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CRIMINAL

Brown v. State: [**confrontation clause**] Playing victim's videotaped statement to the police during the trial did not violate the confrontation clause because the victim testified at trial and was available for further questioning. (Hill, V.; CA 05-1409; 8-30-06; Bird)

Mitchem v. State: [**rape**] Evidence supported verdict that defendant took a substantial step toward the commission of the offense of rape, and the evidence also supported a separate charge of kidnapping because greater restraint than that normally incidental to rape was shown. (Hill, V.; CACR 05-735; 9-6-06; Baker)

Killian v. State: [**speedy trial**] Specific issue was not preserved for appellate review because defendant never informed the court of the reasons that he disagreed with periods of exclusion. [mistrial] Motions for mistrial were properly denied for three separate instances involving: unsolicited comment by a prospective juror during voir dire about the defendant being at the jail several times; informant testimony about defendant's criminal acts that were not part of the current proceedings; and comments during closing argument. (Singleton, H.; CACR 05-1214; 9-6-06; Roaf)

Folk v. State: [**withdrawal of no contest plea**] Court had found the defendant guilty; subsequently, at the sentencing hearing, the defendant moved to withdraw his no contest plea. Judge did not abuse his discretion in refusing the request to withdraw the plea and there was no showing of manifest injustice. (Glover, D.; CA CR 05-1302; 9-6-06; Robbins)

Williams v. State: [**juvenile transfer**] Motion to transfer capital murder case to juvenile court was properly denied based on the defendant's culpability and expert testimony of competence. (Thomas, J.; CACR 06-129; 9-13-06; Vaught)

Hicks v. State: [**double jeopardy**] Retrial, following a mistrial because of a hung jury, does not raise jeopardy concerns. (Culpepper, D.; CACR 05-658; 9-20-06; Roaf)

Story v. State: [**revocation**] Court did not err in reopening case and allowing state to introduce evidence related to dates to determine time period of suspended sentence and whether revocation was timely. (Chandler, L.; CACR 06-101; 9-20-06; Bird)

Jester v. State: [**criminal mischief/timber cutting**] Substantial evidence supported amount of restitution awarded by the jury. Criminal mischief statute is constitutional. (Williams, C.; SC 05-1231; 9-1-06; Glaze)

Talbert v. State: [**sexual assault**] Minister's conviction for sexual assault (third degree), using his position of trust over the victim to engage in sexual intercourse, was supported by the evidence and statute is constitutional. (Langston, J.; SC 05-1279; 9-21-06; Brown)

Vidos v. State: [**capital murder**] Defendant's statements to jailer were initiated by the defendant and were properly admissible. Character evidence of the victim was properly excluded because it was speculative. Search on property was proper because there was no reasonable expectation of privacy to open areas and seizures resulted from officer's observations from a lawful vantage point. (Putman, J.; SC 05-898; 9-14-06; Gunter)

Smith v. State: **[capital murder]** Although body was found in Oklahoma, there was no positive evidence that the crime actually occurred outside of Arkansas. Additionally, there was ample evidence that elements of the crime did take place in this jurisdiction. Evidence of prior bad acts by defendant were admissible as they would be indicative of intent, motive, or planning. (Keith, T.; SC Cr 06-77; 9-21-06; Dickey)

Scissom v. State: **[revocation]** Trial court could not amend probation to include incarceration for a year in a regional facility when the statute in effect at the time of the offense limited the period for such incarceration to 120 days. (Patterson, J.; SCCR 06-351; 9-28-06; Gunter)

Ainsworth v. State: **[untimely entry of judgment]** Failure to file a judgment within 30 days after the court's acceptance of a guilty plea does not render void a judgment subsequently entered nunc pro tunc. (Anthony, C.; SCCR 06-299; 9-28-06; Dickey)

Davis v. State: **[warrant/neutral magistrate]** Search warrant was not invalid because it was issued by a judge who had previously recused from hearing cases involving target because person's son had burglarized judge's home. There was no evidence that judge believed that he could not act impartially or of any actual bias. There was in fact no evidence that judge realized who person was. (Hanshaw, L.; SCCR 06-92; 9-28-06; Corbin)

Davis v. State: **[warrant/neutral magistrate]** Warrant was issued by a part-time district judge who was also an assistant attorney general. There was no evidence other than employment to show that judge was not neutral. Warrant does not have to recite a judicial finding as to why a nighttime search was authorized. Rather, the affidavit contained language which gave cause to believe that a nighttime search was reasonable. (Whiteaker, P., L.; SCCR 05-1257; 9-28-06; Corbin)

CIVIL

Verkamp v. Sagely: **[setting aside quiet title decree]** Appellees failed to provide proof that would entitle them to litigate the validity of the 1976 decree. (Patterson, J.; CA 06-85; 8-30-06; Hart)

Nettles v. City of Little Rock: **[planning commission/appeal]** City's Board of Directors' action on a planning issue was final on the date of the vote and not on the date when the minutes were approved. Appeal to circuit court was timely as the affidavit required by District Court Rule 9 was substantially complied with. (Sims, B.; CA 06-82; 9-6-06; Baker)

Bettis v. Bettis: **[stock transfer]** There was not a conflicts of law issue because the laws of Georgia and Arkansas were similar. Evidence supported finding that father made gift of stock to son. Although certificate was not delivered to son, transfer was made on corporate books and dividends had been paid to son over the years. (Fogleman, J.; CA 05-1323; 9-13-06; Pittman)

Morrow Cash Heating v. Jackson: **[accountant malpractice]** Directed verdict finding that limitations period had run was error because fact issue remained whether time began to run when advice was given or when it was accepted and implemented. (Finch, J.; CA 05-1260; 9-13-06; Pittman)

Multi-Craft v. Perico: **[insurance]** Form requiring disclosure of benefits paid, pending, or denied in last 12 months was not ambiguous; therefore, insurer was justified in excluding coverage because information was not disclosed to it. (Lindsay, M.; CA 06-46; 9-13-06; Bird)

Flagstar Bank v. Gibbins: **[forgery]** Evidence supported finding that deed was forged. (Moody, J.; SC 05-911; 9-14-06; Dickey)

Carquest v. General Parts: **[class action/jurisdiction]** Court erred in denying class certification. Court had subject matter jurisdiction over alleged illegal-tying arrangement and claims were not exclusively federal claims under the Sherman Anti-Trust Act. (Wright, J.; SC 06-16; 9-14-06; Brown)

Davis v. Bland: **[attorney malpractice]** Attorney's negligence did not cause damage because plaintiff failed to prove that had appeal been timely filed she would have prevailed on the merits and increased the amount of child support to be awarded. (Smith, K.; SC 05-1238; 9-14-06; Corbin) [Case is further discussed under Domestic Relations section.]

Stilley v. Fort Smith School District: **[recusal/contempt]** There is no requirement that a hearing be held every time a litigant files a motion to recuse the judge. Attorney's rights were not violated in the finding of contempt against him. (Marschewski, J.; SC 05-666; 9-14-06; Hannah)

Fields v. Byrd: **[malpractice]** Plaintiff's claim for malpractice could only have been brought by the trustee in bankruptcy and not by him personally. Consequently, the original filing was void ab initio. When the plaintiff attempted to substitute the trustee, the limitations period had run and there was no relation back to the initial void filing. (Henry, R.; CA 03-711; 9-20-06; Gladwin)

Pro Transportation v. Volvo: **[final appealable order]** Party nonsuited its breach of warranty and negligence claims (they could be refiled) and it appealed remaining claim submitted to the jury. Appeal is not from a final appealable order. (Piazza, C.; CA 05-1047; 9-20-06; Pittman)

Deaver v. Faucon Properties: **[revival]** Action was properly revived after the plaintiff's death. Rule 25, Ar. R. Civ. P., not statutory law, controls the procedure to revive an action. (Clawson, C.; SC 06-320; 9-21-06; Gunter)

Pest Management v. Langer: **[arbitration]** The arbitration provision provides that even the issue whether the dispute is subject to arbitration is to be decided by arbitration; therefore, the applicability of the arbitration clause is not ripe for a judicial decision. (Clawson, C.; CA 05-1387; 9-27-06; Bird)

City of Huntington v. Mikles: **[contract]** City did not breach chief of police's employment contract by taking away privilege of using a city vehicle. The duration of the agreed-upon compensation was not part of the contract; thus, it was subject to prospective alteration. Evidence supported finding of wrongful discharge as retaliation for filing suit against the city. (Marschewski, J.; CA 06-66; -27-06; Robbins)

Hot Spring County Solid Waste Authority v. Hot Spring County: **[use of tax proceeds]** When issue of tax to fund solid waste projects was voted upon, the citizens authorized the county to use excess funds generated from the tax for other county purposes. (Arnold, D.; CA 06-38; 9-27-06; Neal)

DOMESTIC RELATIONS

Deborah Elizabeth Foster v. Charles Ray Foster, Sr.: **[property division - military retirement]** In September, 2002, the trial court granted a divorce, divided property and debts, and granted temporary custody to the appellee, but did not award visitation or child support at that hearing. The court retained jurisdiction to make further orders in the future. In June, 2005, the appellant filed a motion seeking alimony and a portion of appellee's military retirement, to which he became entitled after the decree was filed. The court denied that motion based upon *res judicata*. The Court of Appeals affirmed. The appellant argued that the order was not final because the issue of custody was reserved for later determination. She also claimed that *res judicata* does not apply because the issue of military retirement was not litigated in a prior action between the parties. The Court of Appeals found that the original decree here was a final order. The parties were absolutely divorced, their property was divided in a final manner, and *res judicata* applies because the division of military retirement could have been litigated at the divorce hearing. The reservation of jurisdiction, according to the Court, related to custody or matters conditioned upon changes in circumstances after the decree. The time to appeal matters regarding the divorce or property division began to run after the divorce decree was filed September 6, 2002. The Court did not reach any of the issues raised about her entitlement to military retirement because *res judicata* prevented the Court's reviewing them. (Spears, J.; No. CA05-1343; 9-13-06; Gladwin)

Carmen Gray v. Karl Gray: **[child custody - changed circumstances]** The parties share legal and physical custody of their children. Appellant mother moved out of state after which true shared legal and physical

custody was impossible to maintain. The Court of Appeals said that once one parent relocated outside of the general area and the parents could no longer cooperate in jointly raising the children, it was clear error for the trial court to find that a material change in circumstances did not exist requiring a change of custody. The Court reversed and remanded to award custody based upon the trial court's determination of the best interests of the children. The Court found that *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003) did not apply to this case because of the nature of the custody in the two cases. (Kilgore, C.; CA06-63; 9-13-06; Vaught)

Marandi Shirley Bernal v. James Shirley: **[child custody - changed circumstances - best interests; contempt]** The Court of Appeals said the trial court made no finding of material change in circumstances so as to justify a change in custody and that the record did not support such a finding. The Court also found that a violation of a court's previous directive does not compel a change in custody, although it is a factor to be taken into consideration. To ensure compliance with its orders, a trial court has the power of contempt, which should be used before the more drastic measure of changing custody. Finally, the record did not reflect any discussion of the best interest of the children. Finding that the appellant's contemptuous behavior alone was not a material change in circumstances, the court reversed and remanded the trial court's order changing custody from the appellant to the appellee. (Cook, V; No. CA06-144; 9-13-06; Neal)

Teresa Ann Davis v. Vandell Bland, D/B/A Bland Law Office: **[child support]** Attorney malpractice case in which appellant sued her former attorney for failing to perfect her appeal of a child-support award resulting from her paternity action. The circuit court had determined in the malpractice action that, despite Bland's attorney malpractice, Davis was unable to prove that, but for his negligence, she would have prevailed on appeal. The trial court noted that it could not conclude that the paternity court had abused its discretion or acted thoughtlessly or without due consideration when it entered the order for child support. On appeal of the malpractice action, the Supreme Court said that Davis had to prove the merits of the child-support issue within the context of the attorney-malpractice case. The Supreme Court noted that it agreed with the circuit court's conclusion that the attorney's failure to perfect the appeal constituted legal malpractice, but that Davis still had to prove that the negligence proximately caused Davis's damages. In a good discussion of the application of Administrative Order No. 10 and the Arkansas Child Support Chart, the Court found that the paternity court's order clearly reflected that the court had adhered to the guidelines of Administrative Order No. 10 when deviating from the presumptive amount of child support. Moreover, the Court said, the paternity court had analyzed the needs of the child and had set support at an amount to cover those needs. The Court also said that the law does not require that a child be entitled to a standard of living identical to his father's. Administrative Order No. 10 states that an award of support should consider an "[a]ccustomed standard of living," which the paternity court clearly considered. No abuse of discretion occurred in the court's awarding child support. Therefore, the Supreme Court decided, Davis would not have prevailed on her appeal of the child support award, so the Court affirmed the circuit court in its dismissal of the malpractice action against Bland. (Smith, K.; No. SC05-1238; 9-14-06; Corbin)

James Huey v. Sandra Huey (Sheiron): **[child-support modification]** In this second appeal of a child-support modification case, the Court of Appeals affirmed the trial court's award of child support of \$24/week for a part of 2002, but reversed and remanded for the trial court to enter an award of \$135/week beginning January 2003. The Court found that the trial court had concluded that the appellee mother had experienced a negative income for the first quarter of 2003 and improperly assessed additional expenditures that had already been accounted for in appellee's income report. Based upon a de novo review of appellee's proof of her actual income and expenses, and taking into consideration a concession made during oral arguments about a calculation error, the court figured the presumptive amount of weekly child support according to the Child Support Chart to be \$135. The Court also awarded the appellant custodial father \$1,000 in attorney's fees. (Vittitow, R.; No. CA05-1254; 9-20-06; Griffen)

Randy Tucker v. Regina Tucker, et al.: **[child support]** Appellant father's child-support obligation was increased from \$45/week to \$1,809.92/month, based on a net-worth approach. Appellant appealed the increase and Intervener OCSE cross-appealed the trial court's order to make the modification retroactive to January 19, 2005, instead of October 3, 2003, the date the petition was filed. The Court of Appeals affirmed the increase, finding that the net-worth approach is specifically authorized by Administrative Order Number 10, which requires a court to consider, in addition to a self-employed payor's tax returns, either his capacity to earn or a net-worth analysis based on such factors as the payor's lifestyle and property. The net-worth method should be used only after a finding that a payor's tax returns are unreliable, a finding which the trial

court made in this case. The Court found that the trial court did not abuse its discretion in calculating appellant's income by the net-worth method. The Court reversed on the OCSE's cross-appeal, finding evidence of change in appellant's income, in the form of financial statements from January 2003, that predated the filing of the petition. The Court found that, even if appellant's *full* increase in net worth was not realized on his financial records until January 19, 2005, he presumably enjoyed the benefits of *incremental* increases in his income during the months in which they arose. The Court reversed the decision concerning the effective date of the modification and remanded for entry of an order making the modification retroactive to October 3, 2003. (McCain, G.; No. CA05-1144; 9-20-06; Griffen)

Patricia Suzanne Mathews v. John Steven Mathews: **[child-support modification]** The parties divorced in Missouri. Custody was awarded to the appellant mother and the appellee father was ordered to pay child support. Four years later, the Missouri court increased the amount of child support. The appellant mother subsequently moved to Faulkner County, Arkansas, where she filed a petition to register the Missouri decree, and where she later filed a petition to modify child support. Below and on appeal, the appellee alleged that appellant had failed to register the Missouri decree in conformity with the pertinent Arkansas statute and he alleged that proper venue was Garland County, not Faulkner County. The trial court found that it had jurisdiction of the case, that venue was proper, and that appellant had properly filed the Missouri decree. The trial court found that a significant change in circumstances had occurred to justify increasing the child support. The trial court set child support at \$2,900/month by temporary order, and at \$1,850/month after trial. On appeal, the Supreme Court found that venue was properly in the county of residence of the custodial mother, Faulkner County, citing Ark. Code Ann. 9-12-320 (Repl. 2002). The Court also found that, while jurisdiction of the case was originally in Missouri, all interested parties now live in Arkansas. Under UIFSA, the Court said, once the individual parties and the child leave the issuing state, the continuing, exclusive jurisdiction of the issuing tribunal terminates. As a consequence of the parties' leaving Missouri and now residing in the same state, the case is not an interstate matter and UIFSA does not apply. The forum state, the residence of both parties, should apply local law without regard to the interstate act. Therefore, the applicable law is the Uniform Enforcement of Foreign Judgments Act. Appellant properly filed the Missouri decree in Faulkner County in conformity with that act when she filed her petition to modify the child support order. Therefore, the trial court did not err in denying appellee's motion to dismiss. (Maggio, M.; No. SC05-1090; 9-21-06; Glaze)

Office of Child Support Enforcement v. Grant E. Goff: **[child support]** The trial court found that the payor father had satisfied his child support obligation by providing a house rent-free to the children and their mother for a period of time and by having the children in his custody for a year. The trial court's use of the term "abatement" in his order was improper. The decision was affirmed with a modification in the language to reflect that the payor father "has satisfied the child-support judgment...by providing support through non-conforming child-support payments...." (Hannah, C.; No. CA06-119; 9-27-06; Baker)

PROBATE

Kelsey McEwen Alexander v. Fredrick John McEwen, et al: **[trusts; IRA; contracts]** The trial court properly interpreted the terms of the beneficiary designation in decedent's IRA and determined that appellee was to receive 33% through the decedent's trust. The court properly admitted parol evidence to resolve an ambiguity in the written instrument, and properly considered a letter, which supported that conclusion. The Supreme Court affirmed on direct appeal. On cross-appeal, the Court remanded for reconsideration of compensation awarded to appellant for serving as trustee, but affirmed the trial court's declining to remove the trustee on appellee/cross-appellant's request. (Spears, J.; SC06-57; 9-21-06; Hannah)

DISTRICT COURT

McNabb v. State: **[Ark. Dist. Ct. R. 9]** On an appeal from district court, the circuit court held that (1) the certified copy of the district court docket sheet was not a record of proceedings within the meaning of Rule 9(b) of the District Court Rules and that the filing of the docket sheet with the circuit court was untimely because it did not comply with Rule 9(b); and (2) it had no jurisdiction to hear the appeal from the district court and ordered the case remanded for sentencing. The Supreme Court has recognized that for district courts, the usual record is the docket sheet. But, the court noted, the record of proceedings must reflect all the proceedings, including all filed documents and motions before the district court. Thus, a charging instrument,

if filed with the district court, should be a part of the proceedings. In this case it was not clear whether a charging instrument was filed with the district court. The Supreme Court found that the certified docket sheet should be considered a record of proceedings sufficient to maintain an appeal from district court to circuit court. Because it was undisputed that appellant timely filed the certified docket sheet within thirty days of the date of judgment and that document was a record of proceedings, the circuit court erred in finding that it was without jurisdiction and in remanding the case. Nevertheless, the Supreme Court directed the circuit court to remand to the district court to settle the record with respect to all other documents and motions filed in the district court, if any, for its *de novo* review. Also, the Supreme Court requested their Civil practice Committee to review Rule 9 and their Criminal Practice Committee to review Rule 36. (Maggio, J.; CR 05-1150; 06-29-06 Corbin)

EIGHTH CIRCUIT

Robinson v. White County [**civil rights**] No reasonable police officer would have read Arkansas's careless and imprudent driving statute in a manner to believe probable cause existed to arrest Robinson after a bridge collapsed beneath his truck. Defendant Sheriff Garrett, who ordered Robinson's arrest, violated Robinson's constitutional right to be free from unlawful arrest, and the district court erred in granting the Sheriff qualified immunity on Robinson's individual capacity claim against him. Defendant Parish, the White County Judge, did not have any authority to order Robinson's arrest and was entitled to qualified immunity. (E.D. Ark.; No. 05-3362)

Weems v. Johnson: [**sex offender registration**] Residency restrictions in Arkansas's sex offender registration statute do not infringe on a fundamental right, and the statute is not subject to strict scrutiny. The restrictions rationally advance some legitimate governmental purpose and are constitutional; restrictions are not so punitive in purpose or effect as to negate the state legislature's intent to create a civil, non-punitive regulatory scheme. Procedural due process challenge to risk assessment process rejected, as the statute and implementing guidelines give offenders notice of the risk assessment process and provides them a meaningful opportunity to be heard. (E.D. Ark.; 05-1152; 7-13-06)

Grayson v. Ross: [**civil rights**] Arresting officer was entitled to qualified immunity on claim he was deliberately indifferent to arrestee's medical needs as it would not have been obvious at the time of the arrest that the arrestee had a serious medical need; similarly, intake officer was entitled to qualified immunity as he did not objectively or subjectively know the arrestee was in need of medical care. Plaintiff failed to establish the police department had either policy or custom of denying inmates' serious medical needs. With respect to plaintiff's claims under the Arkansas Civil Rights Act of 1993, the court certifies the following question to the Arkansas Supreme Court: Does the conscious indifference standard announced in *Sheppard v. Washington County*, 962 S.W.2d 779 (Ark. 1998), afford greater protection to pre-trial detainees than the federal deliberate indifference standard? (W.D. Ark.; # 04-3577; 7-19-06)

Design Professionals v. Chicago Ins. Co. [**Insurance**] Insurer was under no statutory duty to provide insured with a notice of termination, and the district court erred in concluding violation of Ark. Code Ann. Sec. 23-79-3063(B) could serve as the basis for a breach of contract claim in the circumstances of this case. Misstatements in letter concerning coverage did not amount to a violation of Rule 43 of the Arkansas Insurance Department. Under Arkansas law, the equitable estoppel doctrine may not be used to enlarge or extend coverage or to create an insurance contract. (E. D. Ark.; # 05-2275; 7-21-06)

Great American Ins. v. O'Quinn: [**legal malpractice**] Legal malpractice suit was barred by Arkansas Code Sec. 16-22-310 which bars malpractice suits by parties without a privity relationship with the attorney. Third party beneficiary exception in the statute did not apply to the facts of this case. (E.D. Ark.; # 05-3622; 7-31-06)

Noe v. Henderson: [**Migratory Bird Treaty Act**] District court did not err in concluding the Act and federal regulations promulgated thereunder do not preempt Arkansas regulations governing activities involving captive-reared mallard ducks. (E. D. Ark.; No. 05-3244; 08/07/06)

Porter v. Knickrehm : [**Civil rights**] Arkansas's procedures governing admission to a human development center were constitutionally adequate. (E.D. Ark.; No. 05-2978; 8-8-06)

Williams v. Bradshaw : [**civil rights**] In civil rights action brought by decedent's mother, rather than all of decedent's heirs, mother lacked standing and district court properly granted dismissal. District court did not abuse its discretion in denying motion to amend, as the original complaint was a nullity and could not serve as a foundation for an amendment. Claims in amendment on their own were barred by the statute of limitations. (W.D. Ark.; # 06-1413; 8-16-06)

United of Omaha Life v. Honea : [**insurance**] In insurer's indemnification action against broker for violations of broker's contract, broker is agent of insured, not insurer, and record does not support breach of contract claim. (E.D. Ark.; # 05-3892; 8-17-06)

Sanderson Farms v. Lloyd's of London: [**shipping contract**] District court's grant of summary judgment to insurer, concluding P & O was not an intended beneficiary of the policy and SMG did not have an insurable interest in the cargo at the time of the seizure by Russian officials, is affirmed. Title passed at time and place of shipment under C.I.F. shipment terms. Claim that CIF shipment was typographical error is not considered because it is raised for the first time on appeal. Parol evidence cannot be considered to show CIF contrary to intent of parties. (W.D. Ark.; # 05-3766; 8-30-06)

Kenyon v. Edwards: [**arrest/excessive force**] Arresting officer was entitled to qualified immunity on claim he used excessive force to secure plaintiff's arrest. The force used in subduing and handcuffing plaintiff was reasonable under the facts and circumstances. Even if the amount of force used was unreasonable, plaintiff failed to show a clearly established right to be free from the amount of force used in the dangerous and charged atmosphere defendant faced in making plaintiff's arrest. (E.D. Ark.; # 05-3487; 9-7-06)

Martin v. E-Z Mart Stores: [**products liability**] District court did not err in granting summary judgment on plaintiff's claim that cigarette lighter which caused his injury was defective Plaintiff failed to prove which of two lighters he purchased actually was in use at the time of his injury and he failed to offer evidence that either lighter was defective and unreasonably dangerous. Plaintiff's own expert stated he could not testify that the lighter was defective at the time of manufacture, so even if plaintiff could identify the particular butane lighter that was used, his proof would still fail on the issue of product defect. (W.D. Ark.; # 05-4175; 9-27-06)