

## 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  
MARCH, 2008 VOLUME 15, NO. 7

### ANNOUNCEMENTS

On March 13<sup>th</sup>, the Supreme Court adopted revised rules relating to the procedures of the Judicial Discipline and Disability Commission. A copy of the *per curiam* order was included in the weekly mailout.

### CRIMINAL

*Spight v. State*: [**sufficiency of the evidence; first-degree battery**] There was substantial evidence to support appellant's first-degree-battery conviction. [**jury instructions**] The trial court did not err in refusing to give appellant's proffered jury instruction on second-degree battery because second-degree battery was not a lesser-included offense of the offense for which appellant was charged. [**voir dire**] During *voir dire*, the prosecutor asked the jury if the phrase "beyond a reasonable doubt" meant the same thing as "beyond a shadow of a doubt." The appellant objected to this question and argued that the prosecutor was attempting to lower the standard of proof. The trial court overruled the appellant's objection. Thereafter, the prosecutor explained the correct standard of proof and the circuit court instructed the jury on the proper burden of proof. The Court of Appeals concluded that the trial court did not abuse its discretion in overruling appellant's objection and noted that because the jury was instructed on the proper burden on proof, it must be presumed that the jury followed the court's instructions. (Williams, C.; CACR 07-855; 3-5-08; Hart).

*Moore v. State*: [**sufficiency of the evidence; aggravated robbery; capital murder**] There was substantial evidence to support appellant's convictions for aggravated robbery and capital murder. An aggravated-robbery conviction does not require that a theft actually occur; it only requires that the perpetrator act with the purpose of committing theft or resisting apprehension immediately after committing theft. The focus of aggravated robbery is on the physical force used or threatened, and if the defendant had the intent to commit a theft, no actual transfer of property needs to take place for the offense to be complete. [**hearsay testimony of alleged co-conspirator**] The circuit court did not abuse its discretion when it permitted appellant's co-conspirator to testify about statements appellant made during the course and in the furtherance of

the conspiracy. A statement is not hearsay if it is offered against a party and is a statement by a co-conspirator of a party made during the course and in the furtherance of the conspiracy. There need not be a conspiracy count in the indictment to make the provisions of the foregoing rule applicable. However, the alleged co-conspirator must be connected to the conspiracy by evidence independent of the statement at issue. (Piazza, C.; CR 07-804; 3-6-08; Imber).

*Lee v. State*: [**sufficiency of the evidence; fraudulent use of a credit card**] There was substantial evidence to support appellant's fraudulent-use-of-a-credit-card conviction. [**Miranda rights**] Because appellant was not "in custody" at the time that the law-enforcement official questioned him, it was not necessary that he be given the *Miranda* warnings. [**Confrontation Clause**] During appellant's trial, the court permitted a law-enforcement official to testify about statements made by an individual, who was not present. Specifically, the officer testified that appellant's employer advised him that the appellant did not have permission to use the company's credit card and that the company had cancelled the credit card for fear that appellant would attempt to use it. Admission of the foregoing testimony was error because it addressed past events that were potentially relevant to prosecuting the appellant, and because the appellant did not have the opportunity to confront the witness or to cross-examine his testimony. (Cottrell, G.; CACR 07-429; 3-12-08; Marshall).

*Throneberry v. State*: [**sentencing**] The record of a co-defendant's case cannot be considered at the sentencing phase of a defendant's separate trial if the co-defendant's record has not been introduced into evidence. Thus, the records from appellant's co-defendants were improper factors for consideration at appellant's sentencing hearing, and the trial court's judicial notice of those records, which was the basis of its decision to run appellant's sentences consecutively, constituted an abuse of discretion. (Reynolds, D.; CACR 07-889; 3-12-08; Bird).

*Waters v. State*: [**Ark. R. Crim. P. 24.3 (b)**] The Arkansas Supreme Court requires strict compliance with Ark. R. Crim. P. 24.3 (b). Pursuant to the Rule, the right to appeal, following a guilty plea, must be reserved in writing. Because appellant did not comply with the provisions of Ark. R. Crim. P. 24.3 (b), the Court of Appeals lacked jurisdiction to consider his appeal. (Reynolds, D.; CACR 07-760; 3-12-08; Gladwin).

*State v. Richardson; State v. Holden; State v. Joshaway; State v. Weaver; State v. Lee; State v. Whitfield*: [**defective arrest warrant**] An invalid arrest warrant may call for the suppression of a confession or other evidence. However, an invalid arrest warrant does not entitle a defendant to be discharged from responsibility for the alleged offense. Thus, the trial court erred in dismissing theft charges, which were filed against the appellants, based upon an arrest warrant that allegedly failed to comply with Ark. R. Crim. P. 7.1 (c). (Simes, L.; CR 07-610; CR 07-634; CR 07-636; CR 07-637; CR 07-639; CR 07-640; 3-13-08 Hannah; Glaze; Brown; Imber; Gunter; Danielson).

*Young v. State*: [**motion to suppress**] Appellant was advised of her *Miranda* rights, acknowledged that she understood those rights, and did not invoke her *Miranda* rights in any manner during her interrogation. Appellant chose to submit to the questioning by law-enforcement officials. Thus, the trial court properly concluded that appellant's statement was voluntarily given and properly denied appellant's motion to suppress. (Erwin, H.; CR 07-1136;

3-20-08; Hannah).

*Sparkman v. State*: [**Rule 37**] Appellant's attorney failed to move to suppress appellant's custodial statement, which was taken in violation of appellant's Sixth Amendment right to counsel. The circuit court and the Supreme Court on appeal, concluded that if appellant's attorney had requested suppression of the statement, the motion would have been granted. Thus, appellant's trial counsel's performance was deficient. Based upon the great weight accorded a confession, the Supreme Court concluded that there was a reasonable probability that the decision reached by the jury would have been different absent counsel's failure to request suppression of the statement. Therefore, the circuit court erred when it denied appellant's petition for post-conviction relief. (Clinger, D.; CR 06-1141; 3-20-08; Corbin).

*Goodwin v. State*: [**sufficiency of the evidence; aggravated robbery; attempted capital-felony murder**] There was substantial evidence to support appellant's convictions for aggravated robbery and attempted capital-felony murder. [**motion to suppress**] The fact that a police officer made an untrue statement during the course of an interrogation does not necessarily make an otherwise voluntary confession inadmissible. A misrepresentation of fact does not render a statement involuntary so long as the means employed are not calculated to procure an untrue statement and the confession is otherwise freely and voluntarily made with an understanding by the accused of his constitutional rights. If a police officer makes a false promise, which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been voluntarily, knowingly, and intelligently made. The trial court did not abuse its discretion in denying appellant's motion to suppress. (Keaton, E.; CR 07-906; 3-20-08; Brown).

*State v. Webb*: [**Act 346; sentencing**] Appellant was not eligible to be sentenced pursuant to Act 346 because she entered a plea of not guilty and was adjudicated guilty by the court following a bench trial. Because appellant was not eligible for Act 346 sentencing, she was likewise not entitled to have her record expunged. (Proctor, W.; CR 07-1214; 3-20-08; Imber).

*Davenport v. State*: [**sufficiency of the evidence; capital murder; unlawful discharge of a firearm from a vehicle**] Appellant requested a directed verdict based upon in-court identifications, which he argued were unreliable. During appellant's trial, there were three eyewitness, who identified him as the shooter. The testimony of one eyewitness alone is sufficient to sustain a conviction. A jury is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. There was substantial evidence to support the jury's verdicts. The trial court did not err in denying appellant's directed-verdict motion. (Sims, B.; CR 07-1086; 3-20-08; Danielson).

## **CIVIL**

*Bibbs v. Community Bank*: [**standing**] Claims were the property of the bankruptcy estate and could only be filed by the bankruptcy trustee; therefore, individuals lacked standing. (Whiteaker, P.; CA 07-808; 3-5-08; Miller)

*Glenn Mechanical v. South Arkansas Regional Health Center*: [**contract/change orders**] Contract governed the disputed work. Since contract existed, party could not pursue quasi-

contract theories of recovery. (Guthrie, D.; CA 06-1473; 3-5-08; Marshall)

*Grubbs v. Hinde*: **[new trial]** Trial court improperly granted a new trial because of an alleged irregularity in signing the interrogatories. The new trial was not granted on the issue on which the party objected. A proper objection was not made. (Wilkinson, N.; CA 07-239; 3-5-08; Gladwin)

*Scott v. Central Arkansas Nursing Centers*: **[negligence]** It was improper to grant a directed verdict for one of the defendants because the plaintiff's proof established a jury question on defendant's negligence being a proximate cause of the nursing home resident's injuries and death. (Brantley, E.; CA 06-1252; 3-5-08; Griffen)

*Essex Insurance Co. v. Holder*: **[insurance]** Defective construction or workmanship, standing alone, resulting in damages only to the work product itself, is not an "accident" within the meaning of commercial general liability insurance policies. (Certified Question, U.S. District Court; SC 07-803; 3-6-08; Glaze)

*State v. Hatchie Coon Hunting Club*: **[water rights]** State acquired title to submerged island by adverse possession for public use. Hunting club did not consent to submerging its accreted island. By continuous submersion of the island for more than seven years, an artificial high water mark has been established and the submerged island has become part of the river bed and thus the property of the state. (Burnett, D.; SC 07-356; 3-6-08; Brown)

*City of Fort Smith v. McCutchen*: **[administrative appeal]** Ark. Code Ann. Section 14-56-425 does not violate the separations of powers and is constitutional. A de novo trial on appeal of a determination made by a city zoning board regarding the issuance of a variance is not a "legislative" determination. (Tabor, S.; SC 07-864; 3-6-08; Corbin)

*Myers v. Yingling*: **[boundary by acquiescence]** When the determination of the boundary by acquiescence occurred before the current landowners came to occupy the property, they are precluded from claiming that the recognized line is not the true line. (Mills, W.; SC 07-790; 3-6-08; Glaze)

*Viravonga v. Samakitham*: **[intra-temple conflict]** Court has subject matter jurisdiction to determine the issue of who could vote in the temple election. Court did not delve into matters that were essentially religious in nature, but rather applied neutral principle of law to resolve dispute over control over real property and funds. (Marschewski, J.; SC 07-362; 3-6-08; Brown)

*Luu v. Still*: **[malpractice]** Settlement agreement between patient and hospital, including hospital employees, did not cover doctor. (Wilkinson, N.; CA 07-852; 3-12-08; Robbins)

*K.C. Properties v. Lowell Investment Partners*: **[4-32-304]** Opinion discussed application of this statute, specifically whether it prohibits a member of a limited liability company from suing a fellow member for breach of contract and breach of fiduciary duty. **[contract damages]** Loss profits are a type of consequential damages. **[restitution]** A party can only seek restitution if there is a contract implied in fact or implied in law. **[promissory estoppel]** The facts constituting

estoppel must not be taken by argument or inference, and nothing can be supplied by intendment.(Storey, W.; SC 07-471; 3-13-08; Gunter)

*Lynn v. Wal-Mart*: **[employment]** Employer had cause to discharge employee. Public policy exception to the at-will doctrine was not implicated by employer's alleged failure to follow its private, internal policies or the labor laws of foreign countries. (Clinger, D.; CA 07-384; 3-19-08; Vaught)

## DOMESTIC RELATIONS

*Young v. Young*: **[divorce; property]** In distributing the parties' property at divorce, the trial court found that appellant was in a position of trust and dominance over the appellee and that he exercised undue influence over her when she executed a deed that created a tenancy by the entirety in property she had received from her father. The court also ordered an unequal division of marital property by awarding appellee the parties' marital home that was built on the property. The Court of Appeals affirmed the trial court. The Court said that when property is placed in the names of husband and wife, a presumption arises that they hold as tenants by the entirety. The presumption can be overcome only by clear and convincing evidence that a spouse did not intend a gift. Once a spouse shows the existence of a confidential relationship between them and that one was the dominant party, a rebuttable presumption arises that a transfer of property from the subservient one to the dominant one was invalid because of coercion and undue influence. The presumption can be rebutted only if the spouse to whom the property was transferred shows that the transfer was freely and voluntarily executed. It's a two-pronged test that is set out in the opinion. Here, the record supported the trial court's decision, which was not clearly erroneous. The evidence also supported the unequal division of marital property. The trial court's explanation set out in the oral ruling met the statutory requirements that the court state its basis and reasons for not dividing the property equally. (Mashburn, M.; No. CA 07-540; 3-5-08; Heffley)

*Norman v. Cooper*: **[contempt]** This case involves a post-divorce dispute between the parties involving child support and visitation. Both parties were found in contempt after a hearing, the appellant for willfully and intentionally disobeying the court's order by failing to provide child support. He was ordered to jail for 60 days and subjected to "automatic pickup" for missing any future support payments. He was also ordered to pay appellee's attorney fees. Appellee was found in contempt for violating the visitation order and was ordered to 72 hours in jail. She did not appeal. The Court of Appeals affirmed the finding of contempt. The Court said that the court has the inherent authority to punish the appellant for violating its order to pay child support. The statutory authority for the regulation of the punishment for contempt is not a limitation of the court's authority to inflict reasonable punishment for disobedience of process. He was sentenced pursuant to the court's inherent authority to punish violations of court processes. The appellant also contended that the trial court erred in not enforcing his visitation. However, the Court of Appeals said that he not only failed to object to the visitation arrangement the trial court set out, he actually suggested it in the first place. He could not claim error on appeal. (Harkey, J.N.; No. CA07-247; 3-5-08; Vaught)

*Claver v. Wilbur*: **[order of protection]** The Court of Appeals found that the trial court's entry of a protective order was erroneous and unsupported by the evidence. The Court found that no statutory reason for issuing an order existed. The appellee's 16-year-old daughter and the 20-year-old appellant were dating, against the teenager's parents' will. The Court of Appeals said that the only allegations proven were that appellant continued to see the teenager after her parents prohibited contact between them and that appellant had given the teenager a morning-after pill. The issuance of the order upon those facts was erroneous. The Court said that the Domestic Abuse Act did not apply because there was no finding of sexual conduct which constituted a crime. No evidence was presented about physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault. Simply maintaining contact with a boyfriend or girlfriend without parental consent does not rise to the level of domestic abuse. The fact that the parents do not like appellant was not a proper ground upon which to issue an order of protection in the absence of evidence of actual physical harm or the fear of imminent physical harm. The case was reversed and dismissed. (Duncan, X.; No. CA07-871; 3-19-08; Gladwin)

*Wilhelms v. Sexton*: **[child-support arrearages; contempt]** The trial court correctly applied the doctrines of equitable estoppel and laches in ruling that the appellee was absolved of responsibility for more than \$20,000 in child-support arrearages based upon her parents' providing \$39,144 worth of shelter, clothing, food and other support to the children. Secondly, the appellant's appeal of an order of contempt for his failure to pay child support after a change of custody was dismissed for appellant's failure to file a timely notice of appeal, which deprived the appellate court of jurisdiction. (McCain; G.; No. CA07-316; 3-19-08; Hart)

## **PROBATE**

*McMillon, et al. v. Lost Cherokee of Arkansas and Missouri, Inc.*: **[will-construction]** This appeal arose from a petition filed by a bank to clarify decedent's will, specifically with respect to whether references to "savings and checking account" and "remainder of my savings and checking" included cash that was in the decedent's safety deposit box when she died. The trial court found that the \$226,000 in the safety deposit box was part of her "savings." (Weaver, T.; No. CA07-670; 3-12-08; Baker)

*Joyce Miller, Executrix, In the Matter of the Estate of Otha Farris Tackett, Deceased v. Mike Cothran, Personal Representative for the Estate of Judean Tackett, Deceased*: **[decedents' estates; lease]** Otha Tackett and Judean Tackett, both deceased, were husband and wife. During his lifetime, Otha Tackett leased his salvage yard to the Meadors for \$800/month for ten years. The lease provided that, in the event of lessor's death, the lease money would be paid to his wife, Judean. After Otha died, the Meadors began paying Judean the rent, to which Otha's estate objected. When the disagreement arose, the rent was paid into the registry of the circuit court. Then Judean died and her estate took her place in the litigation over the right to the rent. The circuit court found that the provision clearly provided that the money went to Judean and further found that, now that she was deceased, the money went to her estate. In reversing, the Court of Appeals agreed that the provision was clear, but that it was unenforceable because, under Arkansas's precedents, Otha had attempted to make an *inter vivos* gift of a future interest, which

failed as a matter of law because no present interest was conveyed. (Lineberger, J.; No. CA07-869; 3-19-08; Marshall)

## **JUVENILE**

*Hall v. Arkansas Dep't. of Human Servs.*, [TPR]. Circuit court affirmed on termination of parental rights appeal. [**Permanency/Best Interest**] Appellant argued that termination was not required to achieve permanency for the children because they were placed with a relative. While placement with a relative may be a compelling reason not to terminate, it must also be in the child's best interest. The court stated, "it cannot seriously be argued that termination of parental rights of a person who physically and sexually abused his children is not in the children's best interest."

[**Evidence/Grounds**] Appellant then argued that the order was not supported by clear and convincing evidence. The trial court found two grounds for termination. Most of appellant's argument is directed toward the second ground on aggravated circumstances. The appellate court did not address his argument because the trial court had sufficient evidence with the first ground that the children were out of the home for more than 12 months and despite meaningful efforts by DHS the conditions for removal had not been remedied by the parent. The trial court made specific findings that the appellant failed to consistently attend counseling sessions and when he did he failed to address the sexual abuse that caused removal.

[**Child Support**] Appellant finally argued that the court erred in ordering him to pay child support. Appellant failed to designate the proper order that designated the guardianship to the grandmother and the order for child support as an order being appealed. Consequently, an order not mentioned in a notice of appeal is not properly before the court. The appellate court noted that upon termination of parental rights the father became like a stepparent to the children because he remained married to the mother and her rights were not terminated. "A stepparent, by reason of the relationship alone, has no duty to support the stepchild." (Finch, J.; CA07-911; 3-5-2008; Gladwin).

*Clemerson v. Arkansas Dep't. of Human Servs.*, [TPR] Circuit Court affirmed on termination of parental rights after the appeal was before the appellate court for the third time. The appellant had a guardian ad litem and an attorney appointed during the dependency-neglect proceedings. [**Due Process/Competency**] Appellant argued that the trial court's denial of a mental evaluation was a violation of procedural due process, substantive due process, and her competency to stand trial. The appellate court found that only the competency to stand trial was preserved for appeal.

The appellate court held that "due process requires that a defendant in a TPR hearing must be competent as a criminal defendant... this is only procedure, and not a substantive right." The court noted that the defendant has the burden to ensure that the issue of competency is timely raised before the trial court. (Williams Warren.; CA06-152; 3-12-2008; Hart).

## EIGHTH CIRCUIT

*Steinbuch v. Cutler*: [**personal jurisdiction**] Claim that Hyperion Books invaded plaintiff's privacy by publishing and selling the novel *The Washingtonienne* in Arkansas was remanded for tailored discovery to determine whether Hyperion's contacts with Arkansas were so continuous and systematic as to warrant the exercise of general personal jurisdiction over it. District court did not err in finding plaintiff had failed to establish a prima facie case of jurisdiction over defendant Disney. Plaintiff failed to show that defendant HBO's acquisition of an option to produce a fictional TV show based on the book caused him any injury. (E.D. Ark.; # 07-1509; 3-6-08)

*Medical Liability Mutual Ins. v. Curtis LLC* : [**long term care residents rights/limitations**] If presented with the question, the Arkansas Supreme Court would determine that the three-year limitations period set out in Ark. Code 16-56-105 would apply to actions under the Arkansas Long Term Care Residents Rights Act. The district court did not err in applying this limitations period or in determining that the insurer had no duty to indemnify defendants. District court did not err in determining that the only claim in the underlying lawsuit covered under the insured's policy is the Redden estate's breach of contract claims against Evergreene, and the insurer had a duty to defend and indemnify Evergreene on that claim. (E.D. Ark.; # 07-2061; 3-10-08)

*PHL Variable Insurance Company v. McNeill*: [**insurance contract**] District court's grant of summary judgment to insurer after it rescinded and cancelled policy due to insured's material misrepresentation is affirmed. Insured had a duty to inform insurer of substantial change in his health condition and the failure to inform insurer resulted in a material misrepresentation of fact. Applying Arkansas law of uberrima fides, insured had continuing obligation to disclose newly discovered facts. (E.D. Ark.; # 07-1322; 3-27-08)

*Thompson v. Southern Farm Bureau Casualty*: [**offer of judgment**] While defendant's offer of judgment under Rule 68 was unambiguous, the district court erred in determining it was legally valid and should be enforced. An offer of judgment under the rule may not exclude costs and the offer, which excluded all costs, was void. (E.D. Ark.; # 07-1969; 3-28-08)

## U.S. SUPREME COURT

*Snyder v. Louisiana*: [**batson**] During voir dire in petitioner's capital murder case, the prosecutor used peremptory strikes to eliminate black prospective jurors who had survived challenges for cause. The jury convicted petitioner and sentenced him to death. The Louisiana Supreme Court rejected petitioner's claim that the prosecution's peremptory strikes of certain prospective jurors, including Mr. Brooks, were based on race, in violation of *Batson v. Kentucky*.

Held: The trial judge committed clear error in rejecting the Batson objection to the strike of Mr. Brooks. While all of the circumstances bearing on the racial-animosity issue must be consulted in considering a Batson objection or reviewing a ruling claimed to be a Batson error, the explanation given for striking Mr. Brooks, a college senior attempting to fulfill his student-teaching obligation, is insufficient by itself and suffices for a Batson error determination. (March 19, 2008; No. 06-10119)