

APPELLATE UPDATE

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PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
FEBRUARY, 2008

VOLUME 15, NO. 6

ANNOUNCEMENTS

On February 21st, the Supreme Court amended Administrative Order Number 4 and various rules related to court reporters, the record, and exhibits. A copy of the *per curiam* order was included in the mailout.

On February 28th, the Supreme Court amended the Procedures governing the Arkansas Lawyers Assistance Program.

See Foster v. Hill, February 7, 2008, for a discussion of issues related to Administrative Order Number 14 and concurrent jurisdiction among the divisions of a circuit court. Circuit Court, Division 3 appointed special prosecutors to look into the shooting death of a child by the police. Subsequently, Division 6 called a special grand jury to investigate the shooting. Division 6 was without authority to call a special grand jury because Division 3 had exclusive jurisdiction over matters pertaining to the investigation. Where concurrent jurisdiction is vested in two tribunals, the first exercising jurisdiction acquires control to the exclusion of and without interference of others. (*Hill*, V.; SC 07-1235; 2-7-08; Hannah)

CRIMINAL

Jones v. State: **[suppression of evidence]** While investigating a complaint, a law-enforcement official discovered marijuana and drug paraphernalia in appellant's car. The contraband was discovered after the law-enforcement official asked appellant whether there was "anything illegal inside the car." Although appellant readily identified the locations of the contraband in the vehicle, she later argued that the evidence was wrongfully obtained and that it should have been suppressed. The Court of Appeals rejected appellant's argument and determined that the law-enforcement official was acting pursuant to Rule 2.2 of the Arkansas Rules of Criminal Procedure when he inquired as to whether there were illegal items in appellant's car. The Appeals Court further concluded that the encounter did not rise to the level of a seizure of the appellant. Thus, the trial court did not err when it denied appellant's request to suppress the

evidence. (Proctor, W.; CACR 07-352; 2-6-08; Bird).

Lamb v. State: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's rape conviction. [**404 (b); pedophile exception**] The trial court did not err when it admitted evidence that established that appellant had previously sexually abused his daughters because such evidence tended to show the appellant's depraved sexual instinct. (Halsey, B.; CR 07-753; 2-7-08; Imber).

Jefferson v. State: [**sufficiency of the evidence; capital murder; aggravated robbery; theft of property; fleeing**] There was substantial evidence to support appellant's capital murder, aggravated robbery, theft of property, and fleeing convictions. [**causation**] Appellant's actions caused the victim's death. Specifically, "but for" appellant's aggravated robbery, speeding, and fleeing, his victim would not have been in the roadway and would not have been hit by a vehicle. [**circumstances manifesting an extreme indifference to the value of human life**] The phrase "manifesting an extreme indifference to the value of human life" is not void for vagueness. When appellant robbed someone with a gun, fled with his accomplice and the loot in a stolen car on a busy interstate, and initiated a high-speed chase with law-enforcement officials, he was acting under circumstances that manifested an extreme indifference to the value of human life. [**mistrial; prosecutor's comments and actions during closing arguments**] A prosecutor may not draw attention to the fact of, or comment on, the defendant's failure to testify. It is not good practice for the prosecutor to inject his or her personal beliefs into the closing arguments. The trial court did not abuse its discretion in denying appellant's motions for a mistrial based upon the actions and comments of the prosecutor. [**affirmative-defense provision of the capital-murder statute**] The affirmative-defense provision of the capital-murder statute does not unconstitutionally shift the burden of proof to the defendant. (Yates, H.; CR 07-681; 2-14-08; Hannah).

Rodriguez v. State: [**excited-utterance exception to the hearsay rule**] The circuit court abused its discretion when it admitted an out-of-court statement made by the victim's daughter into evidence pursuant to the excited-utterance exception to the hearsay rule because the statement was taken approximately forty hours after the murder and it was made by a declarant, who exhibited a calm demeanor. Thus, the requirements of Rule 803(2) of the Arkansas Rules of Evidence were not satisfied. [**harmless error**] Although the circuit court erred in admitting the hearsay statement, the error was harmless because there was overwhelming evidence of appellant's guilt and the error was slight. [**challenge to the jury pool**] Prior to trial, appellant requested a continuance or stay of the proceedings to allow him to obtain a jury of his peers. The basis for his motion was his opinion that there did not appear to be any Hispanic surnames on the jury list. Thus, he concluded that the manner of selecting a jury from the registered voter list was unconstitutional as it pertained to him. The circuit court denied his motion. On appeal, the Supreme Court affirmed the circuit court and held that appellant failed to meet his burden of establishing a *prima facie* case of deliberate or systematic exclusion of Hispanic and Latino jurors. (Clinger, D.; CR 07-738; 2-14-08; Corbin).

Delamar v. State: [**sufficiency of the evidence; domestic battery in the second degree**] Appellant was convicted of domestic battery in the second degree. A person commits domestic battery in the second degree if, with the purpose of causing physical injury to a family or

household member, he causes physical injury to such person by means of a deadly weapon. The phrase “family or household member” is defined as persons who presently or in the past have resided or cohabited together. On appeal, appellant asserted that the trial court erred when it denied his motion for directed verdict because there was not substantial evidence to establish that the victim was a “family or household member.” Contrary to appellant’s assertion on appeal, he testified at trial that he shared a residence with the victim, gave the victim money to pay for certain household expenses, received mail at the victim’s residence, and stored his personal belongings at the victim’s home. Based upon the appellant’s testimony, the Court of Appeals concluded that there was substantial evidence to establish that the appellant cohabited with the victim and that she was a “family or household member.” (Thomas, J.; CACR 07-769; 2-20-08; Pittman).

Strong v. State: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant’s rape conviction. [**admission of prior conviction**] Where the prior conviction was relatively recent, the prior crime and crime charged were dissimilar, and the issue of appellant’s credibility was important, the trial court did not abuse its discretion in admitting evidence of appellant’s prior conviction. [**Ark. R. Evid. 704**] Testimony in the form of an opinion or inference, which is otherwise admissible, is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. [**admission of evidence**] The trial court did not abuse its discretion when it allowed the State to ask the appellant about his suicide attempts, which occurred after he was made aware of the victim’s allegations against him. The trial court correctly allowed the questioning as tending to show knowledge of appellant’s guilt. (Thyer, C.; CR 06-1346; 2-21-08; Imber).

Hickman v. State: [**jury instructions**] On appeal, appellant argued that the trial court erred in denying his request for a jury instruction on disputed-accomplice liability. The Supreme Court concluded that even if the trial court erred in failing to give a requested jury instruction, the error was harmless. The appellant did not show how he was prejudiced by the trial court’s actions. The Supreme Court will not presume prejudice or reverse the trial court for harmless error. Thus, the appellant’s conviction and sentence were affirmed. (Glover, D.; CR 07-938; 2-21-08; Danielson).

Barritt v. State: [**appeal by the State**] The Supreme Court dismissed the State’s appeal because resolution of the issue, which was raised in the appeal, “turned” on facts unique to the case and did not require the Supreme Court to interpret its criminal rules with widespread ramifications. (Keith, T.; CR 07-1038; 2-21-08; Brown).

Dailey v. State: [**sufficiency of the evidence; abuse of a corpse**] There was substantial evidence to support appellant’s conviction for abuse of a corpse. Specifically, where the evidence established that the appellant placed a dead body in garbage bags, secured the bags with duct tape, covered the body with a tarp, and stored the body in an unheated and locked “junk” room, the trial court did not err in denying appellant’s directed-verdict motion. (Keaton, E.; CACR 07-756; 2-27-08; Miller).

Jones v. State: [**sufficiency of the evidence; possession of cocaine with intent to deliver; possession of marijuana; possession of a firearm by a felon; simultaneous possession of**

drugs and firearms] Appellant, along with three other individuals, were present when a search warrant was executed at a residence in North Little Rock. There was no evidence to indicate that appellant lived at the residence. The controlled substances and the weapon, which were discovered during the search, were not in plain-view and were not recovered from appellant. At the time the warrant was issued, appellant was in a room that was jointly occupied. Based upon the foregoing evidence, the Court of Appeals concluded that there was insufficient evidence to establish that appellant possessed the contraband. (Piazza, C.; CACR 07-770; 2-27-08; Hart).

McMurray v. State: **[accomplice liability]** Because appellant was charged with committing battery in concert with two or more persons, he was on notice that accomplice liability could be an issue at trial. There is no need to expressly charge a defendant as an accomplice to obtain a conviction based upon accomplice liability. **[jury instructions]** It is within the trial court's discretion, at the jury's request, after deliberations have begun, to give an instruction on the issue of accessories. (Kemp, J.; CACR 07-190; 2-27-08; Pittman).

State v. Harris: **[search and seizure]** The evidence of the informant's reliability combined with the accuracy of the informant's information was enough to establish a reasonable suspicion that appellee's vehicle was involved in criminal activity. Thus, law-enforcement officials had a legal basis for stopping appellee's vehicle. Because law-enforcement officials had reasonable suspicion to detain appellee's vehicle, they were not required to establish additional reasonable suspicion to justify the canine sniff of the car. Accordingly, the trial court erred when it suppressed the evidence, which was obtained during the search of appellee's vehicle. (Honeycutt, P.; CR 07-436; 2-28-08; Gunter).

CIVIL

Crooms v. Capps: **[damages]** Plaintiff made a prima facie case of his measure of damages for property damage to his vehicle by presenting an estimate of the cost of repairs to the truck. (Hannah, J.; CA 07-755; 2-6-08; Hart)

Floyd v. Koenig: **[fraudulent concealment]** Court erred in dismissing complaint for failure to plead fraudulent concealment with specificity. Defendant, who was plaintiff's doctor, had a special relationship with her and a duty to speak. The complaint raised issues for the jury regarding fraudulent concealment and whether limitations period was tolled. (Cox, J.; CA 07-728; 2-6-08; Bird)

Clouse v. Tu: **[service]** Plaintiff commenced case by completing timely but defective service of his complaint. This defect entitled the defendant to have the case dismissed but without prejudice. (Cox, J.; CA 07-586; 2-6-08; Marshall)

Despain v. Bradburn: **[pleadings/waiver]** Complaint as to one defendant was dismissed by summary judgment and there was no Rule 54(b) certification. The plaintiff did not waive or forfeit his right to appeal the summary dismissal when he did not reallege the dismissed claims in an amended complaint. **[federal preemption]** Product liability claim against manufacturer of hearing device was not preempted by federal law because the complaint does not raise any claim that would require a specific change in the way the device was manufactured or any device

specific requirements. **[learned intermediary doctrine]** Factual issues exist as to whether it has been established that as a matter of law the warning given to the doctor who implanted the device made him fully aware of the risks associated with the device. (Clinger, D.; SC 07-714; 2-7-08; Glaze)

Edwards v. Nelson: **[circuit court divisions]** Probate Division of Circuit Court appointed son as the administrator of father's estate. When son filed wrongful death action in the Civil Division, case was dismissed because son was not qualified to serve as administrator because he was a convicted felon. Civil division usurped the authority of the probate division in voiding the appointment. (Fitzhugh, M.; SC 07-48; 2-7-08; Gunter)

Advanced Environmental Inc. v. Advanced Control Solutions:**[final order]** When case involves multiple claims and multiple parties, and when the plaintiff has taken a voluntary nonsuit against one defendant and appeals an adverse judgment as to a different defendant, there is a final appealable order. **[tortious interference]** Verdict finding tortious interference of contract was supported by the evidence. Jury could have found that a valid contract containing an enforceable geographic restriction existed. (Duncan, X.; SC 06-1145; 2-7-08; Imber)

Taylor v. Landher: **[medical malpractice]** Plaintiff failed to provide expert testimony to establish a deviation from the standard of care. (Medlock, M.; CA 07-602; 2-13-08; Marshall)

Bilo v. el Dorado Broadcasting Co. : **[water diversion]** Landowner diverted a natural watercourse rather than surface water. Common-enemy doctrine does not apply. (Guthrie, D.; CA 07-507; 2-13-08; Hart)

Centerpoint v. Miller county Circuit Court: **[jurisdiction/venue]** State gas regulatory agencies have exclusive jurisdiction over customers claims. Circuit court was wholly without jurisdiction over disputes between customers and utility companies over natural gas rates. Defendant does not waive improper venue defense when it files its first responsive pleading if the defense was not then available, and it may assert the defense when it becomes available (such as when a party giving rise to venue is dismissed from the case).(Hudson, J.; SC 07-924; 2-14-08; Corbin)

Wright v. Centerpoint Energy: **[venue]** Venue statutes related to wrongful death actions are written in the past tense indicating that venue is based on residence at the time of the occurrence and not the time suit is file (*resided* versus *resides*). (Hill, V.; SC 07-255; 2-14-08; Glaze)

Conagra Foods v. Draper: **[employee/independent contractor]** Evidence supports finding that driver was an employee rather than an independent contractor despite language in the agreement. Conagra exercised control; the driver was not engaged in a distinct occupation or business because his sole purpose was to provide trucks to his only customer –Conagra; and the transport of poultry was part of Conagra's business. AMI 209 was the proper instruction to use under the facts. (Smith, P.; SC 07-332; 2-14-08; Gunter)

Brooks v. Farmers Bank and Trust: **[rule 55 (b)]** Rule 55 (b) requires trial court to give defendant, who has made an appearance in the proceeding, three days notice before hearing motion for default judgment. (Boling, L.; CA 07-694; 2-20-08; Miller)

Farm Bureau v. Nowlin: **[fire insurance]** Verdict for insured, whose home was damaged by fire, was not supported by the evidence because the house was not “occupied” as required by the policy terms.(Guthrie, D.; CA 06-1053; 2-20-08; Glover)

Duke v. Shinpaugh: **[deed challenge]** In suit to set aside a deed, the court properly applied the presumption of undue influence arising out of the confidential relationship between the grantor and grantee. Neighbor's testimony was admissible under the hearsay exception as a statement against pecuniary interest. Power of attorney authorized conveyance of the property so long as principal authorized the self-dealing. (Lindsay, M.; CA 07-229; 2-20-08; Marshall)

Station v. Board of Collection Agencies: **[bond]** Surety bond applied to loss suffered by claimant arising out of violation of usury laws because a violation of the Board’s regulation was shown which triggered the bond.(Moody, J.; SC 07-53; 2-21-08; Corbin)

Selmon v. Metropolitan Life Ins. Co. **[preemption]** Common law bad faith claim against insurance company was preempted by ERISA. Insurance company did not wrongfully terminate insured’s disability benefits. (Moody, J.; SC 06-1340; 2-21-08; Imber)

Bennett v. Spaight: **[relation back doctrine]** Amended and substituted complaint did not relate back to the original complaint to avoid statute of limitations problem because the notice requirement of Rule 15 (c) was not met. (Mills, W.; SC 07-231; 2-21-08; Danielson)

Grand River Enterprises v. Beebe: **[appeal]** When cases are consolidated, an order that disposes of one, but not all of the claims or suits, is not appealable unless the certification required by Rule 54 is made.(Proctor, W.; SC 07-552; 2-21-08; Glaze)

Tozier v. Warden: **[disinterment]** Seven factors were listed by the court of appeals to be considered by trial court when ruling on petition to disinter remains when there is a dispute among family members.(Harkey, J.; CA 07-796; 2-27-08; Miller)

Neal v. Farris: **[summary judgment]** Trial court did not err when it ruled on summary judgment after response had been filed but before full 14 days to file a response had run even though responding party submitting supplemental material after its initial response but before 14 days ran. (Fitzhugh, M.; CA 07-839; 2-27-08; Gladwin)

City of Dardanelle v. City of Russellville: **[contract]** Joint resolution between two cities did not constitute a contract because the terms are too vague to be enforceable. (Patterson, J.; SC 07-195; 2-28-08; Imber)

Firstplus Home Loan Owner v. Bryant: **[class certification]** Class action by borrowers against lenders was properly certified. Commonality factor satisfied despite issues related to choice of law. Typicality factor satisfied as each claim arose from the same wrong allegedly committed by the lenders. Party was an adequate class representative. Numerosity, superiority and predominance factors were all satisfied. (Burnett, D.; SC 07-740; 2-28-08; Hannah)

DOMESTIC RELATIONS

Downum v. Downum: **[custody; relocation; constructive fraud; ARCP Rule 60]** The appellee husband agreed to the appellant's proposed divorce decree, which settled all disputed issues between them, including custody and visitation. When the parties were considering the proposed decree, appellee husband, who knew that appellant wife wanted to find a new job, did not inquire whether she would look outside of northwest Arkansas, where they both lived, and she did not volunteer that she might consider jobs elsewhere. About ten days after appellee husband agreed to the terms of the proposed decree in early November, appellant wife was actively looking for a job, both in northwest Arkansas, and out of state. On December 1, the appellant and her counsel appeared before the court, which approved and entered the decree. The appellee did not appear. The next day, a Louisiana employer responded to appellant's e-mail sent in November. In late December, she accepted a job with that company. She moved to Louisiana with her child in January. The appellee immediately moved the circuit court to vacate the decree based upon her alleged fraud about her job plans. He also asked for custody of the child. The trial court found that appellant had an equitable duty to notify the appellee of any material change regarding custody before the court entered its decree and that, because that was not done, she had committed constructive fraud. The court set aside the custody portion of the decree. The court also determined that, in light of its Rule 60 decision, it had to make an initial custody decision, and it awarded custody to the appellee father, based upon the best interests of the child.

The Court of Appeals found error in the finding that the appellant intended to move to Louisiana before the decree was entered and that she committed constructive fraud. The Court also said that the appellee did not prove constructive fraud because he did not show that he had justifiably relied on the appellant's nondisclosure. He knew that she was looking for a new job, but he did not ask her, either informally or formally through discovery, whether she planned to move. The Court remanded with instructions to return custody to the mother and to provide reasonable visitation to the father. (Scott, J.; No. CA 07-533; 2-6-08; Marshall)

Applegate v. Applegate: **[contempt]** A couple of months after entry of the parties' divorce decree, the appellee (former wife) filed a petition alleging contempt for the appellant's (former husband) alleged failure to pay debts he was ordered to pay in the divorce decree. The court found the appellant in contempt and ordered him to pay \$500 for appellee's attorney's fee. The Court of Appeals found that the trial court made no valid civil contempt or criminal contempt finding, and that no factual basis for contempt existed. The Court compared civil and criminal contempt and distinguished each from the other. (Putnam, J.; No. CA07-657; 2-13-08; Vaught)

Farr v. Farr: **[contempt]** Before one can be held in contempt for violating a court order, the order must be definite in its terms and clear as to what duties it imposes. (Yeagan, C.; No. CA07-369; 2-13-08; Hart)

Dottley v. Miller: **[child support–modification]** In order for a trial court to make the factual determination of whether there have been sufficient changed circumstances to warrant a modification of child support, the trial court must consider evidence. Evidence is "any species of proof legally presented at trial through the medium of witnesses, records, documents, exhibits, and concrete objects for the purpose of inducing belief in the minds of the court or jury. The word 'evidence' includes all the means by which any fact in dispute at a judicial trial is

established or disproved.” A reviewing court must review the entire evidence. Here, there was no evidence to review, so the appellant was effectively denied any review of the trial court’s ruling because no evidence was presented. (Glover, D.; No. CA07-426; 2-20-08; Bird)

Grover v. Grover: **[reconciliation agreement]** The trial court’s decision to set aside a reconciliation agreement was affirmed. The circuit court had found that the appellee wife had signed the reconciliation agreement under duress, which is grounds for setting aside the agreement under Florida law, the state in which the agreement was drafted and signed. The trial court found in the divorce decree “that the agreement was executed more in contemplation of divorce rather than in encouragement of reconciliation.” (Sutterfield, D.; No. CA07-553; 2-20-08; Griffen)

Roark v. Office of Child Support Enforcement, et al.: **[child support]** Independent agreements concerning child support are not binding on the trial court, and the court always retains jurisdiction over child support as a matter of public policy. Also, no matter what an independent agreement states, either party has the right to request modification of a child support award. A trial court is required to investigate the merits of a compromise between parties and to determine its benefits to a minor, and without doing so, any order entered by the court is void on its face. (Clawson, C.; No. CA07-515; 2-27-08; Heffley)

Bass v. Weaver, et al.: **[child support; visitation]** In a divorce action, the intervenor grandmother was awarded custody of a three-year-old child upon a finding that both parents were unfit. No child support was awarded to the grandmother and extensive unsupervised and overnight visitation was awarded to the mother. The Court of Appeals found that child support should have been awarded. The trial court was directed on remand to determine the parents’ income and to enter an order of support based upon the family support chart, to impute income pursuant to Administrative Order No. 10, or to set out reasons that application of the chart is unjust or inappropriate. In addition, the Court found that the extent and duration of visitation to the mother was erroneous given the court’s specific finding that she was unfit. The Court also ordered the appointment of an attorney ad litem on remand to represent the best interests of the child and to reconsider the question of visitation. (Whiteaker; P.; No. CA07-874; 2-27-08; Pittman)

PROBATE

Powell v. Lane, et al.: **[marriage; paternity; adoption]** This appeal involved a domestic relations case and an adoption case. The appellant and separate appellee Davelynn Lane had a marriage ceremony in December, 1996, for which a marriage license was obtained, although it was neither signed by the minister who performed the ceremony nor returned to the county clerk for filing. She was pregnant at the time and gave birth to a son in June, 1997. The appellant and Davelynn lived together as husband and wife until the Spring of 2004. They never obtained a divorce. In June, 2004, Davelynn filed a petition against the appellant to establish paternity. By default judgment entered in July of 2004, he was found to be the father. The court entered an order for visitation, child support, and for the appellant to pay a portion of the child’s medical expenses. On September 4, 2004, Davelynn married Wendell Lane, the other appellee. In March, 2006, they filed a petition for Wendell to adopt the child without the consent of the

appellant. Davelynn consented to the adoption and alleged that appellant had failed significantly to communicate with or to support the child for at least one year. The appellant denied the allegations and refused to consent. In May of 2006, the appellant filed for divorce against Davelynn and, for the second time, to set aside the default judgment of paternity. After consolidating the cases, the trial court dismissed the divorce petition, finding that the parties were never married because the license was never signed or filed. The court also granted the adoption based upon finding that appellant's consent was not required because he had failed significantly and without justifiable cause to support the minor for more than one year. The Court of Appeals held that the appellant and Davelynn were validly married. The Court said that all of the trial court's remaining orders were based upon its conclusion that the appellant and Davelynn were not validly married; therefore, it remanded to permit the trial court to make further findings in accordance with the opinion. (Looney, J.; No. CA06-1355; 2-13-08; Miller)

In Re: Estate of Shawn McKnight v. Bank of America, N.A. [**accounting**] Because the Estate did not object to the probate court's order approving the accounting of Bank of America, the Supreme Court was precluded from addressing the merits of the issues raised on appeal. (Story, B.; No. SC 07-368; 2-21-08; Danielson)

In the Matter of the Estates of Jerome McKnight, Deonte McKnight, Angela Marshall, Stephanie McKnight and Natasha Marshall v. Bank of America, N.A.: [**jurisdiction**] The Estates appealed an order approving the appellee bank's accounting. No objections were filed by the Estates of Jerome McKnight, Deonte McKnight, and Angela Marshall and the probate court did not rule on their claim. The order appealed from lists only beneficiaries Stephanie McKnight and Natasha Marshall, and the court's letter opinion lists only those two. The Supreme Court said that it had no jurisdiction to consider the claims of error of those beneficiaries for whom there is no order or decree. [**jury trial**] The constitutional right to a jury trial does not extend to a case in equity, and an accounting is an equitable remedy. Therefore, the beneficiaries had no right to a jury in these proceedings in probate court. [**breach of fiduciary duty**] The trial court carefully considered the issue of the trustee bank's breach of fiduciary duty in the expenditure of funds from the trust. Most of the expenditures were for housing and associated basic living costs for the beneficiaries, which also benefitted the entire family. The money was used to provide what the parents were not providing. Three attorneys reviewed the administration of the trust. There was no evidence of bad investments or self-dealing on the part of the appellee. The trial court was not clearly erroneous in its finding that the bank did not breach its fiduciary duty. [**release from liability**] As a result of the accounting, the court determined that the trustee did not misuse funds and that nothing was due to the beneficiaries, so the court was not clearly erroneous in releasing the bank from liability. The decision of the court was affirmed. (Story, B.; No. SC 07-371; 2-21-08; Hannah)

Tom v. Cox: [**adoption—consent**] After the birth mother relinquished her parental rights to an infant, the circuit court appointed the president of an adoption service to serve as temporary guardian of the child in order to facilitate an adoption. She placed the child with a potential adoptive parent from California and the child remained with the family in California for ten months. The guardian subsequently refused to consent to the adoption of the child. The circuit court, in denying the adoption, found that the guardian reasonably withheld her consent to the adoption by the appellant. The case centered around an incident when the appellee left the child

alone in a motor home outside a restaurant which the guardian believed put the special needs child in peril. The Court of Appeals affirmed the trial court's denial of adoption. (Kilgore, C.; No. CA07-650; 2-27-08; Baker)

JUVENILE

Rhine v. Arkansas Dep't. of Human Servs., [TPR]. Termination of parental rights reversed and remanded. Court of Appeals found that the trial court abused its discretion in denying appellant's motion for a continuance allowing her to relinquish her parental rights with consent for her mother to adopt. The Court noted that a continuance would have accomplished permanency quicker for the child than proceeding with the hearing and that the child's sibling had already been adopted by appellant's mother. (Zimmerman, S.; CA06-137; 2-27-2008; Hart).

S.F. and D.F. v. Arkansas Dep't. of Human Servs., [D-N Adjudication] Circuit Court upheld in finding appellant's adopted child dependent-neglected for returning him to the home he was removed from. Appellants adopted their grandson resulting from a dependency-neglect case with findings that the child suffered life-threatening abuse that resulted in permanent brain damage.

[Advice-of-Counsel Defense] Appellant argued no fault stating that they followed the advice of their daughter's attorney, that after the adoption was final they could return the child to his parents. The Court of Appeals rejected the advice-of-counsel defense because there was not an attorney client relationship between the appellants and the attorney representing the parents who provided the erroneous legal advice. A dependency-neglect finding does not require a showing of mens rea. The juvenile code focuses on the juvenile best interest not the defendant's intent. The attorney's advice to the parent is not relevant to whether a child is dependent-neglected.

The Court of Appeals found that an advice-of-counsel defense is not recognized in juvenile proceedings. The trial court did not err in finding that appellant neglected their adopted child pursuant to Ark. Code Ann. 9-27-303(36)(A)(vi-vii). (Edwards, R.; CA07-735; 2-6-2008; Glover).

Sparrow v. Arkansas Dep't. of Human Servs., [D-N Adjudication] Circuit Court upheld in finding appellant's child dependent-neglect based on sexual abuse by appellant. [Collateral Estoppel] Appellant argued that collateral estoppel barred the relitigation of child abuse which had been argued in a motion for visitation at a custody hearing in another county. Appellant failed to provide complete transcripts of the custody hearing. The appellate court was unable to determine if the allegations in the dependency-neglect case were the same or if there were additional instances of abuse.

[6th Amendment] Appellant argued that the trial court erred in requiring him to sit outside the child's view during her testimony, violating his right to confrontation. Appellant failed to properly preserve this issue for appeal or cite any authority for his argument that a criminal defendant's right to confrontation extends to dependency-neglect proceedings.

[Hearsay] Finally, appellant argued that the trial court erred in excluding testimony concerning

a statement the child made. Hearsay exceptions are not automatically admissible. The statement was cumulative to other statements and could be excluded under Ark. R. Evid. Rule 403. (Boling, L.; CA07-555; 1-30-2008; Gladwin).

DISTRICT COURT

Lampkin vs. State: [**Remand to district court**] When circuit court remanded this case to district court, it functioned as a dismissal of appellant's appeal. This is permissible even though §16-96-508 only authorizes a circuit court to *affirm* the district court's judgment. The Court of Appeals reversed because it was an abuse of discretion for the circuit court to dismiss the case based on an initial "failure to appear" when the case was thereafter recalled the same day, the appellant was present when the case was recalled, and the court indicated "we're having a trial today." (Sims, J.; CACR07-568; 02-13-08; Griffen)

EIGHTH CIRCUIT

Newton v. Clinical Reference Laboratory: [**medical negligence**]. Dismissal of complaint for failure to comply with Arkansas statute requiring filing of medical affidavit within 30 days is reversed, as Arkansas Supreme Court's subsequent ruling striking statute as unconstitutional eliminates rationale for dismissing the complaint. (W.D. Ark.; #07-1111; 2-22-08)

Marcum v. The Shaw Group: [**torts**] Evidence was sufficient to support the jury verdict in this wrongful death action, as the evidence was sufficient to show that defendant had a duty to remove the structure which caused plaintiff's decedent's death and that a reasonably careful person would have foreseen the appreciable risk of harm which failure to remove the structure would create. Jury instructions properly submitted the issues concerning defendant's duties under its contract with the U.S. Army. (W.D. Ark.; 06-4115; 2-26-08)

U.S. SUPREME COURT

Danforth v. Minnesota: [**testimonial statements/retroactivity**] After Supreme Court announced a "new rule" for evaluating the reliability of testimonial statements in criminal cases (*Crawford v. Washington*), petitioner sought state postconviction relief, arguing that he was entitled to a new trial because admitting the victim's taped interview at his trial violated *Crawford's* rule. The Minnesota trial and appeals courts concluded that *Crawford* did not apply retroactively.

Held: State courts may give broader effect to new rules of criminal procedure than is required by Supreme Court's opinion. (February 20, 2008)

