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PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
NOVEMBER - DECEMBER, 2010 VOLUME 18, NO. 3 - 4

ANNOUNCEMENTS

On November 11, 2010, the Supreme Court published for comment proposed changes to Administrative Order 10. The comment period ends December 31, 2010. A copy of the per curiam was included in the weekly mailout.

On November 11, 2011, the court adopted, effective January 1, 2011, forms for use in order of protection cases. A copy of the per curiam was included in the weekly mailout.

REMINDERS: Administrative Order 14 provides that administrative judges are to be selected on or before the first day of February, 2011 and reported to the Supreme Court. Administrative Plans are due by July 1, 2011.

CRIMINAL

Cook v. State: [**sufficiency of the evidence; possession of drug paraphernalia with intent to manufacture methamphetamine**] Appellant's conviction was not supported by substantial evidence. (Elmore, B.; CACR 10-291; 11-3-10; Hart).

Rios v. State: [**juvenile transfer**] The circuit court did not err when it denied a motion to transfer appellant's case to the juvenile division of the circuit court. (Crow, K.; CA 10-350; 11-3-10; Gruber).

Rhoades v. State: [**revocation of suspended imposition of sentence**] There was substantial evidence to support the trial court’s order revoking appellant’s suspended imposition of sentence. [**motion to obtain DNA sample**] The trial court was correct when it denied appellant’s motion requesting DNA sampling because he was seeking to obtain the sample to use as a defense to a charge for which he had already pled guilty. (Phillips, G.; CACR 10-433; 11-3-10; Gladwin).

Gettridge v. State: [**revocation of suspended imposition of sentence**] The trial court did not clearly err in finding that appellant inexcusably violated the conditions of his suspended impositions of sentences. (Cox, J.; CACR 10-204; 11-3-10; Robbins).

Debriyn v. State: [**motion to suppress**] Pursuant to the fresh-pursuant doctrine, a police officer had the authority to stop appellant outside of his jurisdiction. Once appellant was stopped, it was lawful for the police officer to investigate and arrest appellant for DWI because facts arose during the stop that gave the officer a reasonable cause to believe that appellant was driving while intoxicated. Accordingly, the stop and arrest were proper and the trial court did not err in denying appellant’s motion to suppress. (Gunn, M.; CACR 10-183; 11-3-10; Glover).

Neal v. State: [**juvenile transfer**] The trial court’s order denying appellant’s motion to transfer his case to the juvenile division of the circuit court was not clearly erroneous. (Dennis, J.; CACR 10-564; 11-3-10; Baker).

Montoya v. State: [**Act 346**] Even though appellant had deferred guilty pleas in New Mexico under that state’s first-offender statute, he had never availed himself of the benefits of Act 346, Arkansas’s first-offender act, nor had he been “convicted” of a felony. Therefore, his status under Act 346 should not have been voided and the circuit court erred in doing so. (Clinger, D.; CR 09-1409; 11-4-10; Sheffield).

Dicandia v. State: [**rape-shield statute**] An *in camera* evidentiary hearing must be held on a motion to admit evidence pursuant to the rape-shield statute. Appellant failed to obtain the required evidentiary hearing and the Supreme Court concluded that the circuit court did not err in denying appellant’s motion to admit the evidence. (Piazza, C.; CR 10-346; 11-4-10; Hannah).

Loggins v. State: [**sufficiency of the evidence; possession of a controlled substance with intent to deliver; simultaneous possession of drugs and firearms; possession of drug paraphernalia; maintaining a drug premises**] There was substantial evidence to support appellant’s convictions. (Singleton, H.; CR 09-788; 11-4-10; Corbin).

Brown v. State: [**sufficiency of the evidence; sexual assault in the second degree**] There was substantial evidence to support appellant’s conviction. [**admission of evidence; penalty phase**] Evidence of prior or subsequent uncharged criminal conduct can be admissible at the penalty phase of a trial if it is relevant evidence of the defendant’s character or as evidence of an aggravating circumstance. Accordingly, the trial court did not abuse its discretion when it permitted thirty-five year-old, uncharged-misconduct evidence, which was relevant to appellant’s character and an

aggravating circumstance, to be admitted during the sentencing phase of appellant's trial. (Arnold, G.; CR 10-242; 11-4-10; Sheffield).

Echols v. State: [**Arkansas DNA testing statutes**] The circuit court erroneously interpreted the Arkansas DNA testing statutes and applied the wrong legal standard to appellant's motion requesting a new trial. (Burnett, D.; CR 08-1493; 11-4-10; Sheffield).

Baldwin v. State: [**Arkansas Code Ann. §§ 16-11-201 to 208**] The circuit court erroneously interpreted Arkansas's statutes regarding postconviction appeals based on DNA testing and other scientific evidence and applied the wrong legal standard to appellant's petition seeking a writ of *habeas corpus* and motion for new trial, which were brought pursuant to those statutory provisions. [**recusal**] Appellant's motion seeking the recusal of a circuit judge is moot because the judge, as a newly-elected member of the Arkansas General Assembly, will be unable to preside over appellant's case. (Burnett, D.; CR 09-60; 11-4-10; Hannah).

Misskelley v. State: [**Arkansas DNA testing statutes**] The circuit court applied the wrong legal standard to appellant's *habeas corpus* petition and erred in denying appellant's petition without a hearing. The circuit court erred in denying appellant's request for additional DNA testing. [**use immunity**] When evaluating appellant's *habeas corpus* petition, it was not error for the circuit court to consider appellant's immunized statement, which was taken after appellant's trial and conviction, for use at the trial of two other criminal defendants. [**recusal**] Appellant's motion seeking the recusal of a circuit judge is moot because the judge, as a newly-elected member of the Arkansas Senate, will be unable to preside over appellant's case. (Burnett, D.; CR 08-1481; 11-4-10; Brown).

Juarez v. State: [**revocation of suspended imposition of sentence**] The circuit court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence. (Cox, J.; CACR 10-501; 11-10-10; Gladwin).

Townsell v. State: [**jury instructions**] The only basis to support the giving of a jury instruction, which appellant requested, was appellant's refuted testimony. Thus, the trial court did not err by refusing to instruct the jury on the proffered instruction. (Sims, B.; CACR 10-205; 11-10-10; Kinard).

Goodman v. State: [**revocation of probation**] The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. (Pope, S.; CACR 10-524; 11-10-10; Baker).

Fowler v. State: [**motion to suppress**] Although police officials lawfully stopped appellant based upon reasonable suspicion, they transformed the stop into an illegal seizure and arrest when they arrested appellant for fleeing rather than conducting an appropriate investigation into appellant's activities. Accordingly, the evidence and statement obtained during the stop and arrest should have been suppressed. (Clawson, C.; CR 10-103; 11-11-10; Hannah).

Roberson v. State: **[appeal from district court]** The circuit court did not have jurisdiction to consider appellant's appeal from district court because appellant failed to perfect his appeal by filing it within thirty days from the date of the entry of the judgment in the district court as provided for in Rule 36 of the Arkansas Rules of Criminal Procedure. Because the circuit court was without jurisdiction to consider appellant's appeal, it likewise could not consider the constitutional challenges raised by appellant. (Storey, W.; CR 10-169; 11-11-10; Brown).

Garduno-Trejo v. State: **[revocation of suspended sentence]** The circuit court erred in granting petitions for revocation of appellant's suspended sentence, which were based upon actions that appellant committed prior to the entry of the judgment and disposition order in the case in which the suspended sentence was imposed. (Green, R. ; CACR 10-168; 11-17-10; Gruber).

Sims-Navarre v. State: **[revocation of suspended imposition of sentence]** There was substantial evidence to support the trial court's finding that appellant violated the conditions of his suspended imposition of sentence. (Tabor, S.; CACR 10-271; 11-17-10; Pittman).

Moore v. State: **[custodial statement]** Based upon a review of the totality of the circumstances, the Court of Appeals concluded that the trial court did not clearly err in finding that appellant knowingly and intelligently waived his *Miranda* rights prior to making in-custody statements during an interview with law-enforcement officials. (Wyrick, K.; CACR 10-359; 11-17-10; Pittman).

Robinson v. State: **[sufficiency of the evidence; attempted first-degree murder; first-degree battery]** There was substantial evidence to support appellant's convictions. **[jury instruction]** Because there was no rational basis for giving a second-degree battery jury instruction, the trial court did not err in refusing to give the instruction. (Shirron, P.; CACR 10-529; 11-17-10; Pittman).

Rudd v. State: **[motion to recuse]** The trial judge did not abuse its discretion by denying appellant's motion to recuse. (Erwin, H.; CACR 10-110; 11-17-10; Henry).

Pearcy v. State: **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's conviction. (Wright, J.; CR 10-362; 11-18-10; Danielson).

Neely v. State: **[repeal by implication]** Ark. Code Ann. § 16-90-120 was not repealed by implication and the statute can be read harmoniously with Ark. Code Ann. § 5-4-505. (Sims, B.; CR 10-300; 11-18-10; Gunter).

Franklin v. State: **[motion to suppress]** The trial court properly denied appellant's motion to suppress evidence that was obtained during a lawful search. (Gibson, B.; CACR 10-566; 12-1-10; Gladwin).

Ford v. State: **[motion to suppress]** Because the law-enforcement officer lacked probable cause to initiate a traffic stop, the trial court erred in denying appellant's motion to suppress the evidence that was obtained during the traffic stop. (Crow, K.; CACR 10-697; 12-1-10; Robbins).

Rackley v. State: **[Rule 37]** The trial court erred in denying appellant's Rule 37 petition without making written findings of fact and conclusions of law or holding an evidentiary hearing. (Reynolds, D.; CR 08-1376; 12-2-10; *Per Curiam*).

Partee v. State: **[roadblocks]** The Fourth Amendment does not require a statewide administrative or statutory plan for implementing roadblocks in Arkansas. A roadblock that is established for the purposes of checking drivers' licenses and vehicle registration is reasonable under the Fourth Amendment. (Thyer, C.; CACR 10-460; 12-8-10; Vaught).

Elliot v. State: **[sufficiency fo the evidence; rape]** There was substantial evidence to support appellant's conviction. **[witness testimony]** The trial court did not err by permitting the victim's testimony to be suspended during the State's direct examination without first allowing the appellant to cross examine her. **[admission of evidence]** The trial court did not abuse its discretion by admitting into evidence an anatomical chart of a male body with the appellant's name written on it because the chart was not inadmissible hearsay and its probative value outweighed its potential for unfair prejudice. (Culpepper, D.; CACR 10-185; 12-8-10; Pittman).

Clemmons v. State: **[sufficiency fo the evidence; unlawful discharge of a firearm from a vehicle]** There was substantial evidence to support appellant's conviction. **[404(b)]** The trial court did not abuse its discretion by admitting evidence of appellant's prior bad acts because they established his motive, intent, and identity. **[consent to search]** Although there were some discrepancies in the testimony of the police officers regarding the consent to search given by appellant, the Court of Appeals concluded that based upon the totality of the circumstances, appellant's consent was voluntarily given. (Proctor, W.; CACR 10-206; 12-8-10; Pittman).

Bell v. State: **[admission of evidence]** The evidence of a subsequent crime was properly excluded from appellant's trial as immaterial and irrelevant to appellant's affirmative defense of duress. (Sims, B.; CACR 10-526; 12-8-10; Gladwin).

Maxwell v. State: **[revocation of probation]** The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. (Reynolds, D.; CACR 10-734; 12-8-10; Abramson).

Menne v. State: **[motion to suppress]** A search of appellant's car was conducted after he was illegally detained following the completion of a traffic stop. The evidence found during this unlawful search should have been suppressed. (Erwin, H.; CACR 10-577; 12-8-10; Vaught).

Jimenez v. State: **[right to counsel]** The trial court erred when it refused to suppress appellant's custodial statement that was made after he invoked his right to counsel, which was ignored by law enforcement. **[mental evaluation]** The trial court erred when it failed to suspend the proceedings to allow appellant to receive a mental-health evaluation. (Clinger, D.; CACR 09-1398; 12-8-10; Vaught).

State v. Brown: **[expungement]** Because appellee was convicted of a crime that was not eligible for

expungement, the trial court erred in granting appellee's motion to seal. (Proctor, W.; CR 10-207; 12-9-10; Danielson).

Gilbert v. State: **[motion to suppress]** The law-enforcement official had reasonable suspicion to conclude that appellant was carrying a weapon. Thus, the frisk of appellant was not an illegal search. Accordingly, the trial court did not err in denying appellant's motion to suppress. (Phillips, G.; CACR 10-674; 12-15-10; Abramson).

Meador v. State: **[revocation of probation]** The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. (Looney, J.; CACR 10-740; 12-15-10; Gruber).

Ramsey v. State: **[sufficiency of the evidence; aggravated robbery; theft of property]** There was substantial evidence to support appellant's convictions pursuant to the theory of accomplice liability. **[motion in limine]** Appellant sought to exclude certain evidence as inadmissible pursuant to Rules 402, 403, and 404 of the Arkansas Rules of Evidence. The trial court denied his motion. On review, the appellate court concluded that because the challenged evidence was highly probative and was independently relevant, the trial court did not abuse its discretion by denying appellant's motion in *limine*. (Humphrey, M.; CACR 09-1371; 12-15-10; Vaught).

Isom v. State: **[Rule 37.5]** The circuit court did not err in denying appellant's Rule 37.5 petition for postconviction relief. (Pope, S.; CR 08-1386; 12-16-10; Hannah).

Isom v. State: **[standard of review]** The abuse-of-discretion standard applies when the appellate court is reviewing a trial court's denial of relief requested pursuant to Ark. Code Ann. § 16-112-208(b). **[Ark. Code Ann. § 16-112-208; DNA testing]** When DNA test results match the person requesting additional testing, it is not fundamentally unfair to refuse additional testing. (Pope, S.; CR 09-584; 12-16-10; Brown).

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

Simpkins v. State: (first-degree murder) CACR 10-374; 11-3-10; Pittman.

Foley v. State: (residential burglary) CACR 10-395; 11-3-10; Hart.

Goforth v. State: (breaking or entering; theft of property) CACR 10-262; 11-3-10; Gruber.

Williams v. State: (theft by receiving) CACR 10-622; 11-10-10; Glover.

Jones v. State: (second-offense possession of marijuana) CACR 10-373; 11-17-10; Robbins.

Holloway v. State: (second-degree murder) CACR 10-81; 11-17-10; Vaught.

Fikes v. State: (computer child pornography) CACR 10-263; 12-1-10; Brown.

Brown v. State: (possession of marijuana with intent to deliver) CACR 10-484; 12-1-10; Hart.

Gipson v. State: (residential burglary) CACR 10-738; 12-8-10; Glover.

Jacobs v. State: (possession of methamphetamine; possession of drug paraphernalia; possession with intent to deliver a controlled substance; possession of marijuana) CACR 10-710; 12-15-10; Brown.

CIVIL

Farm Bureau Ins. v. Sells: [**summary judgment**] Because the parties submitted disputed extrinsic evidence on the meaning of the policy exclusion, summary judgment was not proper. (Kilgore, C.; CA 09-1256; 11-3-10; Hart)

Nobles v. Tumey: [**limitations defense**] Court could not rule on the limitations defense as a matter of law because the relevant dates to make determinations on possible concealment or discovery of the fraud are not discernable from the complaint. [**miscarriage of justice**] The judgment should have been vacated under the miscarriage of justice standard when the party's attorney had been disbarred, and the attorney failed to make arrangements for his client. Here, the client did not ignore the lawsuit and made efforts to check on his case that were thwarted by the attorney's abandonment of him. (Fitzhugh, M.; CA 09-861; 11-3-10; Gladwin)

Reichardt v. Creasey: [**sufficiency of service**] Unclaimed mail returned by the post office is not "refused" mail for purposes of Rule 4. (Weaver, T.; CA 10-319; 11-3-10; Gruber)

PC Scale, Inc. v. Roll Off Services, Inc. : [**arbitration**] The several documents executed by the parties are interrelated, but they do not constitute a single contract. The intent to arbitrate only applies to the disputes under one of the agreements. (Clinger, D.; CA 09-1150; 11-3-10; Baker)

Kirstner v. Cupples: [**independent contractor**] Summary judgment finding was proper that relationship between driver and company was that of independent contractor. (Moody, J.; SC 09-1349; 11-4-10; Danielson)

Gable v. Anthony: [**fence**] Restrictive covenant prohibited erection of fence. (Wood, R.; CA 10-234; 11-10-10; Kinard)

Cleary v. Sledge Properties, Inc.: [**counsel table**] Court did not abuse its discretion in denying request for plaintiff's daughter to sit at counsel table. [**adverse possession**] Plaintiff's claim for adverse possession must fail because he did not show proof of payment of property taxes. (Glover, D.; CA 09-1304; 11-10-10; Kinard)

City of Little Rock v. McGeorge Const. Co.: **[dismissal]** Trial court's dismissal of claim was valid; therefore, court lost jurisdiction to vacate the order after 90 days. (McGowan, M.; CA 09-359; 11-10-10; Brown)

Cook v. Cook: **[contract]** Contract provided that defendant did not own the funds but was only entitled to income from the funds for her lifetime. Since she was not the owner, she did not have the right to move the funds from one institution to another nor to reinvest them. (Keaton, E.; CA 09-1317; 11-10-10; Gruber)

Callaway v. Practice Management Services, Inc. **[certified question – Ark. Civil Rights Act]** Individual supervisor can be held personally liable for acts of retaliation under the Arkansas Civil Right Act. (SC10-105; 11-11-10; Hannah)

Gunn v. Farmer Insurance Exchange: **[contract]** Implied covenant of good faith does not apply to employment contract that provides for termination without cause on three months notice. **[tortious interference]** Tortious interference with contract claim is timed barred because all of the actions which form the essence of the claim occurred more than three years prior to the filing of the complaint. **[Ark. Franchise Act]** Insurance agent was not a franchisee under the Franchise Practices Act because only the insurance company itself could commit to coverage. Thus, the agent did not have the unqualified authority to sell or distribute goods or services that is an essential requirement under the Act. (Cox, J.; SC 09-454; 11-11-10; Brown)

Ludwig v. Bella Casa, LLC: **[jury trial]** Appeals from final actions of administrative agencies under Ark. Code Ann. 14-56-425 pertaining to planning boards or zoning agencies may be tried to a jury because the statute confers a right to a jury trial in these types of appeals. **[nuisance]** There is no right to a jury trial on claim for injunctive relief to stop a nuisance. (Fox, T.; SC 09-1278; 11-11-10; Hannah)

Young v. Kajkenova: **[discovery sanctions]** Court failed to exercise discretion in dealing with discovery issue. Decision to bar witness from testifying was not the product of careful consideration but was instead a mechanical application of the judge's general rule of thumb. (Moody, J.; CA 10-172; 11-17-10; Abramson)

Gilbow v. Richards: **[med mal/expert]** Expert witness demonstrated a total lack of knowledge concerning locality's medical community, facilities, and standard of care; consequently, court properly directed verdict as plaintiff failed to establish his case. (Fogleman, J.; CA 09-988; 11-17-10; Glover)

Scott Street Townhouses v. Lloyd's of London: **[summary judgment]** Summary judgment was proper; party is bound to know the contents of a document he signs and cannot excuse himself by saying he did not know what it contained. (Moody, J.; CA09-1127; 11-17-10; Hart)

City of Rockport v. City of Malvern: **[annexation]** Circuit court did not err in finding that there had been substantial compliance with requirements of annexation statute requiring that sewer service be provided, accepted, and in place. **[recusal]** Judge's past service as city attorney, not related to

annexation before the court, did not necessitate recusal. There was no showing of actual bias or prejudice. (Williams, C.; SC 10-151; 11-18-10; Corbin)

Lafont v. Mixon: **[rule 68]** Rule 68 did not infringe on plaintiff's right to a jury trial. The rule does not violate the equal protection clause. Plaintiffs and defendants are not similarly situated in the pretrial settlement context. In light of the purpose of fostering settlements, it is not irrational for the rule to distinguish between the two. (McCallum, R.; SC 10-259; 11-18-10; Corbin)

Patsy Simmons LP v. Finch: **[summons]** Summons served on resident defendant provided that it had 30 days to respond. However, Rule 12 provides that a resident defendant has 20 days and a nonresident has 30 days. This defect in the summons deprived the court of jurisdiction over the defendant. (Finch, J.; SC 10-8; 11-18-10; Brown)

Burdine v. Ark. Dept. Fin. & Adm. **[driver's license]** Circuit court properly affirmed department's disqualification of appellant's commercial driver's license. Missouri's administrative procedure finding him guilty of DUI met federal regulations for a conviction of the offense and justified the finding by DFA. (Scott, J.; SC 10-275; 11-18-10; Danielson).

Stalter v. Gibson: **[deed reformation]** Plaintiff did not establish by clear and convincing evidence that he was entitled to reformation of the deed on dispute regarding reservation of mineral rights. **[character evidence]** The mere fact that a witness is contradicted by other evidence does not constitute an attack on the witness's character for truthfulness. In this case, it was error to admit character evidence, but in this bench trial, this error was not prejudicial. (Clawson, C.; CA 10-366; 12-1-10; Abramson)

Wochos v. Wooverton: **[summary judgment]** Court erred in disposing of all claims by way of summary judgment. Factual issues regarding the fraudulent inducement and related damages exist. (Williams, L.; CA 10-249; 12-1-10; Henry)

Hall v. City of Bryant: **[flood plain management]** Summary judgment was not proper in suit against city regarding building of a park in flood plain. Factual issues exist related to whether city fully complied with standard engineering practices as required by ordinance in performing required analyses. (Phillips, G.; Ca10-25; 12-1-10; Vaught).

Dardanelle Railroad v. Lloyd's of London: **[insurance]** Summary judgment was not proper in case involving the interpretation of a "claims made" policy with factual issues related to notice. (Pearson, W.; CA 10-220; 12-1-10; Pittman).

Dowty v. Riggs: **[negligent infliction emotional distress]** A claim of negligent infliction of emotional distress is not recognized in Arkansas, and this case does not present the opportunity to overrule precedent and recognize a new tort. (Fogleman, J.; SC 10-32; 12-2-10; Hannah)

Schubert v. Target Stores, Inc.: **[negligence]** There was not sufficient evidence to submit to the jury the issue of whether the defendant caused the plaintiff's injuries, and the case did not warrant application of the doctrine of *res ipsa loquitur*. (Sims, B.; SC 10-349; 12-2-10; Corbin)

United American Ins. Co. v. Smith: **[class action]** Predominance – Although individual issues may be raised by defendants to defend plaintiffs’ claims of fraud and misrepresentation, those challenges do not override the crucial issue common to all members, that is, whether defendants engaged in a general scheme to defraud potential customers – to the effect that their insurance product was equal to or better than major medical coverage, and the scope of coverage that was included. (Arnold, G.; SC 10-9; 12-2-10; Gunter)

Advocat, Inc. v. Heide: **[arbitration]** Defendant timely asserted right to arbitration when it filed a motion to compel arbitration and attached a copy of the arbitration agreement three months after the filing of the lawsuit even though in its original answer it asserted the defense but failed to attach a copy of the arbitration agreement. (Shirron, P.; CA 10-371; 12-8-10; Brown)

Mendez v. Glover: **[malpractice/limitations]** Wrongful death complaint was a nullity because there was no personal representative at the time of filing and all of the heirs at law were not parties to the complaint. There can be no relations back in an amended complaint to a prior complaint that was a nullity. (Tabor, S.; CA 10-416; 12-8-10; Vaught)

Beckworth v. Diamante, LLC: **[limitations]** Claim for breach of restrictive covenant was barred by five-years limitations period. Claim accrued when the plaintiff could have first maintained a successful action which was when the defendant made the first sale of a deferred lot. (Phillips, G.; CA 10-126; 12-8-10; Gladwin)

Chase Home Finance v. Wilmington: **[foreclosure]** Foreclosure decree was void because a judgment by default cannot be different in kind from or exceed in amount that prayed for in the demand for judgment. (Fox, T.; CA 10-367; 12-8-10; Robbins)

Southwestern Energy v. Elkins: **[mineral lease/ACA15-73-201]** This appeal is controlled by precedent of *Snowden v. JRE Investments*. Lessor is entitled to develop all of the lands covered by the lease for one year after the expiration of the primary term and is entitled to continue developing all of the land under the lease for one year after the last well was completed. (McCormack, D.; SC 10-516; 12-9-10; Brown) .

Orr v. Hudson: **[dismissal]** Plaintiff filed suit that was dismissed for lack of venue. Plaintiff elected to appeal decision rather than to replead. Appellate court’s affirmance of the dismissal rendered the dismissal with prejudice. (Maggio, M.; SC 09-1406; 12-9-10; Danielson)

Looney v. Blair: **[strike answer]** Trial court did not abuse its discretion in striking an untimely answer. (Hughes, T.; SC 10-159; 12-9-10; Hannah)

Ralph Martin Trust v. Ark. Midstream Gas Services Corp. **[ACA 23-15-101/pipeline/ eminent domain]** The pipeline in question is for public use. It is a gathering line to be used by multiple owners and as such the defendant acts as a common carrier. The power of eminent domain was not granted for private use in violation of the Constitution. (Hughes, T.; SC 10-192; 12-9-10; Corbin)

National Bank of Ark. v. River Crossing Partners, LLC: **[jury trial/foreclosure]** Action was filed as a foreclosure. Trial court erred in submitting to jury the amount of the monetary default. Court of Appeals held that cleanup doctrine remains viable. **[abuse of process]** Plaintiff failed to establish an ulterior purpose or an improper act and thus failed to state a claim for abuse of process. (Fox, T.; CA 10-222; 12-15-10; Pittman)

Sargent v. Spencer: **[limitations]** Foreign object was left in patient after surgery. Plaintiff failed to bring action within one year of the time that the object was discovered. (Williams, L.; CA 10-27; 12-15-10; Hart)

Robinson v. Thomas Lee & Seeco, Inc. **[summary judgment]** Summary judgment was proper in this case because the deeds were controlling as to title to the property and thus there were no disputed facts to be determined. (Clawson, C.; CA-10-87; 12-15-10; Pittman)

Henry v. QHG of Springdale, Inc.: **[attorney's fees]** Fees were properly awarded in case as a result of judge's finding that there was a lack of a justiciable issue but the party continued the suit. (Duncan, X.; CA 10-167; 12-15-10; Gladwin)

Travis v. Southern Farm Bureau: **[summary judgment/insurance]** Issue of implied permission to drive the vehicle implicated facts that needed to be decided by a jury rather than by summary judgment. (Fogleman, J.; CA 10-455; 12-15-10; Gladwin)

Gurlen v. Henry Management, Inc. **[lease]** Landlord's actions in clearing out storage bins and leaving tenant's name off the list of bins not to be disturbed amounted to conversion of the property. Landlord cannot rely on language in lease regarding risk of loss in light of landlord's intentional acts. (Fox, T.; CA 09-1380; 12-15-10; Glover)

Pruitt v. Dickerson Excavation, Inc. **[parol evidence]** Contract was a complete expression of the parties' first agreement. Parol evidence did not relate to the first agreement but to a second agreement. **[accord and satisfaction]** The notation on a check "payment in full" is not enough to establish an accord and satisfaction. (Pearson, W.; CA 10-355; 12-15-10; Robbins)

Carr v. Nance: **[18-11-307/Recreational Use Statute/immunity]** Landowner is not immune from liability because of evidence of malicious intent or an ultra-hazardous condition. In this case, the rider of an ATV struck a cable that had been placed on the property that was not flagged or otherwise warned of. Evidence supported jury's finding of liability. **[punitive damages]** Award was warranted and jury instructions were proper because the jury was instructed that they had to find that the defendants had acted with malicious intent. **[remitting]** Remitting was not proper. The jury's award for caretaking activities was not so great as to shock the conscious or demonstrate passion or prejudice. (Logan, R.; SC10-562; 12-16-10; Gunter)

McLane Southern, Inc. v. Ark. Tobacco Control Bd. **[cigarette pricing]** Board's finding that patronage dividends were not rebates was arbitrary and capricious. A cooperative is a retailer and is prohibited from providing rebates. McLane, a wholesaler in competition with cooperatives, could

not reduce its price to retailers to match that at which a cooperative sells, less any patronage dividends, because the dividends were illegal rebates and thus could not be a price set in “good faith” as required by the statute. (Moody, J.; SC 10-498; 12-16-10; Danielson)

DOMESTIC RELATIONS

Brothers v. Stouffer, et al.: **[custody]** A preponderance of the evidence supported the trial court’s decision to award custody of the teenage daughter to her father. The trial court did not err in denying the appellant’s request for a continuance. Finding no error, the Court of Appeals affirmed the trial court’s decision. (Foltz, H.; No. CA 10-289; 11-3-10; Vaught).

Gibson v. Gibson: **[custody]** The trial court’s decision awarding custody of the parties’ children to the appellee father was not clearly erroneous and was affirmed. (Schantz, D.; No. CA 10-388; 11-3-10; Abramson).

Hayes v. Hayes (Otto): **[Rule 11 sanctions]** The Court of Appeals held that the trial court did not abuse its discretion in denying the appellant’s motion for Rule 11 sanctions against the appellee or her counsel. Appellant alleged that her general denial of the allegations in his posttrial motions violated the rule because at least some of the statements were true. The court said that some statements were accurate, such as quotes from opinions of the trial or appellate court or excerpts from rules. But these correct statements were mixed in with “extensive argument and representations that could be fairly denied by Ms. Otto.” The general denials were grounded in fact and caused the appellant no prejudice. The court also held that imposing Rule 11 sanctions against the appellant was not an abuse of discretion. Therefore, the court affirmed the Rule 11 violation and the \$750 attorney’s fee as an appropriate sanction. (Smith, V.; No. CA 10-58; 12-1-10; Robbins).

Barnes v. Barnes: **[antenuptial agreement; nonmarital and marital property]** Before they married, the parties entered into an antenuptial agreement, which provided that in the event the parties divorced, nonmarital property was to be separate, except as set forth in the agreement. At the time of divorce, the trial court found the agreement valid and binding. One of the contested assets was a Morgan Keegan account created during the marriage and held initially by the parties jointly with right of survivorship. Before the divorce hearing, appellee gave the appellant written authorization to move the funds, which he transferred to an account in his name only. The trial court found the account was marital property and ordered it divided equally. He contends the account was his separate property and that appellee had authorized the assets to be returned to him as his nonmarital property. The Court of Appeals said that once property is placed in the names of husband and wife, a presumption arises that the property is owned as tenants by the entirety, which may be overcome by clear and convincing evidence. Here, the trial court’s finding was not clearly erroneous that appellant made a gift to appellee of a marital interest in the funds when he placed them in a joint account. The appellee cross-appealed that the trial court erred in valuing the Morgan Keegan account as of the date of the divorce. The court said that the law in Arkansas is that marital property is to be divided at the time of the entry of the divorce decree. The case was affirmed on appeal and cross-appeal. (Smith, V.; No. CA 10-419; 12-8-10; Glover).

Toombs v. Toombs: [**Rule 60, ARCP; mediation agreement**] After both parties filed for divorce, they agreed to mediate their property and alimony disputes. Both were represented by counsel at the mediation; they reached an agreement about the division of property and debts and the amount and duration of alimony. Appellant wife subsequently filed a motion to vacate the divorce decree and to set aside the mediation agreement under Rule 60(C), alleging that the mediation was procured through coercion, undue influence, overreaching and duress, and that longstanding physical and mental health issues and the stress of divorce resulted in her being of unsound mind at the time of the mediation. The trial court denied the motion and the Court of Appeals affirmed. The court noted a presumption that every person is sane, competent and capable of understanding the nature and effect of her contracts, and that the burden of proving incompetency was on the appellant, which she failed to meet. On the issue of coercion, the appellant asserted that the appellee was dominant in their relationship and controlled their finances. Coupled with her physical and psychological condition, the result was an inequitable and unfair disposition. The court noted that when a confidential relationship exists between spouses and one is dominant over the other, a rebuttable presumption arises that a transfer of property to the dominant is invalid because of coercion and undue influence. The one to whom the property was transferred has the burden to rebut the presumption. Here, the appellant failed to show such a dominance so as to imply a dominating influence sufficient to amount to duress, coercion, or undue influence. The Court of Appeals found no abuse of discretion in denying the motion to set aside or vacate the decree. (Schrantz, D.; No. CA 10-272; 12-15-10; Abramson).

Maley v. Cauley (Maley): [**visitation; child support**] On the issue of visitation, the Court of Appeals found that the trial court's minor alteration to the children's visitation schedule with the appellant was appropriate and in the best interest of the children. On the issue of child support, the parties' original agreement was for joint legal and physical custody of their children with neither paying child support to the other party. Rather, each was to provide for the children when they were in the respective parents' custody. They were to share expenses, with both agreeing on expenditures other than medical and dental expenses. The appellant father was not abiding by the agreement. He had not significantly contributed to the children's expenses. The court said that the appellee had demonstrated a material change in circumstances that warranted a change in the child-support arrangement. All parents have a legal and moral duty to support their children. The law does not allow them "to pick and choose between previous debts and the support of their children....This is a material change." (Kilgore, C.; No. CA 10-418; 12-15-10; Robbins).

Ware v. OCSE, et al.: [**child support**] The Office of Child Support Enforcement asked for a reduction in the non-custodial parent's child-support obligation because the self-employed payor's income had been reduced. The trial court granted the reduction without making findings required by Administrative Order No. 10. The Court of Appeals reversed and remanded for the trial court to enter an order complying with Administrative Order No. 10. (Partlow, G.; No. CA 10-1; 12-15-10; Pittman).

PROBATE

Shafer v. Estate of Shafer: **[contempt]** The circuit court's finding of civil contempt was not clearly against the preponderance of the evidence. The appellant's contention that the court's order was not definite in its terms was without merit; the Court of Appeals found the order crystal clear in its directive. The case was affirmed. (Hannah, C.; No. CA 10-294; 11-3-10; Henry).

Kuelbs, et al. v. Hill: **[guardianship of an adult]** In a second appeal of this case, the Court of Appeals found that the trial court had authority to continue its proceedings after the first appeal was filed in this case. The probate code provision cited did not limit the court from enforcing its prior orders. The court noted an exception to the rule that a circuit court loses jurisdiction when the record is lodged on appeal in child-custody and child-support cases, which the court analogized to a guardianship case. The court's orders were necessary to remove a noncompliant guardian, to restrict his access to the former ward, and to appoint a new guardian, all within the court's authority under the circumstances of this case. Further, the court did not err in appointing the guardian after attempting other alternatives. Finally, the court did not err in not having a hearing to determine the guardian's qualifications and suitability. The statute does not mandate a hearing, and the record does not indicate that the court ever refused a request from the appellant for a hearing. Cook, V.; No. CA 09-931; 12-1-10; Gladwin).

Lookadoo v. Switzer, et al.: **[trusts]** The appellees' decedent created a trust and executed a pour-over will in Arkansas. She died in Oklahoma. Her three children, the appellees, were executors of the will and successor trustees of the trust. They changed the situs of the trust and the applicable law to Oklahoma, as permitted by the trust. As executors, they filed in Oklahoma for construction and/or interpretation of testamentary documents, requesting permission to encumber the farm in Arkansas for administrative expenses and estate taxes. The appellant was a beneficiary of the trust who was to be allowed to keep the farm and to use it for his benefit for life if, at decedent's death, he "was in a relationship" with her, a fact to be determined by the trustees in their "sole and absolute discretion." Appellant filed a petition to construe the trust in Arkansas County, where the farm is located. The circuit court stayed the Arkansas proceeding pending resolution of the relationship issue in the Oklahoma case. After a grant of summary judgment in Oklahoma, based upon a confirmation that no relationship existed, the trustees sought summary judgment in Arkansas. Appellant asserted that Arkansas had jurisdiction because the case involved title to Arkansas real estate and that the Oklahoma order did not constitute res judicata or collateral estoppel. The circuit court granted the appellees' motion for summary judgment, finding that appellant's petition to construe the trust was barred by res judicata and collateral estoppel. In affirming, the Court of Appeals said that the Oklahoma court rightly decided the case as a matter of trust administration, not one of title to Arkansas real estate, and that the Arkansas court correctly rejected appellant's argument that it must determine title to the Arkansas farm. (Henry, D.; No. CA 09-1342; 12-15-10; Gruber).

JUVENILE

Black v. State [**FINS - Contempt**] The court acted without jurisdiction to hold the appellant in contempt for failure to abide by a no-contact order after the appellant reached the age of 18 because the court lacked jurisdiction related to the original FINS petition. Although punishment for contempt is an inherent power of the court, it must be based on a valid court order of a court having jurisdiction. (Wood, R; 10-415; 12-1-2010; Vaught)

M.W v. State [**Delinquency Adjudication**] Appellant was adjudicated delinquent on second-degree battery. Appellant failed to preserve his sufficiency of the evidence argument because he did not specify the grounds for dismissal as required by Ark. R. Crim. P. 33.1(b). (Warren, J.; 09-1395 12-1-2010; Glover)

Taylor v. Arkansas Dept. of Human Servs. [**Dependency-Neglect Probable Cause & Disposition**] Appellants argued insufficient evidence in initial emergency removal and probable cause order. Probable Cause orders are not appealable. Appellants also argued that the court erred in not placing their children with grandparents at the disposition hearing. Since there was no Rule 54(b) finding, this was not a final and appealable order pursuant to Arkansas Supreme Court Rule 6-9(a)(1)(B). (Gilbert, M.;10-434; 11-3-2010; Pittman)

Blanchard v. Arkansas Dept. of Human Servs. [**Dependency-Neglect Adjudication**] A sufficiency of the evidence challenge must be raised at the trial level to be preserved for appeal. (Zimmerman, S. 10-688; 11-17-2010; Baker)

McCain v. Arkansas Dept. of Human Servs. [**Dependency-Neglect Adjudication**] Appellant challenged the sufficiency of the evidence and argued that the trial court erred in placing more weight with a doctor's testimony than that of the social worker. Due deference is given to the judge to determine witness credibility. There were also undisputed facts to support the court's finding, including appellant's meth abuse and instability. (Coker, K;10-805; 12-8-2010; Brown)

Mahone v. Arkansas Dept. of Human Servs. [**Permanency Planning**] The children were removed from their mother. Appellant, the children's father appealed seeking custody. The trial court placed custody with the maternal grandmother who also had custody of a half-sibling and granted appellant standard visitation. Appellant argued that as a fit parent the court erred in not granting him custody over the grandmother. He argued that the trial court should follow the permanency planning statute that preferred reunification to the parent. The appellate court found that "returning the child to the parent" means the parent from whom he/she was taken. The appellate court reasoned that the father was a fit and willing relative since his children were not removed from him and did not have preferred status over the grandmother. The primary consideration is the children's best interest. (Zimmerman, S.; 10-687; 18-8-2010; Gruber)

Coleman v. Arkansas Dept. of Human Servs. [**Permanency Planning - No Reunification Services**] The trial court placed two younger children with their father and closed their case and left older youth in appellant's home and the case remained open. The children were removed from appellant's home three times within in the past 15 months; appellant continued to have drug

abuse problems; and there was evidence that the younger children were thriving in their father's care. (Halsey, B.; 10-817; 12-15-2010; Robbins)

Johnson v. Arkansas Dept. of Human Servs. [TPR] Appellant argued that the trial court erred in relying on the ground of abandonment from its adjudication order to terminate as the law of the case. Appellant's failure to object to the court ruling precludes appellate review. Appellant also failed to appeal the adjudication based on abandonment which precludes review of those findings in a subsequent appeal. Appellants conviction of endangering the welfare of his children can also be a predictor of potential harm. (Hewett, M. 10-712; 11-10-2010; Henry)

Edwards v. Arkansas Dept. of Human Servs. [TPR] Appellant argued that the trial court failed to find that the TPR had been proven by clear and convincing evidence. The court's order was sufficient where it stated its finding was pursuant to the statute that cited the burden of proof. Appellant's argument that her permissive parenting was not harmful was not supported by the evidence, including specific evidence related to her alcohol abuse and issues that arose during visitation. Appellant's argument that DHS failed to make meaningful rehabilitation efforts also failed, despite the trial court's criticism of DHS's handling of appellant's apparent inability to grasp parenting. (Finch, J.; 10-556; 11-3-2010; Glover)

Pine and Hoffman v. Arkansas Dept. of Human Servs. [TPR] Appellants argued that their failure or inability to achieve sobriety was not within the time frame allowed by the court and they needed more time. Their child was removed when he was five months and he had a host of medical problems stemming from Fetal Alcohol Syndrome. He had been in care for over a year and the parents had not remedied the conditions that caused removal. (Zimmerman, S.; 10-685; 11-17-2010; Glover)

Hoffman v. Arkansas Dept. of Human Servs. [TPR] Appellant argued that the court erred in denying him more time to achieve reunification with his child. The court did not err in finding that the time required for appellant to achieve parental fitness was beyond the statutory requirements due to appellant's history of drug abuse; his previous conviction and incarceration; his disregard of court orders upon release of prison; and his failure to demonstrate stability or sobriety for an appreciable length of time outside of prison. (Zimmerman, S.; 10-826; 12-15-2010; Glover)

Welch v. Arkansas Dept. of Human Servs. [TPR] Appellant argued that the court erred in its best interest finding. The trial court made a specific finding that the child was adoptable and there was evidence that the child was adoptable and that the foster parents were interested in adopting. The evidence also supported the trial court's finding of potential harm where appellant failed to overcome her drug addiction and failed to maintain stable housing. (Zimmerman, S.; 10-969; 12-1-2010; Gruber)

Smith v. Arkansas Dept. of Human Servs. [TPR] Appellant argued that the court erred in its best interest finding that the child was adoptable. There was sufficient evidence by the caseworker who testified that there were prospective adoptive parents for the children if rights

were terminated and that there had already been an inquiry as to one of the children. (Hudson, A.; 10-520; 11-3-2010; Brown)

Cases in which the Court of Appeals affirmed No-Merit TPR:

Hart v. Arkansas Dept. of Human Servs. (Thyer, C.; 10-733; 11-10-2010; Abramson)

Henry v. Arkansas Dept. of Human Servs., (Finch, J.; 10-686; 11-17-2010; Vaught)

Vance and Boryschtsck III v. Arkansas Dept. of Human Servs. (Gilbert, M.; 10-783; 11-17-2010; Robbins)

Bell and Robinson v. Arkansas Dept. of Human Servs. (Hewett, M.; 10-702; 11-17-2010; Robbins)

Garcia v. Arkansas Dept. of Human Servs. (Sullivan, T.; 10-714; 10-17-2010; Vaught)

DISTRICT COURT

Smith v. State: [speedy trial] Appellant contends the circuit court violated his right to a speedy trial. On May 1, 2008, an appeal was lodged in circuit court of a district court conviction. Trial was set for April 27, 2009, but on April 24 the trial court granted appellant's request for a mental evaluation. Trial was reset for June 17, 2009 and after an extension of time to complete the evaluation, an order was entered on August 4, 2009, resetting the June trial to December 7, 2009. This order said that the delay occasioned by the continuance was excludable under Rule 28.3(a). At the pretrial proceeding on December 7, 2009, defense counsel moved for dismissal based on expiration of speedy-trial time period. The motion was denied and defendant was convicted. Since a defendant must lodge a timely objection to an order excluding time under Rule 28.3 or else the issue is not preserved for appellate review, the Court of Appeals held that the point on appeal was not preserved for appellate review. Appellant did not object to the June 17, 2009 order which excluded the time and instead waited until December, 2009. Such a delay cannot be considered timely. (Wyatt, J.; CACR10-414; 10/20/10; Gladwin)

Gazaway v. State: [DWI] Appellant was convicted in district court and on appeal in circuit court of driving while intoxicated. There was a bench trial in circuit court on stipulated facts. Appellant argues that the trial court's finding is not supported by substantial evidence. He contends that the stipulated facts reasonably suggest that his blood-alcohol content was under .08 at the time he was operating his vehicle. The case was affirmed because appellant failed to preserve his argument for appellate review. The means to challenge the sufficiency of the evidence after appellant's bench trial would have been by a motion for dismissal, which must be made at the close of all the evidence and before closing arguments. After the state presented a set of stipulated facts, the judge asked if "there are any arguments to be presented?" The city attorney first responded and then defense counsel argued his point of view that because test showed appellant's blood alcohol level to be rising, then by implication it was lower in the

previous minutes when he was operating his vehicle and stated, “That’s our argument, Your Honor.” The judge then found appellant guilty of DWI and proceeded to the punishment phase. At no time did defense counsel move to dismiss the charges. The Court of Appeals also held that because the case was tried on stipulated facts, the requirements of Ark. R. Crim. P. 33.1 are not excused. The appellate court additionally noted that even if the case was considered on the merits, the possibility that the blood-alcohol level was less than .08 at the time of the stop did not render the judge’s finding of guilt without substantial evidence. (Kemp, J.; CACR10-574; 11/17/10; Robbins)

Wages v. State: **[district court appeal] [right to jury trial]** Appellant was convicted in district court of the crime of harassment. Upon a de novo bench trial in circuit court, appellant appearing pro se was again found guilty. On appeal, appellant challenges the circuit court’s failure to conduct pretrial proceedings. Particularly, he noted the absence in the record of his waiver of his right to a jury trial. The Court of Appeals, citing Ark. Code Ann. § 16-17-703 and Ark. R. Crim. P. 31.2, concluded this absence requires a reversal and a remand. (Henry, J.; CACR10-47; 11/10/10; Hart)

Pack v. Clark, et al: **[district court Rule 9]** This appeal is from the circuit court’s dismissal of appellants’ property-dispute case based on their failure to comply with Rule 9 of the Arkansas District Court Rules. The matter started in county court and with the appeal of the county court order appellants attached a certified copy of the entire county court case file. The circuit court judge in a letter ruling, found that Rule 9 had been amended as of January 1, 2009, and that appellants failed to follow the requirements of the amended rule. The circuit court did not specify in what way Rule 9 was not followed. The Court of Appeals held that the amended Rule 9 controls the appeals process. However, the court erred in finding that appellants failed to comply with the amended rule. Subdivision 9(e) makes it clear that an appeal from county court to circuit court may be perfected by filing a notice of appeal and a certified copy of the county court’s final judgment. It was held that this provision applies in situations, such as this one, where the county court does not maintain a docket sheet. Though the Supreme Court has held that strict compliance with Rule 9 is required and that the failure to file a certified copy of the district court docket sheet – even when a substantial equivalent is filed instead -- is a failure to perfect an appeal from district court to circuit court; here, the appellants appealed from county court, not district court, thus subdivision 9(e) of the rule applies not subdivision 9(b). By adopting 9(e) the supreme court provided for situations where no “docket sheet” was kept by the county court. (Maggio, J.; CA10-231; 11/10/10; Kinard)

EIGHTH CIRCUIT

Rogers Group, Inc. v. City of Fayetteville: **[injunctions]** District court did not err in enjoining enforcement of an ordinance seeking to limit the operation of rock quarries within one mile of the city limits. Under Arkansas law, a city can only regulate a quarry if it is found to be a nuisance and a quarry can only be declared a nuisance by a court of competent jurisdiction. In the absence of such a judicial determination, the city has no statutory authority to regulate the quarry in the guise of abating a nuisance. The district court did not err in finding the quarry had

established a threat of irreparable harm if it was forced to operate under the ordinance's restrictions. (W.D. Ark.; # 09-3915; 12-27-10)

Lexicon v. Ace American Insurance Company: **[insurance]** District court did not properly apply governing Arkansas law when it held property damage resulting from the faulty work of the insured's subcontractor is not an occurrence for purposes of a commercial general liability policy. The relevant Arkansas case law justifies the insurer's decision to deny claims of coverage for damages to the "work product itself, " which, here, would exclude coverage for reconstruction of an iron storage silo; however, the insurer, in the absence of some other exclusion, would be obligated to reimburse the insured for all property damage other than to the silo, including damage to the product stored in the silo and damage to adjacent equipment. (E.D. Ark.; # 10-1100; 12-28-10)