

APPELLATE UPDATE

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PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
DECEMBER, 2008 VOLUME 16, NO. 4

ANNOUNCEMENTS

REMINDER:

Administrative Judge selections need to be reported to the Supreme Court by **February 1, 2009**.

Administrative Plans are to be submitted by **July 1, 2009**.

On December 11th, the Supreme Court handed down two per curiam orders, which were included in the mailout: Adopted Criminal Rule of Procedure 1.9 implementing Administrative Order 19;
Amended Administrative Order 20 regarding civil process servers.

CRIMINAL

Holden v. State: [mental evaluation] Appellant requested a mental evaluation the day before his trial was scheduled to begin. At the hearing on his motion, appellant failed to present evidence to support his request other than a "second-hand account" of his mental state, which was given by his attorney, and was based upon one conversation with appellant's mother. The trial court concluded that there was insufficient cause presented to suspect that appellant suffered from a mental disease or defect. On review, the Court of Appeals concluded that the trial court did not err in denying appellant's request for a mental evaluation. (Hanshaw, L.; CACR 08-361; 11-5-08; Gladwin).

Blanchard v. State: **[admission of photographs]** The trial court abused its discretion when it admitted more than one thousand pornographic photographs into evidence without performing the “gate-keeping function” of sifting through the photographs to determine their probative value in relation to their prejudicial effect. By admitting all of the photographs, without evaluating them individually, the trial court did not exercise any discretion. (Phillips, G.; CACR 07-1157; 11-5-08; Heffley).

Thelma v. State: **[appellate procedure]** An order granting immunity is not a final appealable order. (Cole, J.; CR 08-444; 11-13-08; Wills).

Duncan v. State: **[jurisdiction]** Because a valid arrest warrant, which was based upon a violation of the terms of appellant’s probation, was issued prior to the expiration of his probationary period, and because the arrest warrant established extra-ordinary jurisdiction upon the trial court, it had jurisdiction to revoke appellant’s probation and impose a sentence after appellant’s probationary period expired. (Jones, B.; CACR 08-141; 11-19-08; Vaught).

Pullman v. State: **[sufficiency of the evidence; possession of marijuana with intent to deliver]** There was substantial evidence to support appellant’s conviction for possession of marijuana with intent to deliver. **[suppression of evidence]** Law enforcement officials had reasonable cause to believe that appellant committed a felony. Thus, the warrantee’s arrest of appellant was proper and a search incident to that arrest was also proper. Accordingly, the trial court correctly admitted the evidence, which was obtained during that search. (Cottrell, G.; CACR 08-67; 11-19-08; Hart).

Ewell v. State: **[sufficiency of the evidence; aggravated robbery; theft of property; kidnaping]** There was substantial evidence to support appellant’s aggravated robbery, theft of property, and kidnaping convictions. (Proctor, W.; CR 08-584; 11-20-08; Wills).

Williams v. State: **[appellate review]** The Supreme Court was precluded from considering appellant’s argument on appeal because it was not presented to the trial court, and the Supreme Court will not consider an argument raised for the first time on appeal. (Humphrey, M.; CR 08-619; 11-20-08; Gunter).

Foster v. State: **[revocation of suspended imposition of sentence]** Appellant was convicted of theft and was given a five-year suspended imposition of sentence. Thereafter, appellant committed aggravated assault upon an employee of a correctional facility. Because the State established by a preponderance of the evidence that appellant committed a new offense, the trial court correctly found that he violated a condition of his suspended sentence. (Fitzhugh, M.; CACR 08-421; 12-3-08; Robbins).

Ficklin v. State: **[sufficiency of the evidence; possession of methamphetamine with intent to deliver; possession of ecstasy with intent to deliver]** Proof of a detectable amount of a controlled substance in a consumable form, such as a pill, is sufficient evidence for a fact-finder to infer that the accused possessed a usable amount of the controlled substance. There was substantial evidence to support appellant’s convictions for possession of methamphetamine with intent to deliver and possession of ecstasy with intent to deliver. (Langston, J.; CACR 08-593; 12-10-08; Baker).

Goodsell v. State: **[sufficiency of the evidence; second-degree sexual assault]** The State did not satisfy the corpus-delicti requirement because it failed to offer proof, other than appellant’s out-of-court confession, that the sexual assaults, with which appellant was charged, occurred. Thus, there was not substantial evidence to support appellant’s convictions. (Reynolds, D.; CACR08-115; 12-17-08; Marshall).

Reed v. State: **[postconviction relief]** Rule 37.1 of the Arkansas Rules of Criminal Procedure does not provide a remedy when an issue could have been raised at trial or on appeal. However, an exception to this Rule is made for errors that are so fundamental as to render the judgment of conviction void and subject to collateral attack. The provisions of Rule 37.3 (a) of the Arkansas Rules of Criminal Procedure are mandatory and require a judge to make written findings. (Wyatt, R.; CR 08-345; 12-19-08; Brown).

Hobbs v. Reynolds: [**writ of prohibition**] Appellant may raise his jurisdictional claims in a direct appeal rather than in a petition for a writ of prohibition. [**writ of certiorari**] Appellant was charged by misdemeanor information with a violation of an order of protection. After appellant's arrest, the circuit court set bond and required appellant to submit to GPS electronic monitoring. Thereafter, appellant's bond was revoked for violating the terms of his electronic monitoring. A new bond hearing was held and the circuit court ordered appellant to be held without bond. Appellant twice requested that bail be set. Appellant then filed a petition for a writ of certiorari with the Supreme Court. The Supreme Court concluded that the circuit court's pretrial denial of appellant's bail was an abuse of discretion. Thus, the Supreme Court granted his petition for a writ of certiorari. (Reynolds, D.; CR 08-1364; 12-19-08; Per Curiam).

Marks v. State: [**Rule 701**] The trial court did not abuse its discretion when it permitted a witness to testify that the sound he heard was appellant driving over his victim. The Supreme Court concluded that such evidence satisfied the three-prong test, which is used for determining admissibility of evidence pursuant to Rule 701 of the Arkansas Rules of Evidence. (Jones, B.; CR 08-472; 12-19-08; Brown).

CIVIL

Statewide Outdoor Advertising v. Town of Avoca: [**declaratory judgment**] Court erred in dismissing declaratory judgment complaint for failure to state facts upon which relief could be granted. The complaint sufficiently alleged that plaintiff's rights were affected by the ordinance and sought a determination of its rights. (Duncan, X.; CA 08-483; 11-5-08; Bird)

Neal v. Sparks Regional Medical Center: [**charitable immunity**] Hospital's failure to timely assert the defense of charitable immunity was prejudicial, and trial court erred in failing to strike the amended answer in which the defense was asserted. (Cox, J.; SC 08-169; 11-6-08; Gunter)

Anglin v. Johnson Regional Medical Center: [**charitable immunity**] Trial court properly found on motion for summary judgment that the defendant was immune from suit by virtue of the doctrine of charitable immunity. Granting summary judgment does not deny the plaintiff his constitutional right to a jury trial. (Sutterfield, D.; SC 08-453; 11-6-08; Hannah)

Advance America v. McGinnis: [**arbitration**] Trial court properly refused to enforce motion to compel arbitration because the agreement lacked mutuality of the arbitration obligation. (Thomas, J.; SC 08-492; 11-6-08; Corbin)

McGhee v. Board of Collection Agencies: [**pay-day lender**] Arkansas Check-Cashers Act is unconstitutional because it authorizes loans charging usurious rates of interest. (Sims, B.; SC 08-164; 11-6-08; Danielson)

BBAS, Inc. v. Marlin Leasing Corp. [**conversion**] A claim for conversion was alleged in assertion that refund to person who had not paid the money was an exercise of dominion or control over the money that was inconsistent with "owner's" rights to it. Conversion does not require bad faith or bad motive. (Tabor, S.; CA 08-531; 11-12-08; Glover)

Teris, LLC v. Chandler: [**class certification**] Six requirements for class - action certification were satisfied. In addition, simply because class, as defined, does not include claims for personal injury, such claims have not been abandoned by members of the class; rather, any such claims may be pursued outside of this class action. (Guthrie, D.; SC 08-692; 11-13-08; Corbin)

City of Jacksonville v. City of Sherwood: [**annexation**] Annexation was proper. *Vestal* criteria were satisfied; only one of the five criteria must be satisfied, and in this case, two of the factors were met. There is no requirement that an additional "reasonableness analysis" based on the *Marion* case must be undertaken by the court. Ark Code Ann. Sections 14-56-413 and 426 do not prohibit the annexation into Sherwood of portions of the property which lie within the Jacksonville extraterritorial planning jurisdiction.

(Kilgore, C.; SC 08-386; 11-13-08; Gunter)

Dotson v. City of Lowell: [**venue**] Venue was property in the plaintiff's county under Ark. Code Ann. Section 16-55-213. This newer venue statute repealed by implication section 16-60-116(a). Venue is fixed at the time of the events giving rise to the claim. (Scott, J.; SC 08-240; 11-13-08; Brown)

Lee v. Mansour: [**malpractice**] Summary judgment was not in order. Under facts of case, trial court's grant of the motion to withdraw does not serve as an absolute shield to a separate action for legal malpractice. (Clinger, D.; CA 08-406; 11-19-08; Robbins)

International Paper v. Clark County Circuit Court: [**prohibition/workers comp**] Exclusive jurisdiction was with the Workers' Compensation Commission; circuit court had no jurisdiction. (SC 08-861; 11-20-08; Corbin)

Davis v. McKinley: [**declaratory judgment**] If a party with an interest in the matter is not made a party to the declaratory judgment action, any declaration shall not prejudice the rights of the person not a party. Under the facts of the case, the court properly vacated the default judgment when it became aware of the unnamed party, and the additional fact that there was another suit pending among the parties involving the same issue. (Clawson, C.; CA 08-785; 12-3-08; Pittman)

Southern Bank of Commerce v. Union Planters Bank: [**ucc/holder in due course**] Bank was a holder in due course when it received a cashier's check as payment of an antecedent loan. It was not necessary that the bank release the mortgage securing the loan or make bookkeeping entries before it could be said that it took the check for value. The bank did not have notice that the check would be dishonored until after receipt. (Fogleman, J.; SC 08-288; 12-4-08; Corbin)

Bibbs v. Community Bank of Benton: [**standing/bankruptcy**] Claim was property of the bankruptcy estate; therefore, debtor did not have standing to file action against bank arising out of loan transaction. (Whiteaker, P.; SC 08-378; 12-4-08; Brown)

Johnson v. Cincinnati Ins. Co.: [**post-appeal jurisdiction**] Appellate court's mandate did not deprive trial court of jurisdiction to consider a Rule 60(c)(4) motion with respect to the reinstated judgment (appellate court had vacated order granting a new trial). However, there was no basis to set aside the judgment because of alleged constructive fraud in submitting of a proposed precedent to the court. (Hill, V.; SC 08-327; 12-4-08; Wills)

Hussman v. Throesch: [**post-trial order/jurisdiction**] There was no appellate jurisdiction because the order had been deemed denied by rule and the notice of appeal from that date was untimely. (Smith, P.; CA 08-478; 12-10-08; Marshall)

Terminix v. Trivitt: [**arbitration**] The question of arbitration was controlled by the Federal Arbitration Act rather than the Arkansas Uniform Arbitration Act. (Erwin, H.; CA 08-233; 12-10-08; Heffley)

Daimler Chrysler v. Smelzer: [**lemon law/expenses**] The term "expenses" in Arkansas Lemon Law allows recovery of mileage and copy costs. Rule 54 does not preclude recovery of mileage. [**settlement**] The parties did not reach an agreement to settle the dispute. (Anthony, C.; SC 07-1006; 12-11-08; Imber)

Gatzke v. Weiss: [**Art. 19, section 16/competitive bidding**] The section only applies to county construction contracts and does not apply to state construction projects. (Moody, J.; SC 08-415; 12-11-08; Brown)

Bryant v. Hendrix: [**R. 15/substitution/relation back**] Rule 15 does not apply to substitution of the plaintiff. An amendment of the complaint to substitute the proper party plaintiff is regarded as the institution of a new

action in regards to the statute of limitations. The amendment does not relate back to the date of the original complaint. (Clawson, C.; SC 08-828; 12-11-08; Corbin)

Jones v. Cuurens: [**excited utterance**] Hearsay testimony from state trooper was not admissible under the excited utterance exception because an adequate foundation had not been laid. (Gibson, B.; CA 08-136; 12-17-08; Marshall)

Deschner v. State Farm: [**insurance**] Policy did not provide coverage for injuries arising from paint ball incident. The paint ball was fired from a vehicle, and the policy excluded injuries arising from the occupancy of a vehicle. (Lineberger, J.; SC 07-1159; 12-19-08; Gunter)

Couch v. Farmers Ins.: [**insurance/stacking**] Public policy does not prohibit the stacking of benefits in an insurance policy. (Webb, G.; SC 08-389; 12-19-08; Corbin)

Oliver v. Phillips: [**election contest**] Challenge to candidate's qualifications was filed pre-election, and court had jurisdiction, and the jurisdiction was not lost after the election. However, issue was moot because it was not expedited or ruled on prior to the election. (Lineberger, J.; SC 07-1159; 12-19-08; Gunter)

Davis v. Brushy Island Public Water Authority: [**mootness**] Any judgment rendered on the issue related to the conversion of the association from a nonprofit corporation to a water authority would have no practical legal effect upon the former nonprofit because its facilities were now the subject of a separate receivership. (Moody, J.; SC 08-562; 12-19-08; Hannah)

Scamardo v. Sparks Regional Medical Center: [**charitable immunity**] Law of the case doctrine does not apply when an appellate decision has been overruled. Medical center satisfied six of the eight factors announced in the *George* case. Therefore, based on the totality of the evidence, the defendant was entitled to charitable immunity. (Tabor, S.; SC 08-820; 12-19-08; Wills)

DOMESTIC RELATIONS

Wesley v. Hall: [**paternity; child support; statutory construction**] The trial court correctly applied the statute in effect at the time the written order for child support was filed. Therefore, once the appellee was tested and the court found him not to be the biological father of the child, the court correctly set aside a prior order of paternity, set aside orders for child support, vacated the outstanding amounts, and ordered that there be no refund for child support previously paid, in conformity with Ark. Code Ann. § 9-10-115. (McCorkindale, R.; No. CA 07-1293; 11-5-08; Baker)

Grays v. Ark. OCSE: [**child support; Social Security disability benefits to child**] A case of first impression. Held: "[E]quitable considerations are applicable in determining whether a non-custodial parent may receive a credit against past-due child support by the payment of Social Security disability benefits to the child for whom support is owed. The discretion in this determination is best left to the circuit court." Here, the equities clearly favored the mother. The fact that the son received \$15,835 from the Social Security Administration did nothing to relieve the father of his obligation to pay a judgment for child-support arrears. The Social Security payment to the son did not relieve the inequities borne by the mother and caused by the noncustodial father's failure to honor his child-support obligation. The circuit court's judgment against appellant for nearly \$14,000 in arrears and related court costs and fees was affirmed. (Pope, S.; No. SC 07-1202; 11-6-08; Imber)

PROBATE

Hartsfield, v. Lescher, et al.: [**attorney fees**] The award of fees and costs against the appellant was not an award made to the prevailing party, but was a sanction levied against the appellant for his failure to produce an accounting as representative of the estate as ordered by the circuit court. Such a sanction is expressly provided for by Ark. Code Ann. § 28-52-103(c)(2). It was a tool of enforcement made available to the probate court through the probate code. The Court of Appeals held that the trial court intended to make an award of attorney fees and expenses to punish the appellant for his neglect of his duty as personal representative. (Story, B.; No. CA 07-1125; 11-5-08; Hart)

Stevens v. Heritage Bank, et al.: [**declaratory judgment; dower; debts of the decedent**] A widow takes her dower free of her husband's debts and an estate is not entitled to a setoff when the widow is not indebted to the decedent's estate. (Story, B.; No. CA 08-40; 11-12-08; Hart)

Carmody, et al. v. Betts, Executor: [**construction of will; testamentary trust**] The Court of Appeals affirmed the trial court's finding that the trustees of a testamentary trust had the discretion to consider the assets of the beneficiary in determining her need for support from the trust. The will was undisputedly unambiguous. The language of the trust indicated that the intention of the settlor was not only to use that part of the income necessary to support his sister but also to preserve and distribute assets remaining after his sister's death. The Court found that the language indicated that the settlor believed that the income would be more than sufficient to meet his sister's needs and an intent to protect the principal. Also, it provided for distributing the principal and all undistributed income upon termination of the trust, without any qualification "if any remains." The Court found no error in the "the circuit court's construction of the will or in its adherence to precedent." (Landers, M.; No. CA 07-1286; 11-19-08; Gladwin)

Powell v. Lane, et al.: [**adoption; marital status; paternity; default judgment—collateral estoppel**] In a paternity action filed by the appellee mother of the child in question, the circuit court granted a default judgment against the appellant, finding that he was the natural father of the child and finding that appellant and appellee mother were never married. The court set visitation, ordered child support and ordered the appellant to pay one-half of the child's medical expenses. The appellant did not appeal the decision. In a subsequent step-parent adoption case involving the same child, the circuit court found that the appellant/biological father of the child had failed without justification to support the child for more than one year, that his consent was not necessary for the adoption of the child, and that it was in the best interest of the child to grant the appellee stepfather's petition for adoption. On appeal, the Court of Appeals reversed the circuit court, found that the appellant and appellee mother of the child were validly married, and reversed on all other issues. On a petition for review, the Supreme Court reversed the Court of Appeals and affirmed the circuit court. The majority based its opinion on collateral estoppel, finding that doctrine applicable to a default judgment in this case. The court found that the appellant had personal notice and a full and fair opportunity to be heard on the issue of the validity of the parties' marriage and that the issue of marital status was "actually litigated." The decision of paternity, the Court said, was conclusive, and the appellant is bound by that decision. The Court said that "[e]ach judgment, taken by default, or otherwise, must be examined to determine what was finally decided and whether it meets the requirements of collateral estoppel." The Court also affirmed the trial court's decision in granting the adoption. (Looney, J.; No. SC 08-282; 12-11-08; Hannah)

JUVENILE

Belue v. Arkansas Dept. of Human Servs.: [**TPR**] TPR affirmed. At the time of the termination hearing the children had been out of appellant's home for twenty months and appellant had not remedied the situation that caused removal. Appellant still had issues with regard to housing, employment, finances, anger, and an inability to properly interact with his children during visits. Appellant's compliance with certain aspects of the case plan do not warrant reversal; what matters is whether his compliance made him capable of caring for his children. (Hewett, M.; 08-883; 12-17-2008; Pittman)

R.M.W. v. State: [**Transfer**] The circuit court's decision to deny appellant's transfer to the juvenile division and to try appellant as an adult was affirmed. Appellant, a 15 year-old juvenile, was charged with capital murder, attempted capital murder, and aggravated robbery. The circuit court is required to review the factors in Ark. Code Ann. §9-27-318 for transfer motions. The issue before the trial court was whether the appellant was forced or manipulated into participating in the robbery or whether he was a willing participant. The trial court found that the evidence, including events shown on the videotape, contradicted appellant's testimony and that he was a willing participant. The trial court found that appellant's testimony was not credible. (Proctor, W.; CR08-505; 11-6-2008; Hannah)

Fields v. Arkansas Dept. of Human Servs.: [**TPR**] TPR affirmed. The circuit court did not err in terminating appellant's parental rights on the ground that the appellant was sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the child's life. When the ground under consideration is the length of the prison sentence, the length of the prison sentence can be determinative of the termination decision. (Hewett, M.; 08-296; 11-5-2008; Heffley)

DISTRICT

Wilson v. Dardanelle District of the District Court of Yell County: [**District Court Rules**] Appellant owned a “judgment recovery” business. Acting through the company, appellant became the owner of assignments of judgments in certain small claims cases in district court. The district court initially entered orders acknowledging the assignment of these judgments. The judgments were enforced through writs of garnishment. Subsequently, the district court entered an order setting aside the assignments. Appellant appealed one case to circuit court which held the assignment to be valid. The district court later denied appellant’s motion to reconsider its order setting aside the assignments. Appellant then filed a petition for a writ of mandamus in circuit court alleging that she had a right to collect the judgments under Ark. Code § 16-65-120 and that the circuit court misinterpreted Rule 10(d)(4) of the District Court Rules and Section 4 of Administrative Order 18. It was held appellant’s business fit the definition of a collection agency, which is restricted from bringing an action in the small-claims division of the district court. (Fitzhugh, J.; SC08-901; 12-19-08; Danielson)

EIGHTH CIRCUIT

Engleman v. Murray: [**qualified immunity**] In the factual situation presented in the case, it was objectively reasonable for the officer executing an arrest warrant for plaintiff to believe that he was executing the arrest warrant in Arkansas; as a result, the arrest did not violate the Fourth Amendment, and defendant was entitled to qualified immunity. (W.D. Ark.; #07-2060; 11-17-08)