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CRIMINAL

Bell v. State: **[mistrial]** The trial court did not abuse its discretion when it denied appellant's motions requesting a mistrial. (Tabor, S.; CACR 10-480; 1-5-11; Robbins).

Charland v. State: **[motion to suppress]** There was no unreasonable seizure or detention that would have warranted the suppression of appellant's confession. Thus, the circuit court did not err in denying appellant's motion to suppress. (Crow, G.; CACR 10-365; 1-5-11; Gladwin).

Moss v. State: **[motion to suppress; search warrant; affidavit]** Appellant failed to establish that the affidavit that accompanied the search warrant, which permitted the search of his home, was fatally defective based upon false material, misleading information, or omissions. The affidavit provided sufficient information regarding the existence and timing of alleged criminal activity. Based upon information, which was provided by an informant, there was reasonable cause to believe that there was drug paraphernalia in appellant's home. After concluding that appellant's challenges to the affidavit and the search warrant were without merit, the Court of Appeals held that the trial court did not err in denying appellant's motion to suppress. (Tabor, S.; CACR 10-336; 1-12-11; Vaught).

Estrada v. State: **[sufficiency of the evidence; rape; sexual abuse in the first degree]** There was substantial evidence to support appellant's convictions. (Wright, H.; CR 10-225; 1-13-11; Gunter).

N.B. v. State: [**motion to transfer**] Because appellant was charged with serious aggressive offenses against persons, appellant had a high level of culpability, appellant was unlikely to be rehabilitated, and appellant was charged with several felonies, the Court of Appeals concluded that the trial court did not err in denying appellant's motion to transfer his case to the juvenile division of the circuit court. (Sanders, E.; CA 10-794; 1-19-11; Brown).

Taylor v. State: [**sufficiency of the evidence; capital murder; accomplice testimony**] The State provided sufficient evidence to corroborate the testimony of appellant's accomplice. Thus, there was substantial evidence to support appellant's conviction and the trial court did not err in denying appellant's motion for a directed verdict. (Wright, H.; CR 10-703; 1-20-11; Gunter).

Blueford v. State: [**double jeopardy**] A discussion between the jury foreperson and the court in which the court was advised that the jury was deadlocked on some charges and in agreement on other charges did not constitute an acquittal for the purposes of double jeopardy when a final verdict was not entered. The giving of AMI Crim. 2d 302, the transitional jury instruction, does not negate the foregoing principle of law. (Hanshaw, L.; CR 10-554; 1-20-11; Corbin).

Jackson v. State: [**mistrial**] During appellant's trial, a witness for the State offered testimony on an issue that the defendant believed was precluded by an earlier order of the court. When defendant objected to the testimony, the court instructed the jury to ignore the testimony. The defendant then requested a mistrial. The court denied the motion. On appeal, the Supreme Court concluded that the testimony was not prejudicial on its face and that the trial court did not abuse its discretion when it denied appellant's motion. [**admission of evidence**] The trial court did not abuse its discretion when it refused to allow appellant to question a witness about a subsequent arrest and a misdemeanor gun possession charge. The trial court did not abuse its discretion when it excluded testimony about a bag of substance that may have been marijuana, which was found by police officers at the scene of the crime. (Wright, H.; CR 10-43; 1-20-11; Brown).

Jones v. State: [**motion to suppress**] Because law enforcement officials did not have reasonable suspicion to stop appellant, the results from her subsequent breath tests should have been suppressed as fruit of the poisonous tree. (Storey, W.; CACR 10-588; 1-26-11; Abramson).

Ludrick v. State: [**court interpreter**] The foreign-language interpreter, which was appointed by the trial court, adequately protected appellant's constitutional rights. (Storey, W.; CACR 10-223; 1-26-11; Robbins).

Hall v. State: [**sufficiency of the evidence; second-degree battery**] There was substantial evidence to support appellant's conviction. [**404 (b)**] Evidence of appellant's prior bad acts was admissible to establish his intent. (Green, R.; CACR 10-135; 1-26-11; Pittman).

Vanoven v. State: [**Ark. Code Ann. § 16-85-407**] Arkansas Code Annotated § 16-85-407 relates to matters of notice and provides a criminal defendant with protection against being prejudiced through surprise. A failure to comply with Ark. Code Ann. § 16-85-407 does not invalidate an

otherwise legal sentence. **[admission of evidence]** The trial court abused its discretion when it excluded testimony that established that certain witnesses were offered and accepted plea agreements because such evidence was relevant and showed that the witnesses had incentive to give testimony in appellant's case that was favorable to the State. (Hudson, A.; CACR 10-617; 1-26-11; Vaught).

Sweet v. State: **[sufficiency of the evidence; aggravated robbery]** There was substantial evidence to support appellant's conviction. **[jury instructions]** The circuit court did not abuse its discretion in refusing to instruct the jury on the offense of ordinary robbery because the evidence provided by the State clearly established that appellant was guilty of aggravated robbery. Neither the offense of first-degree false imprisonment nor the offense of second-degree false imprisonment is a lesser-included offense to kidnapping. Thus, the trial court did not err when it refused to instruct the jury on false imprisonment in appellant's case in which he was charged with kidnapping. **[admission of evidence]** The circuit court did not abuse its discretion in allowing a videotape and several photographs into evidence because those items were informative and corroborated the testimony of several witnesses. **[spontaneous statement]** Spontaneous statements are always admissible regardless of whether *Miranda* warnings have been given. (Medlock, M.; CR 10-676; 1-27-11; Gunter).

Riddell v. State: **[continuance]** Appellant failed to comply with Ark. Code Ann. § 16-63-402 (a). Specifically, he did not file an affidavit outlining his diligent attempts to obtain the presence of certain witnesses and explaining the relevant nature of their expected testimony. Accordingly, the trial court did not abuse its discretion in denying appellant's motion for a continuance. (Hearnberger, M.; CR 10-759; 1-27-11; Danielson).

Woodall v. State: **[rape-shield statute]** Because appellant failed to prove that a prior act of sexual conduct clearly occurred, it was not an abuse of discretion for the trial court to exclude certain testimony pursuant to the rape-shield statute. **[mistrial]** The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon negative comments made by potential jurors during *voir dire*. (Whiteaker, P.; CR 10-796; 1-27-11; Baker).

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Christian v. State: (possession of cocaine; possession of marijuana; possession of drug paraphernalia) CACR 10-521; 1-5-11; Gruber.

Morris v. State: (aggravated residential burglary; aggravated robbery; kidnapping; theft of property) CACR 10-653; 1-5-11; Abramson.

Holloway v. State: (fleeing; first-degree endangering the welfare of a minor; second-degree endangering the welfare of a minor). CACR 10-509; 1-26-11; Gladwin.

Metcalf v. State: (first-degree battery) CACR 10-570; 1-26-11; Wynne.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Scott v. State: (suspended sentence) CACR 10-543; 1-26-11; Glover.

CIVIL

Mitchell v. Ramsey: [**doctrine of inconsistent positions/judicial estoppel**] Plaintiff's alternative claims for relief did not violate doctrine of inconsistent positions. The following elements must exist to state a *prima facie* case of judicial estoppel: 1. A party must assume a position clearly inconsistent with a position taken in an earlier case, or with a position taken in the same case; 2. A party must assume the inconsistent position with the intent to manipulate the judicial process to gain an unfair advantage; 3. A party must have successfully maintained the position in an earlier proceeding such that the court relied upon the position taken; and 4. The integrity of the judicial process of at least one court must be impaired or injured by the inconsistent positions taken. (Hill, V.; CA 10-565; 1-5-11; Gruber)

Crites v. Cowan: [**limitations**] Limitations period for civil-rights retaliation claim was no longer than three years. (Kilgore, C.; CA 10-717; 1-5-11; Glover)

Verbitski v. Union Pacific: [**service**] Complaint was not served within 120 days. To extend service period, there must be a written order entered in the record. An oral extension is not effective. (Brantley, E.; CA 10-582; 1-5-11; Robbins)

Le v. Nguyen: [**lease/bankruptcy**] Contract to sell property by a debtor in bankruptcy must be approved by the bankruptcy court to be an enforceable contract. (Kilgore, C.; CA 10-399; 1-12-11; Gladwin)

Massey v. Fulks: [**non-claim period**] Ark. Code Ann. Section 28-50-101 (h) extends the non-claim period for two years when an estate fails to give actual notice to a known or reasonably ascertainable creditor who is identified during the non-claim period. (Harkey, J.; SC 10-364; 1-13-11; Henry)

Pope v. Overton: [**inverse condemnation**] Measure of damages for inverse condemnation is the value of the portion of the land taken plus any damage to the remaining property. One measure of damages for the cutting of trees is the value of the timber taken. [**rule 68**] Rule 68 does not apply to an unallocated offer of judgment submitted by joint defendants. (Shirron, P.; SC 10-63; 1-20-11; Danielson)

Cross v. State Farm Ins.: **[ins/household exclusion]** Accident occurred in Oklahoma involving Arkansas residents and their insurance coverage. Oklahoma does not recognize household exclusion. Terms of policy provide that it is to be interpreted as providing minimum liability coverage required under Oklahoma law (compliance with a foreign states's compulsory insurance laws) . Oklahoma law only requires that the policy comply with Arkansas law. Since policy is in compliance with Arkansas law, it also comports with Oklahoma law, and the household exclusion is enforceable. (Gunn, M.; CA 10-683; 1-26-11; Abramson)

Ridenoure v. Ball: **[prescriptive easement]** Evidence established a prescriptive easement that had not been abandoned. (Lindsay, M.; CA 10-82; 1-26-11; Brown)

Conway Commercial Warehouse, LLC v. FedEx Freight, Inc. **[lease/contract]** Party unsuccessfully argued that its breach was excused because other party breached first. A first breach may release performance only if the first breach is material and sufficiently serious. The measure of damages used by the court was proper because the parties had agreed on the remedy in the event of a breach, and there is no reason not to adhere to the agreement. Prejudgment interest is not available where conflict exists over the validity of the damages sought and the fact-finder is required to use its discretion to determine the amount of damages. In reducing the amount of attorney's fees requested, the court must explain its analysis. (Maggio, M.; CA 10-658; 1-26-11; Hart)

Allstate Ins. Co. v. Dodson: **[instructions]** Non-AMI instructions were not inherently erroneous and a general objection was not sufficient to support contention that instructions were binding and directing the jury to rule in favor of the plaintiff. **[defamation]** Substantial evidence supported jury's finding that Allstate's statements caused plaintiff damages and that those damages are measured in terms of lost profits. **[expert testimony]** Expert testimony was relevant as there was a sufficient connection between the testimony regarding national practices and the activities in question in this case. **[punitive damages]** The awarding of punitive damages in this case was warranted and the amount of the award does not run afoul of due process, including the ratio of compensatory to punitive damages (2.5:1). (Brantley, E.; SC 10-257; 1-27-11; Brown)

Machen v. Machen: **[family-settlement agreement]** After the death of appellant's husband, who was appellee's father, a probate case was filed in which the appellant and the appellee had a dispute over whether or not the decedent's last will was his original will, or a version with handwritten changes that the decedent and both of the parties had signed and dated. A hearing was held in the probate division to determine which version should be admitted to probate and whether the appellant should be appointed executrix. After testimony was presented, the attorney for the appellee stated that the parties actually had a family-settlement agreement that needed to be tried in another court. The appellee subsequently filed a civil complaint alleging that, by the marked-up will, the decedent and the parties had entered into a family-settlement agreement. There were many contradictions in the parties' testimony about where and when changes were made to the document, although they agreed on the substance of the changes. The trial court found that the parties had entered into a family-settlement agreement, that the decedent had

changed the amount of money the appellee was to receive for himself and as trustee for his children, and that other changes were made in the division of some personal property. The court ordered the division of assets in accordance with the agreement. The Court of Appeals, noting that family-settlement agreements are favorites of the law, to be encouraged when no fraud or imposition is practiced, said that the standard of review for contracts in general applies to family-settlement agreements. The court said the parties' signatures on the decedent's marked-up version of the will indicated their mutual intent to enter into a binding agreement. The essential terms were clear, all were competent to contract at the time, and there was sufficient consideration. The decision of the trial court was affirmed. (Chandler, L.; No. CA 10-561; 1-26-11; Vaught).

JUVENILE

Parker v. Arkansas Dept. of Human Servs. [Dependency-Neglect Adjudication] Appellant challenged the sufficiency of the evidence to support the trial court's finding that her son was dependent-neglected based on parental unfitness, neglect, and abuse. The court specifically found that appellant subjected the child to Pediatric Condition Falsification, Munchausen syndrome by proxy, as confirmed by medical personnel. The appellate court noted that while there was counter evidence, it defers to the trial court to observe parties and judge witness credibility. (Arnold, G; 10-746; 1-12-2011, Hart)

Hayes v. Arkansas Dept. of Human Servs. [TPR] Appellant challenged that the TPR was in his child's best interest and that it was contrary to law because his child remained in his mother's custody. The appellate court found that appellant's children needed permanency in the form of a irrevokable break from his violence. The court further noted that the children would not be returned to the "family home" as envisioned by the statute because the children would not be returned to the "family home" as it once existed -- where appellant was once a member of the family. The case was distinguished from *Caldwell* because of appellant's unrelenting violence before and after the case began. Finally, appellant argued that TPR was not in the child's best interest because the circuit court must consider the likelihood of adoption and potential harm. The appellate court found that likelihood of adoption and potential harm do not have to be proved by clear and convincing evidence. They are factors for the court to consider. While adoptability is not likely since they are in the custody of their mother, the potential harm factor weighs heavily in favor of termination due to appellant's violence. (Finch, J.; 10-881; 1-12-2011; Gladwin)

L.W. v. Arkansas Dept. of Human Servs. [TPR] Appellant, minor mother in foster care, challenged the sufficiency of the evidence as to best interest and TPR grounds. The first termination petition was filed in December 2009 based on abandonment when she left her child for over five months when she fled foster care. The trial court continued the goal of reunification with the intent of giving appellant a year to work toward reunification, but made specific findings that appellant abandoned her son and subjected him to aggravated circumstances by fleeing foster

care. DHS filed its second TPR petition in February 2010 alleging the 12 month failed to remedy ground and aggravated circumstances ground. The appellate court affirmed based on aggravated circumstances, including abandonment and that further services would not likely result in reunification. As to best interest, appellant argued that if she were able to live in a stable environment under the supervision of another adult, TPR would not be necessary. The evidence did not support appellant's ability to provide a stable environment for her child. (Branton, W.; 10-890; 1-19-2011; Brown)

N.B. v. State. [Juvenile Division Transfer] The criminal division denied appellant's motion to transfer his case from criminal division to juvenile division. Appellant was charged with two counts of committing a terroristic act, two counts of aggravated assault, and one count of aggravated assault against a household member. Appellant's argument that the trial court failed to consider or misinterpreted the statutory factors was without merit. The court is not required to give equal weight to each factor. Appellant was charged with serious aggressive offenses against persons, his culpability, his prior juvenile court history, and the number of felonies charges were sufficient for the court to deny transfer. (Sanders, E.; 10-794 1-19-2011; Brown)

Case in which the Court of Appeals affirmed No-Merit TPR and Counsel to Withdraw Granted:

Richmond v. Arkansas Dept. of Human Servs., Appellant failed to address drug problem, maintain income or housing, and defied the court's orders. (Branton, W.; 10-995; 1-19-2011; Robbins)

DOMESTIC RELATIONS

McDougal v. McDougal: [child support] The trial court looked at three years of appellant's income to determine "income" for child support purposes. The court used 2007 income as stipulated by the parties for one calculation, but then recalculated the 2007 income for another calculation. The Court of Appeals remanded the case for the trial court to be consistent in its treatment of the appellant's income for that year. The court said that calculations should be consistent or the court should explain a difference in treatment. Also on remand, the trial court should expressly determine whether a material change in circumstances warranting modification of support had occurred. Next, on the trial court's denial of appellant's post-trial motion to claim the children as dependents, the circuit court did not abuse its discretion because the appellant sought to raise an issue not raised at trial. Finally, the court did not err in directing the appellant to pay the appellee's attorney's fee for having to respond to his motions for reconsideration. (Foltz, H.; No. CA 10-604; 1-5-11; Abramson).

Blaylock v. Blaylock: [divorce; property division–pensions] The parties divorced in 1993, and their property settlement agreement was incorporated into the decree. Both parties' pensions were covered by the agreement. Disputes arose about the pensions in 2009. Appellant claimed on appeal that the trial court did not have the jurisdiction or the power to act because more than 90

days had passed. The Court of Appeals said the court retained jurisdiction to interpret, clarify, and enforce the original divorce decree. However, the court reversed and remanded because the trial court did not hold an evidentiary hearing on the merits of the parties' petitions. The court said that the trial court had made factual findings and granted summary judgment without a summary judgment motion, presumably basing its findings on exhibits appended to a letter brief. The court held that the letter briefs did not satisfy the requirements of a summary-judgment motion under ARCP 56(c). (Moore, R.; No. CA 10-659; 1-5-11; Hart).

Hanshaw v. Blair: **[change of custody]** The trial court changed custody of one child from the appellant mother to the appellee father. In doing so, the child was separated from her younger brother. In affirming, the court recited the "well-settled" principles governing modification of custody and found no error. On the issue of separating siblings, the court said that while exceptional circumstances generally are required, that rule is not applied with mechanical rigidity. In this case, siblings had already been separated because a third child was already in the custody of the appellee father. (Duncan, X.; No. CA 09-1339; 1-19-11; Pittman).

Broggi-Dunn v. Dunn: **[property division—real property; military retirement]** The trial court did not err in awarding the marital home and the debt on the home to the appellee husband. The circuit court obviously found more credibility in the appellee's valuation of the property than the appellant's, which is within the court's discretion. However, the court found that the trial court's award of all of appellee's military-retirement benefits was inequitable. The court remanded for the circuit court to determine an equitable division of the marital portion of the monthly military pension. (Huckabee, S.; No. CA 10-451; 1-26-11; Wynne).

Provencio v. Leding: **[property division—military retirement]** The parties entered into a property-settlement agreement at the time of divorce which provided that appellee was awarded all of appellant's military retirement and disability pay. About fifteen years later, the parties signed an agreed order by which appellee is no longer entitled to appellant's disability benefits and the provisions relating to disability were voided. The agreed order provides for appellee to receive all of appellant's "current military pay," with an additional amount ordered to be applied toward an arrearage of \$78,000. Subsequently, the appellant restructured his military retirement so that he was no longer receiving retirement pay, but was receiving only disability benefits, so appellee was receiving nothing. The issue on appeal was whether the trial court erred in finding that the appellee was entitled to \$962.06 per month as her share of appellant's military retirement pursuant to the parties' property-settlement agreement and the subsequent agreed order. The trial court relied on a previous case, *Surratt v. Surratt*, 85 Ark. App. 267, 148 S.W.3d 761 (2004), to conclude that "when a property-settlement agreement in a divorce proceeding divides military-retirement benefits, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree and that the vested interest cannot thereafter be unilaterally diminished by an act of the military spouse." Because her rights to the specific payment were vested, the appellant could not subvert that right by intentionally substituting disability payments for military-retirement benefits. The Court of Appeals affirmed. The court

said the trial court did not order appellant to use his disability benefits to pay his monthly obligation to appellee, but to pay his obligations to her from any resource available to him. (Moore, R.; No. CA 10-312; 1-26-11; Gladwin).

EIGHTH CIRCUIT

Rogers v. Southwestern Bell: **[employment]** Plaintiff failed to establish a breach of the duty of fair representation in this hybrid Section 301 action where the union conducted a thorough evaluation of the incident which led to plaintiff's termination and concluded that the case was not appropriate for arbitration given plaintiff's disciplinary record and his violation of work rules. (E.D. Ark.; # 10-1171; 1-28-11)

Schueller v. Goddard: **[employment]** Plaintiff did not have a valid expectation of continued employment and the termination of his employment did not violate his due process rights; plaintiff could not establish a prima facie case of tortious interference under Arkansas law. (E.D. Ark.; # 09-3047; 2-1-11)