



ARKANSAS REPORTS
VOLUME 320

ARKANSAS
APPELLATE REPORTS
VOLUME 49

THIS BOOK CONTAINS
ARKANSAS REPORTS
Volume 320

CASES DETERMINED
IN THE
**Supreme Court
of Arkansas**

FROM
March 20, 1995 – June 5, 1995
INCLUSIVE¹

AND

**ARKANSAS
APPELLATE REPORTS**
Volume 49

CASES DETERMINED
IN THE
**Court of Appeals
of Arkansas**

FROM
March 15, 1995 – May 31, 1995
INCLUSIVE²

PUBLISHED BY THE
STATE OF ARKANSAS
1995

¹Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 710. Cite as 320 Ark. ____ (1995).

²Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 through 151. Cite as 49 Ark. App. ____ (1995).



MORAN PRINTING, INC.
5425 FLORIDA BLVD.
BATON ROUGE, LOUISIANA 70806
1995

ARKANSAS REPORTS

Volume 320

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
March 20, 1995 – June 5, 1995
INCLUSIVE

MARLO M. BUSH
REPORTER OF DECISIONS

WILLIAM B. JONES, JR.
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REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1995

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OF THE
SUPREME COURT OF
ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(March 20, 1995 –
June 5, 1995, inclusive)

JUSTICES

JACK HOLT, JR.	Chief Justice
ROBERT H. DUDLEY	Justice
DAVID NEWBERN	Justice
TOM GLAZE	Justice
DONALD L. CORBIN	Justice
ROBERT L. BROWN	Justice
ANDREE LAYTON ROAF	Justice

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WINSTON BRYANT	Attorney General
LESLIE W. STEEN	Clerk
JACQUELINE S. WRIGHT	Librarian
MARLO M. BUSH	Reporter of Decisions ¹
WILLIAM B. JONES, JR.	Reporter of Decisions ²

¹Retired May 31, 1995.

²Appointed effective June 1, 1995.

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STANDARDS FOR PUBLICATION OF OPINIONS**Rule 5-2****Rules of the Arkansas Supreme Court and Court of Appeals****OPINIONS**

(a) **SUPREME COURT — SIGNED OPINIONS.** All signed opinions of the Supreme Court shall be designated for publication.

(b) **COURT OF APPEALS — OPINION FORM.** Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

(c) **COURT OF APPEALS — PUBLISHED OPINIONS.** Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked "Not Designated for Publication."

(d) **COURT OF APPEALS — UNPUBLISHED OPINIONS.** Opinions of the Court of Appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as *res judicata*, collateral estoppel, or law of the case).

Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.

(e) **COPIES OF ALL OPINIONS.** In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.

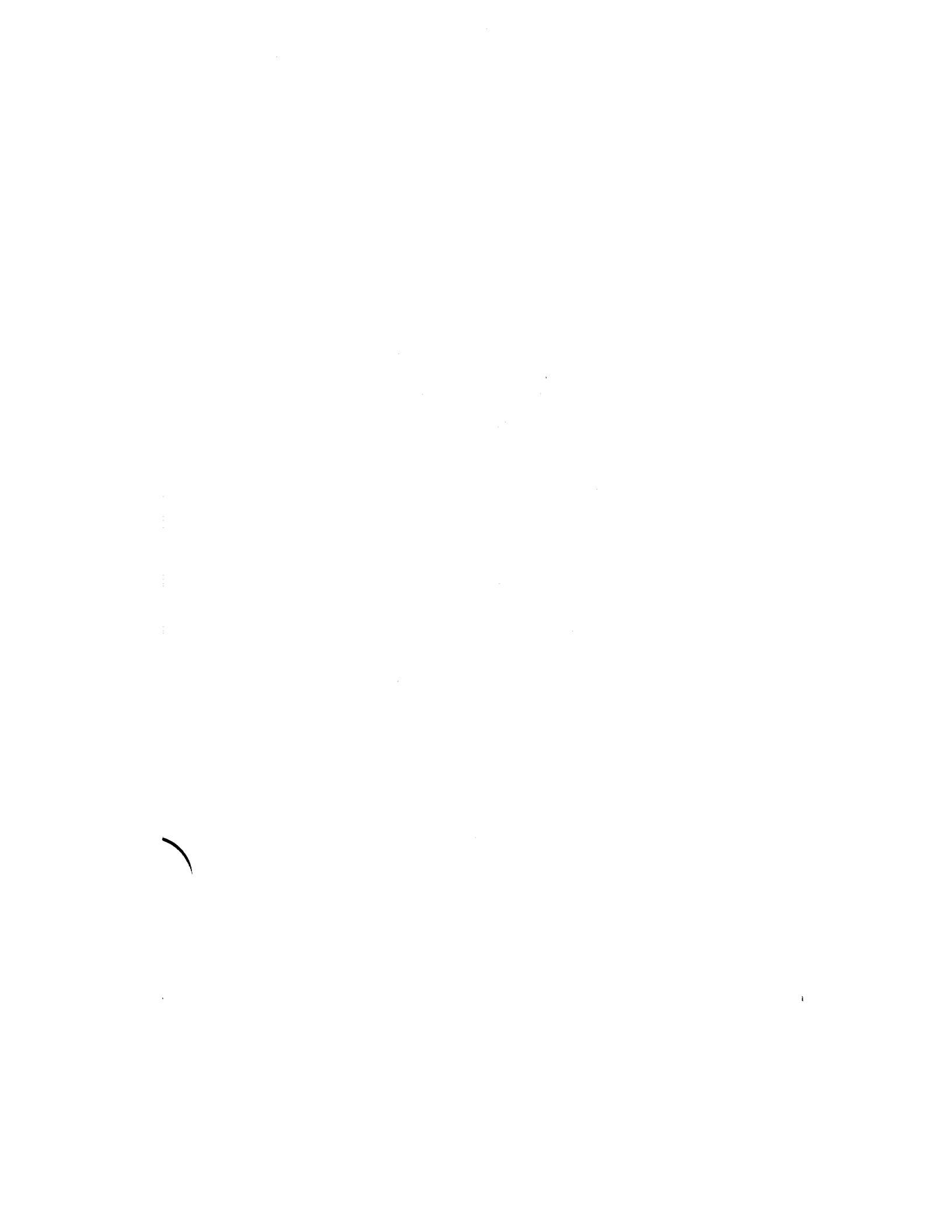
OPINIONS NOT DESIGNATED FOR PUBLICATION

- Acklin v. State, CR 94-1054 (Per Curiam), Petition for Rehearing denied April 10, 1995.
- Askew v. State, CR 94-1017 (Per Curiam), Pro Se Motion to Compel Attorney General to Duplicate Appellant's Brief denied and appeal dismissed April 3, 1995.
- Barrow v. State, CR 94-1351 (Per Curiam), Pro Se Motion for Continuance and Appointment of Counsel granted in part and denied in part May 1, 1995.
- Bell v. State, CR 94-1421 (Per Curiam), Pro Se Motion for Belated Appeal denied April 3, 1995.
- Bone v. State, CR 94-893 (Per Curiam), affirmed March 20, 1995.
- Boyd v. State, CR 94-321 (Per Curiam), Pro Se Motions for Photocopies at Public Expense denied April 10, 1995.
- Burnett v. State, CR 94-1165 (Per Curiam), affirmed April 10, 1995.
- Butler v. State, CR 94-797 (Per Curiam), affirmed May 1, 1995.
- Coleman v. State, CR 95-184 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied May 30, 1995.
- Corp v. May, CR 95-251 (Per Curiam), Pro Se Motion for Rule on the Clerk denied May 1, 1995.
- Edwards v. State, CR 94-1148 (Per Curiam), affirmed May 15, 1995.
- Fox v. State, CR 95-91 (Per Curiam), Pro Se Motions for Extension of Time to File Appellant's Brief and Access to Record granted; Pro Se Motion for Appointment of Counsel denied May 15, 1995.
- Franklin v. State, CR 94-686 (Per Curiam), Pro Se Motion for Access to Trial Transcript and Brief Filed on Appeal in CR 92-685, Pro Se Motion for Appointment of Counsel, and Pro Se Motion for Extension of Time denied April 3, 1995.
- Frazier, Everett Lee v. State, CR 94-995 (Per Curiam), Pro Se Motion for Extension of Time and for Appointment of Counsel denied April 3, 1995.
- Frazier, Iris Wade v. State, CR 95-277 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied May 30, 1995.

- Garner v. State, CR 94-1029 (Per Curiam), affirmed May 8, 1995.
- Gonzales v. State (Per Curiam), affirmed May 22, 1995.
- Goodwin v. May, CR 94-1350 (Per Curiam), Petition for Rehearing denied May 15, 1995.
- Graham v. State, CR 94-1265 (Per Curiam), Petition for Rehearing denied April 10, 1995.
- Hagen v. State, CR 94- 996 (Per Curiam), rehearing denied May 8, 1995.
- Hall v. State, CR 95-166 (Per Curiam), Pro Se Motion for Belated Appeal of Order granted May 22, 1995.
- Hendrickson v. State, CR 86-119 (Per Curiam), Pro Se Motion to File Petition Pursuant to Criminal Procedure Rule 37 in Excess of Ten Pages denied April 10, 1995.
- Hendrix v. State, CR 95-293 (Per Curiam), Pro Se Motion for Belated Appeal for Order denied May 22, 1995.
- Hill v. State, 94-763 (Per Curiam), affirmed May 1, 1995.
- Holloway v. Slayden, 94-569 (Per Curiam), affirmed June 5, 1995.
- Johnson v. State, CR 94-1348 (Per Curiam), Pro Se Motion to Compel Attorney General to Duplicate Appellant's Brief denied and appeal dismissed April 3, 1995.
- Jones v. Davis, 95-304 (Per Curiam), Pro Se Petition for Writ of Mandamus moot May 1, 1995.
- Lane v. State, CR 95-159 (Per Curiam), affirmed June 5, 1995.
- Lovell v. Shirron, CR 95-75 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 20, 1995.
- Matthews v. State, 94-1172 (Per Curiam), affirmed May 1, 1995.
- McArty v. State, CR 94-1010 (Per Curiam), affirmed April 10, 1995.
- McDonald v. Gaines, 95-56 (Per Curiam), Pro Se Motion for Access to Record to Prepare Appellant's Brief and for Extension of Time granted May 1, 1995.
- Montgomery v. Lockhart, 95-29 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief denied and appeal dismissed April 10, 1995.
- Morgan v. State, 94-1439 (Per Curiam), affirmed June 5, 1995.
- Morgan v. Tucker, 94-1439 (Per Curiam), Pro Se Motion for Duplication of Appellant's Brief denied March 20, 1995.

- Nooner v. State, CR 94-358 (Per Curiam), Pro Se Motion to File Pro Se Supplemental Appellant's Brief and Pro Se Motion for Continuance denied May 8, 1995.
- Olles v. Taylor, 95-200 (Per Curiam), Pro Se Motion for Rule on the Clerk and Amended Motion for Rule on Clerk denied May 1, 1995.
- Pryor v. State, CR 94-860 (Per Curiam), affirmed May 1, 1995.
- Riddel v. Davis, 95-334 (Per Curiam), Pro Se Petition for Writ of Mandamus moot May 30, 1995.
- Ridgell v. State, CR 95-303 (Per Curiam), Pro Se Motion for Rule on the Clerk denied May 30, 1995.
- Rutherford v. State, CR 95-287 (Per Curiam), Pro Se Motion for Belated Appeal remanded May 15, 1995.
- Sanders v. State, 94-757 (Per Curiam), affirmed May 8, 1995.
- Smith v. Davis, 95-224 (Per Curiam), Pro Se Petition for Writ of Mandamus denied May 22, 1995.
- Smith v. State, CR 95-63 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief denied and appeal dismissed May 22, 1995.
- Wilburn v. State, CR 94-1110 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted May 8, 1995.
- Williams v. State, CR 94-1059 (Per Curiam), Appellee's Motion to Dismiss Appeal granted; Appellant's Motion to File a Belated Brief moot March 20, 1995.

APPENDIX
Rules Adopted
or Amended by
Per Curiam Orders



IN RE: ARKANSAS RULE OF
CRIMINAL PROCEDURE 36.5

Supreme Court of Arkansas
Delivered March 27, 1995

On October 31, 1994, we published a proposed Rule 36.5 relating to bail on appeal and set January 1, 1995, as the deadline for receiving comments from the bench and bar. On November 19, 1994, the Supreme Court Committee on Criminal Practice met and adopted a recommendation to amend the proposed rule by adding a new subsection which reads:

The circuit court in which the defendant was convicted shall retain jurisdiction to hear and decide any motion to revoke the bail of a defendant set at liberty pursuant to this rule, even if the record on appeal has been lodged with the Supreme Court or the Court of Appeals.

We adopt the new Rule 36.5, effective immediately. The amendment favored by the Criminal Practice Committee will become new subsection (d). The following subsections (now (d), (e), and (f)) will be appropriately redesignated (e), (f), and (g). This rule will supersede former Rules 36.5 through 36.8.

Reporter's Notes to Rule 36.5 (1995): In March 1994, the General Assembly enacted 1994 Ark. Acts 3, First Extraordinary Session. The act, which governed bail on appeal after conviction, was struck down by the Arkansas Supreme Court in *Casement v. State*, 318 Ark. 225 (1994), the Court having found that the act conflicted with post-conviction appeal procedures established by rules of the Court.

Rule 36.5 is, in essence, Act 3, modified to eliminate the requirement that a defendant free on bail pending appeal surrender to the Arkansas Supreme Court upon the affirmation of his conviction. Under this rule the defendant is to surrender to the sheriff of the county in which the defendant was convicted.

The term "bail bond" in subsection (a) of the act has been replaced by "appeal bond" in subpart(a) of the rule.

In addition, subpart (b)(1) of the rule, restating subsection (b)(1) of Act 3, has been modified to speak of filing "a notice of appeal" rather than "an appeal," it being reasonably clear that this was the intent of the Act 3's drafters.

Subpart (c)(1) of the rule, restating subsection (c)(1) of Act 3, has been amended to speak of the circuit court's granting an "appeal bond" rather than "the appeal." Guidelines for imposing conditions of release have been included.

Subpart (d) vests jurisdiction to hear revocation motions in the circuit court.

Subpart (e), restating subsection (d)(1) of Act 3, has been amended to speak of the trial court's granting "an appeal bond," not "an appeal." The rule contains no counterpart of subsection (d)(2) of the act, which was viewed as surplusage.

Finally, language clarifying the procedure to be followed by the Clerk of the Supreme Court and circuit clerks has been added.

Rule 36.5 will supersede A.R.Cr.P. 36.5 through 36.8.

IN RE: Zachary P. MUNCY
Arkansas Bar ID # 87122

896 S.W.2d 432

Supreme Court of Arkansas
Delivered March 27, 1995

On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the license of Zachary P. Muncy of Searcy, Arkansas, to practice law in the State of Arkansas and direct that Mr. Muncy's name be removed from the list of attorneys authorized to practice law in this state.

IN THE MATTER OF RULES OF THE SUPREME COURT
AND COURT OF APPEALS 4-1(a)

Supreme Court of Arkansas
Delivered March 27, 1995

Rule 4-1(a) of the Rules of the Supreme Court and Court of Appeals is hereby amended to read as follows:

(a) BRIEFS – SIZE – PAPER – TYPE. All briefs shall be type written or produced with computer or word processing equipment. Briefs shall be of uniform size on opaque, unglazed 8 1/2" x 11" white paper and firmly bound on the left hand margin by staples or other binding devices. If staples are used, they should be covered by tape. Briefs shall be double-spaced, except for quoted material, which may be single-spaced and indented. Footnote lines, except quotations, shall be double-spaced. Use of footnotes is not encouraged, and they should be used sparingly. Carbon copies are not acceptable, but copies produced by offset printing, positive photocopy, or other dry photoduplicating process which produces a clearly legible black-on-white reproduction may be used. Each page shall be numbered, and both sides of the page may be used. The margin at the top, outer edge, and bottom of each page shall be not less than one inch, and the margin at the binding edge shall be wide enough to allow the text to be read easily. The style of print shall be either mono-spaced, measured in characters per inch, not to exceed 10 characters per inch, or produced in a proportional serif font, measured in point sizes, not to be less than 12 points. Commercial organizations or members of the bar maintaining equipment for duplicating may submit to the Clerk samples for prior approval. If the Clerk is satisfied that such duplicating process will produce documents which conform to the specifications of this Rule, it will be approved.

This rule shall apply to all briefs submitted on or after April 10, 1995.

IN RE: Webster Lee HUBBELL
Arkansas Bar ID #73059

896 S.W.2d 440

Supreme Court of Arkansas
Delivered April 24, 1995

On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the license of Webster Lee Hubbell to practice law in the State of Arkansas and direct that Mr. Hubbell's name be removed from the list of attorneys authorized to practice law in this state.

IN RE: RULE III AND RULE IX OF THE RULES
GOVERNING ADMISSION TO THE BAR

Supreme Court of Arkansas
Delivered May 15, 1995

PER CURIAM. On June 7, 1993, by per curiam order, the Court adopted the Multistate Professional Responsibility Examination (MPRE) as a required element of the bar admission process. The MPRE requirement was incorporated into Rule IX "Examination - Subjects - Passing Grade" which was then divided into two sections. Section A restated the existing Rule IX in its entirety, and Section B set out the MPRE requirement.

Currently both Sections A and B refer to the subject of "ethics" as a matter to be tested on the bar examination. To remove any uncertainty, the paragraph presently titled "Practice, Procedure & Ethics" of Section A of Rule IX, is hereby amended and republished as follows:

PRACTICE AND PROCEDURE

This subject heading may include both state and federal trial and appellate practice and, where applicable, remedies and choice of forum.

On May 18, 1992, by per curiam order, the Court adopted various revisions to the Rules Governing Admission to the Bar, including a records retention schedule which was incorporated as subparagraph "g" into Rule III "Board Records." Subparagraphs "a" through "f" of Rule III list exceptions to the confidentiality provision stated at the beginning of Rule III. It is not the intent of Rule III to include the records retention schedule in the exceptions to the confidentiality provision. Likewise, the last paragraph of Rule III currently designated subparagraph "h" is not a part of the list of exceptions.

Therefore, to remove any uncertainty in its interpretation, Rule III is hereby amended to delete the letters "g" and "h" as designations for the paragraphs discussed herein.

These amendments are effective immediately.

**IN RE: IN THE MATTER OF
THE USE OF JUDICIAL STATIONERY**

Supreme Court of Arkansas
Delivered May 30, 1995

PER CURIAM. We hereby adopt this addition to the first paragraph of the commentary to Canon 2B of the Arkansas Code of Judicial Conduct, effective immediately:

Letters of recommendation may be written on judicial stationery based on personal knowledge of the applicant, but not merely for the purpose of lending the prestige of the judicial office to the applicant.

—

Appointments to Committees

IN RE: ALTERNATE COMMITTEE
ON PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered April 3, 1995

John L. Rush, Esq., Pine Bluff, Arkansas, Fourth Congressional District, and Dr. Rose Marie Word, Pine Bluff, Arkansas, At-Large Position, are appointed to the Alternate Committee on Professional Conduct for terms of seven years to expire March 9, 2002. Mr. Rush and Dr. Word replace Don Smith, Esq., of Pine Bluff and Mrs. Judy Snowden of Little Rock, respectively, whose terms have expired.

The Court thanks Mr. Rush and Dr. Word for accepting appointment to this most important Committee.

The Court expresses its gratitude to Mr. Smith and Mrs. Snowden for their dedicated and faithful service to the Committee.

IN RE: SUPREME COURT COMMITTEE ON MODEL
JURY INSTRUCTIONS - CIVIL

Supreme Court of Arkansas
Delivered May 1, 1995

PER CURIAM. John C. Everett, Esq., of Fayetteville; James H. McKenzie, Esq., of Prescott; Paula Jamell Storeygard, Attorney-at-Law, of North Little Rock; and Honorable Henry Woods, Federal Judge, of Little Rock, are reappointed to our Committee on Model Jury Instructions - Civil, for three-year terms to expire on April 30, 1998.

The Court thanks Mr. Everett, Mr. Mckenzie, Ms. Storeygard, and Judge Woods for accepting reappointment to this most important Committee.

IN RE: SUPREME COURT COMMITTEE ON MODEL
JURY INSTRUCTIONS - CIVIL

Supreme Court of Arkansas
Delivered May 8, 1995

PER CURIAM. Laurie A. Bridewell, Attorney-at-Law, of Lake Village is appointed to our Committee on Model Jury Instructions - Civil, to replace Jacob Sharp, Jr., Esq., of Little Rock who is retiring from the Committee. Ms. Bridewell's term will expire on April 30, 1997.

The Court thanks Ms. Bridewell for accepting appointment to this most important Committee.

The Court expresses its gratitude to Mr. Sharp for his dedicated and faithful service as a member of this Committee.

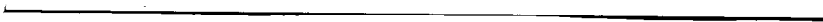
IN RE: APPOINTMENT OF THE REPORTER OF DECISIONS OF THE ARKANSAS SUPREME COURT

898 S.W.2d 468

Supreme Court of Arkansas
Delivered May 30, 1995

PER CURIAM. William B. Jones, Jr., Esquire, of Little Rock, is appointed to the position of Reporter of Decisions of the Arkansas Supreme Court for a term of six years, effective June 1, 1995.

Mr. Jones replaces Marlo May Bush, Attorney-at-Law, who is retiring from the position. The Court expresses its gratitude to Ms. Bush for her dedicated and faithful service.



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- Factors, transfer from circuit to juvenile court. *Ring v. State*, 128.
- Transfer from circuit to juvenile court, court not required to give factors equal weight. *Id.*
- Subject matter jurisdiction determined from pleadings. *Sunbelt Exploration Co. v. Stephens Prod. Co.*, 298.
- Subject matter jurisdiction properly in chancery, cancellation of leases. *Id.*
- Supreme Court has general control over all inferior courts, circuit court has discretion to deny counsel's motion to withdraw from representing an indigent defendant. *Simpson v. Pulaski County Circuit Court*, 468.
- Supreme Court does not issue advisory opinions, any ruling about affirmative defenses would be advisory. *Saunders v. Neuse*, 547.
- Chancery court, when exclusive jurisdiction of paternity matter lies. *Hall v. Pulaski County Chancery Court*, 593.
- Paternity matter, under circumstances, jurisdiction in chancery court, juvenile division. *Id.*
- Jurisdiction, *res judicata* and collateral estoppel are affirmative defenses, not reasons to deny subject matter jurisdiction. *Id.*

Jurisdiction over a maritime tort, assessment as made by the federal court.
Williams v. Ingram, 615.

Jurisdiction, question of subject matter jurisdiction may be raised by the court.
State v. Bickerstaff, 641.

State had no basis upon which to prosecute the appeal, appeal dismissed for lack of jurisdiction. *Id.*

Subject-matter jurisdiction discussed. *Maroney v. City of Malvern*, 671.

Chancery court had and exercised subject-matter jurisdiction, chancery court erred in ruling that subject-matter jurisdiction rested solely in the county court. *Id.*

CRIMINAL LAW:

Appeal from a plea of guilty not allowed, when appeal is allowed. *Hodge v. State*, 31.

Appeal from a post-trial motion, such an appeal allowed. *Id.*

Sentencing, revision of. *Id.*

Illegal sentence exception to the general rule inapplicable, original sentence was not illegal and therefore the Trial Court had no authority to change it. *Id.*

Defendant found not guilty by reason of mental disease or defect, jury not to be told of the options available to the trial court. *Williams v. State*, 67.

Appellant argued that his criminal responsibility was in issue and another psychiatrist should have been appointed to examine him, psychiatrists' conditional evaluation acceptable for the jury to consider. *Id.*

Accused is presumed competent to stand trial, accused bears the burden of proving incompetence, factors on review of denial of a directed verdict motion. *Id.*

Statutory right not to testify, any presumption against defendant for choosing not to testify is considered prejudicial. *Bradley v. State*, 100.

References to a defendant's failure to testify can be harmless error, test for determining whether harmless error occurred. *Id.*

Defendant's failure to testify brought up by the prosecutor, error was harmless. *Id.*

Recidivist statutes, record stating defendant waived right to counsel sufficient for a prior sentence to be used for enhancement purposes, record here so stated. *Id.*

Child victim's testimony sufficient evidence of penetration, neither corroboration nor scientific evidence are required. *Gatlin v. State*, 120.

Sufficient evidence of penetration. *Id.*

Sentencing, whether sentence is consecutive or concurrent discretionary with the trial court and altered only if an abuse of discretion is found. *Wilson v. State*, 142.

Consecutive sentence ordered by trial court, no abuse of discretion found. *Id.*

Pretrial identification, factors to consider in the determination of reliability. *Monk v. State*, 189.

Lineup of suspects, not absolutely impermissible to tell a witness a suspect is in a lineup. *Id.*

Photo lineup not unconstitutionally suggestive, testimony concerning it was admissible. *Id.*

Pretrial identification, identification procedure first using photographs then proceeding to physical identification not unduly suggestive. *Id.*

Physical lineup not unduly suggestive, no abuse of discretion in the Trial Court's admitting the evidence. *Id.*

New rule for appealing rulings on juvenile transfers is adopted prospectively. *Hamilton v. State*, 346.

Terroristic threats, statute construed. *Wesson v. State*, 380.

Stalking, plain terms of the statute require the perpetrator to make a threat with the intent of placing his victim in imminent fear of death or serious bodily injury. *Id.*

Intent cannot be proven by direct evidence, presumption exists that a person intends the natural and probable consequences of his acts. *Id.*

Intent to cause physical injury supported by the evidence, substantial evidence supported conviction for stalking. *Id.*

Confession defined. *Stephens v. State*, 426.

Sentencing, power to exercise clemency and reduce sentences vested in the chief executive. *Williams v. State*, 498.

Sentencing, exceptions to the general rule that power to reduce sentence rests only with the chief executive. *Id.*

When pretrial identification does not comply with due process, when testimony concerning such identification is admissible. *Richmond v. State*, 566.

Testimony concerning pretrial identification, factors to be considered in determining reliability. *Id.*

Evidence that lineup procedure unduly suggestive inconclusive, identification reliable, decision to admit in-court identification not erroneous. *Id.*

Each count in an indictment must stand on its own, each count must contain the *contra pacem* clause. *Id.*

Objection relinquished as relief requested was granted, prejudice argument not reached. *Id.*

Closing arguments, prosecutor may mention that the state's evidence remains undisputed. *Id.*

Sentencing, sentences imposed within the statutory limits will not be reduced or compared. *Clark v. Supreme Court Comm. on Prof. Conduct*, 597.

Rape Shield Statute, victim's prior sexual conduct, discretion of trial court. *Davlin v. State*, 624.

Time of crime not critical unless date is material to offense. *Harris v. State*, 677.

Sentencing is a matter of statute, sentence imposed shall be consistent with the law in effect at the time the crime was committed. *Meadows v. State*, 686.

Appellant's sentence unauthorized and illegal, case reversed and remanded for resentencing. *Id.*

Sentencing, even a partially executed sentence, if illegal, may be ordered corrected. *Id.*

Custodial confessions presumed to be involuntary, factors on review. *Durham v. State*, 689.

Confessions, determination as to when involuntary. *Id.*

Officer's statement not ambiguous, confession voluntarily given. *Id.*

Rape, uncorroborated testimony of victim, whether child or adult, sufficient to support a guilty verdict. *Wilson v. State*, 707.

Sexual crimes against children, time of the crime generally not of critical significance. *Id.*

CRIMINAL PROCEDURE:

Confession of juvenile charged in circuit court, consent of parents not required for waiver of right to counsel, confession admissible at transfer hearing. *Ring v. State*, 128.

Juvenile transfer hearing, impact of crime on child victim relevant and admissible. *Id.*

No prejudice shown from admission of appellant's confession or testimony about impact of crime on victim. *Id.*

Transfer from circuit to juvenile court, burden of proof. *Id.*

Juvenile tried as adult, serious, violent crime is sufficient basis. *Id.*

Trying juvenile as adult, clear and convincing evidence required, standard of review. *Id.*

Denial of transfer to juvenile court not clearly erroneous. *Id.*

Rape is violent offense by definition. *Id.*

Sentencing, modification of generally. *Pannell v. State*, 250.

Trial court without jurisdiction to modify the sentence, amended sentence ordered vacated. *Id.*

Notice of appeal from amended judgment ineffective, first notice of appeal also ineffective where entered prior to date of entry of original judgment. *Id.*

Failure to renew motion for directed verdict at close of case, effect. *Davis v. State*, 329.

Waiver of objection to sufficiency of the evidence, failure to renew motion for directed verdict. *Id.*

Juvenile transfer rulings, new rule for appeals. *Hamilton v. State*, 346.

Juvenile transfer, merits of hearsay argument not reached, no evidence decision based on hearsay. *Id.*

Denial of juvenile transfer supported by information. *Id.*

Prosecutor's subpoena power after charges filed. *Neal v. State*, 489.

Amending information before case submitted to jury, conditions. *Id.*

Sentence enhancement, use of pardoned conviction and expunged conviction. *Id.*

Severance, motion to sever must be renewed before or at the close of all the evidence. *Bunn v. State*, 516.

Severance, error to deny severance, single scheme or plan not involved. *Id.*

Denial of transfer to juvenile court, serious and violent nature of offense is sufficient basis. *Sims v. State*, 528.

Denial of transfer to juvenile court, sufficient basis for denial. *Id.*

Denial of transfer to juvenile court unwarranted, appellant now eighteen. *Id.*

Admission of confession of juvenile, consent of parents not required if appellant ultimately charged and tried in circuit court. *Id.*

Corroboration of confession. *Rucker v. State*, 643.

Sufficient corroboration of confession. *Id.*

Amending information to add alternative charge not prohibited. *Id.*

Challenge to voluntariness of confession, level of defendant's comprehension is factual matter for trial court. *Id.*

Conflicting testimony about appellant's intoxication at time of confession, no error to resolve conflict in favor of state. *Id.*

Claim confession not voluntary because of mental impairment without merit. *Id.*

Purpose of *Denno* hearing to determine voluntariness of confession before jury hears confession, not to restrict evidence presented to jury. *Id.*

Voluntariness of confession, exclusion of evidence harmless where evidence was cumulative. *Id.*

Evaluation by local, approved psychologist was proper alternative to state hospital evaluation. *Id.*

DAMAGES:

Remittitur, when proper. *Johnson v. Gilliland*, 1.

Value of property, only dispute about whether property worth \$10,000 or less, evidence did not support verdict for \$20,250. *Id.*

Value of labor, insufficient testimony to support entire award. *Id.*

Remittitur permitted. *Id.*

Punitive damages, when justified, gross negligence will not support award of punitive damages, malice may be inferred from operation of motor vehicle by one whose judgment, responses, and coordination are impaired by alcohol. *J.B. Hunt Transp., Inc. v. Doss*, 660.

Punitive damages, corporation may be held liable for punitive damages for acts of its agents or servants acting within the scope of their employment. *Id.*

Punitive damages, Arkansas general standard for punitive damages award amount is constitutional. *Id.*

DEEDS:

Interpretation, primary consideration. *Wilson v. Brown*, 240.

Language ambiguous, parol evidence admissible. *Id.*

DIVORCE:

Entry of support order not equivalent of divorce from bed and board, after-acquired property is marital property unless it falls within statutory exception. *Hadden v. Hadden*, 480.

Marital property divided as of date of divorce decree, not divorce complaint. *Id.*
 Division of marital property, adequate explanation required for unequal division.
Id.

Division of marital property, support of adult student daughter not a statutory consideration for unequal distribution. *Id.*

No prejudicial error shown, no support for allegation that marital property was used to pay appellee's attorney's fee. *Id.*

EASEMENTS:

Easements appurtenant and easements in gross distinguished. *Wilson v. Brown*, 240.

Deed language ambiguous as to original intent. *Id.*

No unreasonable interference with rights of either party. *Id.*

Neither party may impede other's use of easement driveway. *Id.*

ELECTIONS:

Issue of sufficiency of petition must be decided before illegal exaction issue may be reached, chancery court had no jurisdiction over this issue. *Zaruba v. Phillips*, 199.

EQUITY:

Replevin, boat not unidentifiable because improved and engine rebuilt. *Johnson v. Gilliland*, 1.

Unclean hands maxim. *Wilson v. Brown*, 240.

Evidence not so clear cut or of magnitude to warrant decision based on unclean hands. *Id.*

ESTOPPEL:

When issue preclusion, or collateral estoppel, is usually applied, issues interpreted narrowly. *In Re: Estate of Goston v. Ford Motor Co.*, 699.

EVIDENCE:

Remedial measures. *Ford Motor Co. v. Nuckolls*, 15.

Relevancy, "any tendency" to make fact of consequence more or less probable. *Id.*

Subsequent remedial measures were relevant. *Id.*

Siblings properly excluded from the courtroom, parents, not siblings, were the victims referred to in the evidentiary rules. *Williams v. State*, 67.

Error to allow rebuttal testimony where appellant never offered evidence of good character. *Landrum v. State*, 81.

State may not solicit comment on character on cross-examination and then offer rebuttal evidence. *Id.*

Improper for state to impeach by extrinsic evidence on a collateral matter elicited on cross-examination. *Id.*

Rebuttal was error, but harmless. *Id.*

Substantial evidence test. *Arkansas Appraiser Licensing & Certification Bd. v. Biles*, 110.

Adoptive admission, sufficient foundational facts required. *Gatlin v. State*, 120.

Error to admit adoptive admission. *Id.*

Prejudice not presumed from error. *Id.*

Determination of harmlessness of error, error not Constitutional error. *Id.*

Hearsay, error harmless. *Id.*

Danger of unreliability in hearsay alleviated by opportunity to cross-examine declarant. *Id.*

Substantial evidence defined and discussed, reviewing agency has the prerogative to decide what weight to accord the evidence. *Bohannon v. Arkansas State Bd. of Nursing*, 169.

Substantial evidence existed to support the Board's finding, ruling of the Board affirmed. *Id.*

- Trial court given wide discretion, when trial court will be reversed. *Monk v. State*, 189.
- Identity of envelope and its contents found to be sufficiently established at trial, no abuse of discretion to admit. *Id.*
- Hearsay, present sense impression defined and discussed. *Brown v. State*, 201.
- Contemporaneous statement describing the robber's actions a present sense impression exception to the hearsay rule, no abuse of discretion to allow statement. *Id.*
- Right to make proffer, exceptions. *Williams v. State*, 211.
- Cumulative and repetitious proffer, no error to prohibit. *Id.*
- Test for determining sufficiency of the evidence, standard on review. *Drummond v. State*, 385.
- Evidence of driving while under the influence substantial, circumstances supported conviction. *Id.*
- Blood/ alcohol level at the time of testing was probative of the level at the time of appellant's arrest, blood alcohol level generally dissipates over time. *Id.*
- DWI, appellant's statement was merely an admission not an out-of-court confession, appellant's argument that his admission required corroboration was without merit. *Stephens v. State*, 426.
- Substantial evidence, what constitutes. *Id.*
- Courts take notice of unquestioned laws of nature in deciding whether the evidence is substantial, notice has been taken of the principle that blood alcohol content decreases with the passage of time. *Id.*
- DWI, substantial evidence existed for a finding that appellant was intoxicated, proof that motorist's blood alcohol content was in excess of the legal limit was admissible as evidence tending to prove intoxication. *Id.*
- Review of trial court's ruling admitting challenged testimony, abuse of discretion standard used. *Id.*
- Prior crimes admissible to cast doubt on assertion that appellant had no knowledge of drugs in his home. *Neal v. State*, 489.
- Prior drug sales, prejudicial effect strong, but not unfair. *Id.*
- Admission of transcripts, proper authentication. *Bunn v. State*, 516.
- Failure to ask that objectionable part of transcript be separated, trial court not required to sustain objection to entire transcript. *Id.*
- Essentially accurate transcripts are admissible. *Id.*
- Failure to object to earlier testimony concerning threatening letter, prejudice not demonstrated. *Id.*
- Cumulative or repetitious evidence not prejudicial. *Id.*
- Record's sponsoring witness not required to be document custodian, other qualified witness may lay foundation. *Columbia Mut. Ins. Co. v. Patterson*, 584.
- No reversal for harmless error. *Id.*
- Authentication requirements separate from hearsay-exception requirements. *Id.*
- Authentication, requirements. *Id.*
- Facts viewed most favorably to appellee, jury verdict supported by substantial evidence. *Williams v. Ingram*, 615.
- Prejudicial effect of testimony about victim's alleged affair with witness outweighed probative value, evidence only minimally relevant, testimony hearsay. *Davlin v. State*, 624.
- Properly excluded, no showing of how testimony would impeach witness. *Id.*
- No error to admit accurate photograph of appellant merely because he appeared to be handcuffed. *Id.*
- Photograph admissible with small marks from first trial. *Id.*
- Best evidence rule not triggered where there was no assertion photograph was not the original. *Id.*
- Expert opinion testimony encompassing ultimate issue. *Id.*
- Expert's opinion permitted to address ultimate issue where opinion did not mandate a legal conclusion. *Id.*

Relevance in discretion of trial court. *Rucker v. State*, 643.
 No convincing argument testimony was prejudicial. *Id.*
 Accident reconstruction by means of expert testimony, general rule and exceptions. *J.B. Hunt Transp., Inc. v. Doss*, 660.
 Trial judge has broad latitude in all evidentiary matters. *Id.*
 Substantial evidence defined. *Id.*
 Evidence of parental abuse introduced through testimony of other witnesses, appellant suffered no prejudice in not being allowed to testify on same subject. *Harris v. State*, 677.
 Substantial evidence of both kidnapping and robbery charges, no error found. *Durham v. State*, 689.
 Finding of attempted murder supported by substantial evidence, trial court did not err in failing to direct the verdict. *Id.*
 Appellant found guilty of rape, evidence sufficient to support the verdict. *Wilson v. State*, 707.

FRAUD:

Affirmative acts of concealment toll the statute of limitations, neither ignorance nor silence will prevent the statute bar. *Norris v. Bakker*, 629.

HIGHWAYS:

Sovereign immunity prevents Highway Commission from being sued, prospective injunctive relief proper. *Austin v. Arkansas State Highway Comm'n*, 292.
 Suit for damages properly dismissed. *Id.*

INSURANCE:

General agent distinguished from soliciting agent. *Columbia Mut. Casualty Ins. Co. v. Ingraham*, 408.
 Oral agreement to insure enforced if by general agent. *Id.*
 Evidence, certified copy of policy not authenticated. *Columbia Mut. Ins. Co. v. Patterson*, 584.
 Policy not admitted into evidence, argument based on false premise and thus without merit. *Id.*
 Underinsured motorist coverage, when implied by law. *Ross v. United Servs. Auto Ass'n*, 604.
 Underinsured motorist coverage, amount of coverage allowed when coverage is implied by operation of law. *Id.*
 Underinsurance provided by operation of law, statute's language authorizes stacking. *Id.*
 Statutes relating to, construction of. *Id.*
 Statute's wording requires coverage for each car, insured may stack minimum coverages that should have been offered. *Id.*
 Policy construed against the insurer, anti-stacking clause inapplicable. *Id.*

JUDGE:

Summary judgment granted, reversed on appeal, judge not required to disqualify, disqualification in discretion of judge. *Ford Motor Credit Co. v. Twin City Bank*, 231.

JUDGMENT:

Moot issue, summary judgment not proper method of disposal. *Martin Farm Enter., Inc. v. Hayes*, 205.
 Dismissal of moot case, dismissal without prejudice. *Id.*
 Summary judgment, burden of sustaining motion. *Ford Motor Credit Co. v. Twin City Bank*, 231.
 Error to grant summary judgment, factual issue existed. *Id.*
 Summary judgment improper, issue still in dispute. *Id.*
 Motion for summary judgment, standard of review. *Brumley v. Naples*, 310.
 Summary judgment granted by trial court, no error found. *Id.*

Summary judgment granted on breach of contract claim, no error found. *Id.*
Summary judgment, factors on review. *Harmon v. Carco Carriage Corp.*, 322.
Summary judgment, when the issue of probable cause may be decided on as a matter of law on summary judgment. *Id.*
Summary judgment granted on the claim for malicious prosecution, error found. *Id.*
Summary judgment granted on the claim of abuse of process, error found. *Id.*
Summary judgment, types of summary judgment distinguished. *Mertz v. Pappas*, 368.
Trial court should have granted summary judgment in favor of appellees, appellants did not have a claim in any court. *Id.*
Summary judgment, when granted, burden of proof. *Norris v. Bakker*, 629.
Summary judgment, adverse party must set forth specific facts showing there is a genuine issue for trial. *Id.*
Appellee's motion for summary judgment granted, appellant failed to meet proof with proof. *Id.*
Summary judgment properly granted, no concealment shown, statute began to run on the date of appellant's last treatment. *Id.*
Trial court reached right decision for wrong reasons, appellate court will affirm on that basis. *In Re: Estate of Goston v. Ford Motor Co.*, 699.

JURY:

Opinion testimony of experts, jury has duty to determine the issue on its own judgment. *Williams v. State*, 67.
Jurors are presumed to be unbiased. *Stewart v. State*, 75.
No error in excusing juror, no error in refusing to grant a mistrial. *Bradley v. State*, 100.
Incomplete and erroneous instructions properly omitted. *Id.*
Batson motion discussed, showing necessary to make a prima facie case. *Id.*
Batson motion, when burden shifts to the state. *Id.*
Batson motion, standard of review for reversal of the trial court's ruling on the motion. *Id.*
Trial court determined that there was no systematic exclusion, no error found. *Id.*
Jury instruction not proffered by appellant, appellant could not later complain about the failure to give it. *Quinney v. Pittman*, 177.
Jury instructions, an instruction that merely sets out the applicable law is not an improper comment on the evidence. *Taylor v. Riddell*, 394.
Use of second paragraph of AMI 1501 objected to by the appellant, second paragraph properly given. *Id.*
Jury instructions, requested instruction not given, trial court correctly rejected the instruction. *Id.*
Jury instructions, AMI 603 a correct statement of the law, no error to give it to the jury. *Id.*
Batson objection raised, no prima facie case made. *Sims v. State*, 528.
Batson objection raised, no pattern shown — part of record not abstracted. *Id.*
Excused venireperson's relationship with appellant's sister not equivalent to juror's passing knowledge of victims or appellant. *Id.*
Batson objection raised and overruled, racially-neutral reasons given. *Id.*
Jury instructions, appellant not entitled to maritime jury instructions absent any maritime tort, other instructions were given that covered the issue. *Williams v. Ingram*, 615.
Jury must determine which facts to believe, jury in a superior position to determine witness credibility. *Id.*
Untimely objection to jury panel, failure to offer criteria to determine boundary limits of excluded age group, failure to cite legal authority or present convincing argument that excluded age group falls within distinctive group. *Harris v. State*, 677.

No timely showing of deliberate or systematic exclusion of any distinctive class of jurors, no showing of prejudice by jury selection process. *Id.*

LIBEL & SLANDER:

Main issue. *Thomson Newspaper Publishing, Inc. v. Coody*, 455.

Public figure, clear and convincing evidence, actual malice. *Id.*

Reckless conduct discussed. *Id.*

Factfinder must determine whether publication made in good faith. *Id.*

Failure to show awareness of probable falsity of statements. *Id.*

Mistaken perception of actual event, speech protected. *Id.*

No convincing proof of purposeful avoidance of truth, no proof publisher entertained serious doubts about truth of publication. *Id.*

Circumstantial evidence of ill will. *Id.*

Reckless conduct, insufficient proof of actual malice. *Id.*

LIMITATION OF ACTIONS:

Conversion, adverse possession, three years. *Johnson v. Gilliland*, 1.

Fraudulent concealment. *Id.*

Bailment, demand and refusal necessary to start statute running. *Id.*

Statute of limitations applied in child support arrearages cases, argument that act supplanted or repealed the previous statute of limitations never presented for a ruling below, argument not reached on appeal. *Arkansas Office of Child Support Enforcement v. House*, 423.

Action already barred by limitations, General Assembly cannot expand the statute of limitations so as to revive such an action. *Id.*

Appellee presented undisputed evidence that the alleged wrongful act could not have occurred later than four years before the appellant filed her complaint, appellant's action too late. *Norris v. Bakker*, 629.

MANDAMUS:

Discretionary remedy, when appropriate. *Saunders v. Neuse*, 547.

Trial court's ruling that mandamus would not lie affirmed, parties had discretion on the filing of lawsuit. *Id.*

MASTER & SERVANT:

Situs of occurrence not determinative of application of doctrine of respondeat superior. *J.B. Hunt Transp., Inc. v. Doss*, 660.

Liability of employee to employer who has been held vicariously liable for employee's actions, liability based upon contract. *Id.*

MINES & MINERALS:

Oil & gas lease, top leases explained. *Sunbelt Exploration Co. v. Stephens Prod. Co.*, 298.

Oil & gas lease, cancellation appropriate for breach of implied covenant or reasonable development. *Id.*

Oil & gas lease, implied covenants. *Id.*

Oil & gas lease, duty of lessee. *Id.*

Oil & gas lease, breach of implied covenant, burden of proof. *Id.*

Oil & gas lease, no actual losses, no breach of duty as prudent operator. *Id.*

Oil & gas lease, attorney's fees authorized. *Id.*

MORTGAGES:

Foreclosure decree and decree confirming foreclosure sale both final and appealable orders, Rule 54(b) certification not necessary. *Watanabe v. Webb*, 375.

Appellants' argument that the foreclosure decree was not final was meritless, commissioner properly appointed and directed to proceed. *Id.*

Rule 54(b) certification unnecessary, when a foreclosure decree's directives have been placed into execution, an appeal may be filed from that final decree without certification, no pending claims remained. *Id.*

MOTIONS:

- Motion for directed verdict denied, pretrial evidence more than sufficient to sustain denial. *Williams v. State*, 67.
- Motion for directed verdict on appellant's affirmative defense of lack of mental capacity denied, denial supported by substantial evidence. *Id.*
- Directed verdict motion discussed, parties are bound by the scope and nature of arguments presented at trial. *Stewart v. State*, 75.
- Motion for directed verdict must be specific, lack of specificity will result in arguments not being preserved for review. *Id.*
- General motion for directed verdict made on general insufficiency grounds, general grounds inadequate to preserve specific argument for review. *Id.*
- Motion to dismiss docketed for decision. *Watanabe v. Webb*, 97.
- Motions for continuance discussed, burden of proof on denial of motion. *Wilson v. State*, 142.
- Motion for continuance, factors to be considered by the trial court in deciding such a motion. *Id.*
- Denial of motion for a continuance, affidavit required to justify a continuance due to a missing witness. *Id.*
- Motion for continuance properly denied, no prejudice shown nor was required affidavit filed. *Id.*
- Motion for directed verdict, standard for reviewing the sufficiency of the evidence. *Quinney v. Pittman*, 177.
- Motion for directed verdict denied, no error found. *Id.*
- Motion for directed verdict, when and how it must be made. *Monk v. State*, 189.
- Motion for directed verdict no more than a renewal of earlier evidentiary objections. *Id.*
- Motion for mistrial, trial court given broad discretion in granting or denying. *Brown v. State*, 201.
- Motion for mistrial denied, factors considered on review, no abuse of discretion found. *Id.*
- Directed verdict motion not sufficiently specific. *Helton v. State*, 352.
- When directed verdict should be granted. *City of Little Rock v. Cameron*, 444.
- Motion that contempt citation be dismissed denied. *Osborne v. Power*, 466.
- Mistrial motion an extreme remedy, when granted. *Richmond v. State*, 566.
- Motion for mistrial declined, no abuse of discretion found. *Id.*
- Posttrial motion may be timely amended, the amendment will relate back to the date of the original posttrial motion and will not extend the time for filing the notice of appeal. *Williams v. Hudson*, 635.
- Motion for directed verdict defined, timing and specificity discussed. *Durham v. State*, 689.
- Motion for directed verdict, renewal of earlier, specific directed verdict motion at the end of all the proof is acceptable. *Id.*
- Motion for directed verdict, factors on review. *Wilson v. State*, 707.

NEGLIGENCE:

- The Fireman's Rule discussed. *Waggoner v. Troutman Oil Co.*, 56.
- Fireman's Rule, justification for using the rule predicated on public policy considerations. *Id.*
- Fireman's Rule applicable, trial court's decision affirmed. *Id.*
- Appellant was acting as a fireman at the time of his injuries, trial court's conclusions correct. *Id.*
- Fireman's Rule, duty owed to volunteer firefighters no different from that owed to paid firefighters. *Id.*
- Medical malpractice, measure for adequate disclosure of the risks of a procedure. *Brumley v. Naples*, 310.
- Proof of, when expert testimony is required. *Id.*
- Definition. *City of Little Rock v. Cameron*, 444.

Proof of. *Id.*

Voluntary intoxication, factor in determining negligence. *Id.*

Insufficient evidence that drinking caused damage to withstand directed verdict. *Id.*

Damages and burden of proof, negligence defined. *Mahan v. Hall*, 473.

Fact that an injury occurred was not of itself evidence of negligence, trial court affirmed. *Id.*

Duty to invitees. *Jenkins v. Hestand's Grocery, Inc.*, 485.

Summary judgment appropriate, no duty owed by landowner to invitee under facts presented. *Id.*

Invitee and licensee distinguished. *Bader v. Lawson*, 561.

Term "invitee" not expanded, child was not an "invitee." *Id.*

Question of duty owed by one person to another is always a question of law. *Id.*

Duty of care landowner owes licensee, what constitutes willful or wanton conduct. *Id.*

Appellees conduct did not breach the duty of care owed to the appellant. *Id.*

Term attractive nuisance discussed. *Id.*

NEW TRIAL:

Trial court's discretion limited, test on review. *Bristow v. Flurry*, 51.

No abuse of discretion by trial court, jury verdict was clearly against the preponderance of the evidence. *Id.*

Review of denial on appeal, determination must be made as to whether the evidence was substantial. *Williams v. Ingram*, 615.

Trial court loses jurisdiction if motion for a new trial is not decided within thirty days from its filing, motion that is neither granted or denied is deemed denied as of the thirtieth day. *Williams v. Hudson*, 635.

OFFICERS & PUBLIC EMPLOYEES:

Immunity from damage awards. *Smith v. Denton*, 253.

Actions failed to rise to equivalent of ill will. *Id.*

PARENT & CHILD:

No duty to support adult child who becomes disabled after majority. *Hadden v. Hadden*, 480.

Jurisdiction over paternity matters, strong preference for concurrent jurisdiction. *Hall v. Pulaski County Chancery Court*, 593.

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Doctrine of res ipsa loquitur, circumstances in which doctrine may be invoked. *Taylor v. Riddell*, 394.

Medical malpractice, applicability of doctrine of res ipsa loquitur. *Id.*

Doctrine of res ipsa loquitur inapplicable to the facts of this malpractice case, only the first necessary element was met, court did not err in denying the instruction. *Id.*

Use of expert testimony in determining the issue of negligence, when experts are necessary, experts were needed in this situation. *Id.*

PRINCIPAL & AGENT:

Apparent authority defined. *Columbia Mut. Casualty Ins. Co. v. Ingraham*, 408.

Insufficient evidence of apparent authority. *Id.*

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PRODUCTS LIABILITY:

Sufficient proof of fault of dealership. *Ford Motor Co. v. Nuckolls*, 15.

Sufficient proof of identity of original manufacturer. *Id.*

Sufficient proof for jury to consider whether successor assumed liabilities. *Id.*
Sufficient proof of successor liability. *Id.*

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PROPERTY:

Title to real estate, when title to real estate is lost by abandonment. *Maroney v. City of Malvern*, 671.
Owner's actions did not constitute abandonment, no error in chancellor's finding that the developer owned the reserved strip. *Id.*

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Freedom of Information Act, agency's responsibility to make records accessible even if not in their possession. *Id.*

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ARKANSAS
APPELLATE
REPORTS

Volume 49

CASES DETERMINED
IN THE

Court of Appeals
of Arkansas

FROM
March 15, 1995 – May 31, 1995
INCLUSIVE

MARLO M. BUSH
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

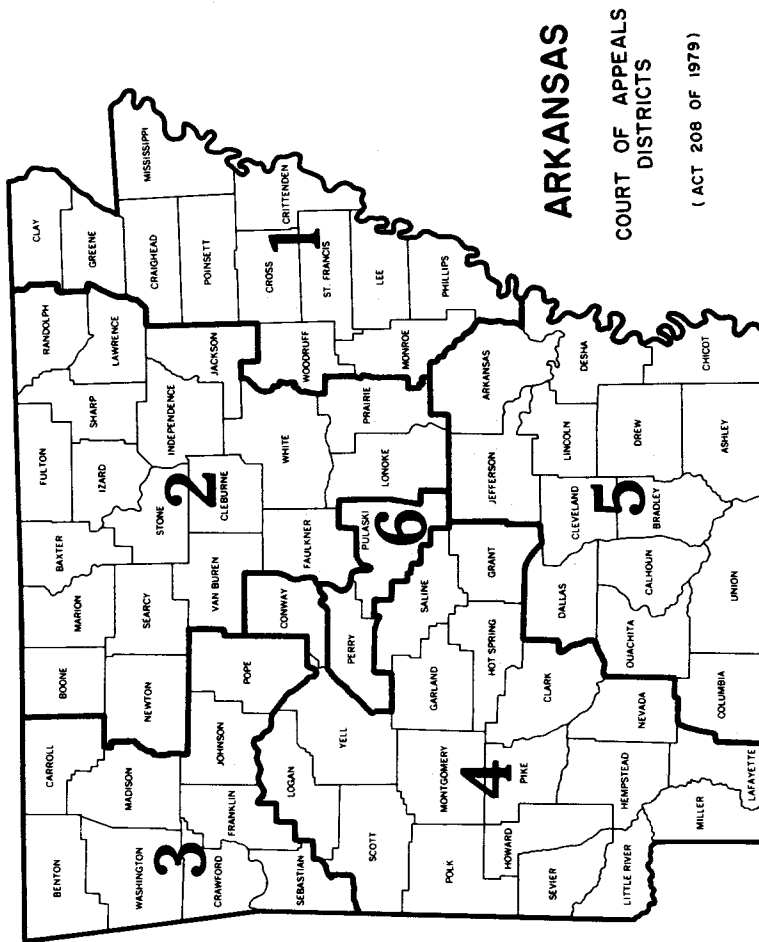
PUBLISHED BY THE
STATE OF ARKANSAS
1995



MORAN PRINTING, INC.
5425 FLORIDA BLVD.
BATON ROUGE, LOUISIANA 70806
1995

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ARKANSAS

COURT OF APPEALS DISTRICTS

(ACT 208 OF 1979)

**JUDGES AND OFFICERS
OF THE
COURT OF APPEALS
OF ARKANSAS**

**DURING THE PERIOD COVERED
BY THIS VOLUME
(March 15, 1995 –
May 31, 1995, inclusive)**

JUDGES

JOHN E. JENNINGS	Chief Judge¹
JOHN MAUZY PITTMAN	Judge²
JAMES R. COOPER	Judge³
JOHN B. ROBBINS	Judge⁴
MELVIN MAYFIELD	Judge⁵
JUDITH ROGERS	Judge⁶

OFFICERS

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MARLO M. BUSH	Reporter of Decisions

¹District 3.
²District 1.
³District 2.
⁴District 4.
⁵District 5.
⁶District 6.

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STANDARDS FOR PUBLICATION OF OPINIONS

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Rules of the Arkansas Supreme Court and Court of Appeals
OPINIONS

(a) SUPREME COURT — SIGNED OPINIONS. All signed opinions of the Supreme Court shall be designated for publication.

(b) COURT OF APPEALS — OPINION FORM. Opinions of the Court of Appeals may be in conventional form or in memorandum form. They shall be filed with the Clerk. The opinions need not contain a detailed statement of the facts, but may set forth only such matters as may be necessary to an understandable discussion of the errors urged. In appeals from decisions of the Arkansas Board of Review in unemployment compensation cases, when the Court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion.

(c) COURT OF APPEALS — PUBLISHED OPINIONS. Opinions of the Court of Appeals which resolve novel or unusual questions will be released for publication when the opinions are announced and filed with the Clerk. The Court of Appeals may consider the question of whether to publish an opinion at its decision-making conference and at that time, if appropriate, make a tentative decision not to publish. Concurring and dissenting opinions will be published only if the majority opinion is published. All opinions that are not to be published shall be marked "Not Designated for Publication."

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the

Arkansas Reports by case number, style, date, and disposition.

(e) **COPIES OF ALL OPINIONS.** In every case the Clerk will furnish, without charge, one typewritten copy of all of the Court's published or unpublished opinions in the case to counsel for every party on whose behalf a separate brief was filed. The charge for additional copies is fixed by statute.

OPINIONS NOT DESIGNATED FOR PUBLICATION

- Alexander v. State, CA CR 94-519 (Pittman, J.), affirmed March 29, 1995.
- Arkholo Sand & Gravel v. Clow, CA 94-476 (Jennings, C.J.), affirmed March 22, 1995.
- Bailey v. Bailey, CA 94-507 (Mayfield, J.), affirmed May 1, 1995.
- Barr v. Brotherhood Mut. Ins. Co., CA 94-752 (Pittman, J.), dismissed May 31, 1995.
- Baxter County Regional Hosp. v. Taylor, CA 94-609 (Robbins, J.), affirmed April 19, 1995.
- Beaver Lake Concrete, Inc. v. REB Enterprises, Inc., CA 93-1381 (Cooper, J.), affirmed April 5, 1995.
- Beavers v. State, CA 94-342 (Pittman, J.), dismissed March 29, 1995.
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- Brown v. State, CA CR 94-721 (Pittman, J.), affirmed March 29, 1995.
- Bruen v. Wallace Hall Masonry Co., CA 94-536 (Pittman, J.), affirmed March 22, 1995.
- Bullard v. State, CA CR 93-1403 (Pittman, J.), affirmed March 15, 1995.
- Campbell v. Doolittle, CA 95-262 (Per Curiam), Appellant's Motion to Supplement the Record granted April 12, 1995.
- Carter v. State, CA CR 94-341 (Jennings, C.J.), affirmed March 22, 1995.
- Casement v. State, CA CR 94-666 (Robbins, J.), affirmed April 19, 1995.
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- Cleveland v. State, CA CR 94-456 (Pittman, J.), affirmed March 29, 1995.
- Colson Caster Corp. v. Morgan, CA 94-507 (Robbins, J.), affirmed May 1, 1995.
- Compton Management v. Earnheart, CA 94-650 (Jennings, C.J.), affirmed May 31, 1995.
- Corbit v. State, CA CR 94-647 (Jennings, C.J.), affirmed May 24, 1995.
- Crow v. State, CA CR 94-542 (Mayfield, J.) affirmed March 29, 1995.

- D & G Trucking Co., Inc. v. Sanders, CA 94-383 (Mayfield, J.), affirmed on appeal and cross-appeal May 17, 1995. Rehearing denied June 28, 1995.
- Davis v. State, CA CR 94-654 (Cooper, J.), affirmed May 24, 1995.
- Dinwiddie v. State, CA CR 94-777 (Jennings, C.J.), affirmed April 12, 1995.
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- Dodd v. Sugar Tree Farms, Inc., CA 94-621 (Rogers, J.), dismissed May 17, 1995.
- Dunn v. State, CA CR 94-490 (Cooper, J.), affirmed March 29, 1995.
- Easley v. State, CA CR 93-1357 (Cooper, J.), affirmed May 1, 1995.
- Ellis v. Ellis, CA 94-326 (Pittman, J.), reversed and remanded in part March 29, 1995. Rehearing denied May 3, 1995.
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- Green v. State, CA CR 94-265 (Pittman, J.), affirmed March 15, 1995.
- Green v. State, CA CR 94-607 (Rogers, J.), affirmed May 10, 1995.
- Hartmann v. E.C. Rowlett Constr. Co., CA 94-1157 (Per Curiam), Appellee's Motion to Dismiss Appeal passed May 17, 1995.
- Hartmann v. E.C. Rowlett Constr. Co., CA 94-1157 (Per Curiam), Motion of Richard S. Muse, Attorney for Appellant, to Proceed with Appeal passed May 17, 1995.
- Hazelbaker v. State, CA 94-722 (Rogers, J.), affirmed April 19, 1995.
- Hill v. Little Rock School Dist., CA 94-577 (Jennings, C.J.), affirmed May 3, 1995.
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- House v. Stillmeadow Convalescent Ctr., CA 94-582 (Jennings, C.J.), affirmed March 29, 1995.
- Howard v. State, CA CR 94-798 (Rogers, J.), affirmed May 31, 1995.
- Howell v. Bates, CA 94-423 (Rogers, J.), affirmed March 15, 1995.
- Ice v. Riceland Foods, Inc., CA 94-614 (Robbins, J.), affirmed March 22, 1995.
- In the Matter of Luster, CA 94-334 (Mayfield, J.), affirmed April 26, 1995.
- Ivy v. State, CA CR 95-135 (Per Curiam), Appellant's Motion to Supplement the Record and to Stay Brief Time granted May 24, 1995.
- James River Corp. v. Peevy, CA 94-943 (Jennings, C.J.), affirmed May 31, 1995.
- Johnson v. State, CA CR 94-747 (Mayfield, J.), affirmed April 19, 1995.
- Johnson v. State, CA CR 94-785 (Robbins, J.), affirmed May 17, 1995.
- Jones v. State, CA CR 94-595 (Cooper, J.), affirmed April 19, 1995.
- Jordan v. Minnesota Mining & Mfg. Co., CA 94-232 (Robbins, J.), reversed and remanded March 29, 1995.
- Kelly v. Ozark Grading and Paving, Inc., CA 94-517 (Cooper, J.), affirmed May 1, 1995.
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- Nowlin v. City of Cotter, CA 93-1336 (Robbins, J.), affirmed March 29, 1995.
- Office of Child Support Enforcement v. Alexander, CA 94-461 (Robbins, J.), dismissed May 10, 1995.
- Owens v. State, CA CR 94-399 (Pittman, J.), affirmed April 19, 1995.
- Paquette v. State, CA CR 94-554 (Pittman, J.), affirmed May 31, 1995.
- Patton v. Sandlin, CA 93-1388 (Jennings, C.J.), affirmed March 29, 1995.
- Pedigo v. P.A.M. Transp., CA 94-537 (Cooper, J.), affirmed March 29, 1995.
- Phillips v. Haller, CA 94-410 (Rogers, J.), affirmed April 12, 1995.
- Pierce v. State, CA CR 94-887 (Rogers, J.), affirmed May 1, 1995.
- Piercefield v. State, CA CR 94-172 (Mayfield, J.), affirmed March 22, 1995.
- Pipkins v. State, CA CR 94-599 (Mayfield, J.), affirmed May 24, 1995. Rehearing denied June 28, 1995.
- Planters & Merchants Bank v. Smith, CA 94-102 (Pittman, J.), affirmed March 22, 1995.
- Platt v. Upjohn Healthcare, CA 94-671 (Mayfield, J.), affirmed May 31, 1995.
- Poole v. State, CA CR 94-272 (Robbins, J.), affirmed April 5, 1995.
- Raborn v. J.B. Hunt, CA 94-525 (Mayfield, J.), affirmed April 12, 1995.

- Ray v. State, CA CR 94-639 (Robbins, J.), affirmed May 1, 1995. Rehearing denied June 7, 1995.
- Rebholz v. State, CA CR 94-835 (Robbins, J.), affirmed May 24, 1995.
- Reed v. Wayne Poultry, CA 94-750 (Rogers, J.), affirmed May 24, 1995. Rehearing denied June 28, 1995.
- Replogle v. Replogle, CA 94-472 (Per Curiam), dismissed May 1, 1995.
- Ritchie v. Lebarge Elec., CA 94-608 (Rogers, J.), affirmed May 17, 1995.
- Ruiz v. State, CA CR 94-708 (Jennings, C.J.), affirmed March 29, 1995.
- Schlinker v. State, CA CR 94-551 (Mayfield, J.), affirmed March 15, 1995.
- Schwarz v. Moody, CA 94-695 (Per Curiam), Appellant's Motion for Stay of Appeal and Brief Time granted May 10, 1995.
- Shelton v. McDonald Restaurants, CA 94-698 (Cooper, J.) affirmed April 26, 1995.
- Slifkin v. Noark Pipeline Sys., Ca 94-325 (Jennings, C.J.), affirmed April 12, 1995.
- Snell v. Snell-Northcutt Elec. Co., CA 94-496 (Jennings, C.J.), reversed and remanded March 22, 1995.
- Snider v. Beasley, CA 94-617 (Rogers, J.), affirmed May 1, 1995.
- Snodgrass v. Chapman, CA 94-882 (Mayfield, J.), affirmed May 31, 1995.
- Snow v. D & R Natural Stone, CA 94-675 (Rogers, J.), affirmed May 1, 1995.
- Southern Air, Inc. v. Sanner, CA 94-552 (Jennings, C.J.), affirmed May 31, 1995. Rehearing denied June 28, 1995. Pittman, J., not participating.
- Speaks v. Affiliated Foods SW, Inc., CA 94-385 (Mayfield, J.), affirmed April 5, 1995. Rehearing denied July 5, 1995.
- Starks v. State, CA CR 94-690 (Robbins, J.), affirmed March 29, 1995.
- State Farm Mut. Auto. Ins. Co. v. Brown, CA 93-1300 (Per Curiam), Appellee's Motion for Attorney's Fees and Costs granted April 19, 1995.
- Stewart v. Central Maloney, Inc., CA 94-585 (Mayfield, J.), affirmed May 10, 1995.

- Stivers v. Atlas Carriers, Inc., CA 94-623 (Mayfield, J.), affirmed April 5, 1995.
- Stone Container Corp. v. Dill, CA 94-616 (Mayfield, J.), affirmed March 22, 1995.
- Summerville v. Battle, CA 95-20 (Per Curiam), Appellant's Pro Se Motion for Appointment of Counsel and for Brief Time denied May 10, 1995.
- Summerville v. Battle, CA 95-20 (Per Curiam), Appellant's Pro Se Motion for Transcript granted May 10, 1995.
- Swan v. Arkansas Dep't of Human Servs., CA 94-746 (Cooper, J.), affirmed May 10, 1995.
- Swenson v. State, CA CR 94-602 (Rogers, J.), affirmed March 29, 1995.
- Terry v. State, CA CR 94-533 (Robbins, J.), affirmed March 29, 1995.
- Tortorich v. Tortorich, CA 94-565 (Jennings, C.J.), affirmed May 24, 1995.
- Traylor v. State, CA CR 94-485 (Cooper, J.), affirmed March 15, 1995.
- Tyson Foods, Inc. v. Mayes, CA 94-610 (Cooper, J.), affirmed April 5, 1995.
- United Fence & Constr. Co., Inc. v. Hickman, CA 94-473 (Cooper, J.), reversed and remanded May 24, 1995. Rehearing denied June 21, 1995.
- USA Truck, Inc. v. Thomas, CA 94-713 (Rogers, J.), affirmed April 5, 1995.
- W.A. Kruger Co. v. Shelby, CA 94-527 (Rogers, J.), affirmed March 15, 1995.
- Walker v. Salem Pub. Sch., CA 94-108 (Rogers, J.), affirmed March 15, 1995.
- Walker v. State, CA CR 94-86 (Rogers, J.), affirmed April 5, 1995.
- Walker v. State, CA CR 94-813 (Mayfield, J.), affirmed May 31, 1995.
- Watson v. Rick's Chevron, CA 94-560 (Jennings, C.J.), affirmed March 22, 1995.
- Weatherly v. Barnhill, CA 94-161 (Pittman, J.), affirmed March 29, 1995.
- Webster v. State, CA CR 94-431 (Per Curiam), Appellee's Motion to Dismiss Appeal denied April 12, 1995.

- West v. Thomason, CA 93-1169 (Mayfield, J.), affirmed March 15, 1995.
- West v. Thomason, CA 93-1169 (Per Curiam), Petition for Rehearing denied May 31, 1995.
- West v. Thomason, CA 93-1169 (Per Curiam), Motion of Separate Appellee for Costs granted May 31, 1995.
- Williams v. Union Bank of Benton, CA 94-664 (Robbins, J.), affirmed April 19, 1995.
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