

APPELLATE UPDATE

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (<http://courts.state.ar.us/opinions/opinions.html>).

PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
DECEMBER, 2005 VOLUME 13, NO. 4

ANNOUNCEMENTS

The 2006 edition of *Arkansas Judicial Elections* has been completed. It is available for viewing on the Judiciary Web Site. If you want a copy, please contact the AOC.

Lake View – On December 15th, the Supreme Court adopted the masters' report in large part and found constitutional infirmities in the current public school funding system. The court's mandate was stayed until December, 2006 to give the General Assembly an opportunity to take corrective action.

CRIMINAL

Friend v. State: The appellant entered a negotiated plea to each of two counts of capital murder and was sentenced to life imprisonment without parole. [**habeas corpus; factual basis for plea**] The allegations (that the trial court made insufficient inquiry as to whether there was a factual basis for the guilty plea) in the appellant's petition did not raise a question of a void or illegal sentence such as could be addressed in a *habeas corpus* proceeding. The circuit court did not err in denying the appellant's petition. (Jones, B.; SCCR 05-03; 12-1-05; *per curiam*)

Utley v. State: [**negligent homicide; criminal negligence**] Although the appellant's loaded garbage truck crossed the center line of the highway and collided with two other vehicles, the State presented insufficient proof that the appellant's actions rose to the level of criminal negligence, and the appellant's conviction was reversed. (Wilson, R.; CACR 04-490; 12-7-05; Griffen)

Diggs v. State: [**sufficiency of the evidence; residential burglary**] There was substantial evidence to support the appellant's conviction for residential burglary. [**enforcement of plea agreement**] The trial court did not err in refusing to enforce a plea agreement which was withdrawn by the prosecutor. The appellant failed to prove that he detrimentally relied on the plea agreement. (Smitherman, T.; CACR 05-392; 12-7-05; Gladwin)

Williams v. State: [**sufficiency of the evidence; theft by receiving**] The evidence was sufficient to allow the jury to find that the appellant knew or had reason to believe that the gun in question was stolen because he was in unexplained possession of the gun that had been discovered missing four months earlier. (Proctor, W.; CACR 05-440; 12-7-05; Bird)

Rice v. State: [**search and seizure; Terry search; “plain feel”**] The officer’s testimony did not permit a reasonable conclusion that the incriminating nature of the object (crack cocaine) in the appellant’s pocket was immediately apparent, and the trial court erred in denying the appellant’s motion to suppress. (Arnold, G.; CACR 05-409; 12-7-05; Pittman)

Bulloch & Dalton v. State: [**search and seizure; warrantless home entry; implied consent**] The State failed to prove that the officers’ warrantless search of the appellants’ home was justified either by exigent circumstances or by an “implied consent” to the search. The trial court erred in denying the appellants’ motion to suppress. (Sims, B.; CACR 05-60; 12-7-05; Baker)

Welch v. State: [**vehicle search; consent**] There was no merit to the appellant’s contention that his consent to search was not voluntary because he agreed only to allow the officer to “look” (as opposed to “search”) inside the vehicle. [**scope of consent**] The circuit court was correct in finding that the officer did not exceed the scope of the consent given by the appellant. [**right to refuse consent**] The requirement that the person giving the consent (for a search of the home) be informed of the right to refuse consent does not extend to consent searches of vehicles. (Yeargan, C.; SCCR 05-266; 12-8-05; Hannah)

CIVIL

Johnson v. Green Acres Nursing Home: [**standing/executor**] Probate Court’s order discharged executor; therefore, the discharged executor had no standing to file a malpractice lawsuit on behalf of the estate. (Burnett, D.; SC 04-1333; 12-1-05; Gunter)

Verdier v. Verdier: [**parental immunity doctrine**] Court rejected request to abandon this doctrine. (Wilkinson, N.; SC 04-1132; 12-1-05; Dickey)

Bashaw v. State: [**public nuisance**] Court’s order properly found club constituted a public nuisance based upon activities that were conducted. Injunction could cover property owner even though he was not a participant in the activities that created the nuisance because he allowed the activities to continue on the premises. (Mazzanti, J.; SC 04-897; 12-1-05; Corbin)

Mitchell v. Lincoln: [**malpractice/summary judgment/expert testimony**] The asserted acts of malpractice are within a lay jury’s comprehension as a matter of common knowledge; therefore, the plaintiff is not obligated to produce expert evidence as to the standard of care in the locality. (Logan, R.; CA 05-360; 12-7-05; Bird)

Campbell v. Carter: [**interference with easement**] Construction of building over septic tank

easement unreasonably interfered with the easement and award of damages was proper. (Storey, W.; CA 05-537; 12-7-05; Gladwin)

Superior Federal Bank v. Jones and Mackey Const. Co.: [**punitive damages**] The degree of defendant's reprehensibility factor in the punitive damages due process analysis may include all of defendant's egregious conduct bearing some nexus to plaintiff's harm. It is not limited only to the defamatory statement that supported the defamation award. Infliction of an economic injury, especially when done intentionally through affirmative acts of misconduct or when the target is financially vulnerable, can warrant a substantial penalty. Ratio of punitive to compensatory award is not unconstitutionally excessive. (Proctor, W.; CA 04-1389; 12-7-05; Hart)

Dwiggins v. Elk Horn Bank; [**bankruptcy stay**] A Section 362 bankruptcy stay applies to proceedings against the debtor. When actions are consolidated, the procedural posture of a suit brought by the debtor is not changed. An action brought by a debtor which the debtor appeals is not stayed by the filing of bankruptcy. (Thomas, J.; SC 04-1374; 12-8-05; Corbin)

Jackson v. Pitts: [**damages/trees**] County extension agent was a qualified expert and his valuation of trees which were destroyed was proper. (Sutterfield, D.; CA 05-463; 12-14-05; Baker)

Helena Chemical Co. v. Caery: [**guaranty**] Guaranty was no longer enforceable because obligation was materially altered when creditor extended credit to different entity (partnership) without getting a new guaranty. (Yates, H.; CA 04-385; 12-14-05; Vaught)

Thomas v. Olson: [**purchase of residence**] Jury's verdict in favor of seller of house on claims of breach of contract, deceit and violation of Deceptive Trade Practices arising out of foundation problems with the house was supported by the evidence. The jury could have based its decision on disclosure of defect, the reduced sales price, or other factors. (Marschewski, J.; SC 05-123; 12-15-05; Dickey)

Eisner v. Farmers Ins. Co. [**third party beneficiary**] Chiropractor was not an intended beneficiary of insurance contract between accident victim and her insurer. A health care provider who provides services pursuant to a personal injury protection provision cannot sue the insurer when the insurer denies benefits upon concluding that the services were not reasonable and necessary. (Clinger, D.; SC 05-365; 12-15-05; Corbin)

Asbury Automotive Center v. Brosh: [**arbitration clause**] The contract arbitration provision was not enforceable because the agreement lacked mutuality of obligation. (Gunn, M.; SC 05-290; 12-15-05; Glaze)

Thompson v. Fischer: [**adverse possession**] Party claiming property by adverse possession must prove all the common law elements. Mere payment of taxes on the property is not enough, especially in light of the lack of evidence that he was claiming the property adversely to the true owner. (Mills, W.; SC 05-127; 12-15-05; Glaze)

Ark. Residential Assisted Living Assoc v. Ark. Health Services Permit Comm. : [**Reg 500M**]

Adoption of 500M was not in conflict with assisted or long-term care statutes. Commission's action was not arbitrary or capricious or an abuse of its discretion. (Humphrey, M.; SC 05-183; 12-15-05; Hannah)

Baxter v. Ins. Co. of North America: [**charitable immunity/direct action**] The decision in *Scamardo v. Jagers*, 356 Ark. 236 (2004) **overruled**. Charitable immunity means immunity from suit – not merely immunity from liability. (Piazza, C.; SC 05-181; 12-15-05; Imber)

DOMESTIC RELATIONS

J. Paul Bridges v. Alison Gaddis Bridges: [**child custody; UCCJEA & PKPA–jurisdiction**] The trial court properly exercised jurisdiction in a modification of child custody proceeding under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnaping Prevention Act (PKPA). According to the Court of Appeals, the trial court proceeded exactly as it should have. After receiving petitions from the appellee mother for registration of her Louisiana judgment and modification of Louisiana visitation orders, the Arkansas court stayed its proceeding and initiated communication with the Louisiana court. The Louisiana court thereafter conducted a hearing and dismissed the case in that state. The evidence before both courts clearly demonstrated that Arkansas was the home state of the children. Also, the trial court did not err in finding that awarding custody to the mother and modifying the visitation of the father were in the best interests of the children. (Duncan, X.; No. CA 04-1105; 12-7-05; Bird)

Office of Child Support Enforcement v. Jason Morgan: [**paternity; dismissal with prejudice**] The first paternity action initiated against the defendant by OCSE on behalf of LaNeza Mooney was dismissed without prejudice, after the results of court-ordered paternity testing showed a probability of 0.00%. A second action by the same plaintiff against the same defendant was dismissed with prejudice. In this case, the Supreme Court adopted the standard of the Supreme Court of Pennsylvania regarding the issue of granting additional paternity tests: The initial paternity test remains viable and binding unless and until the proponent of a second test proves that the first test is not trustworthy. Once the movant proves the first test was defective, the court will weigh the parties' interests to determine whether a subsequent test is justified in light of 4th Amendment privacy interests. The Supreme Court said that under that test in this case, the circuit court did not err in denying the request for an additional paternity test because OCSE presented no evidence that the first paternity test was untrustworthy or defective. However, under *Davis v. OCSE*, 322 Ark. 352 (1995) and *OCSE v. Flowers*, 57 Ark. App. 223 (1997), a dismissal with prejudice in a paternity case is void unless the court first expressly determines that the dismissal is in the best interest of the child. That was not done here. Therefore, the dismissal with prejudice is void and does not bar future proceedings. (Gibson, B.; No. SC 05-7; 12-8-05; Imber)

Nina Lea Alphin (Surber) v. David Paul Alphin: [**custody–modification; visitation**] In this review of a case decided by the Court of Appeals, ___Ark. App. ___, ___S.W.3d ___ (Oct. 13, 2005), the Supreme Court affirmed the change of custody from the mother to the father based upon changed circumstances. The Court found there was sufficient evidence to support the trial

court's transfer of custody, specifically, evidence of changed conditions that the trial court could not have known at the time of the original custody order. (Singleton, H.; SC 05-285; 12-8-05; Glaze)

Deborah G. Cozzens v. Jeffrey A. Cozzens: [**child custody–change of custody–material change in circumstances–standard of proof**] Although the Supreme Court has noted that a more stringent standard applies to custody modifications than to initial custody determinations, this refers to the need to prove such additional factors as changed circumstances since the initial determination, and that the change in circumstances was material to the best interest of the child. These additional circumstances must be proven by a preponderance of the evidence. (Pierce, M.; No. CA 05-273; 12-14-05; Pittman)

PROBATE

Jason V. Burns v. Estate of Noel Cole: [**decedents estates; paternity**] Case involves the interpretation for the first time of Ark. Code Ann. section 28-9-209, which requires that an action be commenced or a claim asserted within 180 days from the death of the decedent; that six conditions be satisfied within 180 days; that a written acknowledgment of paternity must be asserted by the decedent during his lifetime. The trial court found, after a hearing, that the appellant's action in filing a petition to administer the estate within 180 days of decedent's death could not be considered an action or claim against the estate under section 28-9-209(d). The court also found that a card sent from the decedent to appellant's mother was insufficient to establish written acknowledgment of paternity under the Code provision. The Supreme Court found that, at the time appellant filed a petition for appointment of administrator, he had not been declared legally the child of the decedent. He filed a DNA report to the motion, which showed a 99.99% probability of paternity, well beyond the 180-day requirement under the statute. Because he had not been declared a legitimate heir, his initial petition for appointment of administrator of the estate did not constitute a claim against the estate under the statute, according to the Supreme Court. The Court said it follows that he did not comply with the 180-day requirement of the statute. Nor did he satisfy any of the six conditions of the statute that would have allowed him, as an illegitimate child, to inherit from his father. Finally, the Court held that the Christmas card he supplied did not satisfy the statutory requirement for a written acknowledgment by the decedent that the appellant was his natural child, which is also a requirement of the statute. Therefore, the circuit court's decision was affirmed. (Moore, R.; No. SC 04-1343; 12-1-05; Dickey)

Estate of Randall Glen Carpenter, Deceased v. Nita Carpenter: [**decedents estates; alimony**] An alimony obligation for five years arising from the parties' divorce decree terminated upon the payor's death, but the estate was liable for the alimony arrearage that existed at the time of decedent payor's death. (Mazzanti, J.; No. CA 05-403; 12-14-05; Glover)

Janie Neel v. Denise C. Harrison: [**adoption–consent–failure to support**] The Circuit Court granted an adoption to a child's stepmother without the consent of the mother. The trial court had found that the appellant mother's consent was not necessary because the evidence was clear and convincing that she had failed significantly for at least one year to provide for the care and

support of her daughter. In reversing , the Court of Appeals held that the appellee petitioner for adoption “did not prove by clear and convincing evidence that the appellant’s significant failure for at least one year to provide for the care and support of her child was ‘without justification.’” (Isbell, G.; (No. CA 05-248; 12-14-05; Robbins)

Roger and Dana Bridges v. Denise Bush: **[adoption; fraud upon the court]** The appellee and her husband, biological parents of the adopted child, signed consents to adopt and relinquishments of parental rights. Those documents were then taken to their attorney where they were notarized; however, the notary was not present when the consents were signed. They were not executed in conformity with the adoption code. Ark. Code Ann. 9-9-208(a)(1)(Repl. 2002). The Court of Appeals affirmed the trial court’s finding that this constituted a fraud on the court in procuring the decree, and that the adoption was be overturned. (Williams, C.; No. CA 05-352; 12-14-05; Baker)

EIGHTH CIRCUIT

Neal v. Fields **[civil rights]** State licensing board's disclosure that there was investigation concerning plaintiff's nursing license did not violate her property or liberty interests. (E.D. Ark.; #04-3743; 12-1-05)

Hart v. City of Little Rock: **[civil rights]** District court erred in denying City's motion for Judgment as a Matter of Law as the evidence was insufficient to prove the city violated the plaintiff police officers' civil rights when it released their personnel records in response to a subpoena in a criminal case. The evidence was insufficient to show the City recognized and deliberately disregarded the substantial risk of serious harm plaintiffs contend release of the information created, as the evidence showed at most negligence or gross negligence, and the City's action did not rise to the level of subjective deliberate indifference necessary to sustain a substantive due process claim. (E.D. Ark.; #04-2714; 12-22-05)

Lopez, et al. v. James Construction: **[acquired-immunity]** Judgment finding construction company performing work for the state 40% liable for a traffic accident in a construction zone is affirmed. Construction company is not protected from acquired-immunity doctrine based on testimony that company had performed according to plan because jury could find company performed negligently. (E.D. Ark.; CA 04-3926; 12-23-05)