

APPELLATE UPDATE

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ANNOUNCEMENTS

On November 8th, the Supreme Court amended Rules 6.1 and 7.1 of the Rules of Criminal Procedure to clarify that the use of a criminal summons is discretionary. These amendments overturn *Johnson v. State* on that issue.

On December 13th, the Supreme Court announced the establishment of a voluntary pilot program for appellate mediation. A copy of the *per curiam* order was included in the weekly mailout.

CRIMINAL

Bell v. State: **[sufficiency of the evidence]** There was substantial evidence to support appellant's convictions for rape and endangering the welfare of a minor. **[admission of custodial statement]** The evaluation of the credibility of witnesses, who testify at a suppression hearing about the circumstances surrounding an appellant's custodial confession, is for the trial judge. Thus, the trial court was free to accept the testimony of law enforcement officials over the appellant's self-serving testimony and to conclude that appellant was not offered "false promises" in exchange for his confession. Accordingly, the trial court did not err when it admitted appellant's statement. **[pedophile exception to Rule 404 (b)]** The Arkansas Supreme Court's application of the pedophile exception to Rule 404 (b) does not require that the prior act be charged or substantiated before it is admissible. The pedophile exception to Rule 404 (b) requires that there be a sufficient degree of similarity between the prior evidence to be introduced and the sexual conduct for which the defendant is charged. **[excited-utterance exception to the hearsay rule]** The trial court properly admitted the hearsay statements of the victim's brother, who had witnessed the rape, and was describing the crime to his mother as an "excited utterance." **[use of transcript of statement]** The trial court did not err when it permitted the jury to review a transcript of appellant's statement while listening to the audio recording of the statement. The trial court was not required to make a finding as to the accuracy of the transcript. **[admission of**

evidence of prior sex offenses as a juvenile] The circuit court did not abuse its discretion when it allowed the State, during the sentencing phase of appellant's trial, to present evidence that established the facts and circumstances that led to appellant being adjudicated delinquent as a juvenile. (Cole, J.; CR 07-261; 11-1-07; Imber).

Young v. State: **[sufficiency of the evidence]** There was substantial evidence to support appellant's convictions for aggravated robbery, residential burglary, and capital murder. (Erwin, H.; CR 07-378; 11-1-07; Imber).

Hester v. State: **[waiver of jury trial]** The appellant waived his right to a jury trial and then immediately requested that he be permitted to withdraw his waiver. The trial court denied appellant's request. The appellate court noted that: (1) there was no indication that appellant was acting in bad faith when he requested a withdrawal of his waiver, (2) the prosecutor did not object to the appellant's request; and (3) the timing of appellant's request would not have caused a delay in the trial, inconvenience to the witnesses, or prejudice to the State. Thus, the Court of Appeals concluded that the trial court abused its discretion when it denied appellant's request to withdraw his waiver of his right to a jury trial. (Sims, B.; CACR 07-250; 11-7-07; Robbins).

Branning v. State: **[double jeopardy]** The State's dismissal of a case before the trial has begun does not prevent a subsequent prosecution. Accordingly, the State having *nol prossed* certain charges against appellant in district court was free to bring a subsequent prosecution against appellant in circuit court. **[speedy-trial violation]** After excluding the time associated with a continuance requested by the appellant, and the time associated with the State *nol prossing* certain charges in district court and refile in circuit court, the appellant was brought to trial within 347 days of his arrest. Thus, the trial court did not err in denying appellant's motion to dismiss based upon a violation of the speedy-trial rule. (Webb, G.; CR 07-415; 11-8-07; Hannah).

Rackley v. State: **[ineffective assistance of counsel; conflict of interest; challenge on direct appeal]** Because the appellant failed to raise his conflict-of-interest argument to the trial court, the Supreme Court declined to consider the matter on appeal. **[appellate review]** An appellant cannot agree with a trial court's ruling and then attack the ruling on appeal. (Reynolds, D.; CR 06-385; 11-8-07; Glaze).

Epps v. State: **[sufficiency of the evidence; possession of marijuana, second offense]** Proof of prior convictions must be introduced during the punishment phase of a bifurcated trial to protect a defendant from possible prejudice during the guilt phase. Thus, the trial court was correct in permitting the State to introduce proof of appellant's prior conviction during the sentencing phase of his trial. Accordingly, the trial court did not err in denying appellant's motion to dismiss the charge of possession of marijuana, second offense. **[sufficiency of the evidence; felon in possession of a firearm]** To establish a charge for felon in possession of a firearm, the State must prove that the defendant owned or possessed a firearm and that the defendant had a prior felony conviction. Because the State failed to introduce evidence to establish that appellant had a prior felony conviction, the trial court erred when it denied appellant's motion to dismiss the felon-in-possession-of-a-firearm charge. (Sims, B.; CACR 07-218; 11-14-07; Miller).

Hoyle v. State: [**sufficiency of the evidence; battery and manslaughter**] There was substantial evidence to support appellant's battery and manslaughter convictions. [**suppression of evidence**] Where there was probable cause to believe that appellant was under the influence of an illegal substance at the time of a fatal automobile accident, where there was a possibility that the appellant's blood would metabolize the illegal substance before a warrant could be obtained, and where the intrusion caused by the taking of the blood and urine sample was minor and the seriousness of the offense was great, it was not error for the trial court to deny appellant's motion to suppress the results from a blood-alcohol test that may have been obtained without consent or a warrant. [**admission of expert testimony**] After conducting a *Daubert* hearing, establishing that the witness had special training and experience, and determining that the witness' opinions were widely accepted in the scientific community, the trial court properly admitted the expert testimony of an individual, who addressed the issue of the effects of methamphetamine. (Hudson, J.; CR 06-1249; 11-15-07; Corbin).

Harrison v. State: [**Rule 37**] Joint representation is not a *per se* violation of constitutional guarantees of effective assistance of counsel. In her Rule 37 petition, appellant asserted that her attorney was ineffective because he failed to raise certain arguments at a suppression hearing, and because he failed to make a specific directed-verdict motion at the close of the State's case and failed to make a directed-verdict motion at the close of the evidence. The trial court concluded that appellant would not have prevailed on her motion to suppress or her motion for directed verdict. The appellate court agreed. Thus, the trial court was not clearly erroneous in rejecting appellant's claims for relief under Rule 37. (Cottrell, G.; CR 07-109; 11-15-07; Hannah).

Tomboli v. State: [**sufficiency of the evidence; theft by receiving**] There was substantial evidence to support appellant's conviction for theft by receiving. [**Rule 404 (b)**] The trial court erroneously admitted testimony from other victims that established that certain items, which were recovered from the scene of the crime and from appellant's storage, but were not the subject of the pending charges, were stolen. The trial court did not abuse its discretion when it denied appellant's request to introduce evidence that a third party had committed similar crimes because the appellant failed to proffer evidence that would have established that the thefts, which were committed by the third party, were similar in time or method of operation as the theft for which appellant was charged. (Whiteaker, P.; CACR 07-441; 11-28-07; Griffen).

Williams v. State: [**double jeopardy**] Double jeopardy does not attach until a jury is empaneled and sworn. In appellant's case, a jury was selected. However, the jury was never sworn before the trial court declared a mistrial. Thus, the trial court did not err when it denied appellant's motion to dismiss based on double-jeopardy grounds. [**mistrial**] After a jury was selected, but before the appellant's trial began, it was discovered that additional scientific testing was needed. The trial court granted a continuance. After approximately four months, the results from the tests were not available. The trial court finding that: (1) the results from the crime lab were not yet completed; (2) the jury's term of service was nearing an end; and (3) the trial could not be resumed and completed within the jury's term of service ordered a mistrial *sua sponte*. The trial court also observed that the jury could have been tainted during the delay, which would create a possibility that the jury could no longer be fair and impartial during appellant's trial. Based upon

these findings, the Supreme Court concluded that an “overruling necessity” existed and that the trial court did not abuse its discretion when it declared a mistrial. **[speedy trial]** An interlocutory appeal is not the proper procedure for bringing a pretrial speedy-trial issue before the appellate court. The proper method for having the appellate court consider the denial of a motion to dismiss based upon a speedy-trial violation is by petition for a writ of prohibition. (Griffin, J.; CR 07-457; 11-29-07; Brown).

Miller v. State: **[speedy trial]** The act of filing a pretrial motion does not necessarily toll the speedy-trial period. Some delay attributable to the defendant must actually result from the motion. For time to be excludable based upon congestion of the court’s trial docket, a written order or docket entry addressing the items outlined in Ark. R. Crim. P. 28.3 (b) must be entered. (Anthony, C.; CACR 07-501; 12-5-07; Marshall).

Harrison v. State: **[mistrial; juror misconduct]** Appellant requested that the trial court declare a mistrial based upon a conversation between several jurors in which one juror advised the other jurors that she knew the defendant but she failed to disclose that fact to the court. This matter was brought to the court’s attention and the court excused the juror, who knew appellant. After questioning the remaining jurors and receiving assurances that they could continue with the trial and that they could remain impartial, the court denied appellant’s request for a mistrial. The Supreme Court concluded that the trial court did not abuse its discretion when it denied appellant’s request for a mistrial. **[mistrial; discovery violation]** Appellant also requested that a mistrial be declared based upon the State’s failure to provide evidence of a witness’ prior criminal conviction. The court denied appellant’s motion. On appeal, the Supreme Court reminded the bench and bar that “prior convictions shall be disclosed by the prosecution to the defense, upon request.” However, the Court concluded that in this case, the appellant was not prejudiced by the State’s failure to disclose the witness’ prior conviction because the witness testified in prison attire and the appellant was able to question the witness on other criminal convictions. Thus, making the witness’ criminal record known to the jury. Accordingly, the circuit court’s denial of appellant’s motion was affirmed by the Supreme Court. (Humphrey, M.; CR 07-357; 12-6-07; Danielson).

Travis v. State: **[discovery violation]** A circuit court has four options under Rule 19.7 of the Arkansas Rules of Criminal Procedure for remedying a violation of an applicable discovery rule or an order issued pursuant thereto. Specifically, it may: (1) permit discovery; (2) exclude the undisclosed evidence; (3) grant a continuance; or (4) enter an order as the court deems appropriate under the circumstances. **[Batson challenge]** Where the State provided sufficient race-neutral explanations for striking potential jurors, who were African American, the trial court did not err in denying appellant’s *Batson* challenges. **[appellate review]** The Supreme Court will not consider issues on appeal that were not considered and ruled upon by the trial court. (Hill, V.; CR 07-238; 12-6-07; Gunter).

Kelley v. State: **[search and seizure, standing]** Even though appellant was not present in his home during the search, he had a subjective expectation of privacy in the area searched because a search of his home was involved, and society would be prepared to recognize a person’s subjective expectation of privacy in his own home. Thus, the appellant had standing to challenge

the nighttime search of his apartment. **[search and seizure; nighttime search]** A nighttime search of appellant's home was conducted. The affidavit requesting the warrant for the nighttime search contained the conclusory statement that "the objects to be seized were in danger of imminent removal" without providing facts or explanation in support of such a statement. On appeal, the Supreme Court concluded that the affidavit lacked all indicia of reasonable cause to justify a nighttime search. The Supreme Court refused to consider oral statements made to the magistrate by the officer, who requested the warrant, when it was reviewing the affidavit and warrant on appeal because the statements were not recorded. **[Leon good-faith exception]** Having concluded that the affidavit lacked all indicia of reasonable cause to justify a nighttime search, the Court further concluded that under its objective standard, the officers should have known that an affidavit not stating facts that support a nighttime search was in violation of the Court's rules. Thus, the Supreme Court declined to apply the *Leon* good-faith exception to the facts of appellant's case. (Piazza, C.; 12-6-07; Imber).

Solis v. State: **[verification of pleadings]** A verification is a formal declaration made in the presence of an authorized officer, such as a notary public, or under oath but not in the presence of such an officer, whereby one swears to the truth of the statements in the document. Where a statute or rule requires an individual to verify a pleading, it is not sufficient to have his or her attorney sign the document. **[summons]** A summons is a process used to apprise a defendant that a suit is pending against him and to afford him an opportunity to be heard. Having been put on notice of a pending suit, it is the defendant's responsibility to research and comply with all relevant rules and statutes. **[forfeiture proceeding; parties]** It was not an error for the plaintiff to name the property as the defendant in the caption to the suit and to name the property owner as the defendant on the summons in an *in rem* forfeiture proceeding. **[default judgment]** Where the appellant did not have a meritorious defense to the action, the trial court did not abuse its discretion in granting the plaintiff's motion for entry of a default judgment against the appellant. (Clinger, D.; 12-6-07; Brown).

Winston v. State: **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's capital-murder conviction. (Proctor, W.; 12-13-07; Glaze).

Holman v. State: **[admission of evidence]** The trial court did not abuse its discretion when it admitted evidence of a recorded conversation in which the appellant threatened an individual, who was assisting the police in its investigation, because the recorded conversation constituted evidence of appellant's "consciousness of guilt" with respect to the crimes charged. Additionally, the evidence of the recorded conversation was not unduly prejudicial merely because it referenced the fact that appellant was incarcerated. **[404 (b)]** The trial court abused its discretion when it admitted certain items from appellant's residence into evidence because the items related to uncharged criminal conduct and had no independent relevance to the charges pending against appellant. **[privilege against self-incrimination]** A witness may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. The privilege is waived for matters to which the witness testifies, and the scope of the waiver is determined by the scope of relevant cross-examination. Thus, appellant waived his privilege only to those matters to which he testified. Accordingly, the trial court clearly erred when it concluded that, if appellant testified, he waived the privilege as to any

questioning by the State. **[lesser-included offense]** The trial court erred by instructing the jury that felony manslaughter is a lesser-included offense of felony murder. (Sims, B.; 12-13-07; Hannah).

Ellis v. State: **[admission of evidence of other crimes]** The trial court did not err when it admitted evidence that established that appellant's wife had abused her child because such evidence was relevant to a matter about which the victim testified, and because the evidence involved a crime committed by a third party, rather than the appellant, thus the danger of unfair prejudice to the appellant was not great. (Mills, W.; CACR 07-187; 12-19-07; Pittman).

CIVIL

Nabholz Constr. v. Contractors for Public Protection Assoc. **[foia]** For a record to be subject to FOIA, it must be possessed by an entity covered by the act. A private corporation is not such an entity. (Humphrey, M.; SC 07-843; 11-1-07; Danielson)

Teris, LLC v. Gollither: **[class certification]** The court's order is inconsistent as to the definition of the class and needs clarification on remand. (Guthrie, D.; SC 07-155; 11-1-07; Corbin)

Steward v. Statler: **[Act 438 of 2007/standing for wrongful death actions]** Act is to be applied retroactively. Act provides that it is no longer necessary that letters of administration be issued before a personal representative can bring an action so long as an order appointing the administration is entered. (Burnett, D.; SC 06-1306; 11-1-07; Glaze)

Kelley v. USAA Cas. Ins.: **[uninsured motorist]** Act 1043 of 2003 did not overrule the requirement that the uninsured motorist statute requires a plaintiff to prove that the vehicle allegedly causing the damage was uninsured. Furthermore, the law remains that the physical contact requirement in an insurance policy does not violate current Arkansas law and is not contrary to public policy. (Moody, J.; SC 07-367; 11-1-07; Hannah)

Vaccaro Lumber v. Fesperman: **[damages]** The plaintiff's testimony alone was not substantial evidence to support an award ten times the actual damages proved in the case. (Yates, H.; CA 07-233; 11-7-07; Bird)

Hamilton v. Allen: **[summary judgment]** In a medical malpractice action, summary judgment for the defendant doctor was proper because plaintiff failed to produce expert evidence to support her case. (Moody, J.; CA 06-1051; 11-7-07; Bird)

AON Risk Services v. Meadors: **[contract/damages]** Office memorandum constituted a unilateral contract between company and agent with respect to bonus payment plan. Evidence supported jury's award of damages and court erred in reducing it; therefore, on appeal, award is reinstated. (Fox, T.; CA 06-1231; 11-7-07; Vaught)

Arkansas River Educational Services v. Modacure: **[educational cooperative/immunity]** An

educational cooperative qualifies as a governing body of a school district and enjoys the immunity granted by Ark. Code Ann. Section 21-9-301. (Wyatt, R.; SC 07-611; 11-8-07; Danielson)

Riddle v. Udouj: [**breach of warranty of title/limitations**] Cause of action for breach of warranty of title accrues when the grantee is evicted or constructively evicted. Physical encroachments may result in constructive eviction. The fence and shrubbery dispossessed the grantee of part of the land. (Marschewski, J.; SC 07-538; 11-8-07; Brown)

Hubbard v. Natl. Healthcare: [**wrongful death/survival action**] Although letters of administration are not required for standing to file an action, the order of appointment as the administrator must be entered before a complaint is filed. (Erwin, H.; SC 07-423; 11-8-07; Corbin)

Jaramillo v. Adams: [**laches**] Laches barred attempt to nullify deed because of alleged forgery. A reasonable person should have inquired into ownership status of the property and over twenty years passed between time when such an inquiry should have occurred and when action was actually instituted. Plaintiff by that time had lost the right to question the authenticity of the deed. (Sutterfield, D.; CA07-59; 11-14-07; Baker)

Looney v. Raby: [**substitution/relation back**] When writ of execution was issued, it was in the name of the original creditor although loan had been assigned. It was proper to substitute the party to whom the loan had been assigned and the substitution related back to the issuance of the writ. (Fogleman, J.; CA 07-49; 11-14-07; Robbins)

Ryder v. State Farm Ins. [**A.C.A. 23-89-207/subrogation**] The right to reimbursement under section 23-89-207 is a right to subrogation. Even though the statute gives the insurer a statutory lien, the insurer's right of reimbursement is conditioned upon whether the insured is made whole. The made-whole doctrine applies to this statute. (Lindsay, M.; SC 07-448; 11-15-07; Brown)

Willis v. Crumbly: [**elections**] If the original complaint sufficiently states a cause of action to contest an election, then the plaintiff is entitled to offer proof of absentee-ballot irregularities under a "miscellaneous other" category. He was not attempting to amend the complaint with a new cause of action. He was merely making his stated allegations more definite and certain by proof. Amendment 81 removes the requirement that the plaintiff prove how the challenged voters voted. In an election contest, where there is evidence of an illegal ballot, the person who illegally voted can be forced to testify as to whom he voted. (Simes, L.; SC07-572; 11-15-07; Brown)

Follett v. Fitzsimons: [**final order**] Rule 54 certification was not specific so appeal must be dismissed. (Scott, J.; CA 06-1409; 11-28-07; Pittman)

Graftenreed v. Seabaugh: [**instructions**] Court properly instructed jury on transportation costs in seeking medical care and loss of future earning ability. [**digital motion x-rays**] Court did not err in allowing the chiropractor to testify as an expert witness concerning these x-rays. It was within court's discretion that such x-rays were relevant and not unfairly prejudicial. (Yates, H.; CA 06-

1289; 11-28-07; Vaught)

Turner v. Brandt: **[court record]** Although there was no record of a hearing, party is required to reconstruct the record pursuant to Rule 6 of the Rules of Appellate Procedure-Civil. (Conner, J.; CA 07-88; 11-28-07; Bird)

Weiss v. McLemore: **[sovereign immunity]** Ark. Code Ann. Section 24-6-205 constitutes a waiver of immunity to allow state police officers to sue the state in order for an underpaid retiree to seek redress to correct the underpayment. (Brantley, E.; SC 07-12; 11-29-07; Glaze)

Benton County v. Overland Devel. Co. **[summary judgment/mining permit]** Summary judgment was not in order because there were factual issues on whether the mining operation would disturb a civil war battlefield's artifacts and whether there would be significant off-site archeological impact from the red-dirt mining. (Keith, T.; SC 07-613; 11-29-07; Brown)

McGrew v. Farm Bureau Ins. **[summary judgment/ins]** A jury question exists as to whether childcare was the insured's full-time occupation, Once that issue is determined, then the coverage question regarding the business-pursuits exclusion under the homeowners policy can be determined. (Keith, T.; SC 07-421; Imber)

Helena School Dist.. v. Fluker : **[election expense/clerk's overtime]** Court ordered school district to pay circuit clerk's overtime expenses related to special school board election necessitated by a federal court order. Clerk, as an elected official, has statutory duties and a fixed salary, and she is not entitled to overtime payment. (Story, B.; SC 07-642; 11-29-07; Danielson)

Bryant v. Jim Atkinson Tile: **[materialmen lien]** (Whiteaker, P.; CA 07-374; 12-5-07 Heffley)
Bryant v. Candena Contracting, Inc.: **[materialmen lien]** (Whiteaker, P.; CA 07-376; 12-5-07 Gladwin) In order for a subcontractor to acquire a lien on residential real property pursuant to Ark. Code Ann. Section 18-44-101, notice must be provided by the subcontractor (not just the contractor) as set out in section 18-44-115 to the owner prior to the supplying of any materials.

El Paso Production Co. v. Blanchard: **[damage to land by seismic operations]** Although production company had mineral interest, Rule B-42 of the Oil and Gas Commission requires that company get permission of surface estate to enter property to conduct seismic activity. The failure to get such permission constitutes a trespass. This Commission rule is not unconstitutional. **[assignment/license]** The permission in this case to conduct seismic operation was a license and not an assignment. Licensee acquired no interest in the land but only acquired the privilege to occupy the property for the specific purpose of conducting seismic tests. **[unjust enrichment]** Unjust enrichment damages were too speculative. **[tortious interference]** There was no tortious interference with the lease because there was no breach of the lease itself. (Chandler, L.; SC 06-1107; 12-6-07; Gunter)

Chandler v. Ark. Appraiser Licensing Board: **[admin. appeal]** Board's decision to suspend realtor's license was supported by the evidence. (Moody, J.; CA 07-193; 12-12-07; Baker)

Department of HHS v. Storey: **[wrongful termination/judgment/withholding taxes]** Employer was not required to withhold taxes related to back pay and front pay when satisfying a judgment awarded in a wrongful termination case. The judgment does not constitute wages subject to withholding. (Sullivan, T.; SC 07-525; 12-12-07; Corbin)

Landpulaski v. Depart. of Corrections: **[sovereign immunity/quiet title action]** Suit filed to quiet title to lands in which Department of Corrections has an interest is barred by the doctrine of sovereign immunity and the ministerial-act exception is not applicable. (Moody, J.; SC 06-1334; 12-13-07; Gunter)

Rylwell v. Devel. Finance Auth. **[state interest/tax sale]** Ark. Code Ann. Section 22-5-402 applies to property and interest acquired at a tax sale was subject to ADFM mortgage lien. This statute provides that a tax title cannot prevail over the interest of the state. (Gray, A.; SC 07-334; 12-12-07; Imber)

Bolding v. Norsworthy: **[joint account]** Court properly found that account funds belonged in decedent's estate even though sibling had signature rights on the account. There was not substantial evidence indicating that account was established as a joint account with right of survivorship. (Guthrie, D.; CA07-469; 12-19-07; Heffley)

J. Michael Enterprises v. Oliver: **[quiet title]** Legal description in tax deed was sufficient for purposes of color of title. Court properly awarded punitive damages pursuant to Ark. Code Ann. section 5-37-226 because defendant filed quitclaim deed merely to obtain money from plaintiff to clear title to the property. (Finch, J.; CA07-537; 12-19-07; Bird)

Bull Motor Co. v. Murphy: **[joint account]** Car dealer sold vehicle as new even though it had been stolen from its lot and driven by the thief before its recovery. Under Arkansas law, this stolen vehicle was not "new" and dealer breached the contract by representing that it was. The damages awarded for the breach were proper. (Yates, H.; CA07-183; 12-19-07; Pittman)

Stern Agee v. Way: **[arbitration]** Client was not obligated to arbitrate his dispute with broker arising out of situation in which money was improperly placed in an account by client's attorney. Client sought the increase in value in the account after the attorney's conversion. Attorney did not have authority to set up the account; therefore, client could not be bound by agree to arbitrate in account documents signed by the attorney. (Hanshaw, L.; CA06-1410; 12-19-07; Pittman)

DOMESTIC RELATIONS

Victor Lee Bettis v. Wendy Pauline Bettis: **[alimony; child support]**. The trial court found that a substantial change in circumstances justified an increase in the duration and amount of alimony awarded to the appellee. The Court of Appeals affirmed, finding that the evidence supported the appellee's need and the appellant's ability to pay. The Court also affirmed an award of attorney's

fees and expenses in favor of the appellee. (Gray, A.; No. CA06-1417; 11-7-07; Vaught)

Carmen Gray v. Karl Gray: **[child custody]** The trial court found that the appellant mother's move to Missouri constituted a material change in circumstances and that the parties could no longer act as joint custodial parents. The court found that it was in the best interests of the three children to remain in the custody of their father because they have always lived in Little Rock, attended the same school systems, and they do well in school. The court found that the son testified that he wanted to remain with his father and that it was in their best interests to remain together in the same household. The Court of Appeals affirmed the trial court, finding that the facts clearly supported the court's findings on best interests. (Kilgore, C.; No. CA07-584; 12-12-07; Vaught)

Carl Bagley v. Michelle Bagley Williamson: **[child support]** The Court of Appeals found that the trial court erred in finding that the move of the parties' adult son, undisputedly a special needs individual, from the appellee's home into a group home, did not constitute a sufficient change in circumstances to warrant termination of appellant's child support obligation. The evidence showed that the son received an SSI check that covered his group-home housing expenses, transportation, phone bill, and pharmacy expenses. The group home also gave him about \$10 in cash every week or two. He also worked part-time and was paid about \$150 every two weeks, which was banked in his checking account for spending money. The balance in his checking account at the time of the hearing was \$1,300. The Court reversed and remanded with directions to terminate the appellant's child-support obligation. (Medlock, M.; No. CA07-359; 12-12-07; Bird)

Walter John Williams v. Kimberly Williams Ramsey: **[visitation; contempt]** This case represents a post-divorce battle that has been going on for about fourteen years between the parents of the child who is the subject of the dispute. This case resulted from the trial court's finding the appellant father in contempt of prior court orders and the court's ordering a reduction in visitation. The Court of Appeals affirmed the decision with respect to contempt, but reversed and remanded on the reduction in visitation. The Court found that the evidence did not rise to the level to constitute changed circumstances, even though recognizing the father's bad conduct. (Duncan, X.; No. CA07-221; 12-19-07; Glover)

Anthony Hunter and Elaine Hunter v. Timothy M. Haurert: **[name change; visitation]** Appellants are the biological parents of the child in question, J.H., and appellee was Elaine's husband at the time the child was conceived and born. In the parties' divorce decree, the trial court found that the appellee had stood *in loco parentis* to the child and the appellee was awarded visitation and ordered to pay child support and to provide medical insurance. The appellants sought to have the child's surname changed from that of the appellee to that of the appellants and to have appellee's visitation terminated. The trial court denied both requests. The Court of Appeals affirmed the denial of termination of visitation, finding that the appellants' marriage was not a material change in circumstances warranting termination of visitation with the appellee. The Court reversed the trial court's decision regarding name change. The Court found, in looking at the *Huffman* factors on name change, that even though the child has had the name "Haurert" all his life, other factors weigh in favor of the name change. Changing his name will

help preserve and develop his relationship with his biological parents. In addition, it will remove the chance that he may be subjected to difficulties, harassment or embarrassment because he has a different surname from his parents and siblings. Since he is being raised in the home with his biological parents and a younger sibling, all of whom carry the surname “Hunter,” he should be allowed to bear their same name. (Weaver, T.; No. CA07-439; 12-19-07; Miller)

PROBATE

Caroline Louise Langston v. Tony Langston, Administrator, et al.: **[implied revocation of will]**

The appellant and appellee’s decedent were married for 22 years when they divorced. The trial court announced their settlement from the bench on March 20, 2000. On April 7, 2000, the decedent, by a holographic will of one sentence, willed all of his property, real and personal, and money, to the appellant. The divorce decree was entered on May 23, 2000. After the appellant was appointed personal representative, brothers and sisters and their heirs requested that the court appoint an independent personal representative of the estate and declare the will and benefits invalid. The primary issue was the effect of A.C.A. 28-25-109 which provides, in part, that if, after making a will, the testator is divorced, all provisions in the will in favor of the testator’s spouse so divorced are revoked. The trial court found that the holographic will was drafted before the divorce was finalized, and that the statute operated to nullify the will at the time the divorce was entered. The Supreme Court affirmed the trial court. (Story, B.; No. SC06-1365; 11-1-07; Gunter)

Murriel Seymour v. Gladys Biehslich, Executrix: **[will–in terrorem (“no contest”) clause]** What constitutes an *in terrorem*, or “no contest,” clause in a will? The trial court found and the Supreme Court affirmed that the appellant’s actions in filing her own petition for probate of a second will and appointment of personal representative (on a hand-written instrument in her handwriting) constituted a “contest” and excluded distribution to the appellant as an heir of the will that was probated. (Whiteaker, P.; No SC07-63; 11-1-07; Glaze)

Harry McDermott v. Teresa Combs Sharp, et al.: **[guardianship]** The probate court quashed a deposition of Omer Combs, one of three appellees, and ordered appellant attorney to pay attorney’s fees to Omer Albert Combs’s estate, a second appellee. The deposition was taken despite the probate court’s order to quash. Therefore, the appellant’s issue that the order to quash was erroneous was moot, so the Court did not consider the issue on appeal. Secondly, the appellant argued error in connection with a contempt motion that he contended Mr. Combs’s attorney ad litem filed. However, the motion was a motion to quash deposition and for Rule 11 sanctions, along with a motion that appellant cease and desist from contacting Mr. Combs. No motion for contempt was filed. Because he argued contempt on appeal, but failed to argue the Rule 11 sanctions, the Court declined to “research or develop a Rule 11 argument for Appellant.” The trial court was affirmed. (Lineberger, J.; No. SC07-528; 11-8-07; Gunter)

Connie Bell v. Merrie Hutchins, ITMO Estate of Alvin R. Hutchins, Deceased:

[will–procurement, testamentary capacity, and undue influence] The trial court found that the decedent’s last will was invalid and set aside the order admitting it to probate. The

appellant/proponent contended that the circuit court erred in finding that she procured the will and that she had unduly influenced the decedent to make the will. The Court of Appeals reversed the court's finding of procurement and remanded for proceedings consistent with its opinion. The Court held that the trial court erred in finding that appellant procured the will and in shifting the burden of proof to her. The Court also held that the trial court made a proper finding that the decedent had testamentary capacity. The Court said that once testamentary capacity is established, the question of whether the testator was unduly influenced must be answered. Here, because the trial court had erroneously shifted the burden of proof to the appellant/proponent, the Court reversed and remanded for the trial court to act consistently with the opinion. (Guthrie, D.; No. CA07-78; 11-14-07; Gladwin)

Laurie Martin v. Simmons First Trust Company: **[probate–venue]** In this case of first impression, the Supreme Court held that Union County was the proper venue for the probate of the decedent's estate, despite the appellant's contention that proper venue was Ventura County, California, where the decedent was residing when she died. The Court noted that the principal administration of a decedent's estate is in the state where the decedent was domiciled, regardless of where the decedent died. In this case, the decedent was found mentally incapacitated in a guardianship proceeding in Union County, Arkansas. Her daughter, the appellant, thereafter moved her to a nursing home in California. The Court said no evidence suggested that the decedent regained competency and was capable of forming the intent to establish a domicile in California and to abandon her domicile in Arkansas. The trial court's finding that Union County was the proper venue for the probate of the estate was affirmed. (Guthrie, D.; No. SC 07-93; 11-15-07; Hannah)

Renda Kidwell v. Margie Rhew: **[trusts; pretermitted-heir statute]** The Supreme Court affirmed the trial court's finding that the pretermitted-heir statute, Ark. Code Ann. Sec. 28-39-407(b), applies only to wills and not to trusts created during the life of the settlor. (Hannah, C.; No. SC 07-886; 11-15-07; Glaze)

Wael Abdin v. Delores Abden: **[probate; fees and expenses]** The appellant requested an award of expenses and fees for attempting to probate a lost will of his brother, which was the subject of a prior appeal. The trial court dismissed his petition, finding that the appellant lacked the capacity to recover fees and expenses under the pertinent provision, Ark. Code Ann. 28-48-109(a)(Repl. 2004), because he was neither the executor nor the administrator with the will annexed, the two classes of litigants allowed to recover under the statute. The Court of Appeals affirmed, finding that the lost will did not name an executor, which the appellant conceded. He was also not an administrator with the will annexed, because the will had never been deemed valid and duly admitted to probate, a prerequisite to such an appointment by the court. (Gray, A.; No. CA07-140; 12-19-07; Glover)

JUVENILE

Arkansas Dep't of Human Servs. v. C.M. **[administrative appeal attorney's fees]** Circuit Court affirmed in ordering DHS to pay for attorney fees to represent a child in DHS custody before a

child maltreatment administrative hearing. DHS argued that the court did not have subject matter jurisdiction and that the state has sovereign immunity. C.M. was entitled to an attorney pursuant to A.C.A. 12-15-213. The state waived sovereign immunity where assistance was needed to pay an attorney to represent a child in the departments's custody in an unrelated adjudication. (Zimmerman, S.; CA06-434;12-5-2007)

DISTRICT COURT

Honeycutt vs. Foster: [**Mandamus**] In this mandamus case, the appeal was dismissed as it was moot. Appellant's petition for writ of mandamus asked the circuit court to compel the District Court to rule on motions for transfer filed in appellant's case. The circuit court denied the petition because it found that the District Court had acted in the matter such that a writ of mandamus would not be proper. The District Court issued an order finding appellant's motion to transfer on the issue of jurisdiction to be without merit, but transferred the case to circuit court under an abundance of caution because that court had concurrent jurisdiction. The Supreme Court held that because the District Court had acted in the matter, appellant had received the relief requested, and both issues raised on appeal were moot. The Supreme Court also found that neither of the two exceptions to the mootness doctrine applied in this case. Appellant conceded that the District Court had ruled on the motions; however appellant claimed that what he had to do to force the District Court to do its duty was unconscionable. Appellant concluded that this situation could be repeated and that the denial of requested relief "would send the message that lower courts can sit on motions until just before they are compelled to do so would do little to maintaining respect for the judiciary." It was held that this case clearly did not fall in the purview of case recognized by the Supreme Court as capable of repetition yet evade review. Neither did the case involve an issue of substantial public interest that, if addressed, would prevent future litigation. The Supreme Court does not issue advisory opinions. Appeal dismissed. (Landers, J.; 07-655 11-29-07; Corbin)

EIGHTH CIRCUIT

Scenic Holding v. New Bd. of Trustees : [**agency**] Under Arkansas law, the burden of proving an agency relationship lies with the party asserting its existence, and the court did not err in placing on plaintiff the burden of proving the authority of the board to bind the church. (E.D. Ark.; # 06-2934; 11-6-07)

Transcontinental Ins. Com v. Rainwater Construction: [**settlement agreement**] Under Arkansas law, settlement agreements are treated as contracts. Under the circumstances, the parties' settlement agreement unambiguously and sufficiently provided for a release of defendant's attorneys' fees claims. Because defendant released its claim, the district court's award of attorneys' fees is vacated. (E.D. Ark.; # 07-1011; 12-5-07)

Guardian Fiberglass v. Whit Davis Lumber Co.: **[contracts]** In refusing to enforce the provisions of a restrictive covenant, the district court correctly applied Michigan law in concluding that plaintiff had failed to establish that the covenant protected a legitimate business interest. (E.D. Ark.; No: 06-3896; 12-12-07)