

ANNOUNCEMENTS

On April 5th, the Court published for comment a proposed change to Administrative Order Number 3 addressing when a matter has been submitted to the court for decision. The comment period ends June 1, and a copy of the proposal was included in the weekly mailout.

On April 26th, the Supreme Court amended the speedy trial rule, R. 28.2(a), "The time for shall commence running from the date of arrest or service of summons." A copy of the *per curiam* order was included in the weekly mailout.

On April 26th, the Supreme Court amended Administrative Order Number 10 by issuing revised Child Support Guidelines. A copy of the *per curiam* order was included in the weekly mailout.

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

CRIMINAL

Wright v. State [**sufficiency of the evidence; sexual abuse in the fourth degree**] There was substantial evidence to support the appellant's conviction for sexual abuse in the fourth degree. (Langston, J.; CACR 06-1106; 4-4-07; Glover).

Champlin and Treat v. State [**sufficiency of the evidence; possession of a controlled substance**] Law enforcement officials testified that Champlin was driving a vehicle in which a purse containing methamphetamine was found. Champlin advised law enforcement officials that she "did not realize" that she left the drugs in her purse. Based on the foregoing testimony, there was substantial evidence to support appellant Champlin's conviction for possession of a controlled substance. [**sufficiency of the evidence; possession of pseudoephedrine with intent to manufacture**] There was substantial evidence to support appellant Champlin's conviction for possession of pseudoephedrine with intent to manufacture. Specifically, law enforcement officials testified that appellant Champlin admitted that she purchased several boxes of pseudoephedrine to give to a friend to "cook methamphetamine." [**sufficiency of the evidence; preserving issue for appeal**] The Court of Appeals was precluded from reviewing appellant Treat's challenge to the sufficiency of the evidence because he failed to renew his directed-verdict motion at the close of the evidence. [**probable cause to arrest**] The testimony established that the appellants made three separate pseudoephedrine purchases from two separate stores within a relatively short time span. The Court of Appeals concluded that this behavior provided a basis for a reasonably cautious person to conclude that the appellants were committing a crime. Thus, the trial court correctly found that probable cause existed to justify the appellants' arrest. [**suppression of evidence; Miranda Rights**] Contrary to the appellant's assertions, the law enforcement official testified that he read the *Miranda* warnings to the appellants before they volunteered information regarding their involvement in criminal activities. The trial court is charged with determining witness credibility at a suppression hearing. Thus, it was not error for the trial court to accept the law enforcement official's testimony rather than the appellants' testimony and to deny their motions to suppress. (Proctor, W.; CACR 06-770; 4-4-07; Miller).

Robinson v. State [**sufficiency of the evidence; negligent homicide**] Because there was no evidence that appellant was intoxicated at the time of the automobile accident, the Court of Appeals concluded that there was insufficient evidence to support appellant's conviction for negligent homicide. However, the Court of

Appeals, after considering only the evidence that supported the verdict, concluded that there was sufficient evidence to support a conviction for the lesser-included offense of misdemeanor negligent homicide. (Sims, B.; CACR 06-698; 4-4-07; Gladwin).

Johnson v. State [**suppression of evidence; unlawful arrest**] A warrant was issued for appellant's arrest. The crime with which appellant was charged was a misdemeanor. Pursuant to Rule 7.1 (b) of the Arkansas Rules of Criminal Procedure, a summons rather than a warrant should have been issued for appellant's arrest. Because the State failed to follow the Rules of Criminal Procedure, the appellant's arrest was illegal. Accordingly, the trial court erred in denying appellant's motion to suppress the evidence that was obtained during the unlawful arrest. (Hudson, J.; CACR 06-775; 4-4-07; Robbins).

Harris v. State [**revocation of suspended sentence**] The trial court erroneously based its revocation of appellant's suspended sentences on a violation of a condition that was not a written condition of his suspension. (Burnett, D.; CACR 06-812; 4-4-07; Bird).

Baker v. Norris [**habeas corpus petition**] Because the appellant failed to establish that the judgment and commitment order was facially invalid or that the circuit court lacked jurisdiction, the trial court properly denied appellant's petition for *habeas corpus* relief. (Wyatt, R.; SC 06-830; 4-12-07; Danielson).

State v. Wilmoth [**jurisdiction**] The trial court lacked jurisdiction to consider appellant's motion to dismiss certain criminal charges. (Proctor, W.; SCCR 06-1195; 4-12-07; Glaze).

Hughes v. State [**voir dire**] After the prosecution used a peremptory strike to exclude a venireperson during jury selection, the appellant requested permission to question the venireperson. The appellant implied that the prosecution struck the venireperson based on race. The prosecution responded to the appellant's allegation by explaining that its decision to strike the venireperson was based upon information obtained from the Arkansas Crime Information Center and the National Crime Information Computer which established that the venireperson had a prior conviction for driving while intoxicated. The trial court denied appellant's request to question the venireperson. The Court of Appeals concluded that the prosecution's reason for striking the venireperson was race neutral. Accordingly, the trial court did not abuse its discretion when it denied appellant's request to question the member of the venire. (Piazza, C.; CACR 06-930; 4-25-07; Bird).

White v. State [**sufficiency of the evidence; possession of drug paraphernalia with intent to use while in the course and furtherance of a felony-drug offense**] During a routine traffic stop, law enforcement officials discovered that appellant had cocaine and a crack pipe on his person. Appellant was charged with possession of cocaine and possession of drug paraphernalia with intent to use. Appellant admitted that the pipe belonged to him and that he had used the pipe to smoke cocaine in the past. Cocaine residue was found on the pipe. Based upon the foregoing evidence, the Court of Appeals concluded that "possessing the pipe clearly facilitated, or made it easier, for the appellant to smoke or ingest the cocaine." The Court further concluded that there was substantial evidence to establish a "sufficient nexus" between the appellant's possession of the pipe and the appellant's possession of the cocaine. Thus, the trial court correctly denied appellant's motion to dismiss the charge of possession of drug paraphernalia with intent to use while in the course and furtherance of a felony-drug offense. (Langston, J.; CACR 06-779; 4-25-07; Gladwin).

Austin v. State [**admission of evidence establishing prior conviction**] The appellant was charged with being a violent felon in possession of a firearm. At the beginning of the trial, the State offered a certified copy of the appellant's prior conviction for Class D second-degree battery to meet its burden of proof on the felon-in-possession charge. The appellant objected to admission of the conviction and offered to stipulate to the prior felony conviction. The trial court allowed admission of the certified conviction. Additionally, the trial court permitted the prosecution to discuss the nature of the conviction during opening statements and closing arguments. The Court of Appeals, relying upon precedent from the United States Supreme Court and the Arkansas Supreme Court, explained that "when a defendant in a felon-in-possession-of-a-firearm case offers to stipulate to or admit to the convicted-felon element of that charge, the trial court

is required to accept the stipulation or admission, conditioned by an on-the-record colloquy in which the defendant acknowledges the underlying prior felony conviction and accedes to the stipulation or admission.” Accordingly, the trial court erred when it declined to accept the appellant’s stipulation and when it published the certified conviction to the jury. (Proctor, W.; CACR 06-896; 4-25-07; Griffen).

CIVIL

Trelfa v. Simmons First Bank: **[foreclosure]** Any defects in the service of process were cured or waived by the defendants’ appearance without raising an objection to the process or its service prior to the entry of the decree. A junior mortgagee has no authority to foreclose a prior mortgage by the mere process of making the prior mortgagee a party defendant, but in this case, the senior mortgagee consented to the extinguishment of its mortgage. (Fogleman, J.; CA 06-762; 4-4-07; Vaught)

Nash v. American National Property Co.: **[insurance]** Insurance policy reduction clause allows for an offset of underinsured coverage by any payments made pursuant to the liability coverage. The reduction clause is not contrary to public policy found in Ark Code Ann. § 23-89-209. (Gunn, M.; CA 06-611; 4-4-07; Robbins)

Duffield v. Benton Count Stone Company: **[intervention/appealable order]** The court’s order granting permissive intervention but denying intervention as a matter of right is not immediately appealable. (Finch, J.; SC 06-1329; 4-5-07; Corbin)

McMickle v. Griffin: **[instructions]** Court erred in refusing instructions on violations of statutes as evidence of negligence regarding farm tractors on highways, lighting of tractor, and speed requirement. **[113 photographs]** To be admissible, a proper foundation must be laid for each reconstruction photograph of accident scene taken three years after the incident to the effect that the photo was a fair representation of the scene and was substantially similar to the circumstances at the time of the accident. **[loss of life damages]** Amendment to wrongful death statute allowing recovery of loss of life damages applies retroactively. (Simes, L. and Yates, H.; SC 06-672; 4-4-07; Brown)

2200 Commercial v. Hastings Development: **[summary judgment]** Plaintiff filed for summary judgment; the defendant resisted but did not move for summary judgment. Court erred in *sua sponte* granting summary judgment for the defendant. (Fox, T.; CA 06-313; 4-11-07; Pittman)

Zulpo v. Farm Bureau: **[insurance/ business-pursuits exception]** Parents sued baby-sitter when child died in sitter’s care in sitter’s home. Baby sitter’s insurer did not afford protection claiming that business-pursuits exception applied. Court held that providing full-time child-care services for compensation in one’s home on a regular basis comes within the business-pursuits exclusion in the policy. (Keith, T.; CA 06-787; 4-11-07; Gladwin)

Wal-Mart v. Coughlin: **[corporate officer/fiduciary duty/pleadings]** Court erred in dismissing complaint. Wal-Mart specifically pled defendant breached fiduciary duty by failing to divulge material facts relating to his fraudulent conduct to the corporation prior to executing Retirement and Release Agreement. Corporation’s officer and director had a fiduciary duty to disclose material facts, including his own fraud. A claim for fraudulent inducement was sufficiently pled. A release induced by fraud is invalid. (Finch, J.; SC 06-315; 4-12-07; Brown)

C.A.R. Transportation v. Seay: **[conversion]** Evidence did not support claim for conversion against wife. Merely knowing that a trailer parked at her house contained items that had been removed from property to be foreclosed does not established a claim for conversion. **[equitable lien]** Equitable lien on sales proceeds in possession of defendant imposed to satisfy damages for conversion dated from entry of judgment for conversion and not on the date complaint was filed. (Finch, J.; SC 06-1122; 4-12-07; Corbin)

Remmel Trust v. Regions Financial Corp.: **[arbitration]** Parties agreed to arbitrate the claims and court properly confirmed the arbitration award. (Moody, J.; SC 06-616; 4-12-07; Gunter)

Sloan v. Ark. Rural Medical Practice Loan Scholarship Board: **[notice of appeal]** Clerk's alleged failure to provide copy of court's order was not proper basis for court to extend the time to file notice -- after time had expired. Due diligence by parties was not shown. (Humphrey, M.; SC 06-1477; 4-26-07; Glaze)

Danner v. MBNA Bank: **[arbitration]** Summary judgment was not proper because there is a fact issue as to whether customer entered into an arbitration agreement with the bank. (Thomas, J.; SC 06-1429; 4-26-07; Hannah)

Crowell v. Barker: **[medical malpractice/deposition/affidavit]** Motion to strike corrections to a deposition because the corrections were untimely was properly denied because record did not establish whether notice that transcript was available was given. Affidavit by doctor prior to his death was inadmissible as hearsay. (Burnett, D.; SC 06-985; 4-26-07; Hannah)

Simons v. Marshall: **[immunity/police officer]** Suit against state trooper in his official and personal capacities should have been dismissed because of sovereign immunity with respect to his official capacity and for failure to state a claim with respect to his personal capacity. Woman passenger's complaint arising out of traffic stop and arrest of the driver did not demonstrate malice or conscious violation of the law to avoid the statutory immunity under Ark Code Ann. § 19-10-305. (Simes, L.; SC 06-1087; 4-26-07; Corbin)

City of Fayetteville v. Washington County Assessor: **[millage/TIFS/Amendments 74 and 78]** Assessor was not correct in allocating a larger millage rate to the school district than was passed by the voters. Amendment 78 did not repeal parts of Amendment 74 so that the uniform rate of 25 mills could be applied against the increment value and used to pay the bond indebtedness incurred by a redevelopment district. Redevelopment Act did not amend Amendment 74. Proceeds of one mill from the Amendment 30 tax for libraries cannot be diverted to redevelopment financing. (Smith, K.; SC 06-602; 4-26-07; Brown)

DOMESTIC RELATIONS

Roscoe A. Dykman v. Kathryn D. Dykman: **[divorce; alimony]** The issue on appeal was whether the trial court's award of alimony was proper in light of the appellant husband's advanced age. He is an eighty-five-year old doctor of psychology and appellee is a fifty-two-year-old psychiatrist. The Court of Appeals detailed the facts of the case and noted that an award of alimony is within the discretion of the court and will not be disturbed on appeal. In setting an amount of alimony, the primary factors are the need of one spouse and the ability of the other to pay. Although fault and misconduct are not considered, they will be considered when they relate to need or ability to pay. The award of alimony was affirmed, with the Court noting that it is subject to revision in the event of changed circumstances. (Switzer, D.; No. CA06-22; 3-14-07; Pittman)

Lisa L. Holmes v. Joseph Daniel Holmes: **[child custody]** The Court of Appeals held that the change of custody from the appellant mother to the appellee father was based upon a material change in circumstances. The mother had six different sexual partners in four-and-a-half years, cohabiting with each despite the previous order against extramarital cohabitation by both parents. The evidence showed the appellant's lack of financial, residential, and employment stability and her ill-will toward the appellee and his wife. The Court said that the change of custody was clearly warranted and was not based upon the appellant's sexual orientation, as she alleged. (Landers, M.; No. CA06-110; 4-11-07; Griffen)

Charles Brandt, et al. v. Marsha Willhite: **[grandparent visitation]** Interpretation of Arkansas's grandparent visitation statute resulted in a reversal of the trial court's order that the maternal grandmother, the appellee, be granted visitation with her 11-year-old grandson. In analyzing the statute, the Court found that the grandmother had established a significant and viable relationship with the child. However, she did

not prove that it was in the child's best interest that visitation should occur, nor that he would be harmed by losing the relationship with the appellee grandmother. She failed, according to the Court, to rebut the statutory presumption that the father's decision denying visitation was in the best interest of his child. (Duncan, X.; No. CA06-819; 4-11-07; Marshall)

Jessica Leann Harmon v. Frank Douglas Wells: **[child custody]** In this child custody case, the Court of Appeals addressed the issue of whether a biological father of an out-of-wedlock child whose paternity has been determined must prove a material change in circumstances before he may be awarded custody. The Court analyzed two controlling cases and held that if a visitation order entered at the time one is found to be the father is a temporary order, a change in circumstances need not be proved. If the visitation order is permanent, a change in circumstances must be proved. Here, the order was temporary in nature because it did not resolve the issue of custody. As such, no showing of a change in circumstances was required. The Court also found that the trial court's findings related to the appellee's fitness as a parent and to the best interest of the child were not clearly erroneous. (Sutterfield, D.; No. CA06-913; 4-11-07; Vaught)

IN RE: ADMINISTRATIVE ORDER NO. 10 - Arkansas Child Support Guidelines, Per Curiam Opinion Delivered April 26, 2007. Administrative Order No. 10 was amended and Child Support Charts and the Affidavit of Financial Means were revised. The effective date is May 3, 2007. The Administrative Order is available on the Court's website: courts.state.ar.us.

PROBATE

Darrin Green, M.D., et al. v. Epigmenio Nunez: **[wrongful death/personal representative]** Appellants appealed from a denial of their motion to intervene in a probate matter to determine whether the appellee was a duly appointed personal representative when he filed a wrongful death/survival lawsuit against the two of them, the treating physicians for appellee's son at the time he died. An order was entered appointing Mr. Nunoz as administrator. In that order, the court acknowledged the potential for a lawsuit, dispensed with bond, and approved a legal-representation contract, which the Court of Appeals said clearly clothed Mr. Nunoz with the authority to file the lawsuit. Letters of administration were not issued until about six weeks after the lawsuit was filed, when they were issued *nunc pro tunc* to the date the order was entered. The Court concluded that the trial court did not abuse its discretion in issuing the letters of administration *nunc pro tunc*. The Court distinguished *Filyaw v. Bouton*, 87 Ark. App. 320, 191 S.W.3d 540 (2004), holding that the statement in that case that an order appointing a personal representative was not effective until filed with the clerk and letters of administration were issued, as well as the statement that the personal representative had no standing to file a wrongful-death suit until issuance of the letters, was *obiter dictum* and not binding on the Court. The probate court's denial of the intervention was affirmed. (Capeheart, T.; No. CA06-1072; 3-14-07; Gladwin)

JUVENILE

Vancleave v. Arkansas Dept. of Human Servs. **[Child Maltreatment Registry]** Appellant argued that his name should be removed from the Child Maltreatment Registry because he was found not guilty of the same allegations of sexual abuse in a criminal trial. Double Jeopardy protects against the imposition of multiple criminal punishments for the same offense and does not apply because the registry is a civil remedy.

Appellant argued that *res judicata* applied arguing that both cases had the issue of whether he sexually abused children. As to issue preclusion, the Court found that there were two separate issues with two separate burdens of proof. The criminal proceeding was whether appellant was guilty beyond a reasonable doubt of committing criminal acts of sexual abuse. The Administrative Hearing was to determine if the appellant's name should be left on the registry based on a preponderance of the evidence. Further, DHHS was not a party to the criminal proceeding. Claim preclusion is not a bar since because the Administrative Hearing did not involve the same claim or cause of action and did not involve the same parties. (Gunn, Mary Ann, ; CA 06-1059; 4-4-2007; Heffley)

Vancleave v. Arkansas Dept. of Human Servs. **[UCJEA]** Appellant does not argue with the trial court's initial jurisdiction with the emergency order, but argues that the trial court lacked jurisdiction because it failed to contact the Louisiana court. However, there was no evidence in the record of a custody order or proceeding in Louisiana identified by appellant pursuant to Ark. Code Ann. §9-19-209. There was no

certified copy of a Louisiana custody order ever registered in accord with Ark. Code Ann. §9-19-305. The only evidence were statements by appellant about a case involving the physical abuse of her daughter five years ago and that the case had been closed.

UCCJEA does not require a trial court who has assumed temporary jurisdiction to return custody to a parent where there is no competing custody order and in such absence Ark. Code Ann. §9-19-204(b) applied and Arkansas became the home state of the children.

[TPR] TPR upheld based on best interest and aggravated circumstances. Appellant argued that there was not enough evidence on the adoptability of the children and it was not in their best interest to terminate parental rights. The Court noted its previous holding that the trial court shall consider all the factors relating to best interest and evidence must be by clear and convincing evidence that termination is in the best interest of the child. *McFarland v. Arkansas Dept. of Human Servs.*, 91 Ark. App. 323 (2005). There was no error in the trial court's determination that it was in the children's best interest to terminate parental rights.

Appellant argued that the trial court erred in finding that the children had been subject to aggravated circumstances, specifically that the "trial court found that there was little likelihood that services to the family would result in successful reunification." The Court found no error where the parent engaged in repeated cruelty to her children, including physical abuse and failure to protect from physical abuse from a boy-friend. Appellant was offered repeated assistance in Arkansas and Louisiana yet she failed to avail herself to services, gain employment over a two-year period, complete a GED, or comply with the case plan goals. Her lack of progress demonstrated that despite the offer of services there was little likelihood it would result in reunification with her children. (Finch, J.; CA 06-1300; 4-4-2007; Glover)

Meriweather v. Arkansas Dept. of Human Servs. [TPR] TPR upheld based on finding that other factors arose that demonstrated that return home would be contrary to the child's health, safety and welfare, appellant was incapable of remedying the conditions that caused removal, and appellant subjected the child to aggravated circumstances. The one-month old infant came into care as a result of a spiral fracture. DHHS provided intensive services for 14 months and the appellant could only care for the child for 2-3 hours with her mother. Appellant had limited intellectual and mental capacity and physical disabilities, which impaired her ability to care for her child. The trial court also found that it was in the child's best interest for termination of parental rights and that the child was likely to be adopted. The Court found that the appellant was willing to be the parent her child need, but was unable to be the parent on her on. "Appellants' rights had to yield to the best interest of the child." (Edwards, R.; CA 06-955; 4-11-2007; Robbins)

Busbee v. Arkansas Dept. of Human Servs. [TPR & Ark. Sup. Ct. R. 6-9] The TPR hearing was held on 6/15/2006 and the TPR order was entered on 7/13/2006 after Ark. Sup. Ct. R. 6-9 became effective. DHHS alleged the appellant's record was deficient because he did not include all relevant orders in the record. The Court found that the "rules limit the "entire record" to the transcript of the termination from the which the termination order on appeal arose; any petitions, pleadings, and orders relevant to the termination hearing and all exhibits entered into evidence at the termination hearing. Ark. Sup. Ct. R. 6-9(c)(1)." All orders relied upon by the circuit court are relevant. The burden is on the appellant to file a proper record to demonstrate that the trial court was in error. Appellant's failure to do so resulted in a dismissal of the appeal. (Zimmerman, S.; 06-1089; 4-12-2007; Danielson)

EIGHTH CIRCUIT

Hudson v. Conagra Poultry Co. : [arbitration] District court did not err in finding plaintiffs' tort claim was arbitrable under the parties' agreement; arbitrator did not manifestly disregard the law in finding that res judicata barred plaintiffs' claim of post-termination tortious conduct. (W.D. Ark.; # 06-2596; 4-4-07)

Ruminer v. General Motors Corporation : [products liability] Under Arkansas law, a plaintiff in a products liability action must submit proof of a specific defect, and the district court did not err in granting defendant summary judgment on the ground that plaintiff had offered no evidence regarding a specific defect in his vehicle's occupant protections system. In order to establish liability based on

circumstantial evidence and put the burden of disproving other potential causes on the defendant, plaintiff must first establish that his is the type of case where an accident would not have occurred absent a defect and that the circumstances support an inference of liability against the defendant. District court did not err in finding plaintiff failed to meet this standard. (E.D. Ark.; # 06-2192; 4-19-07)

Grayson v. McAllister [**civil rights**] The court certified the following question to the Arkansas Supreme Court: Does the conscious indifference standard announced in *Shepherd v. Washington County*, 962 S.W. 3d 779 (1998), afford greater protection to pre-trial detainees than the federal deliberate indifference standard? In response, the Arkansas Supreme Court adopted the deliberate indifference standard for pre-trial detainees. In light of that court's decision, the district court's application of the deliberate-indifference standard to plaintiff's claim under the Arkansas Civil Rights Act is affirmed. (W.D. Ark.; # 04-3577; 4-26-07)

U.S. SUPREME COURT

Brewer v. Quarterman: [**mitigating factors**] Petitioner Brewer was convicted of murder committed during the course of a robbery. At sentencing, he introduced mitigating evidence of his mental illness, his father's extensive abuse of him and his mother, and his substance abuse. The trial judge rejected all of Brewer's proposed instructions designed to give effect to the mitigating evidence he presented, instructing the jury instead to answer only two special issues: whether his conduct was committed deliberately and with the reasonable expectation it would result in his victim's death and whether it was probable he would commit future violent acts constituting a continuing threat to society. Ultimately, the jury answered both special issues in the affirmative, and Brewer was sentenced to death.

Held: The Texas capital sentencing statute impermissibly prevented Brewer's jury from giving meaningful consideration and effect to constitutionally relevant mitigating evidence.

(No. 05-11287; 4-25-07);

See also on same issue: *Abdul-Kabir v. Quarterman* (No. 05-11284; 4-25-07).

Scott v. Harris: [**police chase/liability**] Deputy terminated a high-speed pursuit of respondent's car by applying his push bumper to the rear of the vehicle, causing it to leave the road and crash. Respondent was rendered quadriplegic. He filed suit under 42 U. S. C. sec. 1983 alleging the use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. The District Court denied Scott's summary judgment motion, which was based on qualified immunity. The Eleventh Circuit affirmed on interlocutory appeal, concluding, inter alia, that Scott's actions could constitute 'deadly force' under *Tennessee v. Garner*, 471 U. S. 1 ; that the use of such force in this context would violate respondent's constitutional right to be free from excessive force during a seizure; and that a reasonable jury could so find.

Held: Because the car chase respondent initiated posed a substantial and immediate risk of serious physical injury to others, Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. (No. 05-1631; April 30, 2007)

