

APPELLATE UPDATE

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PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
MAY, 2008 VOLUME 15, NO. 9

ANNOUNCEMENTS

On May 15th, the Supreme Court amended Supreme Court Rule 4-7 with respect to the number of briefs that must be filed in cases in which the appellant is incarcerated and proceeding *pro se*.

CRIMINAL

Armstrong v. State: **[evidence]** The evidence a defendant wishes to admit to prove third-party guilt must sufficiently connect the other person to the crime. This evidentiary principle was not overruled by the United States Supreme Court in *Holmes v. South Carolina*, 547 U.S. 319 (2006). (Proctor, W.; CR 07-1074; 5-1-08; Danielson).

Marmolejo v. State: **[404 (b)]** Any error that may have resulted from the admission of evidence, which implied that appellant was a “drug dealer or supplier,” was harmless based upon the overwhelming evidence of appellant’s guilt. (Clinger, D.; CACR07-899; 5-14-08; Bird).

First Arkansas Bail Bonds, Inc. v. State: **[bond forfeiture]** A bail-bond forfeiture is a criminal proceeding and the State is not required to initiate a separate civil action. (Wright, H.; CACR 07-1151; 5-14-08; Heffley).

Price v. State: **[circumstances manifesting extreme indifference to the value of human life]** Evidence of an actual intent to kill is not required to establish circumstances manifesting extreme indifference to the value of human life. Appellant intentionally raised his gun and fired a shot into a vehicle that he knew was occupied. Appellant’s actions evidenced an intent to engage in a life-threatening activity against the occupants of the vehicle at which he fired. Based upon the foregoing facts, the jury correctly determined that appellant caused the death of his victim under circumstances manifesting an extreme indifference to the value of human life. (Piazza, C.; CR 07-1195; 5-15-08; Imber).

First Arkansas Bail Bonds, Inc. v. State: **[bond forfeiture]** The State failed to strictly comply with the notice and service requirements of the bond-forfeiture statute. Specifically, upon the criminal defendant's failure to appear, a bond-forfeiture summons was not "immediately" issued as required by Ark. Code Ann. 16-84-207. Because the State failed to strictly comply with the bond-forfeiture statute, the trial court erred by entering an order forfeiting appellant's bond. (Marschewski, J.; 07-386; 07-387; 07-388; 5-22-08; Gunter; Danielson).

Bobo v. State: **[admission of evidence]** Appellant was convicted of two counts of first-degree sexual assault. On appeal, she raised several challenges to the admission of evidence. The Court of Appeals determined that the trial court did not abuse its discretion when it permitted two witnesses to testify that the victim touched the appellant's breast on two occasions because the evidence was independently relevant, and because it fell within the pedophile exception. Additionally, the appeals court concluded that the trial court properly admitted printed versions of email messages between appellant and the victim. Although the messages no longer existed on the appellant's computer or on the victim's computer, the messages were authenticated by the victim, his mother, and an expert witness and the printouts, which were obtained from other computers, accurately reflected the email messages. (Wilkinson, N.; CACR 07-401; 5-28-08; Vaught).

Benjamin v. State: **[sufficiency of the evidence; delivery of a controlled substance]** There was substantial evidence to support appellant's convictions for delivery of a controlled substance. **[jury instructions; alternative sentencing]** The trial court was not required to give an instruction permitting the jury to recommend alternative sentencing, and its refusal to do so was not an abuse of discretion. **[cruel and unusual punishment]** If the sentence that is fixed by the trial court is within legislative limits, the appellate court is not free to reduce it even though it might consider it to be unduly harsh. Appellant's fifty-year sentence, which was within the statutory range of punishment, did not violate the United States Constitution or the Arkansas Constitution. (Smith, K.; CACR 07-1230; 5-28-08; Robbins).

Maxwell v. State: **[appellate review]** A challenge to the sufficiency of the evidence is preserved by making a specific motion for directed verdict at both the conclusion of the State's case and at the conclusion of all of the evidence. Because appellant failed to comply with this procedure, his challenge was not considered by the Supreme Court on appeal. (Langston, J.; CR 07-1318; 5-29-08; Brown).

Daniels v. State: **[robbery]** An individual does not commit a robbery when he is attempting to recover money that he lost while gambling. **[premeditated and deliberated capital murder]** Appellant's actions demonstrated that he acted with premeditation and deliberation when he stabbed his victim and the fact that the victim was still alive at the time the appellant left the crime scene is not determinative of the issue. (Pope, S.; CR 07-954; 5-29-08; Brown).

Swindle v. State: **[contempt]** Where the terms of a contempt order have been fulfilled, the issue of whether the order was proper becomes moot. **[right to a jury trial]** The right to a jury trial is a right held by a defendant. A defendant is not required to request a right that he is already guaranteed. Thus, the trial court erred by requiring a criminal defendant to request a jury trial 48 hours before his assigned trial date or be forced to go forward with a bench trial. (Storey, W.;

CR 07-1281; 5-29-08; Hannah).

CIVIL

City of Fayetteville v. Romine: **[civil rights/immunity]** City employee was immune from civil rights action because plaintiff failed to show that employee should have known that his actions as a city employee violated any right of the plaintiff. (Gunn, M.; SC 07-1088; 5-1-08; Glaze)

City of Alexander v. Doss: **[unjust enrichment]** Property owner was not entitled compensation from city for building a retaining wall allegedly to stop erosion on his property. If the basis for recovery was damage to property, the cause of action was in tort to which the city had immunity. There was no basis for recovery on a theory of unjust enrichment because the property owner was a volunteer. (Fox, T.; CA 07-1122; 5-7-08; Hart)

Vimy Ridge Municipal Water Dist. v. Ryles: **[taxes/limitations]** Provisions regarding general taxes do not apply to the special taxes of improvement districts unless the improvement district adopts the provisions by ordinance. (Proctor, W.; SC 07-1262; 5-8-08; Glaze) (See also, *Wilkins v. Vimy Ridge*, SC 07-690, 5-29-08)

Benton County v. City of Bentonville: **[special legislation]** Benton County failed to bear its burden of proving that Act 219 of 1963 (apportionment of road funds among cities in the county) was not rationally related to achieving a legitimate governmental purpose *in 1963* when it was passed. Under Amendment 14, regarding unconstitutional special legislation, this finding is required in order to conclude that legislation is unconstitutional. Such proof was not introduced in this case; therefore the Act stands. (Keith, T.; SC 07-394; 5-8-08; Hannah)

Green v. AlphaPharma, Inc.: **[Chavers test --frequency, regularity, and proximity test--toxic exposure]** Trial court erred in granting summary judgment in favor of defendants poultry producers. There are genuine issues of fact as to whether chicken litter caused plaintiff's injury. **[exclusion of expert witness]** Court properly found that expert's methodology did not meet Daubert factors. (Smith, K.; SC 07-382; 5-8-08; Gunter)

McCourt Manufacturing Corp. v. Rycroft: **[ACA 11-4-405/statutory penalty]** Discharged employee did not comply with statutory requirements in demanding unpaid wages because he failed to make the demand on the foreman or the keeper of his time. (Fitzhugh, M.; CA 07-1182; 5-14-08; Bird)

Prendergast v. Craft: **[damages/timber]** Under ACA 18-60-102, the measure of damages is either the value of the timber removed or the damage to the market value of the land. **[punitive damages]** Damages were not excessive. (Scott, J.; CA 06-1282; 5-14-08; Robbins)

Hanners v. Giant Oil: **[lease/attorney's fees]** Purchase option contained in lease was not ambiguous, and lessee was entitled to purchase the property at the end of the final option period. This action was brought as a declaratory judgment action – not a breach of contract claim. There is no provision for the award of attorney's fees even though the underlying dispute arises from a

contract. (Burnett, D.; SC 07-1314; 5-15-08; Hannah)

Meyer v. CDI Contractors: **[contractor]** ACA 17-25-103 bars an unlicensed contractor from seeking compensation for contract work done in violation of the statute, and this bar includes claim based on fraudulent inducement because it is tied so closely to the contract. (Moody, J.; CA 07-1307; 5-21-08; Gladwin)

Baptist Health v. Circuit Court: **[certiorari]** A writ of certiorari will not lie to overrule a trial court's order to disclose documents through discovery that a party claims are privileged. The court was not acting without jurisdiction in its ruling. (Fox, T.; SC 07-960; 5-22-08; Glaze)

Felton v. Rebsamen Medical Center: **[immunity/affirmative defense]** Hospital raised the defense of charitable immunity in its pleadings. This defense is an affirmative defense and falls under Rule 8 of the Rules of Civil Procedure. *Low v. Ins. Co.* is applicable retroactively. There was no requirement that the hospital amend its answer after the decision in the case to raise the defense when the hospital had already raised the issue in its answer. (Proctor, W.; SC 07-724; 5-22-08; Danielson)

Sims v. Moser: **[judicial dissolution/receivership]** Creditors were denied due process when their claims were denied without the opportunity to support the claims. Receiver was not given the authority to decide claims, which resided with the trial judge, receiver's role was to present claims to the court and make a recommendation. Although circuit court which appointed the receiver has exclusive jurisdiction over the corporation, other courts have jurisdiction to exercise in personam jurisdiction over issues not directly involved in the process of dissolution. (Fox, T.; SC 07-1200; 5-22-08; Danielson)

Ark. State Highway Comm. v. Wood: **[eminent domain/compensation]** Verdict was contrary to the evidence because the testimony on which the amount of compensation was based had no fair and reasonable basis for concluding that the value of the tract was not diminished by the loss of access to the highway. (Fergus, L.; CA 07-1118; 5-28-08; Heffley)

Tate v. Laboratory Corp: **[limitations]** Limitations period began to run when the first paternity test (finding paternity) was performed and not when a second test revealed that the first test was wrong. The occurrence rule rather than the discovery rule applies. (Brantley, E.; CA 07-1064; 5-28-08; Baker)

Greenwood School Dist. v. Leonard: **[teacher contract]** Probationary teacher's sole recourse was not pursuant to the Fair Dismissal Act, but she could prosecute a breach of contract action. (Fitzhugh, M.; CA 07-1283; 5-28-08; Robbins)

Medical Liability Mutual Ins. v. Alan Curtis Enterprises: **[certified question –attorney's fees]** An insurance company that is successful in a declaratory judgment action on the issue of a duty to defend is not entitled to an award of attorney's fees based merely on language in a unilateral reservation of rights letter. (SC 07-991; 5-29-08; Glaze)

Reeve v. Carroll County: **[rule 11 sanctions]** Imposition of sanctions was not an abuse of

discretion based upon the court's finding that the attorney's motion was frivolous. (Lineberger, J.; SC07-1239; 5-29-08; Danielson)

City of Pine Bluff v. Southern States Police Benevolent Association: **[abolishment of civil service commission]** City was permitted to abolish its civil service commission based on a majority vote of the city council. (Wyatt, R.; SC 07-811; 5-29-08; Imber)

Hambay v. Williams: **[county taxes]** Circuit court lacked subject matter jurisdiction over matters related to the reassessment plan for county taxes in the absence of allegations of illegal exaction or unauthorized taxes. (Epley, A.; SC 07-1026; 5-29-08; Glaze)

Gray v. Mitchell: **[severance pay/constitutionality]** Severance payment for the purpose of removing superintendent was a permitted use of school funds. School board determines whether school district expenditures benefitted the school district. Court's role is to ensure that school money is not diverted to an unrelated purpose. (Fox, T.; SC 07-858; 5-29-08; Brown)

DOMESTIC RELATIONS

Whitmer v. Sullivent: **[disqualification of attorney in change-of-custody case]** By certification memorandum, the Arkansas Court of Appeals certified a question to the Supreme Court: Whether an attorney, who is also a prosecutor, should be disqualified from representing a parent in a change-of-custody suit when criminal charges are brought by the prosecuting attorney's office against the other parent's current spouse. Held: Disqualification is not required because no direct conflict of interest exists, nor is this a case of dual representation. The Court remanded to the Court of Appeals for further action. (No. SC 07-419; 5-1-08; Corbin)

Brown v. Brown: **[child support; marital property]** Appellant husband appealed from an order dividing marital property and setting child support. The circuit court considered income attributable to the husband in a limited partnership in setting child support and in making an unequal division of marital property. Appellant raised both issues on appeal. He also raised issues regarding what the court found to be marital property—an increase in value of the limited partnership's stock brokerage accounts and two residences. The Supreme Court affirmed on all issues. (Guthrie, D.; No. SC 07-994; 5-1-08; Imber)

PROBATE

Smith v. Thomas: **[guardianship]** The statutory natural-parent preference for guardianship of a child is subservient to the best interest of the child. (Collier, L.; No. SC 07-1170; 5-15-08; Brown)

JUVENILE

State v. S.G. **[waiver of counsel/custodial statement]** This is an interlocutory appeal of the circuit court's order to suppress the juvenile's custodial statement finding that his waiver of

counsel was not valid. The state argued that the circuit court erred because his grandmother was present during questioning. The issue as to whether the grandmother was a custodian is a question of fact and not subject to an interlocutory appeal under Rule 3. Appeal dismissed. (Williams Warren, J.; 07-1081; 5-8-2008; Hannah)

Lee v. Arkansas Dept. of Human Servs. [TPR] TPR affirmed. Appellant's appeal is based on sufficiency of the evidence as to children's best interest and termination grounds. Appellant argued that DHS failed to show potential harm to the children if they were returned home. The appellate court noted that the circuit court was only required to consider potential harm to the health and safety of the children that results in continuing contact with the parent. The circuit court is not required to find actual harm or identify potential harm. Harm is to be interpreted broadly and can include lack of stability in a permanent home.

The appellate court noted that the circuit court found two grounds as the basis for the termination order, but noted that only one ground is necessary to terminate parental rights. The children had been out of the home for more than one year and the conditions that caused removal had not been remedied. Appellants argued that they complied with the case plan and court orders. However, the appellate court noted that what matters is whether completion of the case plan achieves its intended results and whether the appellant could care for their children. Mom failed to address environmental issues, continued to have inappropriate discussion with her children about the case, and did not accept responsibility for protecting her children from their father. The father was unable to care for the children due to his abusive behavior and unwillingness to admit fault. He had not dealt with his anger issues and was incarcerated at the time of the hearing. (Branton.; CA 07-1270; 5-28-2008; Vaught)

EIGHTH CIRCUIT

Benton v. Merrill Lynch & Company: [fraud] District court did not err in finding that plaintiffs had failed to state a claim under Section 106(c) of the Arkansas Securities Act as the complaint failed to contain any allegations which might establish that defendant materially aided the fraudulent sale of promissory notes to the plaintiffs; allegations were also insufficient to establish a claim for common law fraud. (E.D. Ark.; 07-2224; 5-5-08)

Moore v. Forrest City School District: [employment discrimination] Defendant school district provided legitimate, non-discriminatory grounds for its hiring and promotion decisions. Defendant failed to show the grounds were pretexts for race discrimination. Plaintiff could not claim that failure to hire her for a position was retaliation for her EEOC complaints as she failed to apply for the position in question. (E.D. Ark.; # 07-2206; 5-7-08)