process. The order rendered against Ricky in his absence rendered the order void as to him. The sale of the property to a third party was void as to Ricky and must be set aside. (Shirron, P.; No. CA06-502; 2-28-07; Pittman)

JUVENILE

Long v. Arkansas Dep't of Human Servs. **[TPR]** Court of Appeals reversed and Circuit Court affirmed on termination of parental rights. The Court found that the record revealed that the appellant failed to comply with the courts orders and did not provide the court with any evidence that she had remedied her drug problem that caused her children to be removed from her home. The evidence showed that she failed to address her drug problems, failed to provide meaningful proof of employment, or establish a stable living environment for her children. (Warren, J.; 06-796; 2-22-2007; Glaze)

State v. L.P. **[motion to suppress]** Circuit Court affirmed in suppressing custodial statements of minor. Juvenile was taken into custody after an alleged terroristic threatening and criminal-mischief complaint at school. The state argued that the trial court erred in suppressing the statement because there were no attempts to notify the parents. Under 9-27-317(h)(2) authorities must notify a parent when a child is taken into custody. The parent is then present, if the child invokes his/her right to speak to the parent. If the parent refuses to go, then counsel is appointed to represent the juvenile.

The state's second argument that the trial court erred in ruling that the officers violated the juvenile's Sixth Amendment right to counsel after counsel was appointed and when officers questioned him outside the presence of counsel is not necessary to address because the trial court properly suppressed the statements on the basis that officers made no attempt to contact the juvenile's parents prior to questioning the juvenile. (Brown, T.; 06-990; 2-15-2007; Corbin)

Arkansas Dep't of Human Servs. v. R.C. **[Child Maltreatment Central Registry]** Circuit Court reversed and remanded and Administrative Hearing Judge upheld on placement of name of a foster parent on the Child Maltreatment Central Registry.

There was substantial evidence to support the finding of abuse of a non accidental physical injury when the evidence revealed that a 4 year-old, disabled child had at least eight to ten bruises evidenced by several straight lines some of which were near the child's vaginal area. The bruises were at least 24 hours old. Further, this was not the result of reasonable and moderate physical discipline by the foster paren based on the child's age, the fact that she suffered from cerebral palsy, used a walker for assistance, and she was not potty trained but the "discipline" resulted from the child taking her diaper off and having feces on herself and the floor.

Appellant next argued that the DHHS' organizational structure is unconstitutional, specifically that there is a conflict of interest that the administrative law judge is part of the Office of Chief Counsel and subordinate to the chief counsel, thus the prosecutor and judge come from the same agency. Therefore it violates appellate's due process rights. The Court previously held in *C.C.B. v. Arkansas Dep't of Human Servs.*, ___ Ark. ___ (Jan. 25, 2007), that the appellant has the burden to demonstrate the he/she was denied due process based on the statutory scheme, the scheme itself does not automatically result in such a violation.

Appellant also argued that the standard of proof by preponderance of evidence is too low and it should be clear and convincing evidence. The traditional standard of administrative hearings is proof by preponderance of evidence. Further, appellant has not shown how she has been prejudiced by the standard of proof.

Finally, appellant argued that she could not properly cross-examine a witness because of an improperly deidentified medical report where both the facility and the author of the report were blacked out. However, DHHS provided the name of the author of the report and a month later the author was called as a witness so the appellant had time to perfect her cross-examination. (Kilgore, C; 06-858-2-8-2007; Danielson)

Ivers v. Arkansas Dep't of Human Servs. [TPR] Circuit Court reversed on termination that was fast tracked based on prior sibling termination. Parents of infant had lost prior child due to drug addiction and then a second child was born with drugs in the infant's system. Both parents failed to submit to hair follicle test ordered by the court. The AAL filed motion for no reunification services which ultimately led to TPR.

The Court of Appeals found that there was no evidence that drug treatment would not be successful. The Court relied on *Conn v. Arkansas Dep't of Human Servs.*, 79 Ark. App. 195 (2002) holding that the trial court erred in finding that it was in the child's best interest to find that prior termination was a sufficient ground for TPR. (Note: This case was before the Adoption Safe Families Act passed in November of 1997)(Zimmerman, S.; CA05-11281 and CA06-137; 2-21-2007; Hart)

EIGHTH CIRCUIT

Allen v. Tobacco Superstore : [abuse of process] As plaintiff did not present false testimony or withhold evidence material to the lawsuit, her conduct in the suit did not rise to the level of an abuse of the judicial process. [discrimination] District court did not err in determining the reasons offered for defendant's failure to promote plaintiff to an assistant manager position in January, 2002, were a pretext for race discrimination; similarly, the court did not err in determining the reasons advanced for a November, 2002, promotion decision were also pretextual and that defendant discriminated and retaliated against plaintiff on the basis of her race when she was denied the promotion. [punitive damages] Award of \$75,000 in punitive damages was set aside, as the evidence does not show that defendant acted with malice or reckless indifference. (E.D. Ark.; #05-3414; 2-2-07)

Crossett Paper Mill v. Cumis Ins. Society : [insurance law] Under the policy in question, bodily injury was excluded from coverage if the injury's sole proximate cause is the use of an auto, and the district court did not err, under the facts presented, in determining that the exclusion applied. (W.D. Ark.; #06-2888; 2-8-07)

Smith v. Casali: [indemnity] The district court erred in finding that a sentence contained in a letter from Casali to Smith constituted a clear expression of Casali's intent to indemnify Smith sufficient to create an enforceable indemnity agreement under Arkansas law. (E.D. Ark.; #06-1601; 2-9-07)

Brown v. Simmons: [civil rights] District court did not err in dismissing claim that the defendant superintendent of schools infringed plaintiff's procedural due process rights by denying him a name-clearing hearing after he was stigmatized by defamatory statements made by other school officials. Plaintiff's complaint failed to allege the elements of a "stigma plus" claim as he failed to allege an alteration or extinguishment of a right or legal status. (E.D. Ark; 2-23-07)

Harris v. Brownlee: **[settlement]** District court did not err in finding defendants had not breached a settlement agreement with plaintiff. (E.D. Ark.; #06-2516; 2-26-07)

Wood v. Valley Forge Ins. **[Insurance]** District court did not err in rejecting insurer's claim that the policy was void ab initio because of insured's misrepresentations at the time the policy was issued. At most, the policy was voidable within two years of issuance and since the policy had been in effect for more than two years at the time the insured died, the incontestability clause of the policy precluded any attempt to rescind the contract. The Arkansas Supreme Court would require proximate cause in order for the sickness or disease exclusion to relieve the insurer of liability under an accidental death policy; here, the insured's drug addiction and depression are too remote to be considered the proximate cause of his death from an drug and alcohol overdose. The district court erred in redacting the insured's death certificate to remove the coroner's conclusion that the insured's death was a suicide, but the error was harmless as the insurer was able to produce other evidence that the death should be considered a suicide. Jury instructions requiring insurer to prove that the death was suicide were proper statements of Arkansas law which places that burden on an insurer trying to defeat coverage under a suicide exclusion. Instructions requiring insurer to prove that insured intended his death at the time he took the drugs and alcohol were correct. (E.D. Ark.; # 06-2193; 2-27-06)

U.S. SUPREME COURT

Philip Morris v. Williams: **[Punitive damages]** In this state negligence and deceit lawsuit, a jury found that Williams' death was caused by smoking and awarded \$79.5 million in punitive damages to the personal representative of the estate. The trial court reduced the latter award, but it was restored by the Oregon appellate courts, rejecting Philip Morris' arguments that the trial court should have instructed the jury that it could not punish Philip Morris for injury to persons not before the court.

HELD: A punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties amounts to a taking of property from the defendant without due process. (#05-1256; 2-20-07)