

## 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 (Supreme Court - [http://courts.arkansas.gov/opinions/sc\\_opinions\\_list.cfm](http://courts.arkansas.gov/opinions/sc_opinions_list.cfm) or Court of Appeals - [http://courts.arkansas.gov/opinions/coa\\_opinions\\_list.cfm](http://courts.arkansas.gov/opinions/coa_opinions_list.cfm)).

PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS  
NOVEMBER, 2009 VOLUME 17, NO. 3

### ANNOUNCEMENTS

The *2010 Arkansas Judicial Elections Guide* has been prepared and can be found on the court's web site under Publications.

### CRIMINAL

*Whitney v. State*: **[revocation of suspended imposition of sentence]** The trial court correctly concluded that appellant violated the terms and conditions of his suspended imposition of sentence by committing the criminal offense of second-degree terroristic threatening. (Tabor, S.; CACR 09-256; 11-4-09; Robbins).

*Clay v. State*: **[admission of evidence]** The trial court did not abuse its discretion during appellant's trial on the charge of driving while intoxicated by permitting a law-enforcement official to testify that he believed that appellant was intoxicated at the time that he was stopped for the violation. (Sims, B.; CACR 09-429; 11-4-09; Brown).

*Ingram v. State*: **[revocation of probation]** There was sufficient evidence to support the circuit court's revocation of appellant's probation. (Keith, T.; CACR 09-102; 11-4-09; Kinard).

*Ewells v. State*: **[misstatement of the law]** The trial court erred by permitting the State to make an erroneous statement of the law during his closing argument and by refusing to allow appellant's attorney to counter this error during his closing argument. (Hearnsberger, M.; CACR 08-657; 11-4-09; Pittman).

*Newman v. State*: [**error coram nobis**] Appellant's petition to reinvest jurisdiction in the circuit court to consider a writ of *error coram nobis* is granted. Appellant's petition for a writ of *error coram nobis* will be limited to the claims of whether he was competent to stand trial and whether there were *Brady* violations in his case. (CR 02-811; 11-5-09; Hannah).

*Gwathney v. State*: [**sufficiency of the evidence; murder; attempted murder; affirmative defense**] There was substantial evidence to support appellant's convictions. [**motion to quash the jury panel**] Because appellant failed to show a substantial irregularity in the drawing or summoning of the jury, and because appellant failed to show that he was prejudiced by the jury selection process, the Supreme Court concluded that the trial court did not abuse its discretion when it refused to quash the entire jury panel. [**motion to strike jurors**] The trial court did not abuse its discretion in failing to strike two jurors. (Simes, L.T.; CR 09-263; 11-5-09; Imber).

*Campbell v. State*: [**sufficiency of the evidence; engaging in a continuing criminal enterprise**] There was insufficient evidence to support appellant's conviction of engaging in a continuing criminal enterprise. [**404(b)**] The trial court erred in failing to grant appellant's motion to exclude evidence of his co-defendant/wife's sexual conduct. [**motion to suppress**] The trial court erred in failing to grant appellant's motion to suppress evidence seized during the execution of a search warrant. (Cole, J.; CR 07-623; 11-5-09; Hannah).

*Heard v. State*: [**sufficiency of the evidence; aggravated robbery**] There was substantial evidence to support appellant's conviction. (Hanshaw, L.; CR 09-647; 11-5-09; Wills).

*Lopez v. State*: [**motion to suppress**] The trial court did not err when it denied appellant's motion to suppress evidence that was obtained during a valid search. (Ford; G.; CACR 09-631; 11-11-09; Robbins).

*Decay v. State*: [**motion to suppress**] Because appellant was aware that calls, which he made while in a county detention center, were monitored and recorded, he did not have a reasonable expectation of privacy in the information contained in the calls. Thus, the trial court did not abuse its discretion when it denied appellant's motion to suppress the transcripts of the telephone calls. [**jury instructions**] The trial court did not abuse its discretion when it refused to give a jury instruction that was not supported by sufficient evidence or when it refused to give a proffered instruction on an issue in which the model instruction was sufficient. [**admission of evidence; pretrial agreement**] The trial court erred when it excluded a toxicology report from evidence based solely on the parties' pretrial agreement to exclude the evidence. [**admission of evidence; photographs**] The trial court did not abuse its discretion when it admitted photographs of the appellant holding an assault rifle because the pictures helped illustrate appellant's statements and helped to establish appellant's motive. [**admission of evidence; third-party statement**] The trial court correctly determined that certain testimony was not hearsay because the testimony was not offered for the truth of the matter asserted. [**death penalty**] The duplication of an element of a capital offense by one or more aggravating circumstances does not render the scheme of the Arkansas death penalty unconstitutional. [**mitigating factors**] The jury is not required to find a mitigating circumstance just because the defendant puts before the jury some evidence that could serve as the basis for finding the mitigating circumstance. The circuit court's decision to limit certain testimony did not violate appellant's right to present evidence of mitigating circumstances. (Storey, W.; CR 08-1259; 11-12-09; Danielson).

*Baker v. State*: [**sufficiency of the evidence; fraudulent use of a credit card**] There was substantial evidence to support appellant's conviction. [**jurisdiction**] Because appellant used a credit card without authorization in Pulaski County, the Pulaski County Circuit Court had jurisdiction over the case. (Sims, B.; CACR 09-376; 11-18-09; Baker).

*White v. State*: [**sufficiency of the evidence; breaking or entering**] There was insufficient evidence to support appellant's conviction. (Ford, G.; CACR 09-220; 11-18-09; Marshall).

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

*Colvin v. State*: (aggravated assault; felony fleeing; driving while intoxicated (second offense); first-degree assault; resisting arrest); Reynolds, D.; CACR 09-589; 11-11-09; Henry.

*Davis v. State*: (second-degree sexual assault); Erwin, H.; CACR 09-288; 11-11-09; Gruber.

*Watson v. State*: (felony theft of property); Williams, C.; CACR 09-395; 11-11-09; Vaught.

## CIVIL

*Konecny v. Dwight Anderson Living Trust*: [**conversion**] Co-tenant "A" was not liable for conversion of crops because other cotenant "B" did not own any of the crops grown, harvested, and sold by the lessee of the land. There was no crop sharing agreement between lessee and "A". (Mills, W; CA 09-146; 11-4-09; Gruber)

*Culhane v. Oxford Ridge*: [**duty**] The duty of an employer of an independent contractor to use ordinary care or to warn of latent dangers does not contemplate a duty to warn of obvious hazards that are an integral part of the work that the contractor was hired to perform. (Duncan, X.; CA 09-338; 11-1-09; Glover)

*Jones v. Turner*: [**pleadings**] By the text of Rule 4, the copy of the complaint served on the defendant is not required to have the signature of the plaintiff's attorney – only the pleading filed with the court is required to be signed. (Maggio, M.; SC 08-1438; 11-5-09; Gunter)

*Dachs v. Hendrix*: [**minority tolling law**] The death of a minor removes the protection of the minority tolling provision of the Arkansas Medical Malpractice Act. An amended complaint asserting survival and wrongful death claims that were time barred cannot relate back to a timely filed original complaint that alleged individual claims asserted by an improper party. (Burnett, D.; SC 08-1191; 11-5-09; Corbin)

*DePriest v. Astrazeneca Pharmaceuticals*: [**drug labeling**] The Deceptive Trade Practices Act bars claim against a drug manufacturer for marketing tactics when they fall within safe harbor of FDA-approved labeling. This safe harbor provision exempts conduct that is permitted under laws administered by the federal agency. Likewise, claims for common law fraud cannot succeed when the defendant's conduct was permitted by the FDA. The ads were in accord with labeling and thus were not false or misleading. (Maggio, M.; SC 08-1257; 11-5-09; Wills)

*Arlands, LLC v. Farmers Bank*: [**tax deed**] Commissioner of State Lands failed to notify person who was entitled to notice of the right to redeem property sold for delinquent taxes. Since notice was not given, statute of limitations did not bar action to set aside the tax deed. (Fogleman, J.; CA 09-362; 11-11-09; Pittman)

*Nix v. Owen*: [**adverse possession**] Adverse possession was not established as possession was permissive. (Dennis, J.; CA 09-21; 11-11-09; Glover)

*Valley v. Helena National Bank*: [**service**] Default judgment was reversed because rule required that case be dismissed if service is not made within 120 days of the filing of the complaint. Remaining issues between the parties arising out of the default judgment have to be dealt with in subsequent action between the parties. (Yates, H.; CA 09-164; 11-18-09; Marshall)

*Frein v. Windsor Weeping Mary LP*: [**contract**] There was mutuality of obligations and contract was enforceable. When there is a contract in place on the matter, unjust enrichment does not apply. (Yates, H.; CA 09-309; 11-18-09; Robbins)

*Pounders v. Reif*: **[legal malpractice]** Three-year limitations period – rather than five-year limitations period for breach of contract – applied to complaint against lawyer in the handling of a prenuptial agreement. (Piazza, C.; SC 09-55; 11-19-09; Danielson)

## JUVENILE

*Seago v. Arkansas Dept. of Human Servs.; Broderick v. Arkansas Dept. of Human Servs.; Reid v. Arkansas Dept. of Human Servs.* **[D-N Adjudication]** These three cases involve adjudications of three of the cases involving children removed from the Tony Alamo Ministries. The Seago opinion includes all the facts from witnesses and depositions admitted in all hearings common to all three appeals, including underage marriages, physical abuse, medical and educational neglect. Members lived and worked in a collective environment controlled by the ministry. Testimony demonstrated that Alamo practiced polygamy and is married to several under-age girls. Alamo also ordered children to be beaten for rule infractions and they never received medical treatment. Appellant Seago argued on appeal that the court erred in finding his daughter dependent-neglected and that the court's order to obtain housing and employment separate from the ministry was unconstitutional as a violation of his First Amendment to the free exercise of religion. The constitutional argument was not addressed on appeal because it was not raised at trial. Seago argued that there was no testimony that children were actually injured by the beatings; that the fasting was biblical atonement and his daughter was not malnourished, but healthy. He also argued that there was no evidence that his child had ever been physically or sexually abused and he challenged the educational neglect finding. The juvenile code is concerned about whether the child is dependent-neglected without reference to which parent committed the acts or omissions leading to the adjudication. The court found that the evidence overwhelmingly demonstrated that the environment is potentially dangerous for children. Seago allowed his daughter to live in Alamo's home cognizant of the practices. Appellant knowingly left her in an environment that included sexual abuse, underage marriages, and beatings. Appellant's failure to protect her from potential harm was more than enough to warrant a finding of dependent-neglected without suffering abuse. (Hudson, J.; 09-244; 11-18-2009; Vaught)

*Broderick v. Arkansas Dept. of Human Servs.*: Appellant made the same arguments as Seago and attacked the credibility of witnesses. In addition to the evidence outlined in the Seago opinion, there was testimony that two of his children were beaten and one of his children was sexually molested by Alamo. Although appellant denied knowledge of the potential danger to his children, the evidence presented sufficiently demonstrated that the environment in which appellant placed his children was dangerous. (Griffin, J.; 09-351; 11-18-2009; Gladwin)

*Reid v. Arkansas Dept. of Human Servs.*: Affirmed for the same reasons expressed in Seago and Broderick. (Griffin, J.; 09-350; 11-18-2009; Marshall)

*Bearden v. Arkansas Dept. of Human Servs.*: **[TPR]** TPR affirmed. The only point on appeal was that there was insufficient evidence of finding that the termination was in the juvenile's best interest because of the potential harm that could be caused by returning custody to the appellant. Although appellant did make some progress, the trial court's finding is supported by the evidence. The evidence showed appellant lacked stability in housing, employment, and relationships. Appellant's behavior around his child during visitation was of concern and the child's behavior before, during and after visits was also concerning. Appellant lacked the capacity to be the type of parent this child needed. (Zimmerman, S.; 09-455; 11-11-09; Gruber)

*Mckellar v. Arkansas Dept. of Human Servs.*: **[No Merit TPR]** TPR affirmed and motion to withdraw granted. (Thyer, C.; 09-573; 11-18-09; Glover)

*Hardy v. Arkansas Dept. of Human Servs.*: **[No Renunciation Services]** Appellant argued that the court erred in sua sponte ordering no reunification services and awarding custody to her parents without a

change in circumstances. Ark. Code Ann. §9-27-329 (now found at §9-27-365) requires at least 14 days notice prior to a hearing. Reversed with directions to comply with statute and then revisit the issue of placement of the children. (French, T.; 09-726; 11-11-2009; Robbins)

*M.T. v. State*: **[Delinquency Adjudication]** Appellant challenged the sufficiency of the evidence. Appellant argued that the state failed to support a finding for second-degree battery because the state failed to show that the teacher suffered serious injury. The evidence was sufficient where the victim testified that her arm was very sore for at least a week and she had to seek medical treatment. Appellant next argued that the state's evidence was insufficient for disorderly conduct because it did not occur in a public place or create a risk of public inconvenience. The statute does not require actual public inconvenience – only that a person engages in fighting or in violent, threatening or tumultuous behavior with the purpose of creating a public inconvenience. The evidence supports the finding where appellant hit a nurse and threatened her and the doctor. (Fergus. L. 09-849; 11-11-2009; Baker)

*W.T. v. State*: **[Probation Revocation]** Affirmed for violating good-behavior probation condition when appellant took someone else's prescription medication to school. He admitted the pills did not belong to him and attempted to distribute them to another student. (Fergus. L. 09-850; 11-18-2009; Gladwin)

## DOMESTIC RELATIONS

*Peck v. Peck (Egerdahl)*: **[child custody--joint custody]** When the parties divorced, they agreed to joint custody of their daughter with the appellee mother having sole physical custody. The appellant father filed for a change of custody when he learned that the appellee's husband was a registered sex offender. The circuit court found that a material change in circumstances had occurred. The court ordered that custody would remain joint, and that the child would continue to live with the appellee. Appellee's husband was forbidden to be alone with the child at any time. The Court of Appeals reversed. The court found that the mutual ability of the parties to cooperate is a crucial factor in joint custody and that the inability to cooperate in sharing the physical care of a child constitutes a material change in circumstances affecting the child's best interest. Here, the presence of a sex offender in the appellee's home created a situation resulting in there being unable to agree who should have primary physical custody. Therefore, it was error for the trial court to continue the joint custody arrangement, and the award of primary physical custody to the appellee is against the preponderance of the evidence. The court also erred in finding it in the best interests of the child to be in the primary physical custody of the appellee. The order was reversed, and the court ordered that appellant have primary custody of the child, and that appellee have standard visitation, with the provision that appellee's husband not be alone with the child at any time without another adult present. (Williams, C.; CA 09-130; 11-4-09; Kinard).

*Matlock v. Matlock*: **[divorce--distribution of property and debts]** “The fact that marital debts may be considered does not mean the judge must divide the debts. He may leave the parties as he found them, obligated individually or jointly to the creditor...” The parties' settlement agreement was silent with respect to their debts, and the appellant never identified the distribution of debt as an issue to be tried. Therefore, the Court of Appeals would not consider it on appeal. The court could not say that the trial court did not take the parties' debts into consideration when setting alimony and dividing property. Alimony and property division are complementary devices used to make dissolution of marriage as equitable as possible. (Putman, J.; CA 09-366; 11-11-09; Baker)

*McCracken v. McCracken*: **[marital property]** Property placed in the names of a husband and wife is presumed to be owned as tenants by the entirety, and the presumption can be overcome only by clear and convincing evidence that a spouse did not intend a gift. When property is held in tenancy by the entirety, it is presumed that the spouse who furnished the consideration made a gift in favor of the other spouse, and this presumption can only be rebutted by clear and convincing evidence. Here, the husband used non-marital funds to purchase property and to build a home. However, the warranty deed conveyed title to both husband and wife. The trial court found that the husband made a gift to the

appellee of the property, and the court expressly rejected the appellant's argument that the parties intended that the land and home remain as his separate property. The appellate court defers to the trial court on credibility determinations. The trial court also did not err in finding credible the appellee's testimony that the appellant forced her to sign a quitclaim deed. Therefore, the trial court's findings of coercion and undue influence were not clearly erroneous and the court affirmed the decision to rescind the quitclaim deed. (Sullivan, T.; CA 09-147; 11-11-09; Henry)

*Shively v. Plautz*: **[custody modification]** Although the trial court found that a material change in circumstances existed because of the appellee mother's actions, the court declined to change custody because of the child's support network while in the custody of her mother. The Court of Appeals affirmed with a caveat that affirming was a difficult decision given the "disturbing actions undertaken by appellee and her family." The court did not reach the appellant's second point on appeal because the appellant had not properly appealed from the order denying his motion for new trial, motion for contempt, and motion for immediate change of custody filed after the hearing. (Harkey, J.; CA 08-1170; 11-11-09; Kinard)

*Roberts v. Roberts*: **[divorce--jurisdiction]** The Supreme Court granted a petition for review of a case decided by the Court of Appeals. At issue was whether the trial court had jurisdiction to enter a divorce decree when the plaintiff did not reside in Arkansas for three full months immediately preceding the entry of the divorce decree. The Court said "yes," and distinguished between two time periods for residency in Ark. Code Ann. § 9-12-307(a)(1)(A). Under that provision, a plaintiff must prove that the plaintiff or defendant resided in Arkansas for sixty days next before the commencement of the action, and that the plaintiff resided in the state for three full months before the final judgment granting the decree of divorce. The court said the General Assembly sought to distinguish the two residency requirements and that the plaintiff had met and proved both. She had lived in Little Rock since 1998, had filed her complaint for divorce on November 16, 2005, and had continued to live in Arkansas until November, 2006, nearly one year after she filed the complaint. Therefore, she had resided in Arkansas for sixty days immediately preceding the filing of the complaint, and she had lived in Arkansas for three full months preceding, or before, the decree was entered. (Pierce, M.; SC 08-740; 11-12-09; Danielson)

*Duncan v. Duncan*: **[appellate jurisdiction; notice of appeal--scrivener's error]** The Court of Appeals certified to the Supreme Court "the question of whether a scrivener's error in a notice of appeal regarding the date of the order appealed from deprives an appellate court of jurisdiction to hear the appeal under Rule 3(e) of the Arkansas Rules of Appellate Procedure-Civil." In her notice of appeal, the appellant stated that she was appealing from an order entered on "May 4, 2001." No such order exists in this case. The Supreme Court noted that while the filing of a notice of appeal is jurisdictional, the court has required only substantial compliance with the procedural steps set out in Rule 3(e). The court held that the notice of appeal in this case substantially complies with Rule 3(e) and remanded the case to the Court of Appeals. (Hannah, C.; SC 09-22; 11-12-09; Brown)

*Harper v. Cannon, et al.*: **[divorce--judicial sale of real property]** In the parties' divorce decree, the court ordered the marital home sold at public auction. The appellant contended the court erred in confirming the sale because the purchase price was so inadequate as to shock the conscience of the court. The Court of Appeals noted that the record indicated that the home did not sell, over a three-year period, at two public auctions or in a private sale, and that the home has defects that have not been repaired. One potential buyer rescinded an offer to purchase the home because of the defects. The appellant's opinion of the value of the house did not take into account the defects, which made the opinion questionable. The trial court found the sale was conducted in an appropriate manner. Given all the circumstances, the trial court did not abuse its discretion in confirming the sale, nor did the record support the appellant's contention that the purchase price was so inadequate as to shock the conscience of the court. (Jamison, L.; CA 09-41; 11-18-09; Henry)

*White v. White*: **[child support--voluntariness of overpayment]** The appellant's child support was paid by wage assignment of \$4300 a month, the amount of temporary support and alimony the trial court ordered. In the final decree nearly five months later, the court ordered support and alimony of

\$3660, but the wage assignment was not changed to reflect that decreased amount. About two years later, the appellant's employer was issued a notice of wage assignment showing the correct amount. Both the appellant and the appellee testified that they were not aware of the overpayment. Appellant claimed he had overpaid nearly \$15,000 and was entitled to reimbursement. The trial court found that the appellant's overpayment of child support was voluntary and that he was not entitled to any reimbursement. In affirming, the Court of Appeals said that it is well settled that the circuit court is not required to give credit for voluntary expenditures by a parent that are above the child-support amount. The court said that the appellant "was aware of the terms of his divorce decree and he was in a superior position to know how much child support was being withheld from his check. The execution of the wage assignment was within his control, and it was his responsibility to verify that he was making child-support payments in the correct amount." (McGowan, M.; CA 09-485; 11-18-09; Baker)

*Edwards v. Edwards*: [**divorce decree; alimony; subject matter jurisdiction**] The Court of Appeals certified this divorce case to the Supreme Court to determine whether the circuit judge lost subject-matter jurisdiction over the case before he entered a Supplemental Divorce Decree. The Supreme Court held that the facts do not present an issue of subject-matter jurisdiction and remanded the case to the Court of Appeals. The trial court clearly had subject-matter jurisdiction over alimony matters under the Arkansas Constitution and the Arkansas Code. Whether the circuit court violated Ark. Code Ann. § 9-12-312 by not deciding alimony in the original decree was not raised to that court, but should have been. The Supreme Court declined to address whether the Code or Arkansas cases apply because the parties did not raise the issue in the circuit court. (Chandler, L.; SC 08-1142; 11-19-09; Brown)

## **EIGHTH CIRCUIT**

*Scroggins v. Wyeth*: [**products liability**] Under recent Supreme Court precedent, plaintiff's state law claim for failure to warn was not preempted by federal law as there was no evidence that the FDA would not have permitted the strengthening of the labels of Premarin, Prempro and Provera in a manner consistent with Arkansas law and defendants have not shown that the state requirements obstruct the purposes of federal drug labeling regulation. Plaintiff's claim was not barred by Arkansas's statute of limitations as the claim did not accrue until the publication of a study by the Women's Health Initiative linking hormone replacement therapy and breast cancer. Plaintiff's evidence on specific and proximate causation was sufficient to support the jury's verdict finding Wyeth and Upjohn liable for her injuries. The district court did not err in admitting the testimony of plaintiff's expert on specific causation; district court did not err in modifying the Arkansas model jury instruction on proximate cause to reflect plaintiff's theory that estrogen plus progestin use promotes preexisting abnormal cells into malignancies; district court did not abuse its discretion in striking her expert's testimony on punitive damages. The district court's order granting judgment as a matter of law to Upjohn on plaintiff's punitive damages claim is affirmed as there was not substantial evidence showing Upjohn acted with such a conscious indifference to the consequences that malice may be inferred. With respect to Wyeth, the court adopts the district court's alternative finding and remands the matter for a new trial on punitive damages, as the evidence could allow a jury to find or infer that Wyeth was guilty of malicious conduct. (E.D. Ark.; # 08-2711; 11-2-09)

*Bell v. Norris*: [**habeas**] In reviewing the question of whether Bell, a minor, made a knowing and intelligent waiver of his rights, the district court did not err in finding the Arkansas Supreme Court correctly identified the "totality-of-the-circumstances test" as the governing legal standard and that it applied the standard in a reasonable manner. (E.D. Ark.; # 07-3432; 11-13-09)