

APPELLATE UPDATE

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ANNOUNCEMENTS

Reminder: ADMINISTRATIVE ORDER NUMBER 14 provides that on or before the first day of February of each year following the year in which the general election is held, the circuit judges of a judicial circuit shall select one of their number by secret ballot to serve as the **administrative judge** for the judicial circuit. In circuits with fewer than ten judges the selection must be unanimous among the judges in the judicial circuit. In circuits with 10 or more judges the selection shall require the approval of at least 75% of the judges. The name of the administrative judge shall be submitted in writing to the Supreme Court. If the judges are unable to agree on a selection, they shall notify the Chief Justice of the Supreme Court in writing and furnish information detailing their efforts to select an administrative judge and the results of their balloting. The Supreme Court shall then select the administrative judge. An administrative judge shall be selected on the basis of his or her administrative skills.

Krystal Taylor has joined the AOC as the staff attorney for the Circuit Court Criminal and Civil Divisions. She will be performing most of the duties which John Millar performed. You will hear more about Krystal later but do not hesitate to contact her for assistance.

CRIMINAL

Mariquez v. State: **[traffic search]** Police lacked reasonable suspicion to detain driver past the end of the traffic stop to conduct a canine sniff of the car. (Medlock, M.; CACR 05-1219; 12-6-06; Hart)

Eastin v. State: **[informant]** Reliability of unknown informant was not established. Informant volunteered the information in an attempt to gain leniency for other charges; and he had not been an informant in the past; police did not corroborate information. **[transcription of statement]** It was error to admit the transcription of defendant's statement because original tape was destroyed. The defendant had no way to determine if the transcription was accurate. (Thomas, J.; CACR 05-1324; 12-6-06; Robbins)

State v. Britt: **[bed-space bond]** Statute only allows for the temporary release of nonviolent offenders and court erred in releasing a violent offender. Court has no authority to ignore statutory language. (Proctor, W.; SCCR 06-857; 12-7-06; Brown)

Hart v. State: **[no knock entry]** Under the facts, including the presence of video camera monitoring the entrances, the no-knock entry was legal. (Fitzhugh, M.; SCCR 06-412; 12-7-06; Hannah)

Springs v. State:**[mitigating factors/form AMCI 2]** Standard form permits the jury to consider other mitigating factors. It is not necessary that an individualized form be submitted in each case. (Fitzhugh, M.; SCCR 06-221; 12-7-06; Corbin)

Tarpley v. State: **[kidnapping]** Defendant kept the doorway blocked after performing terroristic acts and the victim was prevented from summoning assistance; therefore, evidence supported conviction for kidnapping. (Kemp, J.; CACR 06-416; 12-13-06; Pittman)

Brunson v. State: **[orders of protection/confrontation clause]** Sixth amendment right was not violated by court's admission of ex parte orders of protection in murder trial. They were not admitted to show the person was abused but to show that she had in fact sought and obtained the orders thereby indicating the state of the marriage relationship. **[juror]** Juror was properly excused for cause when she could not be rehabilitated from her opposition to judging others or to send someone to the penitentiary. (Jones, B.; SC CR 06-710; 12-14-06; Imber)

Hamilton v. State: **[instructions]** Evidence supported giving both alternatives of the patterned instruction on self defense. **[suppression]** The warrantless search of defendant's home was not justified under the circumstances. The state had more than enough time to obtain a warrant and there were no exigent circumstances. (Henry, D.; CACR 06-257; 12-20-06; Hart)

CIVIL

First National Bank of Lewisville v. Mayberry: **[foreclosure sale/rule 60 clerical error]** Debtor's property was to be sold in separate sales, but the documents confirming the first sale indicated that the bid was for the entire amount of the debt. The debtor enjoined the second sale, and the lender argued that the bid information was a "clerical error." This error by counsel is not a clerical error under Rule 60 and the injunction to bar a second sale was proper. (Anthony, C.; SC 06-760; 12-7-06; Glaze)

Humphries v. Nationwide Ins. **[underinsured coverage]** Passenger was not entitled to coverage. Even though his liability coverage excluded bodily injury to him, the policy defined an underinsured motor vehicle so as not to include any motor vehicle insured under the liability coverage of the policy.(Gunn, M.; CA 06-304; 12-13-06; Hart)

Smith v. Eisen: **[pawn ticket]** Court found that transaction involving the giving of a deed was a loan (not a conveyance) secured by an equitable mortgage and loan was usurious. All usurious payments within five years of the filing of the complaint were within the statute of limitations. An award of attorney's fees was required by ACA 4-57-108. (Fitzhugh, M.; CA 05-1405; 12-13-06; Gladwin)

Wilson v. Weiss: **[special legislation]** Act providing money to city of Bigelow for infrastructure, sewer, and streets is special local legislation in violation of Amendment 14 of the state constitution. (Proctor, W.; SC 06-740; 12-14-06; Brown)

Chapman v. Ford Motor Co **[evidence]** Ford's introduction of reports on sudden acceleration was not in error; they were relevant on the issue of punitive damages and they were not hearsay. Court did not abuse its discretion in various evidence rulings. (Cole, J.; SC05-1004; 12-14-06; Gunter)

Sluder v. Steak and Ale: **[dismissal]** When court dismissed complaint pursuant to Rule 12(b)(6), the dismissal is without prejudice to refile a complaint that stated a cause of action; however, if the plaintiff chooses to appeal the order and loses, it becomes a dismissal with prejudice. (Johnson, K.; SC 06-638; 12-14-06; Corbin)

Gibson v. Direct Insurance Co.: **[insurance/lienholder]** Auto dealer was not entitled to notice of cancellation of insurance because it was not a lender under the statute requiring notice to banks and lending institutions. (Switzer, D.; CA 06-316; 12-20-06; Bird)

Dunaway v. Garland County Fair Assoc.: **[non-profit corp]** Court did not err in denying request for a continuance; evidence supported dismissal of claims attempting to invalidate board's actions. (Williams, L.; CA 06-724; 12-20-06; Bird)

Technology Partners v. Regions Bank:**[limitations]** In suit against bank involving theft of checks by an employee of a business, limitations period began running when each check was negotiated. There was no fraudulent concealment. There were no affirmative acts of concealment and mere continuation of a prior nondisclosure does not constitute affirmative acts. There was no confidential relationship or special circumstance between the bank and its customer giving rise to a duty to speak on the bank's part. (Proctor, W.; CA 06-648; 12-20-06; Crabtree)

DOMESTIC RELATIONS

Tina Bailey v. Mark Bailey: **[child custody; alimony; marital debt]** The appellant mother appealed from the trial court's order of joint custody of the parties' two children, of the court's order of weekly alimony for six months, and of the court's order that the marital debts be divided equally. The Court of Appeals reversed and remanded on all points. The Court found that the trial court had erred in awarding joint custody of the parties' children because they could not cooperate in reaching shared decisions in matters affecting the welfare of their two children. With respect to alimony, the Court of Appeals found that the appellant had no assets at this time upon which to rely for support, so that the trial court had abused its discretion in awarding an insufficient amount of alimony to appellant. Finally, the Court found that the trial court had abused its discretion in dividing the marital debts equally because it was not economically feasible for the appellant to deplete the property awarded to her as half of the marital property in order to pay half of the debt, and appellee has far more ability to earn substantial income than appellant does at this time. Upon remand, the trial court is to reconsider the issues in accordance with the opinion and the equities of the case. (Reynolds, D.; No. CA06-660; 12-6-06; Bird)

Patricia Suzanne Mathews v. John Steven Mathews: **[child support; UIFSA]**; As a result of a petition for rehearing, this opinion was substituted for one handed down September 21, 2006, in a case certified to the Supreme Court by the Court of Appeals as presenting issues of first impression, issues of substantial public interest, and issues that required clarification or development of the law involving the registration of foreign child-support orders. In that September opinion, the Court held that because the parents and child now reside in Arkansas, instead of Missouri where the original child support order was entered, that the provisions of UIFSA were inapplicable. The Court noted that it had relied upon a comment to UIFSA when it was enacted in 1993, rather than to a subsequent amendment in 1997. The Court said that UIFSA does apply to the case and that the jurisdictional basis for the Court of Appeals' certification of the case was an inappropriate basis for certification. Therefore, the Court withdrew its earlier opinion and remanded to the Court of Appeals for its consideration of the issues raised by the parties. (Maggio, M.; No. SC05-1090; 12-7-06; Glaze)

Kevin Wayne Hodge v. Mary Hodge: **[child custody; temporary vs. permanent order of custody]** Custody order from January of 2000 was held to be a permanent order, which required a showing of a material change in circumstances to support a change in custody. The court was instructed to consider the factors on a relocation issue on remand, as well as the best interest of the child. (Story, B.; No. CA06-494; 12-20-06; Vaught)

PROBATE

Allen Henderson v. Dorothy Callis: **[adoption; termination of parental rights]** The appellant putative father appealed from the trial court's order granting the appellee's adoption, claiming that the court erred in terminating his parental rights based solely upon the fact that he was incarcerated. In reversing, the Court

of Appeals found that the record included no showing that the appellant had unreasonably withheld his consent. The Court said that he had no obligation to consent merely because he is incarcerated. The Court outlined the putative father's efforts to locate his son, to obtain custody of his son, and his registration with the Putative Father Registry. (Bell, K.; No. CA06-352; 12-13-06; Griffen)

Kimberly Roberts v. Richard Westover, et al.: **[adoption–jurisdiction]** The Supreme Court held that Arkansas courts had no jurisdiction of an adoption when neither the child to be adopted nor the prospective adoptive parents resided in Arkansas. The fact that the guardian of the child was a resident of Arkansas—when the child did not live with the guardian—was not enough. See Ark. Code Ann. § 9-9-205, regarding jurisdiction in adoption of minors. (McGowan, M.; No. SC06-436; 12-14-06; Glaze)

EIGHTH CIRCUIT

OH Casualty Ins. Co. v. Union Pacific RR: **[insurance coverage]** District court's grant of summary judgment to insurance company holding Union Pacific was not an additional insured because there was no required written contract naming it as an additional insured is reversed. Additional Insured endorsement did not require written contract or agreement be in place on date of occurrence as long as occurrence happens within policy period and requirements were met. Known loss doctrine is inapplicable. District court erred in concluding accident did not arise out of insured's work. (W.D. Ark.; No. 05-3814; 12-4-06)

Quinn etc. v. Owen Federal Bank: **[contract]** District court properly dismissed breach of contract claim between customer and bank because there was no valid contract to authorize direct withdraw of mortgage payment. Negligence claim failed because bank did not owe duty to debit customer account under authorization. Bank's report to credit agency was truthful and thus defamation claim failed. (E.D. Ark.; No. 06-1982; 12-8-06)

Arnold v. Nursing and Rehab. **[employment discrimination]** District court erred in requiring employee to show she was performing job satisfactorily rather than being merely qualified to satisfy prima facie case, but employee did not offer proof decision to terminate for verbal abuse was pretextual and did not show racial animus was behind decision to terminate for misconduct. (E.D. Ark.; No. 05-4270; 12-8-06)

Feeney v. AT&E, Inc. **[rescission]** The court erred in rescinding the parties' contract for purchase of the company as the court's judgment did not restore the status quo. (E.D. Ark.; # 06-1500; 12-29-06)