

## Civil Cases

### Medical-malpractice plaintiff wins \$3,500,000 jury verdict when doctor amputates his leg unnecessarily

**McCoy v. Montgomery** - #06-1243. Arkansas Supreme Court, June 21, 2007. Appeal from the Circuit Court of Sebastian County, Hon. Norman Wilkinson. **AFFIRMED.**

**Held:** \$3,500,000 jury verdict in medical-malpractice case was affirmed. Opinion by Justice Gunter.

**Brief facts:** This was a medical-malpractice case arising out of the treatment of Paul Montgomery for heart and leg problems. On June 29, 2000, Montgomery and his wife sued several doctors and clinics for negligence when his leg had to be amputated. He had endured several bypass surgeries both on his coronary arteries and the femoral arteries of both legs, as well as grafting and thrombectomies.

Montgomery voluntarily nonsuited the initial lawsuit. He refiled the action on November 25, 2003, relying on A.C.A. § 16-56-126, the "savings statute." Dr. Mark McCoy filed a motion to dismiss, which the trial court denied. A jury returned a verdict for the Montgomerys, awarding damages that totaled \$2,800,000 in actual damages, \$200,000 in loss of consortium damages to Mrs. Montgomery, and an additional \$500,000 in punitive damages.

Dr. McCoy appealed, arguing 1) he was not timely served, 2) the trial court erred in awarding punitive damages, 3) the trial court erred in excluding mention of Dr. Lonnie Harrison who consulted with two of the plaintiffs' experts, 4) the trial court should have permitted the deposition of Dr. Edward Diethrich to be read, or alternatively, continued the case, and 5) two other issues that were not preserved for trial. The Arkansas Supreme Court affirmed.

**Important points:** 1. Failure to comply with service requirements results in failure to commence the action so as to effectuate the one-year savings provisions of A.C.A. § 16-56-126. Here, Dr. McCoy's secretary signed for restricted delivery certified mail on two

occasions. The Arkansas Supreme Court found her to be his agent, although Dr. McCoy denied this. Service was proper, and the savings statute was applicable.

2. An award of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred. Here, there was testimony given at trial that suggested that Dr. McCoy avoided conducting routine tests before surgery that would have shown that surgery was unnecessary. Further, McCoy's former partner testified that whether a patient had insurance would factor into McCoy's decision whether to operate and that he often rushed through one surgery in order to do another that same day.

3. Dr. Lonnie Harrison acted as a consultant and legal assistant on the plaintiffs' case. The fact that he participated in consulting with two of the plaintiffs' experts had no relevance to the case, nor did the fact that Harrison had been convicted of drug possession, causing him to lose his medical license.

4. One of Dr. McCoy's experts gave a video deposition in which he would not respond to many of the plaintiffs' impeachment questions. The trial court properly excluded the entire video on the plaintiffs' motion to strike, especially in light of the fact that the witness was allowed to travel to Arkansas and testify live at the trial.

Attorney for doctor: Walker Dale Garrett, Fayetteville; Paul D. McNeill and Mark Alan Mayfield, Jonesboro

Attorney for plaintiffs: Bobby R. McDaniel, Jonesboro and John M. Burnett, Albuquerque, NM

Attorney for Clinic: James Michael Cogbill, Fort Smith

Attorney for St. Edwards: William Powell Thompson and Rex Wallace Chronister, Fort Smith

### Class certification affirmed in suit against Batesville nursing home

**Beverly Enterprises-Arkansas, Inc. v. Thomas** - #06-877. Arkansas Supreme Court, June 21, 2007. Appeal from the Circuit Court of Independence County, Hon. John N. Harkey. **AFFIRMED.**

**Held:** Class certification was affirmed. Opinion by Justice Brown.

**Brief facts:** The estate of Helen Cook, an elderly resident at the Batesville nursing home, brought this class-action negligence and Arkansas-Residents'-Rights-Act suit against the nursing home. The complaint alleged that the nursing home failed to meet the residents' basic daily needs by failing to properly and adequately staff the facility and provide a clean, safe living environment, which resulted in a loss of dignity for the residents. Each resident had signed the same Resident Admission Agreement, in which the home agreed to take care of the residents' basic daily needs.

Annette Thomas, the permanent guardian of the estate of Ms. Cook, moved for certification of all residents of the Batesville nursing home from September 13, 2000, to June 30, 2004, and sought appointment by the circuit court as class representative.

Thomas later voluntarily dismissed without prejudice her negligence and medical-malpractice claims against the nursing home. After this, the trial court entered an order granting class

certification with respect to the contract and statutory claims only. The trial court specifically excluded the negligence and medical malpractice claims from the class certification. Finally, Thomas moved to sever her individual claims on behalf of Helen Cook for medical malpractice and negligence from the class claims, and the trial court granted the motion.

The trial court's order granting class certification found common questions of law and fact relating to understaffing. It found 489 class members. The trial court found that Thomas and her attorney were adequate representatives, and that class action was the superior method to resolve the common liability issues fairly and efficiently.

The nursing home appealed, arguing 1) any common questions of fact or law that may be present in this case do not predominate over individual issues, 2) a class action is not the superior method to litigate this case, 3) Thomas is an inadequate class representative because she severed her individual claims for medical malpractice and negligence, and 4) *Kohn v. American Housing Foundation, Inc.*, 178 F.R.D. 536 (D.Colo.1998) calls for denial of the class certification in this case. The Arkansas Supreme Court affirmed.

**Important points:** 1. If a case involves preliminary, common issues of liability and wrongdoing that affect all class members, the

predominance requirement is satisfied even if the trial court must subsequently determine individual damages issues in bifurcated proceedings. Here, one overarching issue did exist --- whether the nursing home was chronically understaffed so as to violate the residents' statutory and contractual rights.

2. Without class certification, some of the claims could merely "go away" because many of the claims may involve only small amounts of damage and many of the class members may not be able to afford the litigation expenses of bringing their claims separately. Further, many of the class members were elderly, were unaware of their rights, and would not be able to file their claims if the class were not certified.

3. The nursing home relied on *Kohn v. American Housing*

*Foundation, Inc.*, 178 F.R.D. 536 (D.Colo.1998). The plaintiffs in *Kohn* brought a negligence claim where a finding of causation for each class member was necessary to establish liability. Here, the trial court specifically excluded claims for medical malpractice and personal injury.

Attorney for class: Alfred Francis Thompson, III and J. Scott Davidson, Batesville; Callis L. Childs, Conway; Phillip Bohrer and Scott E. Brady

Attorney for nursing home: Marvin Samuel Jones, III and Jess Askew, III, Little Rock; Rex M. Terry, Fort Smith; and Paul D. McNeill, Jonesboro

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### Widow not entitled to monies her husband depleted from joint account before his death

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**Cloud v. Brandt** - #06-1102. Arkansas Supreme Court, June 21, 2007. Appeal from the Circuit Court of Lonoke County, Hon. Phillip T. Whiteaker. **REVERSED AND REMANDED ON DIRECT APPEAL; AFFIRMED ON CROSS-APPEAL.**

**Held:** Partial summary judgment in favor of widow in will contest was reversed and remanded; cross-appeal was affirmed. Opinion by Justice Imber.

**Brief facts:** The parties were married in 1932. The wife brought one child to the marriage, William Holden. The parties had another child during the marriage, Virginia Cloud.

The parties were farmers. Holden assisted the father in building a reservoir. He asked to be compensated. The parties decided to give each of their children \$20,000. Cloud received hers, but Holden was going through a divorce and wanted to wait.

The parties sold their farmland in two sales in August, 2000. The father deposited the proceeds into a joint checking account, but later opened a separate checking account in his name funded with money from the joint account. He then removed the money from his checking account and purchased CDs in his name totaling over \$200,000.

He executed a will in 1997, leaving everything to his wife and upon her death to Cloud and Holden equally. He executed a new will in 2002, naming Cloud as executrix. He created a family trust with his wife as the prime beneficiary to receive income from the trust for her care and support and upon her death, Cloud, who was also the trustee, was the residual beneficiary.

The father died on March 1, 2002, and Cloud proffered the new will for probate. The mother contested the will, or in the alternative elected to take the spousal share against the will. The trial court granted her request to exercise her right to take the surviving spouse's statutory share as against the will, but reserved its holding on the will-contest issue. Cloud filed a motion for summary judgment, claiming that the mother's will contest was moot because he had taken against the will; therefore, the issue of whether the will was valid had no effect on the amount she would receive from the estate. The trial court ruled in favor of Cloud, finding that the will contest was moot.

Holden filed a claim for \$20,000 against the father's estate for work done on the farm. The trial court denied Holden's claim, ruling that his claim was really an attempt to collect upon an undelivered inter vivos gift from the decedent.

On February 20, 2004, the mother filed a motion for declaratory judgment that the CDs her husband had purchased with the proceeds

of the land sale were her property as the surviving tenant of a tenancy by the entirety in the joint funds. She filed a motion for partial summary judgment, alleging that the CDs were her property by operation of law. The trial court entered an order in which it concluded that the mother owned the CDs by operation of law.

The trial court interpreted *Lofton v. Lofton*, 23 Ark. App. 203 (1988), to stand for the proposition that a spouse cannot destroy an estate by the entirety in a joint bank account without the consent of the other spouse. The trial court concluded that as surviving tenant by the entirety, the mother owned the CDs by operation of law.

Cloud appealed, arguing 1) the mother's declaratory-judgment action was time barred under the nonclaim provision of Arkansas Probate Code, A.C.A. § 28-50-101 (raised for the first time on appeal); and 2) the trial court erroneously relied on the *Lofton* decision in concluding that the father could not destroy the tenancy by the entireties in the couple's joint funds without his wife's consent. The Arkansas Supreme Court declined to address the first issue because it was raised for the first time on appeal, but agreed with Cloud on the second issue and reversed and remanded.

On cross-appeal, Holden and the executor of his mother's estate (who passed away during the pendency of the litigation) argued that the trial court erred in finding the property was not held as tenants by the entirety and that the trial court erred in denying Holden his \$20,000 claim against the estate. The Arkansas Supreme Court affirmed on both points, holding that the property in question was not held in both parties' names and the evidence presented was not conclusive as to whether the father intended the \$20,000 as payment for Holden's work or as a gift.

**Important points:** 1. One spouse can reduce the amount of a tenancy by the entirety by withdrawing funds from a joint account and reducing them to his or her separate possession and, absent another claim for relief, the surviving spouse is only entitled to the remaining balance in the joint account.

2. The court in *Lofton* considered the consent of the wife solely for determining the husband's intent in a divorce case. The trial court erred in its application of *Lofton* to the instant case.

3. The father was not precluded from unilaterally destroying the tenancy by the entirety in the joint checking account without his wife's consent. As the surviving tenant by the entirety, the wife was only entitled, as a matter of law, to the balance of funds in the joint account at the time of her husband's death.

Attorney for wife's estate and son: James Patrick Flowers, Marianna  
Atty for dad's estate/daughter: Charles Sidney Gibson, II; Dermott

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### The obligation to pay child support does not survive the death of a child

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**Hardy v. Wilbourne** - #05-1335. Arkansas Supreme Court, June 21, 2007. Appeal from the Circuit Court of Union County, Hon. Michael

Richard Landers. **AFFIRMED.**

**Held:** Denial of petition for child support affirmed. Opinion by Justice Danielson.

**Brief facts:** The parties had a child out of wedlock. She had cerebral palsy, and the father did not contribute to her medical care nor pay child support. He did not remember her on birthdays or Christmas. He never established paternity nor gave the child his name. He occasionally did visit her. When the child died at the age of 14, her estate collected \$500,000 in a wrongful-death case. One third of the settlement was approved for attorney's fees. The trial court then divided the remaining proceeds. The mother received 60%, each of the child's half brothers received 17.5%, and the father received 5%.

Shortly after the settlement, the mother petitioned the court to establish paternity and for back child support. She asked the court to freeze the monies from the wrongful-death settlement until the back child support was resolved. The father responded, asserting two affirmative defenses: 1) the trial court had no jurisdiction over the probate court's division of the wrongful-death settlement, and 2) that the mother had never sought court-ordered child support during her daughter's life and that she was equitably estopped from doing so.

The trial court held that it did not have the authority to freeze the funds from the wrongful-death settlement, and denied the mother's motion to do so. It denied the mother's petition for child support, finding that any award of support would not benefit the child. The trial court noted that the mother had never petitioned for

child support during the child's life. It added that the probate court had taken into account that the father had not paid child support when it awarded the mother and her children 95% of the proceeds of the wrongful-death settlement.

The mother appealed, arguing 1) the trial court erred in denying her child support based on the probate court's consideration of nonpayment of support in its order of distribution, and 2) the trial court erred in relying on the mother's failure to initiate child support during the child's life. The Arkansas Supreme Court affirmed.

**Important points:** 1. A petition for child support may not be initiated after the death of a child. A.C.A. § 9-14-104

2. A parent must have physical custody of the child to receive child support. *See* A.C.A. § 9-14-105(b)(1). Here, the child had passed away prior to the mother's filing of the petition for child support.

3. The obligation to pay child support does not survive the death of the child. Here, the father's obligation to pay child support would have terminated by operation of law upon the child's death even if the trial court were able to grant the mother's petition for child support otherwise. *See* A.C.A. § 9-14-237.

Attorney for father: Pro se

Attorney for mother: William C. Plouffe, Jr.; El Dorado

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### Attorney's license suspended for six months for using disrespectful language toward the Arkansas Supreme Court in a brief

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**Stilley v. Supreme Court Committee on Professional Conduct - #06-972.** Arkansas Supreme Court, June 21, 2007. Appeal from the Supreme Court Committee on Professional Conduct, Panel B. **AFFIRMED.**

**Held:** Six-month suspension of attorney's license was affirmed. Opinion by Justice Corbin.

**Brief facts:** Oscar Stilley, the attorney in this professional conduct case, used disrespectful language toward the Arkansas Supreme Court in a client's brief. Panel A of the Supreme Court Committee on Professional Conduct sent Stilley its confidential decision. Stilley requested and received another public hearing in front of Panel B.

Prior to the hearing before Panel B, Stilley requested to take the depositions of the then-sitting justices of the Arkansas Supreme Court. The office of professional conduct issued subpoenas which were later quashed because all published opinions speak for themselves, and the request for subpoenas in this proceeding was improper.

After a hearing, Panel B found that Stilley had violated Model Rules 1.7(b), 3.1, 3.4(c), and 8.4(d) and suspended his license for six months. The committee granted Stilley's motion for stay pending appeal. Stilley appealed, and the Arkansas Supreme Court affirmed.

**Important points:** 1. Stilley argued that the justices should have recused themselves because they, as his accusers, had an interest in

the outcome of the case. The justices had no interest in the outcome of the case. The only people who had any involvement in the proceeding would be the Office of Professional Conduct and the hearing panel.

2. Stilley argued that his due process was violated because the justices presiding over his case had an interest in the outcome, that the justices usurped the role of Panel B, and he was denied the right to cross-examine his own "accusers."

3. The practice of law is a privilege, not a right. Any protections to a law license are only subject to the very lowest of review under the Due Process and Equal Protections Clauses of the Constitution.

4. Arkansas Supreme Court Rule 1-5 states: "No argument, brief, or motion filed or made in the [Arkansas Supreme] Court shall contain language showing disrespect for the circuit court." This rule applies toward all courts and officers of the court. Stilley had notice of this rule because it is inscribed on his attorney's license and was part of the oath he took when he received his attorney's license.

5. The brief before the Arkansas Supreme Court was not a privileged communication.

6. Stilley's repeated and continuous use of strident disrespectful language constituted serious misconduct, especially because it resulted in substantial prejudice to a client. The Court upheld his six-month suspension.

Attorney for Stilley: Oscar Stilley, Fort Smith

Attorney for committee: Robert Stark Ligon, Jr.; Little Rock

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### Freight elevator was shut down until safety violations were corrected

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**Nash v. Arkansas Elevator Safety Board - #06-1257.** Arkansas Supreme Court, June 21, 2007. Appeal from the Circuit Court of Pulaski County, Hon. Willard Proctor, Jr. **AFFIRMED.**

**Held:** Elevator safety board's grant of conditional variance was affirmed. Opinion by Justice Gunter.

**Brief facts:** The Arkansas Elevator Safety Board condemned a 1926 freight elevator in a Little Rock warehouse. The board ordered the owners to cease operation for failure to have its required safety inspections and operating permit. The last operating permit had expired in 2000, the last safety inspections had been in 1990, and the last full-load safety test had been in 1987.

The owners petitioned the board for a variance to reclassify the

elevator as a material lift only. The board denied the variance request and approved the operation of the elevator only if the owners would make 11 safety corrections. The owners testified that the corrections would cost \$60,000, but gave no written estimates of a new elevator, costs of repair, or value of the property.

At a second and third hearing, the board refused to grant the variance request and required the owners to make 11 safety corrections to use the elevator as a material lift. It also conditioned the variance upon compliance with prohibiting the elevator's use by passengers, removing all controls from the car to the outside of the car, and posting a conspicuous sign stating, "No Passengers Allowed by Law -- Material Lift Only." The board granted the variance request based on these conditions.

The owners petitioned for review before the Pulaski County Circuit Court. The circuit court affirmed. The owners appealed, arguing 1) the board erred in finding there was no undue hardship, 2) the trial court erred in refusing to allow the requested variance, or exceptions to the code, regarding an elevator that was in existence prior to the code, and 3) procedural irregularities evidenced discrimination. The Arkansas Supreme Court affirmed.

**Important points:** 1. Because the owners failed to prove that they

suffered a clearly evident undue hardship pursuant to A.C.A. § 20-24-106(d), the Arkansas Supreme Court affirmed the board's findings on this issue.

2. The board has the authority to adopt standards for existing elevators. A.C.A. § 20-24-106(b). According to subsection (f) of the Elevator Safety Code, existing elevators must be brought up to code. The board did not err in conditioning its approval for a variance upon correcting the 11 code violations.

3. The board did not err in considering the 11-point violation report. The report was made two days before the hearing, and the owners received a copy of it at the hearing.

4. The tape of the first hearing was blank, and there was no transcript of that hearing. The circuit court found the record incomplete and a supplement to the record was filed. This cured any deficiency.

5. The owners' constitutional discrimination arguments were not before the board; therefore, the Arkansas Supreme Court could not reach the merits of the point on appeal.

Attorney for owners: Jim Roger Nash, Little Rock  
Attorney for board: Denise Parsons Oxley, Little Rock

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### Service of process by certified mail, restricted delivery, was invalid where a non-agent signed and addressee signed two days later without receiving the package

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**Valley v. Helena National Bank** - #CA06-1075. Arkansas Court of Appeals, June 20, 2007. Appeal from the Circuit Court of Phillips County, Hon. Harvey Yates. **REVERSED.**

**Held:** Default judgment in favor of bank was reversed. Divisions I, III, and IV. Opinion by Judge Bird. Judge Vaught, joined by Judges Gladwin and Robbins, dissented in a written opinion.

**Brief facts:** Helena National Bank sued J.F. Valley on a promissory note. It attempted service through certified mail, restricted delivery. The postman made a mistake and let a secretary in Valley's building sign for the papers, although it was marked restricted delivery. Two days later, the postman found Valley and asked him to sign the green card, which he did. Valley claimed he never received the paperwork.

The trial court entered a default judgment. Valley filed a motion to set it aside, which the trial court denied. It found that service was proper. It also found that Valley failed to comply with the Arkansas Rules of Civil Procedure by failing to file a brief with his motions to set aside the default judgment. Valley appealed, and the Arkansas Court of Appeals reversed.

Judge Vaught, joined by Judges Gladwin and Robbins, dissented opining that he had found no cases from any jurisdiction in which service was challenged where the evidence contained a green card with two signatures; one of which was the party to be served. Valley's signature meant something, and Valley (a lawyer) should have known it did. No further inquiry was necessary. Valley's

signature, he stated, though dated later than the secretary's, complied with Rule 4.

**Important points:** 1. Compliance with the service-of-process requirements must be exact.

2. Default judgments are void due to defective process regardless of whether the defendant had actual knowledge of the pending lawsuit.

3. The secretary was neither Valley nor his properly registered agent according to postal regulations.

4. Absent evidence that Valley received the summons and complaint -- which is not present in this case, Valley's signature across the return receipt two days later did not "cure" the defective service.

5. The dissent's statement that, because Valley signed the green card, "no further inquiry was necessary" improperly places the burden on Valley to prove that he did not receive service. This is simply not the law. The return of service is prima facie evidence that service was made as stated. The burden then shifts to the party claiming that service was not valid to overcome the prima facie case created by proof of service. In this case, the bank never made a prima facie case.

Attorney for Valley: Don R. Etherly, Helena  
Attorney for bank: Charles David Roskopf, Helena

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### Texas law applied to attorney's fees in claim on grandfather's estate

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**Calvert (Jr.) v. Estate of Fred R. Calvert, Sr.** - #CA06-1036. Arkansas Court of Appeals, June 20, 2007. Appeal from the Circuit Court of Madison County, Hon. Mark Lindsay. **AFFIRMED.**

**Held:** Award of attorney's fees to estate was affirmed. Division I. Opinion by Judge Vaught. Judge Heffley concurred in a written opinion.

**Brief facts:** Fred R. Calvert, Jr. made a claim against his grandfather's estate for remaining property and any cash or assets derived

from the sale of property, which he claimed had been invalid. The trust had transferred property to Calvert's father in 1977. The personal representative denied Calvert's claim.

The trust contained a choice-of-law provision that provided that the Texas Trust Act governed. At a hearing on the matter, the trial court issued an opinion finding that Texas law applied to the dispute and, that under the trust agreement, there was no breach of fiduciary duty, fraud, bad faith, or negligence on the part of the trustees, nor any rights of Calvert to recover as a beneficiary of the trust.

The estate filed a motion for attorney's fees. The trial court

found that the attorney's-fees issue was governed by A.C.A. § 16-22-308, and *Bailey v. Delta Trust & Bank*, 359 Ark. 424 (2004). It granted the estate's motion, and issued an order awarding attorney's fees, along with costs, witness fees, and mileage, to the estate in the amount of \$21,800.57. Calvert appealed, arguing that the trial court erred in awarding attorney's fees because his claim against the estate sounded in tort rather than in contract. The Arkansas Court of Appeals affirmed.

Judge Heffley concurred, opining that she believed Arkansas law governed the issue of attorney's fees and would have affirmed using Arkansas law.

**Important points:** 1. Attorney's fees are not allowed except where expressly provided for by statute.

2. The Arkansas Court of Appeals affirmed the award of

attorney's fees based on Texas law pursuant to the Texas Trust Code. The trust agreement expressly stated that the Texas Trust Act governed administration of the trust except in any circumstance where the Texas Trust Act conflicted with the trust agreement.

3. The trial court rightly applied Texas law and the Texas Trust Code to answer the attorney's-fees question. It provides that the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just. The award of attorney's fees to estate was proper.

Attorney for Calvert: William Benjamin Putman, Fayetteville  
Attorney for estate: William Jackson Butt, III; Charles Scott Trantham; and Jon P. Robinson; Fayetteville

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### Divorce decree stated wrong date of divorce, changing the wife's portion of the husband's retirement account

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*Allen v. Allen* - #CA06-823. Arkansas Court of Appeals, June 20, 2007. Appeal from the Circuit Court of Lonoke County, Hon. Phillip T. Whiteaker. **REVERSED AND REMANDED.**

**Held:** Division of marital property was reversed and remanded. Divisions I, II, and III. Opinion by Judge Hefley. Judge Marshall concurred in part and dissented in part in a written opinion. Judge Glover, joined by Chief Justice Pittman, dissented in a written opinion.

**Brief facts:** The parties were married for seven years. They were divorced by a decree entered on August 30, 2004. The trial court divided the marital property. The trial court held that the husband's share of the wife's business was \$40,000. The wife was entitled to deduct from that sum her marital share of equipment the husband had sold and her share of the husband's retirement benefits accrued during the marriage. Filled in later on the decree by the husband's lawyer were the dates of the parties' marriage and divorce. They were in a different font, obviously added later, and initialed by the husband's lawyer. The divorce date was noted as June 24, 2004, the date of the final hearing instead of the date the order was entered. The wife's lawyer signed the decree, approving it.

The decree stated that the wife could deduct for the equipment and other deductions not listed in the opinion. A dispute arose after the decree was entered. The husband did not become fully vested in his retirement plan until July 1, 2004. In his motion to enforce the decree, he argued that because of the listed date of divorce in the decree, the wife was only entitled to the contributions he had made to the plan – not his employer's contributions. The trial court agreed and in another order in March, 2006, awarded the wife only \$5,721 for the husband's retirement. After deductions for the equipment and

other deductions not listed in the opinion, the trial court ordered the wife to pay the husband \$16,283.25 for his share of her business. The wife appealed only as to the division of the husband's retirement benefits. The Arkansas Court of Appeals reversed and remanded. It found that the divorce decree was not a final, appealable order, but the March, 2006 order was.

Judge Marshall concurred in part and dissented in part, opining that he would reverse and remand for the trial court to explain why it construed this final, but ambiguous, decree in the way it did.

Judge Glover, joined by Chief Judge Pittman and Judge Robbins dissented, opining that A.C.A. § 9-12-315(a) ties *distribution* of marital property to the time a decree is entered. The statute does not prohibit *valuation* of marital property at an earlier, agreed upon date, which occurred here.

**Important points:** 1. A judgment, decree, or order is "entered" when it is stamped or marked by the clerk. By law, the parties' marriage did not end until August 30, 2004, when the decree was filed.

2. A decree is a final, appealable order if it dismisses the parties from the court, discharges them from the action, or concludes their right to the subject matter in controversy. Here, the decree provided that the wife owed the husband \$40,000 for his interest in her business, but that sum was to be reduced by set-offs in unstated amounts. The decree was not self-executing, as it did not state with specificity the amount of money the wife was required to pay.

Attorney for wife: Tracie Harris Lacerra, North Little Rock  
Attorney for husband: Hubert W. Alexander, Jr.; Jacksonville and Randall Irwin Hall; Little Rock

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### Shortly after divorce, mother gets protective order against abusive father -- stops agreed visitation

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*Chiolak v. Chiolak* - #CA06-1217. Arkansas Court of Appeals, June 20, 2007. Appeal from the Circuit Court of Faulkner County, Hon. David L. Reynolds. **AFFIRMED.**

**Held:** Entry of protective order was affirmed. Division III. Opinion by Judge Glover.

**Brief facts:** The husband in this case appealed from an order of protection entered against him. Just prior to the decree of divorce being entered, which awarded the father standard visitation, the father took a trip to California with the child. During that trip, the father reportedly accused the child of stealing and slapped him, choked him, put his knee in his chest, and slammed him into the wall, giving him a knot on his head, a black eye, and some bruises.

The mother claimed the father had been abusive before, but that she had just wanted to get the divorce out of the way. That is why she signed the divorce decree which awarded the father visitation, but later filed for an order of protection. The trial court granted a two-year order of protection. It stopped the father's visitation, telling the parties that it could be modified by order of the chancery court after a hearing or by agreement.

The father appealed, citing a case in which the visitation matter was in a different county than the protection-order proceedings to challenge the trial court's jurisdiction (*Clark v. Hendrix*, 84 Ark. App. 106 (2003)) and arguing *res judicata*. The Arkansas Court of Appeals affirmed, holding that this case was different because both proceedings were held in the same county. Further, the divorce and visitation proceeding was not ongoing.

**Important points:** 1. The court ordering the protective order made it clear that it was subject to modification by the divorce court. It did not usurp the divorce court's authority, but in fact deferred to it.

2. The child's allegations of abuse arose just two days before the decree was entered. The trial court did not err in refusing to apply

the doctrine of res judicata to bar the petition for a protective order.

Attorney for mother: Frances E. Scroggins, Conway

Attorney for father: Michael U. Sutterfield, Conway

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### **Workers' Compensation Commission erroneously relies on a different patient's medical records in determining the claimant's healing period**

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*Vaughan v. APS Services, LLC* - #CA07-35. Arkansas Court of Appeals, June 20, 2007. Appeal from the Arkansas Workers' Compensation Commission. **REVERSED AND REMANDED.**

**Held:** Denial of further temporary total disability was reversed and remanded. Division III. Opinion by Judge Hart.

**Brief facts:** The claimant suffered a compensable injury to her neck while at work. The opinion did not give the details of the incident. The commission decided she had reach her healing period no later than June 15, 2005, and was not entitled to temporary total disability compensation after that date.

The claimant appealed, arguing that the medical report relied on by the commission was not hers. The claimant's attorney had sent the

medical report in question to the employer's attorney to show that the claimant's doctor had left the state of Arkansas, and had intended to refer all of his patients to another doctor, Dr. Amad. The claimant had somehow been overlooked. The medical report was that of another patient treated by the same doctor and referred to Dr. Amad. The Arkansas Court of Appeals reversed and remanded, finding the commission made erroneous factual findings.

**Important points:** See above.

Attorney for claimant: Kenneth E. Buckner, Pine Bluff

Attorney for employer: Aylmer Gene Williams, Little Rock

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### **Cintas employee shuffled to different positions after he took military leave filed discrimination suit**

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*Maxfield v. Cintas Corp.* - #06-2626. United States Court of Appeals for the 8th Circuit, June 14, 2007. Appeal from the United States District Court for the Eastern District of Arkansas. **REVERSED AND REMANDED.**

**Held:** Grant of summary judgment was reversed and remanded. Opinion by Judge Colloton. Judge Gruender dissented. Judge Richard W. Goldberg participated.

**Brief facts:** This was the second appeal in this employment-discrimination case. Darold Maxfield had served in the U.S. Army since 1985. In 1999, he went to work for Cintas as a service sales representative and was quickly promoted to a facility outside sales representative.

In July 2001, Cintas granted him a military leave of absence for reserve duty from July 15 to September 28, 2001. When Maxfield returned from duty in, Cintas transferred him from the sales position to the position of proactive service trainer. Maxfield then received another military leave of absence on January 22, 2002 to last through June 15, 2002. In March 2002, Cintas eliminated the PST position, and placed Maxfield in a telemarketing position when he returned from leave.

On August 19, 2002, Cintas approved military leave for Maxfield on August 19, 20, and 23, 2002. Maxfield and Cintas then disputed whether Maxfield was improperly using sick leave while on military leave, which led to his dismissal on August 30, 2002.

Maxfield filed suit alleging discrimination. The United States District Court granted Cintas's summary-judgment motion, and Maxfield appealed. The 8th Circuit reversed and remanded holding that by transferring Maxfield from the sales position to the trainer position, Cintas denied him a "benefit of employment" within the meaning of Uniform Services Employment and Reemployment

Rights Act, (USERRA)(38 U.S.C. § 4301, et seq.) and presented sufficient evidence to support a finding that his military status was a motivating factor in Cintas's decision to transfer him. The 8th Circuit concluded that despite Cintas claims to the contrary, there was still a genuine issue of fact as to whether Maxfield's reserve status was a motivating factor in the transfer.

On remand, Cintas moved again for summary judgment on the USERRA claims. In support of its motion, Cintas produced an affidavit from its general manager, that asserted that even had Maxfield not been associated with the military in any way, he would have made the same decision to transfer Maxfield from the sales position to the trainer position in August 2001, and to discharge him in August 2002.

The U.S. District Court concluded that Maxfield had failed to come forward with any evidence to establish a genuine issue of material fact as to whether Cintas would have taken the same employment actions, even absent his military status. The U.S. District Court granted summary judgment and dismissed the complaint. Maxfield again appealed. The 8th Circuit applied the law of the case and reversed and remanded.

Judge Gruender dissented, opining that because the United States District Court called for additional discovery that was not objected to by either party and produced an affidavit explaining the actions of the company, the rule of law established in the first appeal no longer controlled the U.S. District Court's consideration of a summary judgment motion on the same-decision issue.

**Important point:** Countervailing evidence creates a genuine issue for trial as to whether the company's explanations are to be believed. As such, there was a genuine issue of fact and summary judgment should not have been granted.

## Criminal Cases

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### Man with HIV has intercourse with his girlfriend's 15-year-old daughter and her friend

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*White (James) v. State* - #CR06-1187. Arkansas Supreme Court, June 21, 2007. Appeal from the Circuit Court of Pulaski County, Hon. John W. Langston. **AFFIRMED.**

**Held:** Conviction of rape, fourth-degree sexual assault, and exposing another person to HIV with sentence of life plus 432 months was affirmed. Opinion by Chief Justice Hannah.

**Brief facts:** The defendant had sex with his girlfriend's 15-year-old daughter and her 15-year-old friend. He had lived with his girlfriend and her daughter for about five years and considered himself to be her father. He had attended her parent-teacher conferences as her guardian. The daughter testified that he had sex with her two to three times a week. He had sexual intercourse with the girls despite the fact that he knew he was HIV positive. He did not inform the girls that he was HIV positive.

Prior to trial, the defendant moved to sever the exposure-to-HIV charge from the other charges because it was inflammatory. The trial court denied the motion. The defendant also moved for a continuance until he could locate the school counselor. He claimed she would testify that the girls initially denied the incident when confronted. The trial court denied this motion as well.

A jury convicted the defendant of rape of his girlfriend's daughter (because he was her guardian), fourth-degree sexual assault of the friend, and exposing another person to HIV and sentenced him to life plus 432 months. The defendant appealed, and the Arkansas Supreme Court affirmed.

**Important points:** 1. There was sufficient evidence that the defendant stood in the position of guardian under the criminal code, that he had sexual intercourse with the daughter, and that she was 15

at the time.

2. There was sufficient evidence that the defendant was at least 20, the friend was less than 16, and that he had sexual intercourse with her.

3. The credibility of the witnesses was an issue for the jury and not the Arkansas Supreme Court. The jury is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence.

4. There was substantial evidence that the defendant had sexual intercourse with the friend, and she later found out from police that he was HIV positive.

5. The motion to sever the HIV portion of the trial was properly denied. The acts were part of a single scheme and the same evidence was offered to prove both crimes.

6. There was no error in admitting a nurses's testimony that the defendant tested positive for HIV three years prior to the trial. HIPAA provides privacy surrounding medical records; however, provides that nothing within the Act is to be construed to limit a state's authority to investigate crimes.

7. The omission of cumulative evidence does not deprive the defense of vital evidence. Here, the defendant failed to show that the school counselor's testimony would have been anything but cumulative.

8. Prior similar acts with the same child are admissible. There was no abuse of discretion in allowing the daughter to testify that the defendant had had sex with her two to three times a week.

Attorney for defendant: Joseph C. Self, Fort Smith

Attorney for state: Attorney General

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### Man convicted of scalding toddler's feet in hot bath water

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*Bell (Richard, Jr.) v. State* - #CACR06-1286. Arkansas Court of Appeals, June 20, 2007. Appeal from the Circuit Court of Mississippi County, Hon. Ralph Edwin Wilson. **AFFIRMED.**

**Held:** Conviction of domestic battery in the first degree with sentence of 10 years' imprisonment (4 years suspended) was affirmed. Division I. Opinion by Judge Baker.

**Brief facts:** The defendant was convicted of first-degree domestic battery for injuring his girlfriend's 15-month-old son. He put him into a tub of water so hot that the skin literally peeled off of his little feet.

At the bench trial, several conflicting statements of the defendant were presented. He claimed he checked the water temperature, but recanted and said he did not check it. He said the child did not scream immediately, but later said the child was screaming as he left the bathroom. He first claimed he put the boy's brother in the tub with him, but later claimed he did not. The defendant moved for directed verdict, and the trial court denied.

The trial court found him guilty of first-degree domestic battery

and sentenced him to 10 years' imprisonment with four years suspended. The defendant appealed, claiming the trial court erred by misinterpreting the proof required for the culpable mental state and in failing to grant his motion for directed verdict. The Arkansas Court of Appeals affirmed.

**Important points:** 1. A person commits domestic battering in the first degree if he causes serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life. The trial court did not err finding the defendant did so.

2. A presumption exists that a person intends the natural and probable consequence of his acts. A defendant's improbable explanation of suspicious circumstances may be admissible as proof of guilt.

3. The defendant's testimony showed that he knew he needed to check the water temperature and monitor the child in the bathtub.

Attorney for state: Attorney General

Attorney for defendant: Bill Eugene Bracey, Jr.; Blytheville

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### Work-place relationship turned sour -- man convicted of domestic battery

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*Fuller (Robert) v. State* - #CACR06-1291. Arkansas Court of Appeals, June 20, 2007. Appeal from the Circuit Court of Pulaski

County, Hon. Willard Proctor, Jr. **AFFIRMED.**

**Held:** Conviction of third-degree domestic battery with sentence of one year probation and fine of \$300 was affirmed. Division IV. Opinion by Chief Judge Pittman.

**Brief facts:** The defendant was romantically involved with his victim, a married co-worker. They went out to eat and to the movies, spent the night together, and engaged in sexual relations multiple times. After the victim ended the relationship, the two bickered at work. Finally, the defendant's comments hit a nerve, and the victim flew at him. He hit her, bruising her. The trial court convicted him of third-degree domestic battery, fined him \$300 and placed him on probation for one year. The defendant appealed, contesting that the incident qualified as "domestic" battery. The Arkansas Court of Appeals affirmed.

**Important point:** Domestic battery requires injury to a family or household member, which can include someone in a dating relationship. A dating relationship can be either romantic *or* intimate. *See* A.C.A. § 5-26-302. Here, the testimony was sufficient to show that the defendant and victim had numerous romantic and intimate interactions of various types for a sufficient length of time to support a finding of dating relationship under the statute.

Attorney for defendant: William Robert Simpson, Jr. and Clint Eugene Miller; Little Rock

Attorney for state: Attorney General

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## Woman confesses to burning her own house, but state did not prove it was arson, and conviction is reversed and dismissed

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**Fowler (Barbara) v. State** - #CACR06-943. Arkansas Court of Appeals, June 20, 2007. Appeal from the Circuit Court of Hot Spring County, Hon. Chris E. Williams. **REVERSED AND DISMISSED.**

**Held:** Conviction of arson with sentence of 120 months' imprisonment was reversed and dismissed. Division I. Opinion by Judge Vaught.

**Brief facts:** In this arson case, the state introduced evidence that the defendant had removed her sentimental possessions from her home, asked her son to have his ex-wife remove her belongings, and cleaned out the refrigerator and pantry to give the contents to a friend before burning her own house for the insurance money.

The trial court convicted the defendant of arson and sentenced her to 120 months' imprisonment. The defendant appealed, arguing that there was no evidence, other than her own confession, that the fire was intentionally set, and the state failed to rebut the common-

law presumption against arson. The Arkansas Court of Appeals agreed, and reversed and dismissed.

**Important points:** 1. The state failed to offer corpus delicti proof of arson -- proof that the defendant actually set the fire.

2. Arkansas law requires more than the defendant's out-of-court confession. The state was required to provide other proof that the offense was committed. Here, the fire investigator was unable to independently identify the fire's point of origin or establish that the fire was intentionally set.

3. The state presented ample evidence to support a conclusion that the defendant intended to burn her house down, but without the defendant's supporting confession, the state failed to carry its burden of proving that the defendant actually carried out the act.

Attorney for def.: J. Brent Standridge, Benton and Barbara Fowler  
Attorney for state: Attorney General

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## Other Significant Actions

The Court published a per curiam order regarding the establishment of a voluntary pilot program for the filing of electronic briefs, excluding the addendum. The Court invites and encourages the voluntary filing of electronic briefs. A copy of the *Standards for the Pilot Study to Evaluate the Use of Electronic Briefs* is posted on the Arkansas Judiciary's website at <http://courts.state.ar.us>.

The Court published a per curiam order raising the Supreme Court and Court of Appeals filing fees from \$100 to \$150 effective July 31, 2007.

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