

## APPELLATE UPDATE

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PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS  
February, 2009

VOLUME 16, NO. 6

### ANNOUNCEMENTS

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

### CRIMINAL

*Kelley v. State:* **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant's rape conviction. **[expert testimony; hearsay]** During appellant's trial, a doctor testified that the victim suffered from a sexually transmitted disease. Appellant objected to the admission of the testimony asserting that it was hearsay because the doctor had not performed the test that established that the victim suffered from the condition. On appeal, the Supreme Court explained that an expert can render an opinion based upon facts and data otherwise inadmissible, including hearsay, as long as they are of a type reasonably relied upon by experts in the field. The Supreme Court concluded that the trial court did not abuse its discretion when it permitted the doctor to testify that the victim suffered from the illness because she relied upon a lab report that contained data reasonably relied upon by physicians when diagnosing and treating patients. **[relevancy]** Appellant sought to introduce testimony that the victim's mother, with whom he had engaged in sexual intercourse, did not suffer from the same sexually transmitted disease as his victim. The trial court did not allow the testimony because it concluded that the evidence was not relevant. The Supreme Court considered the testimony to be on an issue that was "collateral" to the issue of whether appellant committed the offense of rape. Accordingly, the trial court did not abuse its discretion in excluding the testimony. (Proctor, W.; CR 08-926; 2-5-09; Hannah).

*Brown v. State:* **[statutory interpretation]** The Bluebonnet Equine Humane Society was a "victim" as defined by Ark. Code Ann. § 5-4-205. Thus, the trial court did not err when it

determined that the organization was entitled to restitution from appellant. (Pope, S.; 08-1051; 2-5-09; Danielson).

*Law v. State:* **[sufficiency of the evidence; abusing an adult]** There was substantial evidence to support appellant's conviction of abusing an adult. **[constitutional challenge; void for vagueness]** When applied to the facts in appellant's case, Ark. Code Ann. § 5-28-103 was not unconstitutionally vague. (Humphrey, M.; CR 08-231; 2-5-09; Wills).

*Doyle v. State:* **[revocation of probation]** The trial court's decision to revoke appellant's probation after he tested positive for cocaine and was charged with driving while intoxicated, was not clearly against the preponderance of the evidence. (Erwin, H.; CACR 08-530; 2-18-09; Hart).

*Layton v. State:* **[sufficiency of the evidence; possession of a controlled substance with intent to deliver; simultaneous possession of drugs and firearms]** There was substantial evidence to support appellant's convictions of possession of a controlled substance with intent to deliver and simultaneous possession of drugs and firearms. **[speedy-trial violation]** After removing the excludable periods from the speedy-trial calculation, appellant was brought to trial within twelve months of his arrest. Thus, the trial court correctly denied his motion to dismiss the charges against him based upon a speedy-trial violation. (Chandler, L.; CACR 07-1292; 2-18-09; Robbins).

*Watkins, Atkins, and Perry v. State:* **[sufficiency of the evidence; kidnapping]** There was substantial evidence to support appellants' kidnapping convictions. **[double jeopardy]** Appellants were tried on the charges of felon in possession of a firearm and commission of a felony with a firearm. Appellants argued that the trial court should have dismissed one of the charges because to be tried on both violated the double jeopardy clause. The trial court refused to dismiss the charges. On review, the Court of Appeals determined that because the charge of commission of a felony with a firearm was used only as an enhancement to appellants' sentences, the double jeopardy clause was not violated. **[mistrial]** During the trial, the prosecutor asked one of the appellants the following question: "Well, what did you do down here when you were staying down here? Besides sell dope." Based upon this question, a mistrial was requested. The trial court denied the motion, issued a strong warning to the prosecutor, and admonished the jury to disregard the statement. The Court of Appeals, noting that other evidence at the trial indicated that the appellant had a history of being involved with drugs, concluded that the trial court did not err in denying the motion for a mistrial. **[voir dire]** The trial court did not err by reading the enhancement charges to the jury at the opening of the *voir dire* examination. **[severance of offenses]** The trial court erred when it refused to sever the felon-in-possession-of-a-firearm charge from the other charges because the charges were not part of the same scheme and did not require proof of the same evidence. However, under the facts of this case, the error was not prejudicial to the appellants. (Williams, C.; CACR 08-445; 2-25-09; Kinard).

*Beebe v. State:* **[revocation of probation]** A petition to revoke appellant's probation was filed alleging that he violated the conditions thereof by committing assault and battery and by failing to pay fines and costs. The trial court found that appellant violated the conditions of his

probation and sentenced him to the Department of Correction. On appeal, the Court of Appeals concluded that there was insufficient evidence to prove that appellant violated the conditions of his probation by committing assault and battery because there was no evidence of the alleged act only evidence that appellant was charged with the offense. However, there was evidence that appellant violated the conditions of his probation by failing to report to his probation officer, failing to pay fines, and by using marijuana and methamphetamine. Accordingly, the trial court did not err in revoking appellant's probation. (Erwin, H.; CACR 08-937; 2-25-09; Pittman).

*Rollins v. State*: **[sufficiency of the evidence; manslaughter]** Because there was no evidence that appellant acted recklessly, there was insufficient evidence to support appellant's manslaughter convictions. (Fox, T.; CACR 08-608; 2-25-09; Vaught).

*Donaldson v. State*: **[404(b)]** Appellant was charged with two counts of felony sexual assault in the second degree and one count of attempted felony sexual assault in the second degree. Each of appellant's charges involved a different woman. Thereafter, the trial court granted appellant's motion to sever the charges. During appellant's trial on the first charge, the circuit court allowed the women from the other two cases to testify about their allegations of appellant's sexual misconduct. Appellant asserted that the testimony should have been excluded pursuant to Rule 404 (b) of the Arkansas Rules of Evidence. The appellate court agreed with appellant and concluded that the trial court abused its discretion when it admitted the evidence. (Pope, S.; CACR 08-734; 2-25-09; Gladwin).

*Wallace v. State*: **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's conviction of capital murder. **[suppression of statement to 911 dispatch]** Appellant sought to suppress statements that he made to 911 dispatch after he shot his wife and her friend. At the time on appellant's statements to 911 dispatch, he was not in custody, but rather was alone in his vehicle. Appellant called 911 dispatch from his vehicle and he was free to end the call and to travel to any location that he chose at any time during the call. Because appellant was not "in custody" for purposes of *Miranda*, any statements that he made to 911 dispatch were not subject to suppression. **[change of venue]** Appellant requested a change of venue based upon excessive pretrial publicity. The trial court denied his motion. On appeal, the Supreme Court reviewed the record and noted that the members of the jury, who had heard about the case through the media, agreed to set aside their prior knowledge and form an opinion based only on the evidence presented at trial. Thus, the Court concluded that the jury selection process used in appellant's trial yielded an impartial jury free from potential prejudices caused by excessive pretrial publicity. **[suppression of statement to law enforcement]** While appellant was in custody, and after he was advised of his *Miranda* Rights, a law enforcement official asked appellant if he understood that he had the right to talk to an attorney before any questioning and the right to have an attorney present with him during questioning. Appellant responded, "Yes, sir. Do I need one?" Appellant then said that he did not know whether he needed an attorney, that he understood his rights, and that he could not afford an attorney. Thereafter, appellant signed a form indicating that he understood his rights and that he chose to waive those rights. After waiving his rights, appellant made a statement to law enforcement officials. On appeal, he asserted that the statement should have been suppressed because it was taken in violation of his Fifth Amendment Right to Counsel. The Supreme Court held that appellant's request for the

assistance of counsel was ambiguous and that it was not the type of unequivocal request that is required to force an interrogating officer to cease questioning. Accordingly, suppression of appellant's statement was not required. (Arnold, G.; CR 08-112; 2-26-09; Imber).

## **CIVIL**

*Parker v. Southern Farm Bureau*: **[insurance]** Insurance company refused to provide a defense in suit by one neighbor against another involving a fatal shooting. Homeowner's policy excluded coverage related to intentional acts. Summary judgment was not proper as to construction of the general liability policy in regard to whether exclusion applied to intentional act directed at one person which resulted in injury to another. (Kilgore, C.; CA 08-568; 2-4-09; Robbins)

*Powhatan Cemetery, Inc. v. Colbert*: **[trust]** Complaint asserted a claim for equitable relief. (Erwin, H.; CA 06-32; 2-4-09; Gladwin)

*City of Little Rock v. Rhee*: **[code violations/injunction]** Section 5-74-109 defines a common nuisance, and it requires that the city prove that a property has been used to facilitate the commission of alleged crimes – not merely that crimes occurred on the site. (Humphrey, M.; SC 08-606; 2-5-09; Brown)

*Rice v. Ragsdale*: **[legal malpractice/limitations]** Occurrence rule is precedent and Court of Appeals is bound to follow it. The expiration of the limitations period for the underlying medical malpractice case marked the commencement of the limitations period for the malpractice claim against the client's attorney. (Simes, L.; CA 08-186; 2-11-09; Brown)

*State Farm v. Stamps* **[insurance/statutory penalty]** The amount of the jury verdict is within twenty per cent of the amount demanded to trigger the award of the 12% statutory penalty. Although plaintiff sought \$250,000 in damages from the jury, she had made demand on insurer for \$150,000, this latter amount is the demand for purposes of the statute and the verdict was within twenty per cent of that amount.(Fitzhugh, M.; CA 08-750; 2-11-09; Vaught)

*Cook v. Ratliff*: **[prescriptive easement]** Party A did not prove any overt act that would make clear to Party B that Party A was exerting an adverse use and claim to the property. (Bell, K.; CA 08-732; 2-11-09; Glover)

*Martin v. Bobo*: **[quiet title]** Res judicata was not a bar to this quiet title action. Property involved in prior litigation was in section 29. Present suit involved section 30 property, and this property is not sufficiently described by the language "accretions thereto" in referring to property in section 29. Plaintiffs did not have a fair and full opportunity to litigate their claim in the prior case. (Culpepper, D.; CA 08-651; 2-11-09; Gruber)

*Archer v. Sisters of Mercy Health System*: **[Act 750 of 2007/liability pools]** Act 750 which permits direct-action lawsuits against pooled-liability funds is remedial in nature and can be applied retroactively. (Hearnsberger, M.; SC 08-784; 2-12-09; Brown)

*Jackson v. Sparks Regional Medical Center*: **[charitable immunity]** Sparks Regional Medical Center is an entity entitled to charitable immunity based on the factors set out in *George v. Jefferson Hospital Assn.* Under the facts of this case, dismissal of the case based on the statute of limitations resulted in an injustice because of the changes that took place in the law during the course of the lawsuit. The amended complaint should relate back to the original timely filed complaint under Rule 15(c). (Tabor, S.; SC 08-323; 2-12-09; Danielson)

*Buck v. City of Hope*: **[administrative appeal]** Suit by landowner against city was not an administrative appeal but a suit against the city. When a landowner suffers an adverse decision by a city council acting in its administrative capacity, the landowner must challenge the action by taking an appeal within 30 days of the decision. However, in this case, the landowner was not aggrieved by the council's action in approving a lease. His complaint arises out of work done on the property which he alleges created a nuisance. (Culpepper, D.; CA 08-709; 2-18-09; Henry)

*Russell v. Watson Chapel School Dist.*: **[teacher dismissal]** District substantially complied with statutory requirement for the notice of nonrenewal. (Jones, B.; SC 08-1034; 2-19-09; Danielson)

*Kearney v. City of Little Rock*: **[city's police power]** City acted legally in razing structure that was detrimental to the public welfare. (Kilgore, C.; CA 07-1317; 2-25-09; Kinard)

*Kasses v. Satterfield*: **[legal malpractice]** Limitations period for legal malpractice is three years. (Fox, T.; SC 08-978; 2-26-09; Danielson)

*Schubert v. Target Stores*: **[final order]** Order was not a final appealable order because an intervenor remained as an outstanding party with a potential claim. (Sims, B.; SC 08-921; 2-26-09; Corbin)

*The Medical Assurance Co. v. Castro*: **[negligent supervision]** Evidence was sufficient to support verdict for negligent supervision. Fact that jury did not find employer separately negligent does not affect finding of liability for negligent supervision. (Fitzhugh, M.; SC 08-1010; 2-26-09; Wills)

*Vent v. Johnson*: **[default]** It was proper to enter a default judgment even if the defendant was only 6 days late in filing an answer. In the recovery of damages following the entry of the default, it was not necessary for the plaintiff to plead that the school district had liability insurance for negligent acts. Rather, this was an affirmative defense which had to be pled and the defense was lost by virtue of the default. The qualified immunity afforded by Ark. Code Ann. Section 21-9-301 must be asserted and proven as an affirmative defense. (Simes, L.; SC 08-388; 2-26-09; Wills)

*Shields v. OHG of Springdale, Inc.*: **[counsel]** Trial court did not err in allowing attorney to continue to serve. Court was aware of deterioration the relationship between attorney and the client, but the attorney was representing the client's interest- not his own- and had authority to

act on behalf of the client. (Lindsay, M.; SC 08-744; 2-26-09; Hannah)

## **DOMESTIC RELATIONS**

*Cummings v. Cummings*: [**valuation of business**] The valuation of goodwill is a question of fact and is dependent upon the particular circumstances. The circuit court did not assign any goodwill to the value of the business. The court's valuation was not clearly erroneous. [**alimony**] The circuit court's award of \$1/year alimony was appealed by both parties. Alimony and property divisions are complementary devices that a circuit court employs to make dissolution of a marriage as equitable as possible. A court need not award nominal alimony in order to retain jurisdiction for future modification. The circuit court's order indicated that it considered the proper factors in deciding the issue of alimony. No abuse of discretion was shown. [**settlement agreements**] There are two different types of property agreements regarding the payment of alimony, one an independent contract, which does not merge into the court's award of alimony, and which gives the party a remedy at law on the contract in the event the court has reason not to enforce his decretal award by contempt proceedings. The second is an agreement by which the parties, without making a contract meant to confer on the spouse an independent cause of action, merely agree upon the amount of alimony the court should award. The second type does not prevent a court from later modifying its decree. [**marital assets**] The trial court did not err in awarding the wife \$12,000 for her share of the value of gifts the husband gave to his girlfriend during the course of the case. A circuit court may consider such gifts when determining a final property allocation. (Cook, V.; No. CA 07-1325; 2-11-09; Pittman)

## **PROBATE**

*Garcia, et al. v. Estate of James M. Duvall*: [**appellate review**] Because the Appellants abandoned their original argument and failed to obtain a ruling on their alternative argument the court did not address their argument on appeal. The failure to obtain a ruling on an issue from the circuit court precludes review on appeal. (Sullivan, T.; No. SC 08-845; 2-12-09; Corbin)

*Kelly, et al. v. Estate of Edwards*: [**intervention**] The issue of timeliness of a petition to intervene is within the sound discretion of the trial court and is subject to reversal only when that discretion has been abused. Timeliness is to be determined from all the circumstances, and the trial court must consider three factors: (1) how far the proceedings have progressed; (2) whether any prejudice to other parties has been caused by the delay, and (3) the reason for the delay. Here, the probate judge did not abuse his discretion in finding that Appellants' petition to intervene was untimely. (Spears, J.; No. SC 08-1234; 2-19-09; Imber)