



ARKANSAS REPORTS  
VOLUME 323

ARKANSAS  
APPELLATE REPORTS  
VOLUME 52

*[T]he law is the last result of human  
wisdom acting upon human experience  
for the benefit of the public.*

— SAMUEL JOHNSON  
(1709-1784)

THIS BOOK CONTAINS THE OFFICIAL  
**ARKANSAS REPORTS**  
Volume 323

CASES DETERMINED  
IN THE

Supreme Court  
of Arkansas

FROM  
January 8, 1996 — March 18, 1996  
INCLUSIVE<sup>1</sup>

AND

**ARKANSAS APPELLATE  
REPORTS**  
Volume 52

CASES DETERMINED  
IN THE

Court of Appeals  
of Arkansas

FROM  
January 17, 1996 — March 13, 1996  
INCLUSIVE<sup>2</sup>

PUBLISHED BY THE  
STATE OF ARKANSAS  
1996

---

<sup>1</sup>Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 805. Cite as 323 Ark. — (1996).

<sup>2</sup>Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 through 259. Cite as 52 Ark. App. — (1996).



ERRATA

---

319 Ark. 537; *Claiborne v. State*:

The parallel citation should be "893 S.W.2d 324."

319 Ark. 602; *Claiborne v. State*:

The parallel citation should be "892 S.W.2d 511."

322 Ark. at 823; first paragraph, line two:

The date "November 7" should be "November 4."

322 Ark. at 826; second paragraph, line seven:

The words "be issued" should be inserted between "days," and "to."

Set in Baskerville

DARBY PRINTING COMPANY  
6215 PURDUE DRIVE  
ATLANTA, GEORGIA 30336  
1996

# ARKANSAS REPORTS

Volume 323

CASES DETERMINED  
IN THE

Supreme Court  
of Arkansas

FROM  
January 8, 1996 — March 18, 1996  
INCLUSIVE

WILLIAM B. JONES, JR.  
REPORTER OF DECISIONS

CINDY M. ENGLISH  
ASSISTANT  
REPORTER OF DECISIONS

PUBLISHED BY THE  
STATE OF ARKANSAS  
1996

## CONTENTS

---

	Page
JUSTICES AND OFFICERS OF THE SUPREME COURT	v
TABLE OF CASES REPORTED	
Alphabetical	vi
Opinions by Respective Justices of Supreme Court, Per Curiam Opinions, and Per Curiam Orders Adopting or Amending Rules, etc.	xiv
STANDARDS FOR PUBLICATION OF OPINIONS	
Rule 5-2, Rules of the Supreme Court and Court of Appeals	xix
TABLE OF OPINIONS NOT REPORTED	xxi
OPINIONS REPORTED	1
APPENDIX	
Rules Adopted or Amended by Per Curiam Orders	806
Appointments to Committees	814
Professional Conduct Matters	816
INDEX	
Alphabetical Headnote Index	817
References to Acts, Codes, Constitutional Provisions, Rules & Statutes	844

JUSTICES AND OFFICERS  
OF THE  
SUPREME COURT OF  
ARKANSAS

DURING THE PERIOD COVERED  
BY THIS VOLUME  
(January 8, 1996 —  
March 18, 1996, inclusive)

---

JUSTICES

BRADLEY D. JESSON	Chief Justice
ROBERT H. DUDLEY	Justice
DAVID NEWBERN	Justice
TOM GLAZE	Justice
DONALD L. CORBIN	Justice
ROBERT L. BROWN	Justice
ANDREE LAYTON ROAF	Justice

OFFICERS

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

## TABLE OF CASES REPORTED

---

### A

Abel <i>v.</i> Kowalski .....	201
Abernathy <i>v.</i> State .....	563
Adkins ( <i>Renfro v.</i> ) .....	288
Agerton Logging, Inc. ( <i>Frisby v.</i> ) .....	508
Architecture Plus ( <i>Zufari v.</i> ) .....	411
Arkansas Dep't of Human Services <i>v.</i> Wilson .....	151
Arkansas State Hwy. Comm'n ( <i>Stratton v.</i> ) .....	740

### B

Benton <i>v.</i> State .....	550
Best Enter., Inc. ( <i>Weiss v.</i> ) .....	712
Bowen <i>v.</i> State .....	233
Bradley <i>v.</i> State .....	564
Bridges <i>v.</i> State .....	565
Briscoe <i>v.</i> State .....	4
Brown <i>v.</i> State .....	319
Bryant <i>v.</i> State .....	130
Builder's Transp., Inc. <i>v.</i> Wilson .....	327
Burns <i>v.</i> State .....	206
Butler <i>v.</i> Comic .....	725
Byrd <i>v.</i> State .....	235

### C

Cartwright ( <i>Edward J. DeBartolo Corp. v.</i> ) .....	573
Chaisson <i>v.</i> Ragsdale .....	373
Cherepski <i>v.</i> Walker .....	43
Cherry <i>v.</i> State .....	733
City of Little Rock ( <i>National By-Prods., Inc. v.</i> ) .....	619
City of Lowell <i>v.</i> M & N Mobile Home Park, Inc. ....	332
Clark <i>v.</i> Ridgeway .....	378
Clark <i>v.</i> State .....	211
Coca-Cola Bottling Co. ( <i>Foxsmith, Inc. v.</i> ) .....	13



ARK.]	CASES REPORTED	vii
		8
Cole v. State	.....	136
Cole v. State	.....	725
Comic (Butler v.)	.....	363
Craig v. Traylor	.....	95
Croom v. Younts	.....	

D

Doe v. Union Pac. R.R. Co.	.....	237
Dokes v. State	.....	566
Donihoo v. State	.....	134
Donihoo v. State	.....	442
Douglass v. Nationwide Mut. Ins. Co.	.....	105
Driggers v. Locke	.....	63
Danforth (Murphy v.)	.....	482

E

Echols v. State	.....	40
Edward J. DeBartolo Corp. v. Cartwright	.....	573
Eichelberger v. State	.....	551
Equity Fire & Casualty Co. v. Needham	.....	22

F

Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members	.....	706
Farm Bureau Policy Holders & Members (Farm Bureau Mut. Ins. Co. v.)	.....	706
First Commercial Trust Co. v. Rank	.....	390
First Commercial Trust Co. v. Rank	.....	406-A
Flemens v. Harris	.....	421
Ford Motor Credit Co. (France v.)	.....	167
Foxsmith, Inc. v. Coca-Cola Bottling Co.	.....	13
Fraker (Holaday v.)	.....	522
Frana v. State	.....	1
France v. Ford Motor Credit Co.	.....	167
Frazier v. State	.....	350
Frazier (Prudential Ins. Co. v.)	.....	311
Frisby v. Agerton Logging, Inc.	.....	508

## G

Galvin <i>v.</i> State .....	125
Green <i>v.</i> State .....	635
Guinn <i>v.</i> State .....	612
Guy <i>v.</i> State .....	649

## H

Haase <i>v.</i> Starnes .....	263
Hackler (Perryman <i>v.</i> ) .....	500
Hall <i>v.</i> Rental Management, Inc. ....	143
Hamilton <i>v.</i> State .....	614
Hamilton <i>v.</i> Villines .....	492
Hansen (Smith <i>v.</i> ) .....	188
Hansen <i>v.</i> State .....	407
Harris (Flemens <i>v.</i> ) .....	421
Hertlein <i>v.</i> St. Paul Fire & Marine Ins. Co. ....	283
Hill <i>v.</i> State .....	796
Hogue <i>v.</i> State .....	515
Holaday <i>v.</i> Fraker .....	522
Holland Retirement Ctr., Inc. (Whitney <i>v.</i> ) .....	16

## I

In re: Baxter .....	232
In re: Brumley .....	431
In re: Malaby .....	236
In re: Petition of the Arkansas Bar Ass'n .....	203
In re: Rook <i>v.</i> Sheriff .....	443

## J

Jackson (Mason <i>v.</i> ) .....	252
Johnson (Skaggs <i>v.</i> ) .....	320
Jones (Stacks <i>v.</i> ) .....	643
Jones <i>v.</i> State .....	496
Jones <i>v.</i> State .....	655
Jordan <i>v.</i> State .....	616
Jordan <i>v.</i> State .....	628

## K

King <i>v.</i> King .....	799
King (King <i>v.</i> ) .....	799
King <i>v.</i> State .....	558
King <i>v.</i> State .....	671
Kowalski (Abel <i>v.</i> ) .....	201

## L

Lake View Sch. Dist. No. 25 (Tucker <i>v.</i> ) .....	693
Laster (Wordlaw <i>v.</i> ) .....	30
Lester <i>v.</i> Mt. Vernon-Enola Sch. Dist. ....	728
Locke (Driggers <i>v.</i> ) .....	63
Luedemann <i>v.</i> Wade .....	161

## M

M & N Mobile Home Park, Inc. (City of Lowell <i>v.</i> ) .....	332
Macon <i>v.</i> State .....	498
Marine Servs. Unlimited, Inc. <i>v.</i> Rakes .....	757
Mason <i>v.</i> Jackson .....	252
Mason <i>v.</i> State .....	361
Mayfield <i>v.</i> State .....	801
McGehee <i>v.</i> State .....	704
Miller (Ray <i>v.</i> ) .....	578
Misskelley <i>v.</i> State .....	449
Misskelley <i>v.</i> State .....	478-A
Mitchell <i>v.</i> State .....	116
Moore <i>v.</i> State .....	529
Morrissey <i>v.</i> State .....	803
Mosley <i>v.</i> State .....	244
Mt. Vernon-Enola Sch. Dist. (Lester <i>v.</i> ) .....	728
Mulling <i>v.</i> Mulling .....	88
Mulling (Mulling <i>v.</i> ) .....	88
Murphy <i>v.</i> Danforth .....	482

## N

Nance <i>v.</i> State .....	583
National Bank of Commerce <i>v.</i> Quirk .....	769
National By-Prods., Inc. <i>v.</i> City of Little Rock .....	619

National Union Fire Ins. <i>v.</i> Tri-State Iron and Metal . . . . .	258
Nationwide Mut. Ins. Co. ( <i>Douglass v.</i> ) . . . . .	105
Needham (Equity Fire & Casualty Co. <i>v.</i> ) . . . . .	22
Norman <i>v.</i> State . . . . .	444
Norman <i>v.</i> State . . . . .	447

## O

Oliver <i>v.</i> State . . . . .	743
----------------------------------	-----

## P

Parnell <i>v.</i> State . . . . .	34
Passley <i>v.</i> State . . . . .	301
Patton <i>v.</i> State . . . . .	617
Perryman <i>v.</i> Hackler . . . . .	500
Petree <i>v.</i> State . . . . .	570
Phillippe ( <i>State v.</i> ) . . . . .	434
Pike <i>v.</i> State . . . . .	56
Ports Petroleum Co. <i>v.</i> Tucker . . . . .	680
Prudential Ins. Co. <i>v.</i> Frazier . . . . .	311

## Q

Quirk ( <i>National Bank of Commerce v.</i> ) . . . . .	769
---	-----

## R

Ragsdale ( <i>Chaisson v.</i> ) . . . . .	373
Rakes ( <i>Marine Servs. Unlimited, Inc. v.</i> ) . . . . .	757
Rank ( <i>First Commercial Trust Co. v.</i> ) . . . . .	390
Rank ( <i>First Commercial Trust Co. v.</i> ) . . . . .	406-A
Ray <i>v.</i> Miller . . . . .	578
Reed <i>v.</i> State . . . . .	28
Renfro <i>v.</i> Adkins . . . . .	288
Rental Management, Inc. ( <i>Hall v.</i> ) . . . . .	143
Richmond <i>v.</i> State . . . . .	236
Ridgeway ( <i>Clark v.</i> ) . . . . .	378
Robinson <i>v.</i> Robinson . . . . .	224
Robinson ( <i>Robinson v.</i> ) . . . . .	224

## S

St. Paul Fire & Marine Ins. Co. ( <i>Hertlein v.</i> )	283
Sheriff ( <i>Rook v.</i> ), In re	443
Sherman ( <i>Zhan v.</i> )	172
Simpson <i>v.</i> State	135
Simpson <i>v.</i> State	582
Skaggs <i>v.</i> Johnson	320
Smith <i>v.</i> Hansen	188
Smith <i>v.</i> State	804
Solomon <i>v.</i> State	178
Stacks <i>v.</i> Jones	643
Starnes ( <i>Haase v.</i> )	263
State ( <i>Abernathy v.</i> )	563
State ( <i>Benton v.</i> )	550
State ( <i>Bowen v.</i> )	233
State ( <i>Bradley v.</i> )	564
State ( <i>Bridges v.</i> )	565
State ( <i>Briscoe v.</i> )	4
State ( <i>Brown v.</i> )	319
State ( <i>Bryant v.</i> )	130
State ( <i>Burns v.</i> )	206
State ( <i>Byrd v.</i> )	235
State ( <i>Cherry v.</i> )	733
State ( <i>Clark v.</i> )	211
State ( <i>Cole v.</i> )	8
State ( <i>Cole v.</i> )	136
State ( <i>Dokes v.</i> )	566
State ( <i>Donihoo v.</i> )	134
State ( <i>Donihoo v.</i> )	442
State ( <i>Echols v.</i> )	40
State ( <i>Eichelberger v.</i> )	551
State ( <i>Frana v.</i> )	1
State ( <i>Frazier v.</i> )	350
State ( <i>Galvin v.</i> )	125
State ( <i>Green v.</i> )	635
State ( <i>Guinn v.</i> )	612
State ( <i>Guy v.</i> )	649
State ( <i>Hamilton v.</i> )	614
State ( <i>Hansen v.</i> )	407
State ( <i>Hill v.</i> )	796
State ( <i>Hogue v.</i> )	515

State (Jones <i>v.</i> )	496
State (Jones <i>v.</i> )	655
State (Jordan <i>v.</i> )	616
State (Jordan <i>v.</i> )	628
State (King <i>v.</i> )	558
State (King <i>v.</i> )	671
State (Macon <i>v.</i> )	498
State (Mason <i>v.</i> )	361
State (Mayfield <i>v.</i> )	801
State (McGehee <i>v.</i> )	704
State (Misskelley <i>v.</i> )	449
State (Misskelley <i>v.</i> )	478-A
State (Mitchell <i>v.</i> )	116
State (Moore <i>v.</i> )	529
State (Morrissey <i>v.</i> )	803
State (Mosley <i>v.</i> )	244
State (Nance <i>v.</i> )	583
State (Norman <i>v.</i> )	444
State (Norman <i>v.</i> )	447
State (Oliver <i>v.</i> )	743
State (Parnell <i>v.</i> )	34
State (Passley <i>v.</i> )	301
State (Patton <i>v.</i> )	617
State (Petree <i>v.</i> )	570
State <i>v.</i> Phillippe	434
State (Pike <i>v.</i> )	56
State (Reed <i>v.</i> )	28
State (Richmond <i>v.</i> )	236
State (Simpson <i>v.</i> )	135
State (Simpson <i>v.</i> )	582
State (Smith <i>v.</i> )	804
State (Solomon <i>v.</i> )	178
State (Story <i>v.</i> )	567
State <i>v.</i> Webb	80
State <i>v.</i> Webb	87-A
State (Williams <i>v.</i> )	568
State (Willis <i>v.</i> )	41
State (Woodruff <i>v.</i> )	448
State (Woods <i>v.</i> )	605
Story <i>v.</i> State	567
Stratton <i>v.</i> Arkansas State Hwy. Comm'n	740

---

## T

Traylor (Craig <i>v.</i> )	363
Tri-State Iron and Metal (National Union Fire Ins. <i>v.</i> )	258
Tucker <i>v.</i> Lake View Sch. Dist. No. 25	693
Tucker (Ports Petroleum Co. <i>v.</i> )	680

## U

Union Pac. R.R. Co. (Doe <i>v.</i> )	237
--------------------------------------	-----

## V

Villines (Hamilton <i>v.</i> )	492
--------------------------------	-----

## W

Wade (Luedemann <i>v.</i> )	161
Walker (Cherepski <i>v.</i> )	43
Webb (State <i>v.</i> )	80
Webb (State <i>v.</i> )	87-A
Weiss <i>v.</i> Best Enter., Inc.	712
Welsh (White <i>v.</i> )	479
White <i>v.</i> Welsh	479
Whitney <i>v.</i> Holland Retirement Ctr., Inc.	16
Williams <i>v.</i> State	568
Willis <i>v.</i> State	41
Wilson (Arkansas Dep't of Human Services <i>v.</i> )	151
Wilson (Builder's Transp., Inc. <i>v.</i> )	327
Woodruff <i>v.</i> State	448
Woods <i>v.</i> State	605
Wordlaw <i>v.</i> Laster	30

## Y

Younts (Croom <i>v.</i> )	95
---------------------------	----

## Z

Zhan <i>v.</i> Sherman	172
Zufari <i>v.</i> Architecture Plus	411

OPINIONS DELIVERED BY THE RESPECTIVE  
JUDGES OF THE ARKANSAS SUPREME COURT  
DURING THE PERIOD COVERED BY THIS  
VOLUME AND DESIGNATED FOR PUBLICATION

---

BRADLEY D. JESSON, CHIEF JUSTICE:

Cherepski <i>v.</i> Walker .....	43
Cole <i>v.</i> State .....	136
Doe <i>v.</i> Union Pac. R.R. Co. ....	237
Edward J. DeBartolo Corp. <i>v.</i> Cartwright .....	573
Hall <i>v.</i> Rental Management, Inc. ....	143
Misskelley <i>v.</i> State .....	449
Mosley <i>v.</i> State .....	244
National By-Prods., Inc. <i>v.</i> City of Little Rock .....	619
Pike <i>v.</i> State .....	56
Skaggs <i>v.</i> Johnson .....	320
White <i>v.</i> Welsh .....	479

ROBERT H. DUDLEY, JUSTICE:

Arkansas Dep't of Human Servs. <i>v.</i> Wilson .....	151
Builder's Transp., Inc. <i>v.</i> Wilson .....	327
City of Lowell <i>v.</i> M & N Mobile Home Park, Inc. ....	332
Eichelberger <i>v.</i> State .....	551
Farm Bureau Mut. Ins. Co. <i>v.</i> Farm Bureau Policyholders .....	706
Frana <i>v.</i> State .....	1
Jordan <i>v.</i> State .....	628
Luedemann <i>v.</i> Wade .....	161
Murphy <i>v.</i> Danforth .....	482
Weiss <i>v.</i> Best Enter., Inc. ....	712

DAVID NEWBERN, JUSTICE:

Briscoe <i>v.</i> State .....	4
Butler <i>v.</i> Comic .....	725
Cole <i>v.</i> State .....	8
Driggers <i>v.</i> Locke .....	63



France <i>v.</i> Ford Motor Credit Co. ....	167
Green <i>v.</i> State .....	635
Hamilton <i>v.</i> Villines .....	492
Jones <i>v.</i> State .....	496
Lester <i>v.</i> Mt. Vernon-Enola Sch. Dist. ....	728
Mason <i>v.</i> Jackson .....	252
Mulling <i>v.</i> Mulling .....	88
Ray <i>v.</i> Miller .....	578
Simpson <i>v.</i> State .....	582
State <i>v.</i> Webb .....	80

## TOM GLAZE, JUSTICE:

Burns <i>v.</i> State .....	206
Cherry <i>v.</i> State .....	733
Foxsmith, Inc. <i>v.</i> Coca-Cola Bottling Co. ....	13
Frazier <i>v.</i> State .....	350
Macon <i>v.</i> State .....	498
Mason <i>v.</i> State .....	361
National Union Fire Ins. <i>v.</i> Tri-State Iron & Metal .....	258
Stacks <i>v.</i> Jones .....	643
Whitney <i>v.</i> Holland Retirement Ctr. ....	16

## DONALD L. CORBIN, JUSTICE:

Clark <i>v.</i> State .....	211
Craig <i>v.</i> Traylor .....	363
Equity Fire & Casualty Co. <i>v.</i> Needham .....	22
Guy <i>v.</i> State .....	649
Haase <i>v.</i> Starnes .....	263
Hertlein <i>v.</i> St. Paul Fire & Marine Ins. Co. ....	283
Jones <i>v.</i> State .....	655
King <i>v.</i> State .....	671
Nance <i>v.</i> State .....	583
Perryman <i>v.</i> Hackler .....	500
Reed <i>v.</i> State .....	28
Robinson <i>v.</i> Robinson .....	224
Solomon <i>v.</i> State .....	178
Stratton <i>v.</i> Arkansas State Hwy. Comm'n .....	740
Wordlaw <i>v.</i> Laster .....	30
Zhan <i>v.</i> Sherman .....	172

## ROBERT L. BROWN, JUSTICE:

<i>Chaisson v. Ragsdale</i> .....	373
<i>Clark v. Ridgeway</i> .....	378
<i>Croom v. Younts</i> .....	95
<i>First Commercial Trust Co. v. Rank</i> .....	390
<i>Frisby v. Agerton Logging, Inc.</i> .....	508
<i>Hansen v. State</i> .....	407
<i>Hogue v. State</i> .....	515
<i>King v. State</i> .....	558
<i>Mitchell v. State</i> .....	116
<i>Oliver v. State</i> .....	743
<i>Parnell v. State</i> .....	34
<i>Renfro v. Adkins</i> .....	288
<i>Smith v. Hansen</i> .....	188
<i>Woods v. State</i> .....	605
<i>Zufari v. Architecture Plus</i> .....	411

## ANDREE LAYTON ROAF, JUSTICE:

<i>Flemens v. Harris</i> .....	421
<i>Galvin v. State</i> .....	125
<i>Holaday v. Fraker</i> .....	522
<i>Marine Servs. Unlimited, Inc. v. Rakes</i> .....	757
<i>Moore v. State</i> .....	529
<i>National Bank of Commerce v. Quirk</i> .....	769
<i>Passley v. State</i> .....	301
<i>State v. Phillippe</i> .....	434
<i>The Prudential Ins. Co. of America v. Frazier</i> .....	311
<i>Tucker v. Lake View Sch. Dist. No. 25</i> .....	693

## PER CURIAM:

<i>Abel v. Kowalski</i> .....	201
<i>Abernathy v. State</i> .....	563
<i>Benton v. State</i> .....	550
<i>Bowen v. State</i> .....	233
<i>Bradley v. State</i> .....	564
<i>Bridges v. State</i> .....	565
<i>Brown v. State</i> .....	319
<i>Bryant v. State</i> .....	130
<i>Byrd v. State</i> .....	235

Dokes <i>v.</i> State .....	566
Donihoo <i>v.</i> State .....	134
Donihoo <i>v.</i> State .....	442
Douglass <i>v.</i> Nationwide Mut. Ins. Co. ....	105
Echols <i>v.</i> State .....	40
First Commercial Trust Co. <i>v.</i> Rank .....	406-A
Guinn <i>v.</i> State .....	612
Hamilton <i>v.</i> State .....	614
Hill <i>v.</i> State .....	796
In Re: Baxter .....	232
In Re: Estate of Brumley .....	431
In Re: Malaby .....	236
In Re: Petition of the Arkansas Bar Ass'n ..	203
In Re: Rook <i>v.</i> Sheriff .....	443
Jordan <i>v.</i> State .....	616
King <i>v.</i> King .....	799
Mayfield <i>v.</i> State .....	801
McGehee <i>v.</i> State .....	704
Misskelley <i>v.</i> State .....	478-A
Morrissey <i>v.</i> State .....	803
Norman <i>v.</i> State .....	444
Norman <i>v.</i> State .....	447
Patton <i>v.</i> State .....	617
Petree <i>v.</i> State .....	570
Richmond <i>v.</i> State .....	236
Simpson <i>v.</i> State .....	135
Smith <i>v.</i> State .....	804
State <i>v.</i> Webb .....	87-A
Story <i>v.</i> State .....	567
Williams <i>v.</i> State .....	568
Willis <i>v.</i> State .....	41
Woodruff <i>v.</i> State .....	448

## APPENDIX

---



---

**RULES ADOPTED OR AMENDED BY PER CURIAM ORDER:**

In Re: Arkansas Rules of Criminal Procedure 28.2 (Per Curiam) .....	808
In Re: Standardized Forms and Procedures for Reporting Case Information in the Arkansas Trial Courts (Per Curiam) .....	809
In Re: Arkansas Code of Judicial Conduct (Per Curiam) .....	806
In the Matter of Arkansas Rules of Criminal Procedure 37.2(c) (Per Curiam) .....	807
In the Matter of Changes to the Arkansas Rules of Civil Procedure Ark. R. Civ. P. 15(b) .....	813

**APPOINTMENTS:**

In Re: Supreme Court Alternative Committee on Professional Conduct (Per Curiam) .....	814
In Re: Supreme Court Committee on Criminal Practice (Per Curiam) .....	814
In Re: Supreme Court Committee on Model Jury Instructions — Criminal (Per Curiam) .....	815

**PROFESSIONAL CONDUCT MATTERS:**

In Re: Armstrong (Per Curiam) .....	816
-------------------------------------	-----

---

---

**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 judi-

cata, 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**

---

---

- Beatty v. Baker*, CR 96-21 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 11, 1996.
- Bohanan v. State*, CR 95-1180 (Per Curiam), Pro Se Motion for Belated appeal of Order granted February 5, 1996.
- Bradford v. State*, CR 95-449 (Per Curiam), Pro Se Motion for Belated Appeal denied February 26, 1996.
- Brewer v. State*, CR 96-42 (Per Curiam), Appellee's Motion to dismiss Appeal granted; appeal dismissed March 18, 1996.
- Brown v. State*, CR 95-1131 (Per Curiam), affirmed February 26, 1996.
- Bryan v. State*, 95-134 (Per Curiam), affirmed March 11, 1996.
- Burnley v. State*, CR 95-1088 (Per Curiam), Pro Se Motion for Extension of Time to File Brief and Pro Se Motion for Duplication of Brief at Public Expense denied and appeal dismissed February 19, 1996.
- Chatten v. State*, CR 95-987 (Per Curiam), Pro Se Motion for Duplication of Appellant's Brief at Public Expense and Motion for Appointment of counsel denied and appeal dismissed January 8, 1996.
- Cloer v. Davis*, Cr 96-244 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 11, 1996.
- Cook v. State*, CR 95-988 (Per Curiam), Pro Se Motion for Extension of Time denied and appeal dismissed January 29, 1996.
- Cook v. State*, CR 95-652 (Per Curiam), affirmed February 12, 1996.
- Davis v. Davis*, Cr 95-1253 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 22, 1996.
- Davis v. State*, CR 95-907 (Per Curiam), Pro Se Motion for Access to Record granted January 16, 1996.
- Davis v. State*, CR 95-907 (Per Curiam), Pro Se Motion for Reconsideration of Motion for Access to Record denied February 12, 1996.
- Drury v. Warren*, 95-1208 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 22, 1996.
- Dulaney v. State*, CR 95-1094 (Per Curiam), Pro Se Motion to Dismiss Appeal Without Prejudice granted in part; appeal dismissed with prejudice February 19, 1996.

- Dyas v. State*, CR 95-1240 (Per Curiam), affirmed March 18, 1996.
- Edmondson v. State*, CR 95-263 (Per Curiam), Pro Se Motion for Appointment of Counsel Treated as Motion for Belated Appeal denied January 8, 1996.
- Ford v. State*, 95-1019 (Per Curiam), affirmed March 4, 1996.
- Fox v. State*, CR 95-91 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted; Motion for Duplication of Brief denied February 19, 1996.
- Franklin v. Plegge*, CR 95-1275 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 11, 1996.
- Franklin v. State*, CR 94-686 (Per Curiam), Pro Se Motion for Reconsideration denied February 12, 1996.
- Friend v. State*, CR 96-2 (Per Curiam), Pro Se Motion for Rule on the Clerk denied March 18, 1996.
- Green v. Erwin*, Cr 96-4 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 12, 1996.
- Hall v. State*, CR 95-166 (Per Curiam), Pro Se Motion to Substitute Brief and for Appointment of Counsel granted in part and denied in part; Pro Se Motion for Court Order Authorizing the Arkansas State Crime Laboratory to Release Report denied January 16, 1996.
- Harris v. Burnett*, CR 95-744 (Per Curiam), Pro Se Motion for Reconsideration denied February 5, 1996.
- Harris v. Garrett*, 95-1363 (Per Curiam), Pro Se Motion to Expedite Appeal denied February 12, 1996.
- Harris v. State*, 95-1363 (Per Curiam), affirmed March 11, 1996.
- Harris v. State*, Cr 95-856 (Per Curiam), affirmed January 22, 1996.
- Horton v. State*, CR 95-1335 (Per Curiam), Pro Se Motion for Belated appeal of Judgment remanded March 4, 1996.
- Jackson v. State*, Cr 95-520 (per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted February 5, 1996.
- Johnson v. State*, CR 95-843 (Per Curiam), affirmed February 5, 1996.
- Johnson v. State*, Cr 95-497 (Per Curiam), Motion for Reconsideration of Motion to Dismiss Appeal denied February 26, 1996.
- Jones v. State*, CR 96-231 (Per Curiam), Pro Se Motion for Rule on the Clerk granted March 11, 1996.



- Jones *v.* State, 95-633 (Per Curiam), rehearing denied January 22, 1996.
- Langley *v.* State, CR 95-1129 (Per Curiam), Pro Se Motion for Belated appeal of Order and Pro Se Motion for Transcript denied January 29, 1996.
- Lively *v.* Reynolds, Cr 96-22 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 11, 1996.
- Matthews *v.* State, 95-869 (Per Curiam), affirmed February 5, 1996.
- McDonald *v.* Gaines, 95-56 (Per Curiam), affirmed January 22, 1996.
- Miller *v.* State, CR 95-129 (Per Curiam), affirmed, Motion to dismiss denied January 29, 1996.
- Mosley *v.* State, CR 95-872 (Per Curiam), Pro Se Motion to Relieve Counsel, to Proceed Pro Se on Appeal and for Photocopies denied January 16, 1996.
- Nathaniel *v.* State, CR 95-1196 (Per Curiam), Pro Se Petition for Writ of Certiorari denied February 19, 1996.
- Norman *v.* State, CR 95-361 (Per Curiam), Pro Se Motion to Dismiss Counsel and Pro Se Motion for Appointment of Counsel denied March 18, 1996.
- Penor *v.* State, CA CR 90-322 (Per Curiam), Pro Se Motion for Transcript denied and Petition for Certiorari to Arkansas Supreme Court denied February 26, 1996.
- Phills *v.* Davis, CR 95-1294 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 5, 1996.
- Reed *v.* State, CR 95-797 (Per Curiam), Pro Se Motion for Appointment of Counsel denied and appeal dismissed January 29, 1996.
- Riddle *v.* Norris, 95-858 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted January 22, 1996.
- Rutherford *v.* State, CR 95-287 (Per Curiam), Pro Se Motion for Belated Appeal denied February 26, 1996.
- Scott *v.* State, CR 90-6 (Per Curiam), Pro Se Motion to File an Enlarged and/or Subsequent Petition Pursuant to Criminal Procedure Rule 37 denied January 16, 1996.
- Surveyor *v.* State, CR 95-796 (Per Curiam), affirmed February 19, 1996.
- Tapp *v.* State, CR 95-1351 (Per Curiam), Appellee's Motion to Dismiss Appeal granted; appeal dismissed March 18, 1996.

- Tolbert *v.* State, CR 95-1334 (per Curiam), Pro Se Motion for Belated Appeal granted; appeal dismissed March 18, 1996.
- Ware *v.* State, CR 95-47 (Per Curiam), Pro Se Motion for Reconsideration denied January 29, 1996.
- Watson *v.* State, CR 95-1206 (Per Curiam), affirmed March 18, 1996.
- Wesley *v.* State, CR 96-86 (Per Curiam), Pro Se Motion for Rule on the Clerk denied March 11, 1996.
- Wilburn *v.* State, CR 94-1110 (Per Curiam), Pro Se Motion for Extension of Time to File Petition for rehearing denied February 19, 1996.
- Williams *v.* State, CR 95-1225 (Per Curiam), Pro Se Motion for Belated appeal of Order denied March 4, 1996.
- Wilson *v.* State, CR 95-1312 (Per Curiam), Pro Se Motion for Duplication of Appellant's Brief at Public Expense denied and appeal dismissed March 4, 1996.
- Woods *v.* State, 95-1252 (Per Curiam), affirmed March 11, 1996.

# APPENDIX

Rules Adopted  
or Amended by  
Per Curiam Orders

IN RE: THE ARKANSAS CODE OF JUDICIAL  
CONDUCT

Supreme Court of Arkansas  
Opinion delivered January 29, 1996

**PER CURIAM.** The Arkansas Bar Association and the Association's Special Committee on the Model Code of Judicial Conduct jointly petition this court to amend Canon 5(A)(3)(d)(ii), which deals with prohibited statements by judicial candidates during political campaigns. The petition requests that we strike the existing subsection and substitute therefor the following language:

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or . . . .

In their petition, the petitioners state that the existing subsection (ii) has been held to be unconstitutional as impermissibly restraining the First Amendment free speech rights of judicial candidates. *See Beshear v. Butt*, 863 F. Supp. 913 (E.D. Ark. 1994). The Judicial Discipline Commission was permanently enjoined by the district court from enforcing the language that currently appears in subsection (ii). The proposed language by the petitioners is identical to the language proposed by the American Bar Association.

The petition has merit. Accordingly, we strike the existing subsection (ii) and adopt the above-stated language as Canon 5(A)(3)(d)(ii), to be effective immediately.

IN THE MATTER OF ARKANSAS RULES OF  
CRIMINAL PROCEDURE 37.2(c)

Supreme Court of Arkansas  
Opinion delivered January 29, 1996

PER CURIAM. Rule 37.2(c) is amended, effective immediately, to read as follows:

(c) If a conviction was obtained on a plea of guilty, or the petitioner was found guilty at trial and did not appeal the judgment of conviction, a petition claiming relief under this rule must be filed in the appropriate circuit court within ninety (90) days of the date of entry of judgment. If the judgment was not entered of record within ten (10) days of the date sentence was pronounced, a petition under this rule must be filed within ninety (90) days of the date sentence was pronounced.

If an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty (60) days of the date the mandate was issued by the appellate court. In the event an appeal was dismissed, the petition must be filed in the appropriate circuit court within sixty (60) days of the date the appeal was dismissed. *If the appellate court affirms the conviction but reverses the sentence, the petition must be filed within sixty (60) days of a mandate following an appeal taken after resentencing. If no appeal is taken after resentencing, then the petition must be filed with the appropriate circuit court within ninety (90) days of the entry of the judgment.*

IN RE: ARKANSAS RULE OF CRIMINAL  
PROCEDURE 28.2

Supreme Court of Arkansas  
Opinion delivered February 19, 1996

PER CURIAM. RULE 28.2

We amend Rule 28.2(b) of the Rules of Criminal Procedure, effective immediately, as follows:

(b) When the charge is dismissed upon motion of the defendant and subsequently the dismissed charge is reinstated, or the defendant is arrested or charged with the same offense, the time for trial shall commence running from the date the dismissed charge is reinstated or the defendant is subsequently arrested or charged, whichever is earlier; and when the charge is dismissed upon motion of the defendant and subsequently the charge is reinstated following an appeal, the time for trial shall commence running from the date the mandate is issued by the appellate court;

COURT'S NOTES, 1996 AMENDMENT: Subsection (b) was amended to address situations where the defendant successfully moves to have charges dismissed but charges are subsequently reinstated by the trial court or on appeal. See *Thornton v. State*, 317 Ark. 257, 878 S.W.2d 378 (1994).

IN RE: STANDARDIZED FORMS AND PROCEDURES  
FOR REPORTING CASE INFORMATION IN THE  
ARKANSAS TRIAL COURTS

Supreme Court of Arkansas  
Opinion delivered February 26, 1996

**PER CURIAM.** In 1992 the Administrative Office of the Courts (AOC) received a grant from the State Justice Institute (SJI) to study the need for uniform data elements to be collected and shared among courts and court-related agencies through the development of forms to be adopted for use statewide. A consultant was retained who issued a report which made specific findings concerning the need for additional information to be collected in all cases and suggested changes in the process for the collection and reporting of case information.

Pursuant to that report, the Court issued a Per Curiam Order on June 14, 1993, appointing ad hoc committees, the members representing circuit and chancery judges, court clerks, prosecuting attorneys, public defenders, the private bar, Department of Human Services, Department of Correction, law enforcement, and court related agencies, to review the consultant's report and to make recommendations to the Court regarding the adoption of reporting forms for criminal, civil, chancery, probate, and juvenile division cases.

Pursuant to those recommendations, the AOC obtained a technical assistance grant from SJI in 1994 to contract for the formatting of the reporting forms.

In December, 1995, the Committees submitted their final report to the Court recommending that standardized forms be required upon the filing and disposition of all civil, criminal, chancery, probate, and juvenile matters handled by the trial courts of this state. In addition, the Committee recommended the adoption of additional rules outlining the necessary procedure needed to implement such a requirement.

Pursuant to Article 7, Section 4 of the Arkansas Constitution and A.C.A. §16-10-101, the Supreme Court has general superintending control over the trial courts and may, pursuant to Court rule, require reports from all courts of the state. A.C.A. §16-10-102 requires the AOC, under the direction of the Court,

to examine the statistical systems of the courts and "make recommendations to the Supreme Court for a uniform system of judicial statistics."

Collection and sharing of uniform case data among courts and court related agencies is necessary if the reporting of data is to be accurate, whether disseminated publicly or utilized inter-agency. While the use of a limited number of forms is legislatively mandated, a more comprehensive requirement by the Court of the use of standardized forms in all courts appears to be the best means of insuring that useful and accurate case data will be gathered.

Therefore, the Court approves and publishes the attached Administrative Order Number 8 — *Forms for Reporting Case Information In All Arkansas Trial Courts*, which will take effect July 1, 1996. The Order sets out the procedure for the adoption and use of the new reporting forms which will replace all forms currently used by court clerks to report case data to the AOC. The AOC is charged with the responsibility of implementing Administrative Order Number 8 subject to any further orders of this Court.

The Court expresses its appreciation to the members of the ad hoc drafting committees for their service on this most important project. Having completed their appointed task, the committees are hereby dissolved.

ADMINISTRATIVE ORDER NO 8 — FORMS FOR  
REPORTING CASE INFORMATION IN ALL  
ARKANSAS TRIAL COURTS

SECTION I. SCOPE.

Beginning July 1, 1996, in every action filed in the circuit, chancery, and probate courts, a form designed for the uniform collection of case data shall be completed and filed with the initial pleading and again at final disposition. These forms, while required, are solely for the purpose of collecting statistical case data and shall not be admissible as evidence in any court proceeding or replace or supplement the filing and service of pleadings, orders, or other papers as required by law or the rules of this Court.



## SECTION II. RESPONSIBILITY FOR FORMS.

### a. *Administrative Office of the Courts.*

The Administrative Office of the Courts (AOC) shall be responsible for the content and format of the forms after consultation with other appropriate agencies or as may be required by law. The AOC shall be responsible for training in the use of these forms and for initial dissemination of the forms.

### b. *Court Clerk.*

The court clerk shall not accept an initial pleading which is not accompanied by the appropriate completed form. The court clerk shall maintain a supply of forms to ensure their availability to attorneys or pro se litigants. The court clerk shall weekly forward a copy of the forms which have been filed to the AOC. These forms shall replace all forms currently used for reporting case data to the AOC. For the purposes of this Administrative Order, court clerk means the elected circuit, chancery, or county clerk, or his/her deputy clerks in whose office a pleading, order, judgment, or decree is filed.

## SECTION III. PROCEDURE.

### a. *Criminal Cases.*

The office of the prosecuting attorney shall be responsible for completion of the criminal information form and for filing it in the Office of the Circuit Clerk who shall forward a copy to the AOC on a weekly basis.

Upon conviction and sentencing to the Arkansas Department of Correction, the office of the prosecuting attorney shall be responsible for completion of the Judgment and Commitment Order. The Order shall be submitted to the circuit judge for signature and filed in the Office of the Circuit Clerk. The clerk shall forward a copy to the AOC pursuant to SECTION II.b.

Where the final disposition does not result in a commitment to the Arkansas Department of Correction but may include any of the following — an order of probation, suspended imposition of sentence, commitment to the Department of Community Punishment or to the county jail, a fine, restitution, and/or court costs — the office of the prosecuting attorney shall be responsible for completion of the Judgment and Disposition Order which

shall be submitted to the circuit judge for signature and filed in the Office of the Circuit Clerk. The clerk shall forward a copy to the AOC pursuant to SECTION II.b.

b. *Civil Circuit, Chancery and Probate Cases.*

When an action is commenced, the attorney or pro se litigant filing the initial pleading shall be responsible for completion of the filing information on the appropriate reporting form, and that form shall be filed with the court clerk. The court clerk shall not accept the pleading unless it is accompanied by the reporting form. The court clerk shall file the original in the case file and shall forward a copy of the reporting form to the AOC pursuant to SECTION II.b.

When the final order/decreed/judgment is filed with the court clerk, the clerk or other appropriate official as designated by the trial court shall complete the disposition information on the original form in the case file. The court clerk shall sign, date, and forward a copy of the completed reporting form to the AOC pursuant to SECTION II.b.

c. *Juvenile Division Chancery Cases.*

Pursuant to A.C.A. Sec. 16-13-603(d)(2), the juvenile division judge shall designate a staff person who shall be responsible for the completion of the filing information on the appropriate juvenile reporting form when the initial pleading is filed. The form shall be forwarded to the court clerk for filing. The court clerk shall not accept the initial pleading unless it is accompanied by the reporting form. The court clerk shall forward a copy of the reporting form to the AOC pursuant to SECTION II.b.

The staff person designated by the juvenile division judge shall be responsible for completing the disposition information on the appropriate juvenile reporting form when a disposition order is entered and forwarding the form to the court clerk for filing. The court clerk shall sign, date, and forward a copy of the reporting form to the AOC pursuant to SECTION II.b.

IN THE MATTER OF CHANGES TO THE ARKANSAS  
CIVIL PROCEDURE; ARK. R. CIV. P. 15(b)

Supreme Court of Arkansas  
Opinion delivered February 26, 1996

PER CURIAM. In response to the recent *per curiam* opinion delivered by the Arkansas Court of Appeals in *Planters Bank & Trust Co. v. Smith*, No. CA 95-1156 (February 7, 1996), the Reporter's Notes accompanying Ark. R. Civ. P. 15(b), concerning amendments to conform pleadings to the evidence, are hereby amended to read as follows:

2. Section (b) is identical to FRCP 15(b). It follows prior Arkansas law by permitting amendments to conform to the proof adduced at trial. This rule goes somewhat further, however, by more or less making it mandatory that pleadings be amended to conform to the proof where there has been NO objection to such proof. *Metropolitan Life Ins. Co. v. Fugate*, 313 F.2d 788 (C.C.A. 5th, 1963); *Bradford Audio Corp. v. Pious*, 329 F.3d 67 (C.C.A. 2nd, 1968). (Emphasis added.)

The amendment corrects an inadvertent omission in the Notes by inserting the word "no" to precede the word "objection" in the phrase "where there has been objection to such proof." This change harmonizes the Notes with the language in Rule 15(b), which grants the court discretion in allowing amendments to the pleadings when an objection is made to the evidence as not being within the pleadings.

This change is effective as of the date of this opinion.



Appointments to  
Committees

IN RE: SUPREME COURT COMMITTEE ON  
CRIMINAL PRACTICE

Supreme Court of Arkansas  
Opinion delivered February 12, 1996

*PER CURIAM.* Raymond Abramson, Esq., of Clarendon, Frank Newell, Esq., of Little Rock, Scott Stafford, Esq., of Little Rock, and the Honorable Gordon Webb of Harrison, are hereby reappointed to the Supreme Court Committee on Criminal Practice for three-year terms to expire on January 31, 1999. The Honorable Tom Keith of Bentonville is hereby appointed to the Committee for a three-year term to expire on January 31, 1999.

The court thanks Mr. Abramson, Mr. Newell, Professor Stafford, and Mr. Webb for accepting reappointment, and Judge Keith for accepting appointment to this most important Committee.

The court expresses its appreciation to the Honorable William Enfield of Bentonville, whose term has expired, for his years of faithful service to this Committee.

---

IN RE: SUPREME COURT ALTERNATIVE  
COMMITTEE ON PROFESSIONAL CONDUCT

Supreme Court of Arkansas  
Opinion delivered February 26, 1996

*PER CURIAM.* James Michael Cogbill, Esq., of Fort Smith, Third Congressional District, and Rita Mitchell Harvey of Little Rock, are hereby appointed to the Supreme Court Alternate Committee on Professional Conduct for seven-year terms to expire on March 9, 2003. Ms. Harvey will fill an At-Large Non-Lawyer position.

The court thanks Mr. Cogbill and Ms. Harvey for accepting appointment to this most important Committee.

The court expresses its appreciation to Ben Core, Esq., and Grainger Williams, whose terms have expired, for their years of

service to this Committee.

---

IN RE: SUPREME COURT COMMITTEE ON  
MODEL JURY INSTRUCTIONS — CRIMINAL

Supreme Court of Arkansas  
Opinion delivered February 26, 1996

PER CURIAM. Larry Carpenter, Esq., of North Little Rock, and Jackson Jones, Esq., of Little Rock, are hereby reappointed to the Supreme Court Committee on Model Jury Instructions — Criminal for three-year terms to expire on February 28, 1999. Mr. Jones will serve as the Chairman of the Committee.

Dale Adams, Esq., of Little Rock, and Lea Ellen Fowler, Attorney-at-Law, of Little Rock are hereby appointed to the Committee for three-year terms to expire on February 28, 1999.

The court thanks Mr. Carpenter and Mr. Jones for accepting reappointment, and Mr. Adams and Ms. Fowler for accepting appointment to this most important Committee.

The court expresses its appreciation to John C. Calhoun, Jr., Esq., and Tom Carpenter, Esq., whose terms have expired, for their years of faithful service to this Committee, and especially to Mr. Calhoun for his work as its chairman.





Professional Conduct  
Matters

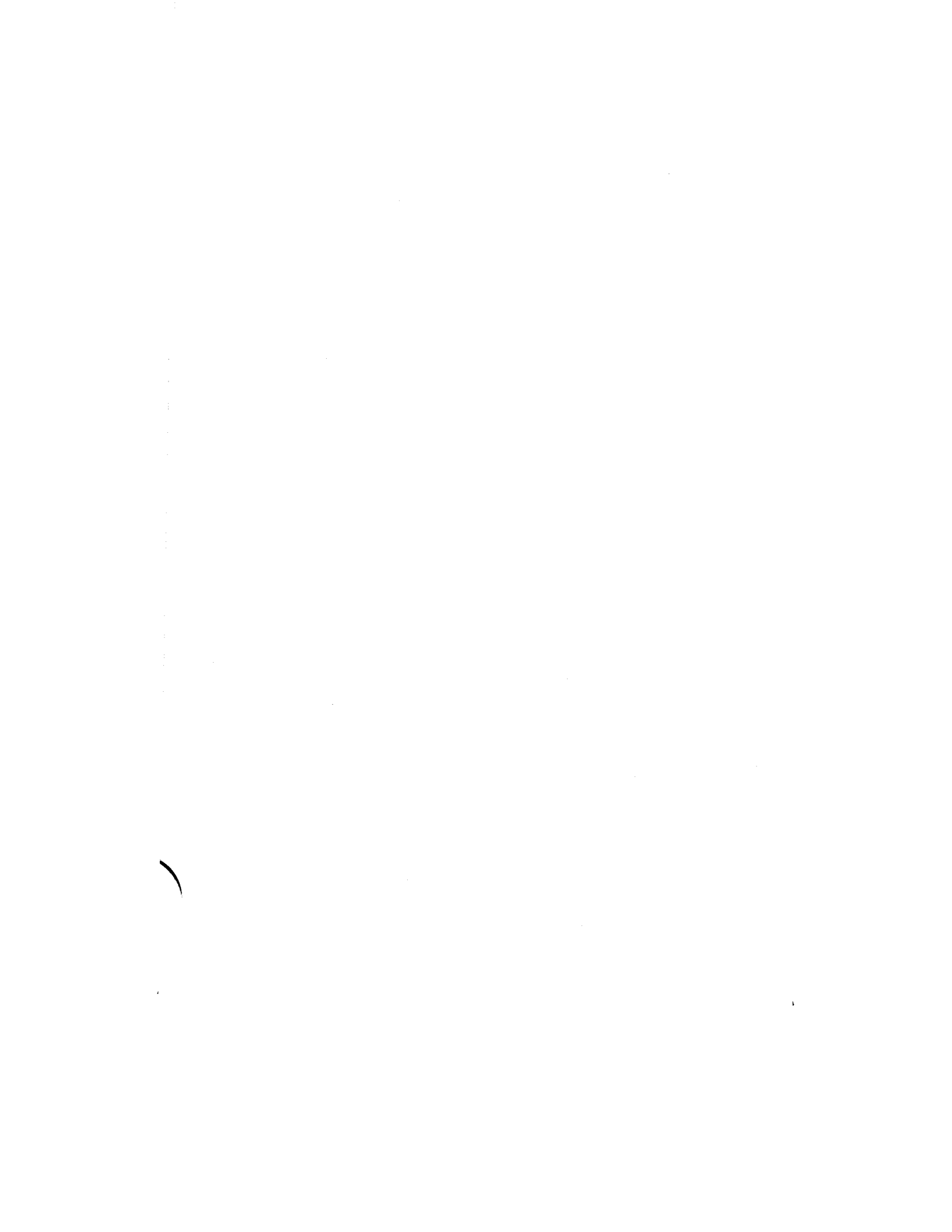
IN RE: Murry Frank ARMSTRONG,  
Arkansas Bar ID # 75001

914 S.W.2d 763

Supreme Court of Arkansas  
Opinion delivered February 19, 1996

PER CURIAM. On recommendation of the Supreme Court Committee on Professional Conduct, we hereby accept the surrender of the license of Murry Frank Armstrong of Star City, Arkansas, to practice law in the State of Arkansas and direct that Mr. Armstrong's name be removed from the list of attorneys authorized to practice law in this state.

Alphabetical  
HEADNOTE  
INDEX



## HEADNOTE INDEX

## ACTION:

- Subsequent suit based on the same events and subject matter, trial court correct in holding that the subsequent suit was barred by res judicata. *Wordlaw v. Laster*, 30.
- Clergy malpractice not a recognized cause of action, summary judgment proper. *Cherepski v. Walker*, 43.
- Circuit court's policy justifications did not present grounds for reversal. *Douglass v. Nationwide Mut. Ins. Co.*, 105
- Admission of autopsy photograph, issue not preserved for review. *Mitchell v. State*, 116.
- Class action, A.R.C.P. Rule 23 is comparable to F.R.C.P. Rule 23, supreme court interprets in same manner as federal courts. *Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 706.
- Class action, order regarding class certification is separate from merits of case. *Id.*
- Class action, certification, standard of review. *Id.*
- Class action, commonality, trial court did not abuse its discretion in finding commonality of interests. *Id.*
- Class action, typicality, claims are typical when they arise from same wrong, trial court did not abuse its discretion in finding typicality. *Id.*

## ADMINISTRATIVE LAW &amp; PROCEDURE:

- Declaratory orders under Administrative Procedure Act have same status in adjudication as agency orders. *Douglass v. Nationwide Mut. Ins. Co.*, 105.
- No distinction seen between judicial review of agency rule and judicial review of declaratory order. *Id.*
- Issue fit subject for review and petition for declaratory relief where rule or declaratory order has direct effect on business operations of insurance company, Commissioner's order ripe for determination and subject to review. *Id.*
- Standard of review. *Arkansas Dep't of Human Servs. v. Wilson*, 151.
- When decision will be affirmed or set aside. *Id.*
- Appellant's regulation not applicable to appellee trust. *Id.*

## APPEAL &amp; ERROR:

- Grounds for objection changed on appeal, argument waived on appeal. *Whitney v. Holland Retirement Ctr., Inc.*, 16.
- Summary judgment, standard of review. *Equity Fire & Cas. Co. v. Needham*, 22.
- Chancellor's finding that appellee paid sufficient premium invalidated ground for cancellation of insurance and rendered issue of statutory prohibition of cancellation moot. *Id.*
- Appellant must obtain ruling giving basis of trial court's ruling. *Id.*
- Burden on appellant to bring up record sufficient to demonstrate error. *Id.*
- Failure to cite authority or present convincing argument, judgment affirmed. *Id.*
- Court does not entertain arguments raised for first time on appeal. *Parnell v. State*, 34.
- Remand left in effect for factual determination by trial court of appellant's competency with respect to abandonment of death-penalty issues on appeal. *Echols v. State*, 40.
- Attorney admitted negligence in not having record filed on time, motion for rule on clerk granted. *Willis v. State*, 41.

- Parties cannot change the grounds for an objection on appeal, arguments not raised at trial not reached on appeal. *Pike v. State*, 56.
- Denial of motion for new trial, standard of review. *Croom v. Younts*, 95.
- A.R.Cr.P. Rule 37, only two claims cognizable in Rule 37 proceedings. *Bryant v. State*, 130.
- A.R.Cr.P. Rule 37, conclusory allegations unsupported by facts do not provide basis for hearing or postconviction relief. *Id.*
- A.R.Cr.P. Rule 37, allegations in twenty-three page document not considered. *Id.*
- A.R.Cr.P. Rule 37, judge who presided over defendant's trial can also preside over defendant's postconviction proceeding. *Id.*
- Attorney's duty to file record on time. *Donihoo v. State*, 134.
- Rule on clerk. *Id.*
- Motion for rule on clerk, good cause for granting. *Simpson v. State*, 135.
- Issue not raised below not reached on appeal. *Luedemann v. Wade*, 161.
- No citation of authority or convincing argument, argument not considered. *France v. Ford Motor Credit Co.*, 167.
- Objection to trial court's award of costs could have been raised below, matter not raised below not addressed on appeal. *Zhan v. Sherman*, 172.
- Prejudice will not be presumed, no reversal absent a showing of prejudice. *Solomon v. State*, 178.
- Prevailing party bound by trial court's decision. *Smith v. Hansen*, 188.
- Prevailing party has no standing to challenge issue decided favorably. *Id.*
- Matter returned to court of appeals, appellate court directed to have appellants promptly file briefs. *Abel v. Kowalski*, 201.
- Appellant failed to object at the earliest opportunity, argument not preserved for appeal. *Clark v. State*, 211.
- Appellant failed to abstract pertinent parts of the record, appellate court precluded from considering certain issues. *Id.*
- Objection at trial level needed to reach issue on appeal, no objection made. *Robinson v. Robinson*, 224.
- Motion to stay mandate granted. *Bowen v. State*, 233.
- Motion for rule on clerk, good cause for granting. *Byrd v. State*, 235.
- Motion for rule on clerk, good cause for granting. *Richmond v. State*, 236.
- Final, appealable judgment, ARCP Rule 54(b) allows interlocutory appeals under certain circumstances but not here. *Doe v. Union Pac. R.R. Co.*, 237.
- Final, appealable judgment, Ark. R. App. P. 2, general rule of appealability, circuit court's ruling was on preliminary matter. *Id.*
- Final, appealable judgment, supreme court declined to adopt amendment to Ark. R. App. P. 2 to allow appellant's interlocutory appeal, considerations. *Id.*
- Final, appealable order, appeal was premature. *Id.*
- Summary judgment, standard of review. *Haase v. Starnes*, 263.
- Part of order granting summary judgment to appellee on breach-of-warranty claim reversed and remanded. *Id.*
- Trial court erred in granting summary judgment where appellant pleaded and offered proof of express warranty made by appellee. *Id.*
- Failure to obtain ruling, issue waived on appeal. *Id.*
- Failure to present convincing argument, issue not addressed. *Id.*
- Summary judgment, order modified to reflect that summary judgment was granted with prejudice. *Id.*
- Summary judgment, standard of review. *Hertlein v. St. Paul Fire & Marine Ins. Co.*, 283.

- Motion for a directed verdict is a challenge to the sufficiency of the evidence, challenge to sufficiency of the evidence must be reviewed prior to a review of trial errors. *Passley v. State*, 301.
- Appellant's argument raised for the first time on appeal, court will not address such arguments. *Prudential Ins. Co. v. Frazier*, 311.
- Motion for rule on clerk, good cause for granting. *Brown v. State*, 319.
- Summary judgment, standard of review. *Skaggs v. Johnson*, 320.
- Appellate review of equity cases, fact and law reviewed differently. *City of Lowell v. M & N Mobile Home Park, Inc.*, 332.
- Failure to request separation of inadmissible portions of transcribed statement, issue could not be argued on appeal. *Frazier v. State*, 350.
- Appellate court does not consider matters outside the record; on the record supplied, notice of appeal was timely. *Craig v. Traylor*, 363.
- Trial court failed to rule on whether Workers' Compensation Law applied here, issue waived on appeal. *Id.*
- Appellant entitled to have her claim heard, trial court's order as it pertained to appellant's breach of contract complaint reversed and remanded. *Clark v. Ridgeway*, 378.
- Prevailing party cannot appeal. *First Commercial Trust Co. v. Rank*, 390.
- Record on appeal confined to that which is abstracted, failure to abstract critical document precludes the court from considering the issues concerning it. *In re: Brumley*, 431.
- References to will in briefs not useful, record on appeal cannot be supplemented by statements made in the argument portion of the briefs. *Id.*
- Will never provided in its entirety, seven justices will not examine a single transcript. *Id.*
- Motion for rule on the clerk, good cause for granting. *Donihoo v. State*, 442.
- Motion for rule on clerk, petition for issuance of writ of habeas corpus, matter remanded for findings of fact. *In re: Rook v. Sheriff*, 443.
- Appeal would have been perfected had it not been for failure of counsel to admit fault where it was evident that attorney did not render effective assistance. *Norman v. State*, 444.
- Appellant's attorney is responsible for filing record, attorney compounded error by not accepting fault for untimely tender. *Id.*
- Direct appeal of conviction is matter of right, defendant cannot be penalized by dismissal of appeal when appointed counsel has failed to follow mandatory appellate rules. *Id.*
- Motion for rule on the clerk, granted. *Id.*
- Motion for rule on clerk treated as motion for belated trial. *Woodruff v. State*, 448.
- Appeal of criminal conviction, review of sufficiency, general rule. *Misskelley v. State*, 449.
- Objections must be raised in timely manner. *Id.*
- Issue precluded from appellate review where there is no clear ruling by trial court. *Id.*
- Probate cases, standard of review. *White v. Welsh*, 479.
- Appellants not interested persons, no standing to question issuance of probate court's order. *Id.*
- Review of chancery cases, when reversed. *Perryman v. Hackler*, 500.
- Sanctions requested by appellee declined, no authority cited for such sanctions. *Id.*
- Arguments made without argument or citation to authority, arguments not considered. *Id.*
- Court requested to disregard cross-appeal if no error found in rulings on direct appeal, arguments not addressed. *Id.*

- Chancery cases tried *de novo* on the record, when reversed. *Holaday v. Fraher*, 522.
- Issue not presented to the trial court, matter not reached on appeal. *Id.*
- Even constitutional arguments raised for the first time on appeal will not be considered. *Moore v. State*, 529.
- Motion for rule on clerk, good cause for granting. *Benton v. State*, 550.
- Harmless error, no reversal where evidence was merely cumulative. *Eichelberger v. State*, 551.
- Sufficiency of evidence, principles of appellate review. *Id.*
- Argument not ruled upon by trial court not preserved for appeal. *King v. State*, 558.
- Motion to complete record, granted. *Abernathy v. State*, 563.
- Motion for extension of time to complete and file record, exceptional circumstances. *Bradley v. State*, 564.
- Motion for rule on clerk treated as motion for belated appeal, good cause for granting. *Bridges v. State*, 565.
- Motion for rule on clerk treated as motion for belated appeal, good cause for granting. *Dokes v. State*, 566.
- Motion to dismiss appeal denied, motion to disqualify trial court denied, certiorari granted. *Story v. State*, 567.
- Motion for rule on clerk, petition for writ of certiorari to complete record, good cause for granting. *Williams v. State*, 568.
- Court overlooked nothing in original petition, petition for rehearing denied. *State v. Webb*, 87-A.
- Grounds for objection changed on appeal, argument waived on appeal. *Simpson v. State*, 582.
- Argument not raised at trial, court did not address it. *Nance v. State*, 583.
- Objection to physical evidence different from objection to opinion testimony, defendant cannot change argument on appeal. *Woods v. State*, 605.
- Motion for rule on clerk, clerk correctly refused to allow appellant to file record. *Guinn v. State*, 612.
- Motion for rule on clerk, appellant's allegation that he was misled was not material to failure to timely file notice of appeal, motion denied. *Id.*
- Motion for rule on clerk, good cause for granting. *Jordan v. State*, 616.
- Motion for rule on clerk, good cause for granting. *Patton v. State*, 617.
- Argument cannot be raised for first time on appeal, argument waived if not argued in original brief. *Jordan v. State*, 628.
- Argument procedurally barred, defendant was required to address lesser-included offenses in his motion for directed verdict to preserve challenge to sufficiency of evidence necessary to support conviction for lesser-included offense. *Id.*
- No ruling on motion obtained from trial court, point not preserved for appellate review. *Id.*
- Damages argument not preserved below, argument not reached on appeal. *Stacks v. Jones*, 643.
- Any error argued on appeal must first have been raised below, appellant's failure to do so prevented supreme court from considering his argument. *Id.*
- Sufficiency of evidence considered first. *Jones v. State*, 655.
- Sufficiency of evidence considered first. *King v. State*, 671.
- Denial of directed verdict treated as challenge to sufficiency of evidence, test for determining sufficiency of evidence. *Id.*
- Substantial evidence supported jury's verdict, trial court did not err in denying motion for directed verdict. *Id.*



- Finality of judgments and orders, jurisdictional requisite, duty of appellate court to determine. *Tucker v. Lake View Sch. Dist. No. 25*, 693.
- Finality of judgments and orders, requirements. *Id.*
- Finality of judgments and orders, requirements for finality not met. *Id.*
- Motion for extension to complete record, partial transcript filed, motion granted. *McGehee v. State*, 704.
- Arguments abandoned or not made to trial court, not addressed on appeal. *Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 706.
- Argument based on constructive fraud not made to trial, not considered. *Butler v. Comic*, 725.
- Court must rely upon abstracted order. *Stratton v. Arkansas State Hwy. Comm'n*, 740.
- Appeal dismissed for noncompliance with Rule 54(b), case remanded. *Id.*
- Appellant's obligation to obtain ruling at trial. *Oliver v. State*, 743.
- Review of chancery cases, trial court may be affirmed where it reached right result, even though for wrong reason. *Marine Servs. Unlimited, Inc. v. Rakes*, 757.
- Argument not raised below, argument procedurally barred. *Id.*
- No objection made at trial to limitation on closing argument, issue not preserved for appeal. *National Bank of Commerce v. Quirk*, 769.
- No authority or convincing argument made, decision of trial court will be affirmed. *Id.*
- Appellees not unreasonable in their belief that additional portions of record were needed for proper consideration of issues, motion to retax costs denied. *Id.*
- Attorney's duty to timely give notice of appeal and file record. *Mayfield v. State*, 801.
- Motion for belated appeal granted. *Id.*
- Motion for belated appeal, case remanded for evidentiary hearing. *Morrissey v. State*, 803.
- Motion for belated appeal, good cause for granting. *Smith v. State*, 804.
- Reversal and remand related solely to appellee Stecker, judgment entered in favor of appellee Robbins affirmed. *First Commercial Trust Co.*, 406-A.
- ATTORNEY & CLIENT:**
- Claims of ineffective assistance of counsel, when they may be raised on direct appeal, rationale behind rule of law. *Reed v. State*, 28.
- Appellant failed to raise the issue of counsel's ineffectiveness during trial, issue not preserved on appeal. *Id.*
- One who is not licensed attorney may not practice law in Arkansas. *Abel v. Kowalski*, 201.
- Motion to affirm or adopt authorization for recertification, action premature, motion denied. *In re: Baxter*, 232.
- Attorney barred from practice of law in Arkansas. *In re: Malaby*, 236.
- Asserted contract did not relate to attorney's performance of professional services for appellant, privity of contract was lacking. *Clark v. Ridgeway*, 378.
- Allegation of purposeful concealment of affidavit meritless, appellant presumably had a copy of the affidavit. *Id.*
- Appellant's allegations of breach of fiduciary duty and conflict of interest without merit, appellee had no duty to appellant based on legal representation. *Id.*
- Fact that attorney abandoned appeal is not in itself cause to relieve him of responsibility to provide effective assistance of counsel on appeal. *Norman v. State*, 444.

## ATTORNEY'S FEES:

Fees, order of attorney's fee after entry of judgment is collateral matter, issue not properly subject to review. *Mason v. Jackson*, 252.  
 Illegal exaction, may not be recovered absent statute or rule permitting recovery, attorney's fees not allowed in illegal-exaction case where no refund is sought. *Hamilton v. Villines*, 492.

## AUTOMOBILES:

Measure of damages, proving damages for property that is not a total loss. *Zhan v. Sherman*, 172.  
 Factfinder given latitude in its decision in awarding damages, award of damages supported by competent evidence. *Id.*

## BANKS &amp; BANKING:

Statute providing encoding and retention warranties to collecting banks and payors did not apply to appellee. *France v. Ford Motor Credit Co.*, 167.

## CIVIL PROCEDURE:

Rule does not distinguish between discovery and evidentiary depositions. *Whitney v. Holland Retirement Ctr., Inc.* 16.  
 Action failed to raise claim in tort or fraud, appellant's argument for reversal based on a false premise. *Wordlaw v. Laster*, 30.  
 Review of trial court's Rule 11 determination, requirements of Ark. R. Civ. P. 11. *Cherepski v. Walker*, 43.  
 Costs authorized to the prevailing party pursuant to rules of civil procedure, trial judge's award of authorized costs is discretionary. *Zhan v. Sherman*, 172.  
 Voluntary nonsuit of a claim distinguished from voluntary nonsuit with respect to an opposing party, nonsuit here involved a party and so was appealable. *Renfro v. Adkins*, 288.  
 Service of process, Nonresident Motorist Act allowed service of process on the Secretary of State, trial court had *in personam* jurisdiction over appellee. *Id.*  
 Service perfected under the Nonresident Motorist Act, trial court had personal jurisdiction over appellee. *Id.*  
 When A.R.C.P. Rule 12(b) motion treated as one for summary judgment, matters considered in summary judgment proceedings. *Clark v. Ridgeway*, 378.  
 Affidavits were presumably considered by the trial court, dismissal order treated as one for summary judgment. *Id.*  
 Class actions, notice. *Hamilton v. Villines*, 492.  
 Class actions, notice, purpose of requiring. *Id.*  
 Class actions, notice, chancellor's notice requirement improper, matter reversed and remanded. *Id.*  
 Plain error rule rejected by court. *Stacks v. Jones*, 643.  
 Appealable orders, A.R.C.P. Rule 54(b) jurisdictional matter must be raised by appellate court. *Stratton v. Arkansas State Hwy. Comm'n*, 740.  
 Appealable orders, requirements of Rule 54(b). *Id.*  
 Appealable orders, order failed to comply with Rule 54(b), dismissal warranted. *Id.*  
 Admission of depositions provided for under rules, both witnesses were out of state at time of trial. *National Bank of Commerce v. Quirk*, 769.  
 Depositions, rules do not distinguish between discovery and evidentiary depositions. *Id.*  
 Plaintiff's burden of proof in medical malpractice cases requires expert testimony when asserted negligence is not matter of common knowledge. *Id.*  
 Medical malpractice, exclusion of critical expert testimony constituted prejudicial error. *Id.*

## CONSTITUTIONAL LAW:

- Double Jeopardy Clause, case affirmed because record showed no violation. *Frana v. State*, 1.
- Legitimate equal protection argument not made, no constitutional basis for finding that municipal court lacked jurisdiction of misdemeanors that occurred outside the city limits. *State v. Webb*, 80.
- Only necessary constitutional issues decided. *Haase v. Starnes*, 263.
- Contract clause, not to be construed literally but to allow state to exercise police powers, no violation of contract clause. *Id.*
- Constitutional preference for general rather than special laws, directory or cautionary as applied to General Assembly. *Id.*
- Powers of government, General Assembly gives powers to municipalities, including zoning power. *City of Lowell v. M & N Mobile Home Park, Inc.*, 332.
- Legislative power discussed, legislative branch is the sole judge of the laws. *Id.*
- Legislative and judicial branch distinguished. *Id.*
- When a legislative enactment may be set aside by the judicial department. *Id.*
- Statutes presumed constitutional, when classifications permitted. *Misskelley v. State*, 449.
- Statutes, rationale for distinction between rights accorded those tried in juvenile court and those tried as adults. *Id.*
- Statutes, accomplice testimony, rationale for greater safeguards where appellant's conviction is based on testimony of third person. *Id.*
- Taking of blood not a violation of Fifth Amendment, protections of Fifth Amendment do not extend to demonstrative, physical tests. *Moore v. State*, 529.
- Ex post facto* laws prohibited. *Eichelberger v. State*, 551.
- Ex post facto* laws, acts constituted violation of *Ex Post Facto* Clause, increased burden of punishment to juveniles, punitive statutory scheme. *Id.*
- Denial of counsel, issue must be raised on direct appeal or be waived. *Oliver v. State*, 743.
- Denial of counsel, cases indicating issue may be raised in Rule 37 petition overruled. *Id.*
- Denial of counsel, new requirement for raising issue on direct appeal applied prospectively. *Id.*
- Right to counsel, constitutionally guaranteed. *Id.*
- Right to counsel, accused has right to represent himself, waiver, must be voluntary, knowing, and intelligent. *Id.*
- Right to counsel, trial court must inquire of accused's ability to retain counsel and explain right to attorney. *Id.*
- Right to counsel, financial capability to hire counsel not explored by trial court, appellant relinquished representation to standby counsel. *Id.*
- Right to counsel, appellant was not denied right to counsel, trial court's finding not clearly erroneous. *Id.*
- Issue not properly briefed and argued at trial, argument procedurally barred. *National Bank of Commerce v. Quirk*, 769.
- Provision under which appellant complained never shown to have been adopted, mere legislative recommendation does not constitute classification which violates equal protection clause. *Misskelley v. State*, 478-A.

## CONTEMPT:

- Counsel directed to appear and show cause why he should not be held in contempt. *Norman v. State*, 447.

## CONTRACTS:

- Rescission at law. *Douglass v. Nationwide Mut. Ins. Co.*, 105.
- Rescission on grounds of fraud or deceit, must be done as soon as rescinding party discovers truth. *Id.*
- Rescission on grounds of fraud or deceit, may be accomplished by prompt restoration of benefits to contracting party and by clear statement that rescission is intended. *Id.*
- Existence of for the trier of fact to determine, where a fact question is raised the issue then becomes whether the cause of action is precluded by prior litigation where breach of contract could have been raised. *Clark v. Ridgeway*, 378.
- Breach of contract, acquiring government approval was material element of contract, non-performance of contractual duty constitutes breach. *Zufari v. Architecture Plus*, 412.
- Appellants contention in error, authority cited by appellants inapplicable. *Perryman v. Hackler*, 500.
- Judgment for unpaid rent proper, evidence supported chancellor's finding. *Id.*
- Contract for sale terminated by its own terms, denial of appellants' request for reformation proper. *Id.*

## CORPORATIONS:

- Notice of shareholders' meetings required to be given to shareholders, when actions of majority of members of board of directors are invalid. *Marine Servs. Unlimited, Inc. v. Rakes*, 757.
- Appellee's acceptance of salary and failure to protest after notification of illegal termination constituted ratification, trial court erred in awarding appellee judgment for his salary to date of trial. *Id.*

## COURTS:

- Limitations as to cases tried in circuit versus municipal courts, municipal courts may assert limited subject-matter jurisdiction throughout the county in which it sits. *State v. Webb*, 80.
- Equal protection argument not reached, appellant's argument easily answered. *Id.*
- Chancery courts have a limited function when reviewing legislation, arbitrary and capricious defined. *City of Lowell v. M & N Mobile Home Park, Inc.*, 332.
- Decisions are applied retrospectively, limitation rules have long been in effect. *Flemens v. Harris*, 421.
- Subject-matter jurisdiction, raised by appellate court on its own motion. *Tucker v. Lake View Sch. Dist. No. 25*, 693.

## COVENANTS:

- Restrictive covenants, restrictions upon use of land not favored by courts, parties confined to meaning of language employed. *Ray v. Miller*, 578.
- Restrictive covenants, construction of. *Id.*
- No written restriction preventing construction of mixed masonry-and-metal fireplaces. *Id.*
- Restrictive covenants, must be in writing, effect of general plan of development. *Id.*
- Restrictive covenants, chancellor did not err in dismissing appellants' claim based on general plan of development. *Id.*

## CRIMINAL LAW:

- Accomplice, defendant's burden to prove. *Cole v. State*, 8.
- Accomplice defined. *Id.*

- Accomplice, trial court did not err by refusing to declare witness an accomplice as matter of law, appropriate for jury to decide whether participation was under duress. *Id.*
- Appellant held criminally culpable irrespective of the fact that he used the overt conduct of innocent agents, trial court properly denied appellant's motion for a directed verdict. *Parnell v. State*, 34.
- Where criminal trials must be held according to law. *State v. Webb*, 80.
- Defendant in criminal case is ordinarily presumed to be mentally competent to stand trial, test for determining if accused is competent. *Mitchell v. State*, 116.
- Competency to stand trial, substantial evidence supported circuit court's ruling. *Id.*
- Juvenile transfer, guidelines for consideration of motion to transfer. *Cole v. State*, 136.
- Juvenile transfer, burden of proof. *Id.*
- Juvenile transfer, trial court not required to give equal weight to each of the statutory factors, violence considered. *Id.*
- Juvenile transfer, standard of review. *Id.*
- Juvenile transfer, prosecutor's discretion to file charges in circuit court, circumstances. *Id.*
- Possession of handgun on school property, legislative intent behind criminal statute. *Id.*
- Information sufficient to establish that offense charged is of serious nature. *Id.*
- Juvenile transfer, serious charges constituted clear and convincing evidence supporting circuit court's decision to deny transfer. *Id.*
- Purpose of *Miranda* warnings, resolution of whether suspect was "in custody." *Solomon v. State*, 178.
- Review of voluntariness of confession, trial judge's ruling not clearly against the preponderance of the evidence. *Id.*
- Acquittal based on psychiatric report, trial court's authority and discretion. *Burns v. State*, 206.
- Denial of motion to acquit based on psychiatric report was within trial court's authority and discretion. *Id.*
- Defendant not found guilty by reason of mental disease or defect, jury not to be told of options available to trial court. *Id.*
- Forcible compulsion defined, test for determining whether there was force. *Mosley v. State*, 245.
- Accomplice liability statute discussed, criminal liability makes no distinction between principals and accomplices. *Passley v. State*, 301.
- Accomplice liability, relevant facts considered. *Id.*
- Statutory rape is serious crime. *Hansen v. State*, 407.
- "Purposely" defined. *Misskelley v. State*, 449.
- Murder, intent usually inferred from circumstances. *Id.*
- Accomplice liability, factors. *Id.*
- Accomplice liability, mere presence, acquiescence, silence, or knowledge not sufficient, when conviction will be upheld. *Id.*
- Accomplice liability, substantial evidence that appellant purposely aided and facilitated commission of first-degree murder. *Id.*
- Motion for new trial, newly discovered evidence, grounds for reversal. *Id.*
- Motion for new trial, newly discovered evidence, appellant did not use due diligence in trying to discover most of evidence. *Id.*
- Motion for new trial, newly discovered evidence, medical examiner's opinion would not have had impact on trial's outcome, trial court did not abuse its discretion in denying new trial. *Id.*

- Delivery of controlled substance, "attempted transfer", not necessary to show exchange of drugs for money. *Jones v. State*, 496.
- Accomplice testimony, independent, corroborative evidence required. *Hogue v. State*, 515.
- Defendant must either have the trial court declare a person an accomplice as a matter of law or submit the issue to the jury, defendant need not do both to preserve the issue of an erroneous denial of a directed verdict motion. *Id.*
- Trial court made a finding that person was an accomplice, appellant preserved the issue of whether the trial court erred in declining to direct a verdict on insufficient corroborative evidence. *Id.*
- Determination whether magistrate had a substantial basis for finding probable cause, totality of circumstances approach used. *Moore v. State*, 529.
- Trial court had substantial basis on which to find probable cause to grant the order for blood withdrawal. *Id.*
- Disposition of offenders, illegal sentence, two-year imprisonment followed by five-year probation exceeded maximum statutory penalty. *Petree v. State*, 570.
- No erroneous finding of any aggravating circumstance with respect to death penalty was found, harmless-error review not conducted. *Nance v. State*, 483.
- Voluntariness of confession, standard of review. *Jones v. State*, 655.
- Voluntariness of confession, finding that both of appellant's recorded statements were voluntary was not clearly erroneous. *Id.*
- Accomplice, defendant's burden to prove. *King v. State*, 671.
- Accomplice defined. *Id.*
- Accomplice, facts did not show conclusively that witness was an accomplice, trial court correctly refused to declare witness an accomplice as matter of law. *Id.*
- Accomplice, remand for retrial appropriate where witness's status presents jury question and jury not given opportunity to consider issue. *Id.*

#### CRIMINAL PROCEDURE:

- Directed verdict motion must state specific grounds for motion. *Mitchell v. State*, 116.
- A.R.Cr.P. Rule 37, amended to provide appropriate limitations for seeking postconviction relief after action by circuit court upon remand. *Bowen v. State*, 233.
- Severance, granting or refusing discretionary with the trial court. *Passley v. State*, 301.
- Denial of severance proper, proximity in time and place provided an ample basis for denial of severance. *Id.*
- Use of person's silence for impeachment purposes, bar does not apply to cross-examination regarding prior inconsistent statements. *Frazier v. State*, 350.
- Confessions, review of voluntariness, factors. *Misskelley v. State*, 449.
- Confessions, custodial confession presumed involuntary. *Id.*
- Confessions, false promise of reward or leniency invalidates confession, no evidence appellant's confession obtained in such a manner. *Id.*
- Confessions, age and mental capacity alone are not sufficient to suppress confession. *Id.*
- Confessions, youth alone not sufficient to exclude confession. *Id.*
- Confessions, low intelligence quotient alone will not render confession involuntary. *Id.*
- Confessions, appellant repeatedly advised of his rights, no stranger to criminal-justice system. *Id.*
- Confessions, four-hour interrogation not undue, officers' persistent questioning was permissible, no evidence of mental or physical punishment. *Id.*

- Confessions, police may use some psychological techniques so long as accused's free will is not completely overborne, numerous factors pointed to voluntariness of confession. *Id.*
- Confessions, trial judge's determination of voluntariness was correct, waiver of rights was voluntary. *Id.*
- Confessions, juveniles, failure to obtain parent's signature on waiver form does not render confession inadmissible, requirement of parental consent limited to juvenile-court proceedings. *Id.*
- Warning to persons asked to appear at police station. *Id.*
- Confessions, failure of police to record entire interrogation, not required by Arkansas law, considered as factor, did not invalidate confession. *Id.*
- Blood samples properly taken, even assuming the rules were violated, appellant failed to demonstrate prejudice. *Moore v. State*, 529.
- Pretrial identification, when Due Process Clause is violated. *King v. State*, 558.
- Suggestive pretrial identification, factors considered in determining reliability of identification. *Id.*
- Photo lineups not unduly suggestive, appellant's argument without merit. *Id.*
- Identification process not unduly suggestive, no abuse of discretion in trial court's admission of the evidence. *Id.*
- Postconviction relief, A.R.Cr.P. Rule 37 filing deadlines also govern statutory petitions, jurisdictional in nature. *Petree v. State*, 570.
- Postconviction relief, petition not filed in timely manner, circuit court had no jurisdiction to correct sentence, case remanded for reinstatement of original judgment and commitment order. *Id.*
- Appellant not entitled to verbatim transcription of probable-cause hearing, officer's affidavit and bench warrant satisfied appellant's constitutional requirements to due process. *Nance v. State*, 583.
- Denial of demurrer by trial court not in error, lack of probable cause is not statutory ground for demurrer to indictment. *Id.*
- Circuit court has no authority to conduct preliminary hearing to determine if probable cause exists to justify charge brought by information. *Id.*
- Information filed charging appellant with offense, accused not entitled to judicial review of such filing. *Id.*
- Pretrial amendment of information which does not change nature of crime charged is allowed, amendment to information to add allegation of habitual offender does not change nature or degree of crime. *Id.*
- Information need not be accompanied by affidavit, appellant cited no authority for his argument. *Id.*
- Information containing specific charge may by itself constitute bill of particulars, such was case here. *Id.*
- Reading of instruction in disjunctive was proper, appellant's argument without merit. *Id.*
- Function of bill of particulars, appellant's argument meritless. *Id.*
- Sentencing, departures from standards, any defect in departure form should have been raised to trial court. *Woods v. State*, 605.
- Sentencing, departures from standards, trial court circled numbers of apposite aggravating circumstances, procedure was appropriate under statute. *Id.*
- Postconviction relief, meritless appeal dismissed. *Hamilton v. State*, 614.
- Postconviction relief, all grounds must be raised in A.R.Cr.P. Rule 37 petition, statute in conflict with rule. *Id.*
- Postconviction relief, petition was untimely. *Id.*
- Directed-verdict motion must apprise trial court of specific basis for motion. *Jones v. State*, 655.

- Speedy trial, shifting burden. *Id.*
- Speedy trial, period of delay attributable to defendant excludable for good cause. *Id.*
- Speedy trial, trial court's failure to set forth excluded period in order or docket, no automatic reversal if contemporaneous record made. *Id.*
- Speedy trial, no contemporaneous record made by circuit judge, oversight remedied by subsequent order. *Id.*
- Post-conviction relief, restriction to application of Ark. R. Crim. P. 37 when petitioner not informed of provisions of then applicable 36.4. *Cherry v. State*, 733.
- Application of Rule 37 where defendant had not been apprised of its existence, only firmly established and regularly followed state practice may be interposed by state to prevent subsequent review of federal constitutional claim. *Id.*
- Fox v. State* overruled to extent its application denied procedural due process to defendants who had not been timely advised of their post-conviction remedy under Rule 36.4, case reversed and remanded for hearing on merits of appellant's petition. *Id.*
- Death penalty, motion to limit appeal, remanded for findings by trial court. *Hill v. State*, 796.
- Death penalty, when abandonment of appeal of death sentence permitted. *Id.*
- Death penalty, mandatory review of competency hearing. *Id.*

## DAMAGES:

- Award for damaged fence affirmed, competent testimony regarding cost of the fence's repair not objected to. *Zhan v. Sherman*, 172.
- Trial court may not substitute its judgment for jury's when there is basis in evidence. *Smith v. Hansen*, 188.
- Remittitur reviewed *de novo*. *Id.*
- Remittitur order reversed and remanded for reinstatement of original verdicts. *Id.*
- Punitive damages, no fixed standard of measurement, factors that may be considered. *Id.*
- Punitive damages, trial court did not err in submitting issue to jury. *Id.*
- Punitive damages, purpose, not mandatory, remand not warranted on due-process grounds. *Id.*
- Jury determines amount of damages, trial court has some power to put defective verdict in form carry out the intention of the jury, but may not substitute its conclusion as to a material matter. *Robinson v. Robinson*, 224.
- Trial court impermissibly invaded the province of the jury to determine the amount of damages, new trial ordered for determination of damages and liability. *Id.*
- Award of punitive damages not error, record did not support appellant's argument. *Id.*
- Claim award excessive, factors on review. *Builder's Transp., Inc. v. Wilson*, 327.
- Future expenses do not require the same degree of certainty as past medical expenses, future medical expenses properly considered. *Id.*
- Sufficient proof of injury and potential for future medical expenses, damage award did not shock the conscience. *Id.*
- Burden of proving damages, proof must consist of facts. *Marine Servs. Unlimited, Inc. v. Rakes*, 757.
- Child had no independent right to recover medical expenses, trial court's ruling proper. *National Bank of Commerce v. Quirk*, 769.

## DISCOVERY:

- Pertinent rules of discovery discussed, prosecutor responsible for providing reports of tests and information concerning his witnesses. *Mosley v. State*, 244.



Violation of, key to determining if violation is reversible error. *Id.*  
Violation occurred, error was harmless. *Id.*  
Denial of, discretion of trial court, policy considerations regarding depositions of police officers, no abuse of discretion. *Misskelley v. State*, 449.  
Discovery violations, standard of review on imposing sanctions. *Moore v. State*, 529.

## DIVORCE:

Alimony, chancellor can make award of alimony that is reasonable under circumstances. *Mulling v. Mulling*, 88.  
Alimony, purpose of, primary factors. *Id.*  
Alimony, chancellor did not abuse discretion in reserving award of alimony. *Id.*  
Alimony, where spouse is unable to pay at time decree is entered, court may decline to award specific amount until such time as changed circumstances permit payment of alimony. *Id.*  
Alimony, decree modified to reflect that appellant's unemployment prevented him from paying alimony at time of entry of decree. *Id.*  
Alimony, conflicting case law overruled. *Id.*  
Division of proceeds, record supported chancellor's finding that parties had settled respective equity interests in house by agreeing to sell and divide proceeds. *Id.*

## EVIDENCE:

Hearsay, statement by co-defendant was not "in furtherance" of a crime. *Cole v. State*, 8.  
Hearsay defined, statement recited by State's witness was not hearsay because it was not offered for truth of matter asserted. *Id.*  
Hearsay, statement admissible because it tended to show effect on listener. *Id.*  
Challenge to the sufficiency of, factors on review. *Pike v. State*, 56.  
Jury chose to believe eyewitness, sufficient evidence found that appellant committed the murder. *Id.*  
Much of witness's testimony could be reconciled with the physical evidence, evidence reviewed in the light most favorable to the State. *Galvin v. State*, 125.  
Excited utterance exception to hearsay rule discussed. *Luedemann v. Wade*, 161.  
Statement made to policeman erroneously admitted, excited utterance not proven. *Id.*  
Statement incorrectly admitted as an excited utterance, evidence was cumulative and therefore harmless. *Id.*  
Nonjury case should not be reversed because of the admission of incompetent evidence, when reversal is proper, estimate evidence did not affect trial court's findings or award of damages. *Zhan v. Sherman*, 172.  
Witness sequestration, victim's daughters should have been sequestered by the trial court. *Solomon v. State*, 178.  
Sequestration rule, purpose of. *Id.*  
Victim's daughters improperly allowed to remain in court during trial, prejudice demonstrated, conviction reversed and remanded. *Id.*  
Evidence alleged insufficient, substantial evidence discussed. *Id.*  
Jury resolves conflicting versions of the facts, substantial evidence found to support the verdict. *Id.*  
Proffered evidence inadmissible, direct examination did not open the door. *Id.*  
Victim's violent character not an essential element of the murder charge or of appellant's defense of accident, appellant's attempt to use proffered testimony circumstantially properly disallowed. *Id.*  
Evidence of prior, similar bad acts properly admitted, pedophile exception to rules applicable. *Clark v. State*, 211.

- Challenged testimony relevant, probative value outweighed prejudicial effect. *Id.*  
Purpose of Rule 615, appellant did not demonstrate reversible error. *Id.*  
Erroneous admission of hearsay testimonies rendered harmless, victim's testimony independently evidenced her rape. *Id.*  
Admission of statement may have been error, error not shown to be prejudicial. *Robinson v. Robinson*, 224.  
Challenge to sufficiency of, guidelines. *Mosley v. State*, 244.  
Substantial evidence of forcible compulsion, victim's testimony alone sufficient to sustain rape conviction. *Id.*  
Jury determines credibility, jury clearly believed medical testimony. *Id.*  
Challenge to sufficiency, substantial evidence discussed. *Passley v. State*, 301.  
Proof sufficient to establish the joint nature of appellant's activities with the co-defendants, state not required to prove appellant physically entered their home with the requisite intent. *Id.*  
When trial court will exclude relevant evidence, trial court's decision reversed only upon a showing of manifest abuse of discretion. *Id.*  
911 call allowed into evidence by trial court, no abuse of discretion found. *Id.*  
Prior consistent statement, when not hearsay, admissible in present case. *Frazier v. State*, 350.  
Prior consistent statement, limited admissibility, appellant could not complain that statement was used substantively where limiting instruction was neither requested nor accepted. *Id.*  
Expert witness, determination of qualifications. *First Commercial Trust Co. v. Rank*, 390.  
Expert witness, not critical whether medical expert is general practitioner or specialist. *Id.*  
Expert witness, emergency-medicine physician's opinion on standard of care for doctors in detecting and reporting child abuse was apposite, variances in practices not pivotal factor in diagnosing child abuse. *Id.*  
Expert witness, need not be one who has practiced in particular locality if appropriate foundation is established. *Id.*  
Expert witness, trial court abused its discretion in excluding medical-expert testimony. *Id.*  
Letter erroneously admitted under business-record exception to hearsay rule, evidence was cumulative and therefore harmless. *Zufari v. Architecture Plus*, 413.  
Trial court accorded wide discretions in rulings. *Misskelley v. State*, 449.  
Polygraph tests, results not admissible. *Id.*  
Trial court's exclusion of polygraph results upheld. *Id.*  
Expert testimony, witness not allowed to refer to interview with appellant, no prejudicial violation of Ark. R. Evid. 703. *Id.*  
Expert testimony, "suggestibility" test results, appellant not prejudiced by trial court's refusal to allow, witness allowed to offer opinion.  
Relevant evidence defined, trial court's ruling on relevancy given great weight. *Id.*  
Every item of challenged evidence corroborated some aspect of appellant's confession, evidence offered by the State to corroborate other evidence is relevant.  
Any corroboration of confession was highly probative, ruling admitting evidence upheld. *Id.*  
Ample evidence that appellant attempted to transfer cocaine for money. *Jones v. State*, 496.  
Corroborative evidence must be sufficient standing alone to establish the commission of the offense and to connect the defendant with it, circumstantial evidence qualifies as corroborating evidence. *Hogue v. State*, 515.

Sufficient evidence to connect appellant to the crime, evidence connecting appellant to the crime was substantial. *Id.*

Admissibility of novel scientific evidence, relevancy standard used. *Moore v. State*, 529.

DNA profiling no longer novel scientific evidence, trial judge was correct. *Id.*

Trial court conducted inquiry into whether reliable methodology was used in creating DNA profiles, any challenge to the conclusions reached should have been made at trial. *Id.*

Admission of relevant evidence within the sound discretion of the trial court, standard of review. *Id.*

Hearsay, invoice was written assertion made out of court and offered to prove amount of damages. *Eichelberger v. State*, 551.

Admission of invoice was not merely cumulative, victim never testified to amount of his damages, reversible error. *Id.*

Admission of itemized statement reflecting damages did not prejudice appellants. *Id.*

Challenge to sufficiency of, factors on review. *Nance v. State*, 583.

Motion for directed verdict properly denied, circumstantial evidence of attempted rape was substantial. *Id.*

Admissibility of photographs, no abuse of discretion found in trial court's admission of photos. *Id.*

Appellant's objection to photograph at trial limited to its admission into evidence, showing photo to medical examiner not prejudicial. *Id.*

Rebuttal evidence presented during sentencing phase of trial, trial court had discretion to allow such evidence. *Jordan v. State*, 628.

Tape recordings and transcriptions, trial court did not err in denying motion to strike recording. *Jones v. State*, 655.

Tape recordings and transcriptions, argument that recording and transcription prepared by different secretary should have been dismissed was without merit. *Id.*

Ruling on relevancy, factors on review, no abuse of discretion shown. *National Bank of Commerce v. Quirk*, 769.

Trial court has discretion to exclude otherwise admissible testimony, no abuse of discretion found. *Id.*

Exclusion of evidence of past employment as medical expert not error, no abuse of discretion found. *Id.*

**EXECUTORS & ADMINISTRATORS:**

Sale of estate property, notice to "interested persons", definition. *White v. Welsh*, 479.

**FRAUD:**

Promise cannot be made false by subsequent events and still be considered intentional fraud unless party making the promise knew it would not be kept at the time the promise was made. *Clark v. Ridgeway*, 378.

No factual basis found for the conclusory allegation that appellee intentionally misrepresented his neutrality in the divorce case, court's finding that appellee was immune from appellant's complaint was correct. *Id.*

**GUARDIAN & WARD:**

Appellant paid proceeds to putative guardian without court authority, chancellor's ruling correct. *Prudential Ins. Co. v. Frazier*, 311.

Parental Kidnapping Prevention Act applicable, appellants sought temporary and eventual permanent guardianship. *Murphy v. Danforth*, 482.

Parental Kidnapping Prevention Act, hierarchy of jurisdictional preferences. *Id.*

Parental Kidnapping Prevention Act, first two jurisdictional categories satisfied. *Id.*

Parental Kidnapping Prevention Act, third jurisdictional category satisfied.  
 Parental Kidnapping Prevention Act, prohibits court from exercising jurisdiction if another court is already doing so, Arkansas court appropriately refused to intervene. *Id.*  
 Parental Kidnapping Prevention Act, Uniform Child Custody Jurisdiction Act, emergency powers limited, emergency jurisdiction should not be used to modify custody order permanently. *Id.*  
 Appellants sought permanent change of custody under emergency jurisdiction, Arkansas court correctly refused to exercise emergency jurisdiction. *Id.*

#### HIGHWAYS:

Common law rule adhered to, court declined to place the burden of public safety on those whose properties abut streets and highways. *Driggers v. Locke*, 63.

#### INSURANCE:

Rescission on grounds of fraud or deceit, right of insurer to rescind coverages is unavailable where third-party claims are at issue. *Douglass v. Nationwide Mut. Ins. Co.*, 105.  
 Cancellation statutes, sixty-day period for cancellation not applied under circumstances. *Id.*  
 Statute of limitations commences for an insurance agent at the time the negligent act occurs. *Flemens v. Harris*, 421.  
 Limitation of actions, decision based on longstanding rule, trial court correctly applied the law. *Id.*

#### JUDGES:

Disqualification discretionary, no abuse of discretion in decision not to recuse. *Bryant v. State*, 130.

#### JUDGMENT:

Summary judgment, when final appealable order exists. *Driggers v. Locke*, 63.  
 Nonsuit was against one of several parties, where there are multiple parties the disposition of the case as to fewer than all does not amount to a final appealable order. *Id.*  
 Finality of judgment where there has been a nonsuit without prejudice against one of multiple parties arising out of a single incident, similar cases have not been dismissed. *Id.*  
 Final and appealable order, where the nonsuit is to a party and not to an issue in the case, previous ruling inapplicable. *Id.*  
 Summary judgment, issue involving question whether duty exists properly decided by summary judgment. *Hall v. Rental Management, Inc.*, 143.  
 Standards for summary judgment, factors on review. *Renfro v. Adkins*, 288.  
 Summary judgment, once *prima facie* entitlement to summary judgment established, burden shifts to opposing party. *Id.*  
 Several material issues of fact existed as to appellee Jaunita Adkins, trial court erred in granting summary judgment as to this negligent entrustment issue. *Renfro v. Adkins*, 288.  
 Summary judgment properly granted, no evidence that either party supplied truck to appellee. *Id.*  
 Propriety of summary judgment in favor of appellees Frederick and Rebecca Adkins not addressed, no basis for a claim against them. *Id.*  
 Summary judgment, burden of sustaining motion on moving party, proof viewed in light most favorable to party resisting motion. *Skaggs v. Johnson*, 320.  
 Summary judgment, when proper. *Id.*

Summary judgment, standards on review. *Craig v. Traylor*, 363.  
Trial court invaded province of the jury in making a proximate cause determination, trial court erred in granting summary judgment as a matter of law. *Id.*  
Motion to set aside judgment failed to demonstrate prejudice, trial court's action was consistent with appellant's conviction for capital murder. *Nance v. State*, 583.  
Jurisdiction to modify judgment not in issue here, when trial court loses jurisdiction. *Id.*  
Standard of review for summary judgment, factors on review. *National Bank of Commerce v. Quirk*, 769.

**JURISDICTION:**

Appellate court has no jurisdiction over ecclesiastical matters, court would not address claims. *Cherepski v. Walker*, 43.  
If offense occurred outside the territorial jurisdiction of the court, a judgment rendered by the court would be void. *State v. Webb*, 80.  
Place where misdemeanor charges must be tried, not limited to the city in which the court sits. *Id.*  
Chancellor had subject matter jurisdiction, action for accounting against an insurance company and former guardian. *Prudential Ins. Co. v. Frazier*, 311.  
Determination as to whether zoning enactment permissible, chancery court has subject-matter jurisdiction. *City of Lowell v. M & N Mobile Home Park, Inc.*, 332.

**JURY:**

Inadequacy of the jury's award a primary issue, when trial court's denial of a motion for a new trial will be sustained. *Whitney v. Holland Retirement Ctr., Inc.* 16.  
Record on appeal not clear as to expenses claimed, court would not speculate as to verdict reached by jury. *Id.*  
Instructions, instruction couched in alternative, jury could readily have discerned that tort of outrage is intentional tort. *Croom v. Younts*, 95.  
Appellant had burden of proving systematic exclusion of members of his racial group from venire, elements of *prima facie* showing of systematic exclusion. *Mitchell v. State*, 116.  
Selection process, mere showing that venire is not racially representative will not make *prima facie* showing of racial discrimination. *Id.*  
Selection process, appellant did not meet test of *prima facie* showing of racial discrimination. *Id.*  
*Batson* challenge, procedure to be followed. *Id.*  
*Batson* challenge, elements of *prima facie* case that racial discrimination is basis of juror challenge, standard of review. *Id.*  
*Batson* challenge, appellant did not make *prima facie* case. *Id.*  
Discrimination, presence of minority members on jury not determinative but significant, State's explanation for challenge was racially neutral. *Id.*  
Objections to jury verdict, time to object is prior to discharge of jury. *Smith v. Hansen*, 188.  
Expert testimony, jury not bound to accept expert testimony as conclusive, jury to decide whether defendant has sustained burden of proving insanity, jury is sole judge of credibility of witnesses. *Burns v. State*, 206.  
Sufficient evidence existed for jury to find appellant was sane when he committed crimes. *Id.*

- Instruction properly given, argument without merit. *Clark v. State*, 211.
- Determination of credibility, free to believe part of evidence and reject other parts. *Misskelley v. State*, 449.
- Use of sudden emergency instruction, instruction inapplicable if any evidence of negligence on the part of the person seeking the instruction. *Frisby v. Agerton Logging, Inc.*, 508.
- Use of sudden emergency instruction inappropriate when there are two parties to the action, each of which proves some fault on the part of the other, sudden emergency instruction improperly given. *Id.*
- Appellant's argument erroneous, no error to instruct jury on both premeditated and deliberated mode and felony-murder mode of committing capital murder. *Nance v. State*, 583.
- Appellant not convicted on purportedly erroneously given instruction, argument not considered. *Id.*
- Jury may convict on some counts and not on others, defendant may not attack his conviction on one count because it is inconsistent with his acquittal on another count. *Jordan v. State*, 628.
- Res ipsa loquitur* instruction properly refused, substantial evidence to contrary that accident had not even occurred. *National Bank of Commerce v. Quirk*, 769.
- JUVENILES:**
- Arkansas Rules of Criminal Procedure apply to delinquency proceedings. *Mason v. State*, 361.
- Juvenile defendants may not appeal from plea of guilty or nolo contendere except for conditional guilty plea, appellants' guilty pleas were not conditional, supreme court precluded from hearing their appeals. *Id.*
- Transfer from circuit to juvenile court, factors. *Hansen v. State*, 407.
- Decision to hold juvenile for trial as adult must be supported by clear and convincing evidence, when overturned. *Id.*
- Commitment to juvenile facility not available for person older than eighteen. *Id.*
- Trial court did not err in denying transfer. *Id.*
- Decision to retain or transfer case to juvenile court, factors considered. *Macon v. State*, 498.
- Transfer considerations, not all factors need be given equal consideration. *Id.*
- Trial court concluded available juvenile rehabilitation was limited and inappropriate, proof was sufficient to deny appellant's motion to transfer. *Id.*
- Transfer from circuit to juvenile court, factors considered. *Green v. State*, 635.
- Transfer from circuit to juvenile court, court not required to give factors equal weight. *Id.*
- Transfer from circuit to juvenile court, seriousness of offense coupled with violence is sufficient for denial of motion to transfer. *Id.*
- Transfer from circuit to juvenile court, offense charged was serious. *Id.*
- Transfer from circuit to juvenile court, information may be sufficient evidence of serious and violent nature of crime alleged, information in present case did not allege violence. *Id.*
- Transfer from circuit to juvenile court, appellant charged with having "recklessly" caused death, State did not intend to prove that "violence was employed." *Id.*
- Transfer from circuit to juvenile court, seriousness alone not sufficient to deny transfer, factors pointed toward transfer to juvenile court, matter reversed and remanded. *Id.*
- Transfer from circuit to juvenile court, factors considered. *Guy v. State*, 649.
- Transfer from circuit to juvenile court, party seeking transfer has burden of proving transfer is warranted. *Id.*

Transfer from circuit to juvenile court, court not required to give factors equal weight. *Id.*

Transfer from circuit to juvenile court, circuit court's decision to retain jurisdiction must be supported by clear and convincing evidence. *Id.*

Transfer from circuit to juvenile court, standard of review. *Id.*

Transfer from circuit to juvenile court, use of violence is sufficient factor for circuit court to retain jurisdiction. *Id.*

Transfer from circuit to juvenile court, appellant's association with use of weapon in "drive-by" shooting was sufficient to satisfy violence criterion. *Id.*

Transfer from circuit to juvenile court, no violence beyond that necessary to commit offense is necessary. *Id.*

Transfer from circuit to juvenile court, circuit court's order retaining jurisdiction affirmed. *Id.*

**LABOR:**

Employer failed to maintain employment records required by Fair Labor Standards Act, court can rely on employee's own recollections to determine number of hours worked. *Marine Servs. Unlimited, Inc. v. Rakes*, 757.

Fair Labor Standards Act, burden of proof of employee suing employer for unpaid wages or overtime. *Id.*

Appellee sought unpaid wages and overtime under Fair Labor Standards Act, no error in trial court's awarding judgment for appellee. *Id.*

**LANDLORD & TENANT:**

Duties of landlord to tenant, generally no duty to protect tenant from criminal acts. *Hall v. Rental Management, Inc.*, 143.

Duties of landlord to tenant, landlord who assumes duty not required is removed from general rule. *Id.*

Duties of landlord to tenant, landlord's use of modest, conscientious safety measures did not impose duty to protect tenants from third-party criminal acts. *Id.*

Duties of landlord to tenant, case controlled by general rule. *Id.*

**LIMITATION OF ACTIONS:**

Affirmative defense, burden of proof. *Cherepski v. Walker*, 43.

Allegations against appellee barred on the face of the complaint, burden shifted to appellant to prove that the statute was tolled. *Id.*

Statute barred action against appellee, trial court correctly ruled that no material factor was left in dispute. *Id.*

Medical Malpractice Act's statute of limitations superseded Wrongful Death Act's statute of limitations, trial court did not err in granting summary judgment. *Hertlein v. St. Paul Fire & Marine Ins. Co.*, 283.

Ark. Code Ann. § 16-56-111(b) is applicable statute of limitations for written-contract actions, held applicable to present case. *Zufari v. Architecture Plus*, 411.

Appellant's cause of action accrued more than five years before complaint was filed, test for determining when breach-of-contract action accrues. *Id.*

Appellant filed suit well after applicable statute of limitations had expired. Action was time-barred. *Id.*

Request for trial court to order arbitration was time-barred. *Id.*

Trial court found right of parents to recover expenses incurred on behalf of daughter barred by statute of limitations, trial court not in error. *National Bank of Commerce v. Quirk*, 769.

## MASTER &amp; SERVANT:

Discretionary term of employment allows either party to terminate at will, employer should not have absolute right to terminate employee for act done for good of public. *Marine Servs. Unlimited, Inc. v. Rakes*, 757.

Exceptions to employment-at-will doctrine, at-will employee has cause of action for wrongful discharge if fired in violation of state's well established public policy. *Id.*

Discharge of at-will employee, when public policy contravened. *Id.*

## MOTIONS:

Motion to dismiss treated as one for summary judgment, limitations on review. *Cherepski v. Walker*, 43.

Denial of motion for directed verdict, factors on review. *Galvin v. State*, 125.

Motion for mistrial properly denied, trial court did not abuse its discretion. *Solomon v. State*, 178.

Directed verdict, whether family doctor had reasonable cause to suspect abuse was issue for resolution by jury. *First Commercial Trust Co. v. Rank*, 390.

Directed verdict, supreme court reluctant to affirm directed verdict on behalf of a plaintiff, test not met. *Id.*

Directed-verdict motion defined, substantial evidence defined. *Misskelley v. State*, 449.

Motion to quash felony information for lack of probable cause properly denied at trial, lack of probable cause is not statutory ground for motion to set aside indictment. *Nance v. State*, 583.

Review of order granting motion to dismiss, how treated. *National By-Products, Inc. v. City of Little Rock*, 619.

Appellant's directed verdict motion failed to specify excessive damages as ground, motion for directed verdict must state movant's specific grounds. *Stacks v. Jones*, 643.

Motion for directed verdict, factors on review. *National Bank of Commerce v. Quirk*, 769.

Directed verdict properly granted, no proof presented as to applicable standard of care. *Id.*

## NEGLIGENCE:

Duty of landowner at common law, no duty imposed to control vegetation for the benefit of users of a public highway. *Driggers v. Locke*, 63.

When summary judgment is appropriate. *Smith v. Hansen*, 188.

Duty to control conduct of third person, not owed unless special relationship exists between tortfeasor and third person or victim. *Id.*

No *bona fide* claim of negligence existed. *Id.*

Case presented cause of action of intentional tort rather than negligence, summary judgment appropriately granted. *Id.*

Negligence the sole theory for liability imposed, failure to instruct the jury on the theory of intentional tort, prejudicial error found. *Robinson v. Robinson*, 224.

Prima facie case of, negligence defined. *Mason v. Jackson*, 252.

Trial court's conclusions regarding issue of negligence not clearly erroneous. *Id.*

Medical malpractice, when expert testimony is required. *Haase v. Starnes*, 263.

Negligent entrustment, necessary elements of proof. *Renfro v. Adkins*, 288.

Medical malpractice, elements necessary to sustain claim. *Skaggs v. Johnson*, 320.

When expert testimony is required. *Id.*

Medical malpractice, doctors made conscious medical decision to leave foreign object in appellant's leg, expert testimony required. *Id.*



Medical malpractice, appellees met burden of proving prima facie case for summary judgment, appellants failed to show disputed issue of fact existed, order of dismissal affirmed. *Id.*

Comparative fault requires a determination of proximate cause, proximate cause defined. *Craig v. Traylor*, 363.

Issue of proximate causation for damages not relevant where appellee found to be immune from negligence claim, appellant's point without merit. *Clark v. Ridgeway*, 378.

Causation, ordinarily a fact question for jury. *First Commercial Trust Co. v. Rank*, 390.

Causation, fact issue existed on whether failure to diagnose and report child abuse was partial cause of child's death. *Id.*

Trial court must assess whether any proof of negligence exists on the part of the party requesting the instruction, trial court erred in giving the sudden emergency instruction. *Frisby v. Agerton Logging, Inc.*, 508.

Doctrine of *res ipsa loquitur*, when doctrine may be invoked. *National Bank of Commerce v. Quirk*, 769.

**NEW TRIAL:**

Error in the assessment of the amount of recovery is a ground for a new trial, clear and manifest abuse of discretion standard used. *Luedemann v. Wade*, 161.

Jury determines credibility, trial court did not abuse its discretion in denying motion for a new trial. *Id.*

Denial of motion, standard of review, trial court did not err. *Smith v. Hansen*, 188.

**PARENT & CHILD:**

Hearing to terminate parental rights or remove custody, right to counsel. *Briscoe v. State*, 4.

Hearing to terminate parental rights or remove custody, notice of right to counsel, issue moot. *Id.*

Hearing to terminate parental rights or remove custody, statutory provision for right to attorney is mandatory, error to allow hearing at which appellant asked for attorney to proceed, error harmless. *Id.*

Hearing to terminate parental rights or remove custody, error of failing to provide counsel in earlier hearings was cured by provision of counsel if final hearing. *Id.*

Uniform Interstate Family Support Act's purpose is the support of the child and the enforcement of the same, consideration of collateral issues runs counter to the act's goal. *Chaisson v. Ragsdale*, 373.

Chancellor's authority in considering the UIFSA petition limited to child support and enforcement, chancellor's order as it pertained to setoff and visitation reversed. *Id.*

Child support, modification of order, statute providing for relieving non-biological adjudicated father of future support held applicable. *State v. Phillippe*, 434.

Child support, order of refund reversed, contrary to preponderance of evidence and the law. *Id.*

**PARTIES:**

Direct action statute limited to insurance carriers of cooperative non-profit organizations, individuals are not mentioned. *National Bank of Commerce v. Quirk*, 769.

Suits allowed under direct action statute, statute not applied retroactively. *Id.*

Motion for intervention improperly denied, intervenor had independent cause of action. *Id.*

## PETITIONS:

Request for approval of referral fee, request referred to Committee on Professional Conduct. *In re: Petition of the Arkansas Bar Ass'n*, 203.

## PHYSICIANS AND SURGEONS:

Physician may make express contract with patient. *Haase v. Starnes*, 264.  
Medical Malpractice Act, applicable to case of wrongful death resulting from medical malpractice. *Herlein v. St. Paul Fire & Marine Ins. Co.*, 283.  
Malpractice statute does not prohibit general practitioner from testifying as an expert. *First Commercial Trust Co. v. Rank*, 390.  
Similar-locality rule, medical expert not disqualified from testifying about child abuse. *Id.*  
Medical malpractice, medical injury defined, statute encompasses cause of action for failure to diagnose child abuse under facts of case. *Id.*  
Proof required in action for medical injury, burden of proof. *National Bank of Commerce v. Quirk*, 769.  
Residents entitled to summary judgment as matter of law, no argument offered that either resident deviated below required standard. *Id.*

## PLEADING:

Amended pleadings, pleading in response, time limits. *Edward J. DeBartolo Corp. v. Cartwright*, 573.  
Amended pleadings, earlier appellate-court opinion contained broad language conflicting with holding in present case, overruled. *Id.*  
Amended pleadings, amended complaint generally supersedes original complaint. *Id.*  
Amended pleadings, appellant's time for response should have been calculated from date of service of amended complaint, entry of default judgment prior to expiration of response time was improper. *Id.*

## PRODUCTS LIABILITY:

Statutory product-liability remedies not applicable, parties did not fit requisite categories. *Mason v. Jackson*, 252.

## PROHIBITION, WRIT OF:

When writ may issue. *State v. Webb*, 80.  
When properly issued. *Id.*

## PROPERTY:

Tenancy by the entirety, rebuttable presumption of gift from party furnishing consideration. *Mulling v. Mulling*, 88.  
Determination as to amount of damages, property owner may give own opinion as to the value of the damaged property. *Zhan v. Sherman*, 172.  
Restrictions on land use not favored, any restrictions must be clearly apparent. *Holaday v. Fraher*, 522.  
Restrictive covenants, general rule governing. *Id.*  
Enforcement of restrictive covenants, appellants were fully aware of the provisions contained in their deed and the applicable restrictive covenants. *Id.*  
Expression limiting use of property not ambiguous, any additional use must be reasonably incidental to residential use. *Id.*  
Chancellor determined that appellants' building was not used exclusively for residential purposes, chancellor's determination not clearly erroneous. *Id.*  
Taking of property by municipality, when compensation is required. *National By-Products, Inc. v. City of Little Rock*, 619.  
Law of inverse condemnation discussed. *Id.*

Condemnation, when taking occurs. *Id.*  
Condemnation, when taking occurs. *Id.*  
Condemnation, no damages allowed for mere "threat to condemn." *Id.*  
Condemnation, planning in anticipation of improvement does not constitute taking.  
*Id.*  
Continued adherence to general rule supported by public policy considerations,  
government cannot incur inverse condemnation liability merely by announcing  
plans to condemn property in future. *Id.*  
Condemnation, property continued to be used for its traditional purpose, appellee's  
actions did not constitute taking of appellant's property. *Id.*

## REPLEVIN:

Effect of uncertified check issued in payment of underlying obligation, suspension  
continues until dishonor of check or until paid or certified. *France v. Ford Motor  
Credit Co.*, 167.  
Effect of uncertified check issued in payment of underlying obligation, statute  
provided no defense to replevin action. *Id.*

## SALES:

Article 2 of Uniform Commercial Code not applicable, agreement was for personal  
services and not a sale. *Mason v. Jackson*, 252.

## SCHOOLS &amp; SCHOOL DISTRICTS:

Teacher Fair Dismissal Act, strict compliance with notice provisions required,  
failure to comply strictly with act. *Lester v. Mt. Vernon-Enola Sch. Dist.*, 728.  
Teacher Fair Dismissal Act, no evidence that appellant was aware of his right to  
have hearing no fewer than five days after his request, no waiver of right, case  
reversed and remanded. *Id.*

## SEARCH &amp; SEIZURE:

Taking of blood sample not an unreasonable search, there was no unjustified  
element of personal risk and pain. *Moore v. State*, 529.  
Factors on review of trial court's denial of motion to suppress, there need only be  
probable cause to believe that place to be searched contains evidence of crime.  
*Nance v. State*, 583.  
Probable cause did exist for search, no error found. *Id.*  
Search warrant properly issued, no error demonstrated. *Id.*

## SETOFF &amp; COUNTERCLAIM:

Setoff may be pled in any action for the recovery of money, an action for the  
establishment of child support not construed as an action for the recovery of  
money. *Chaisson v. Ragsdale*, 373.

## STATUTES:

Meaning of statute clear, appellee not disqualified from receiving Medicaid benefits.  
*Arkansas Dep't of Human Servs. v. Wilson*, 151.  
Act's purpose clear, retroactive application of law intended. *Id.*  
Language clear and unambiguous, principal of appellee's trust should not have been  
considered in determining eligibility for Medicaid. *Id.*  
Construction of, Ark. Code Ann. § 16-114-206 (1987) does not apply to actions for  
medical injury based on breach of express warranty where issue is whether  
medical-care provider guaranteed results. *Haase v. Starnes*, 263.  
Statutory burden-of-proof requirements in medical-malpractice action have no  
relevance in contract-based action arising out of guarantee of specific, favorable  
results. *Id.*

- No conflict between Ark. Code Ann. § 16-114-206(a) and Ark. R. Evid. 702. *Id.*  
 Statute did not usurp court's authority to regulate the practice of law, arguments  
 meritless. *Clark v. Ridgeway*, 378.
- Unambiguous language, no need to resort to rules of statutory construction. *State v.*  
*Phillippe*, 434.
- Statutory construction, juvenile restitution, statutory limits apply per victim.  
*Eichelberger v. State*, 551.
- Statute previously interpreted by court, appellant's argument meritless. *Nance v.*  
*State*, 583.
- Given deference only to extent that they are compatible with appellate court rules,  
 time limitations imposed in Rule 37 are jurisdictional. *Hamilton v. State*, 614.
- Statutes presumed constitutional, construction of penal statutes. *Ports Petroleum Co.*  
*v. Tucker*, 680.
- Strict compliance with procedural requirements may be waived. *Lester v. Mt.*  
*Vernon-Enola Sch. Dist.*, 728.

## TAXATION:

- Distribute specifically allowed to pass along the tax by showing it separately on sale  
 invoices, agency's construction of the act will not be overturned unless clearly  
 wrong. *Foxsmith v. Coca-Cola Bottling Co.*, 13.
- Appellant was not "subject to" the soft drink tax, trial court's dismissal of  
 appellant's complaint affirmed. *Id.*
- Gross-receipts tax, rentals of tangible personal property are taxable. *Weiss v. Best*  
*Enter., Inc.*, 712.
- Gross-receipts tax, determination of whether transaction constitutes taxable lease,  
 appellate court looks to factors involved. *Id.*
- Gross-receipts tax, transactions were leases. *Id.*
- Gross-receipts tax, exemption for public utility providing sewer services, appellee  
 was not solely providing sewer services. *Id.*
- Gross-receipts tax, charge for services constituted part of gross proceeds, entire  
 proceeds subject to taxation. *Id.*
- Gross-receipts tax, "gross receipts" and "gross proceeds" defined. *Id.*
- Gross-receipts tax, sales tax must be paid on price received for article without  
 deduction for value of labor. *Id.*
- Gross-receipts tax, taxpayer required to keep adequate records, burden of refuting  
 assessment upon taxpayer. *Id.*
- Gross-receipts tax, taxpayer's records showed transactions were leases, fully taxable  
 mixed transactions, appellee did not meet burden of refuting assessment. *Id.*
- Gross-receipts tax, dominant-use test rejected. *Id.*
- Gross-receipts tax, exemption for public utilities or public-service companies. *Id.*
- Gross-receipts tax, difference between exemption and exclusion, taxpayer must  
 prove entitlement to exemption beyond reasonable doubt. *Id.*
- Gross-receipts tax, appellee failed to prove exemption from taxation as utility or  
 public service. *Id.*

## TORTS:

- Duty owed always a question of law. *Cherepski v. Walker*, 43.
- Liability for the acts of another, appellant's claim for breach of fiduciary duty  
 really a claim for the nonexistent right of alienation of affection. *Id.*
- Tort of outrage, elements of. *Id.*
- Claim for outrage in reality a veiled attempt to bring an action for alienation of  
 affection, trial court ruled correctly. *Id.*

Question of whether a duty owed is always a question of law. *Driggers v. Locke*, 63.

Outrage, elements. *Croom v. Younts*, 95.

Outrage, willful and wanton conduct defined, extreme and outrageous conduct defined. *Id.*

Outrage, standard of review. *Id.*

Outrage, clear-cut proof required to establish. *Id.*

Outrage, test for substantial evidence of appellant's willful and wanton conduct met. *Id.*

Outrage, test for substantial evidence of appellant's extreme and outrageous conduct met. *Id.*

Outrage, substantial evidence introduced. *Smith v. Hansen*, 188.

Parental immunity doctrine, doctrine inapplicable where appellant was unemancipated minor at the time of the alleged tort. *Robinson v. Robinson*, 224.

Tort of outrage discussed. *Renfro v. Adkins*, 288.

Tort of outrage claim correctly dismissed, claim not supported by the proof. *Id.*

Deceit, elements. *Butler v. Comic*, 725.

Transferred intent, doctrine generally not applied in cases of misrepresentation, exception. *Id.*

Deceit, trial court did not err in finding no evidence of reliance on chain of title. *Id.*

## TRADE REGULATION:

Subject matter of Act within General Assembly's police powers to regulate industry of general public interest. *Ports Petroleum Co. v. Tucker*, 680.

Exercise of state police powers, acts can be sustained only if they enhance general welfare. *Id.*

Mere cutting of prices does not equate to predatory practice. *Id.*

Difference between predation and competition relative to lowering prices discussed. *Id.*

Purpose of federal antitrust laws. *Id.*

Predation distinguished from legitimate price cutting. *Id.*

Review of state economic regulations for due process violation, standard to be used. *Id.*

Act 380 overbroad in that it prohibited legitimate competition, due process unconstitutionally impaired. *Id.*

## TRIAL:

Merger of charges, violation of implied-consent law not lesser-included offense of driving while intoxicated and vice versa, offenses not based on same conduct. *Frana v. State*, 1.

Right to trial by jury, appeals from municipal court tried de novo in circuit court. *State v. Webb*, 80.

Two-tier system of providing a trial by jury for accused misdemeanants has withstood constitutional scrutiny, case reversed and dismissed. *Id.*

Exclusion of witnesses at trial, victim allowed to remain in courtroom, appellant failed to show how fairness was jeopardized. *Mitchell v. State*, 116.

Jury instructions, AMCI 401 matched statutory language, no error to refuse proffered non-AMCI instruction. *Misshelley v. State*, 449.

Jury instructions, failure to instruct on lesser-included offense is harmless error where jury convicted defendant of greater offense. *Id.*

Jury instructions, proper to refuse instruction if not supported by rational basis, no rational basis for manslaughter instruction. *Id.*

- Declaration of mistrial discussed, trial court given wide discretion in granting or denying. *Moore v. State*, 529.
- Testimony so prejudicial admonition to jury did not cure it, trial court's denial of mistrial an abuse of discretion. *Id.*
- Trial court has wide latitude in controlling arguments of counsel, rulings will not be overturned absent clear abuse. *Jordan v. State*, 628.
- Appellant merely objected to appellee's closing argument without requesting limiting instruction or mistrial, trial court did not abuse its discretion. *Id.*
- Refusal to give jury instruction proper, instruction inappropriate. *Stacks v. Jones*, 643.
- Trial court has wide discretion to control counsel's arguments, no prejudice shown in trial court's refusal to allow damage argument. *National Bank of Commerce v. Quirk*, 769.

## TRUSTS:

- Trust's goal was not to force the taxpayers to maintain appellee in a nursing home while she preserved her assets for her heirs, purpose simply to help widow manage her affairs. *Arkansas Dep't of Human Servs. v. Wilson*, 151.

## USURY:

- Cause of action for usury not assignable, no error in trial court's limiting appellants' award to twice the amount of interest they paid. *Perryman v. Hackler*, 500.
- Usury voids the contract only to the extent of unpaid interest. *Id.*
- Appellants had defaulted, acceleration and forfeiture provisions were triggered, relationship of landlord-tenant existed pursuant to the terms of the contract. *Id.*

## UTILITIES:

- Public utility distinguished from private entrepreneurship. *Weiss v. Best Enter., Inc.*, 712.
- Lease and service of toilet does not fit within definition of public-utility sewer service, appellee failed to prove exemption as public sewer service, reversed and dismissed. *Id.*

## WAIVER:

- Requires knowledge of right on part of party alleged to have waived it. *Lester v. Mt. Vernon-Enola Sch. Dist.*, 728.

## WITNESSES:

- Introduction of deposition when witness unavailable, trial court did not abuse its discretion in allowing use of deposition. *Whitney v. Holland Retirement Ctr., Inc.*, 16.
- Credibility of determined by the jury, not the appellate court. *Pike v. State*, 56.
- Determination of credibility left to the trier of fact, uncorroborated testimony of one State's witness is sufficient to sustain a conviction. *Galvin v. State*, 125.
- Appellant's credibility argument meritless, jury, not appellate court, determines credibility. *Id.*
- Exceptions to rule requiring exclusion of witnesses from the courtroom, witness should have been excluded. *Clark v. State*, 211.
- Error harmless, no prejudice shown to have resulted. *Id.*
- Appellant failed to request time to interview witness prior to trial, even though he knew she was going to testify, appellant failed to request remedies available to him. *Id.*

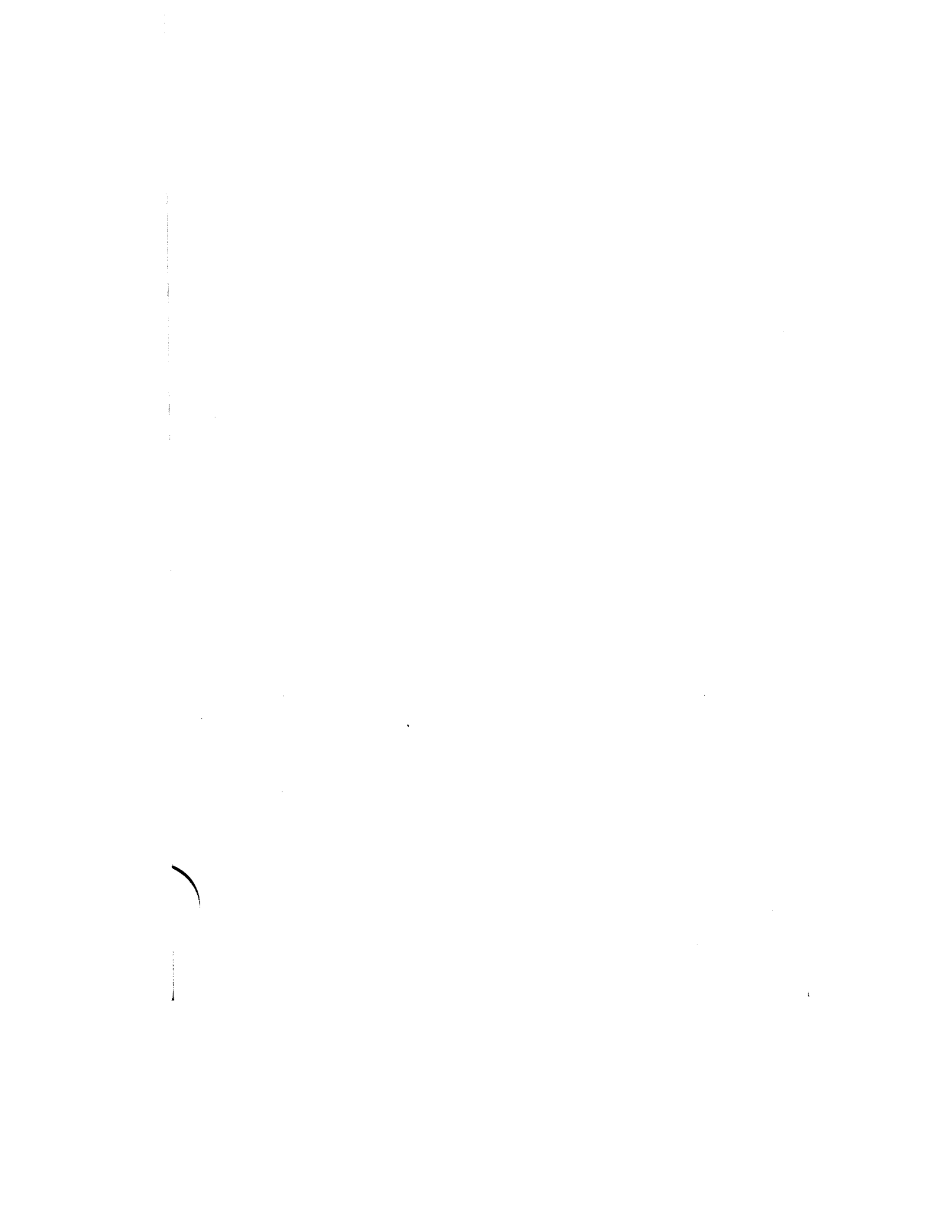
- Particular facts bearing on an informant's reliability may be required, no such requirement where the witness is a good citizen and not an informant. *Moore v. State*, 529.
- Witness not an informant, court had substantial basis upon which to conclude that there was probable cause to order the taking of the appellant's blood. *Id.*
- Conflicts in testimony of witnesses, trial court must resolve. *Id.*
- Admission of opinion testimony by lay witnesses, when requirements of the rule are met. *Id.*
- Admission of lay testimony not an abuse of discretion, trial court's determination not in error. *Id.*
- One witness's identification objected to, but other witnesses gave similar evidence, objection without merit. *Jordan v. State*, 628.
- Witness's status as accomplice is mixed question of law and fact, when question must be submitted to jury. *King v. State*, 671.
- Witness's testimony created fact question regarding his status, trial court erred in refusing to give instruction on disputed accomplice status, case reversed and remanded for retrial. *Id.*
- Trial court makes determination as to credibility. *Marine Servs. Unlimited, Inc. v. Rakes*, 757.
- Appellees found not liable for conversion, trial court's determination not clearly erroneous. *Id.*
- Appellant's evidence insufficient to warrant award for conversion, trial court's finding not clearly erroneous. *Id.*

**WORKERS' COMPENSATION:**

- Dual-employment doctrine, conditions of liability. *National Union Fire Ins. v. Tri-State Iron and Metal*, 258.
- Dual-employment doctrine, no negligence liability for special employer under circumstances. *Id.*
- Dual-employment doctrine, special employer fell within exclusivity provision of Workers' Compensation Act, neither a negligence nor contract action could be filed against appellee under circumstances. *Id.*
- Jurisdiction is concurrent in the courts and agency, trial court properly found that it had concurrent jurisdiction to determine applicability of Workers' Compensation Law. *Craig v. Traylor*, 363.

**ZONING & PLANNING:**

- Review of zoning legislation, judicial branch may not review *de novo*. *City of Lowell v. M & N Mobile Home Park, Inc.*, 332.
- Review of, burden on the moving party to prove the enactment arbitrary. *Id.*
- Chancellor should only have determined whether there was a rational basis for the city's refusal to rezone the land, rational basis found. *Id.*
- Opinion of local residents is an appropriate factor for consideration, mere fact of public opposition alone not sufficient basis on which to deny an application, chancellor's ruling in error. *Id.*
- Owner of property may give opinion testimony as to the value of his property, such testimony should be stricken only if it has no reasonable basis. *Id.*
- Public opposition to zoning application reflected logical and reasonable concerns, such opposition should not have been disregarded by the court. *Id.*
- Appellee failed to meet its burden of proof, legislative branch acted within its discretion in refusing to rezone the tract. *Id.*





Index to  
Acts, Codes, Constitutional  
Provisions, Rules, and  
Statutes Cited

**INDEX TO  
ACTS, CODES, CONSTITUTIONAL PROVISIONS,  
INSTRUCTIONS, RULES, AND  
STATUTES CITED**

<b>ACTS:</b>	
Acts by Name:	
Alabama Motor Fuel Marketing Act .....	691
Arkansas Administrative Procedures Act .....	105, 111
Arkansas Gross Receipts Act .....	712, 713, 714
Arkansas Medical Malpractice Act .....	264, 265, 269, 273, 274, 277, 278, 279, 280, 281, 282, 283, 285, 286, 287, 288, 392, 396, 401, 402, 769, 771, 779, 780, 781
Arkansas Minimum Wage Act .....	765, 766
Arkansas Petroleum Trade Practices Act .....	680, 681, 682, 683, 684, 685, 686, 687, 688, 690, 691, 692
Arkansas Unfair Practices Act .....	689, 692
Declaratory Judgment Act .....	700
Equitable School Finance Systems Act .....	699
Fair Labor Standards Act .....	759, 765, 766, 767
Law Enforcement Officer's Bill of Rights .....	478-A, 478-B
Nonresident Motorist Act .....	289, 294, 295
Parental Kidnapping Prevention Act (P.K.P.A.) .....	482, 483, 484, 488, 489, 490, 491
Revised Uniform Reciprocal Enforcement of Support Act (RURESAs) .....	365
Teacher Fair Dismissal Act .....	728, 729, 730, 731, 732
Trade Practices Act .....	111
School Finance Act of 1984 .....	696, 697, 699
Uniform Child Custody Jurisdiction Act .....	484, 491
Uniform Interstate Family Support Act (UIFSA) .....	373, 375, 376, 377, 378
Uniform Reciprocal Enforcement of Support Act (URESAs) .....	376
Victim Crime Protection Act .....	555
Workers' Compensation Act .....	259, 262
Wrongful Death Act .....	283, 284, 285, 286, 287, 288
<b>Arkansas Acts:</b>	
Act 53 of 1883 .....	52, 56, 288
Act 39 of 1887 .....	501, 507
Act 87 of 1915, § 10 .....	84
Act 555 of 1953 .....	648
Act 14 of Second Extraordinary Session of 1965, § 7 .....	794
Act 709 of 1979 .....	278
Act 34 of 1983 .....	696
Act 462 of 1985 .....	125
Act 46 of 1989 .....	52, 56
Act 625 of 1989 .....	731
Act 542 of 1991 .....	788
Act 292 of 1993 .....	772, 787, 788, 789
Act 380 of 1993 .....	680, 681, 682, 683, 684, 685, 686, 687, 688, 691, 692
Act 380 of 1993, § 3 .....	685
Act 380 of 1993, § 4 .....	682, 685, 686, 687, 692
Act 424 of 1993 .....	167
Act 457 of 1993 .....	113
Acts 61 and 62 of 1994 .....	551, 553, 555
Act 67 of Second Extraordinary Session of 1994 .....	469
Act 486 of 1995 .....	294
Acts 916 and 917 of 1995 .....	695
Act 917 of 1995 .....	699, 702, 703, 704
Act 917 of 1995, § 15(b) .....	698
Act 1261 of 1995 .....	411

## CODES:

(See also RULES and STATUTES)

## Arkansas Code Annotated:

4-2-314—316	256
4-3-114	170
4-3-310	167, 168, 170
4-3-310(b)(1)	167, 171
4-4-209	168, 171
4-5-102	501, 505
4-26-805	762
4-57-107	501, 504, 505, 507
4-75-209(a)(1)	689, 692
5-1-110	3
5-2-202(1)	449, 463
5-2-202(3)	477, 636, 640
5-2-208	11
5-2-302	120
5-2-313	206, 208, 209
5-2-402	37
5-2-402(3)	34, 37, 38
5-2-403	10, 11, 677
5-2-403(a)	301, 306, 456, 463, 477
5-2-405	37
5-4-104	570, 572
5-4-401	608
5-4-401(a)(4)	640
5-4-501	601
5-4-603(d)	589, 605
5-10-101	601, 604
5-10-101(a)(1)	590, 599
5-10-101(a)(1) and (a)(4)	603
5-10-101(a)(4)	590, 599
5-10-102(a)(2)	462
5-10-102(a)(3)	462
5-10-103(a)(1)	632
5-10-104(a)(3)	477, 636
5-10-104(c)	640
5-13-204	651
5-13-310	651
5-14-101(1)	219
5-14-101(2)	245, 249
5-14-101(9)	219
5-14-103	37, 249, 408
5-64-701(a)	497
5-64-701(b)	496
5-65-103	3
5-65-111(b)(3)	570, 572
5-65-202	3
5-73-119	137, 142
6-17-1501 through 6-17-1510	729
6-17-1503	731
6-17-1509(c)(1)	728, 730, 731
6-20-301 — 319	696
8-4-102	722
8-4-102(1)	722
8-4-102(5)	722
9-10-108	438, 441
9-10-115	441
9-10-115(c)(2)	438
9-10-115(d)	435, 437, 438
9-12-312(a)(1)	91
9-12-315(a)(2)	94
9-12-315(b)(1)	94
9-12-317	94
9-13-201 to -228	491
9-13-203(a)(3)	491
9-17-101 et seq.	375
9-17-301	376
9-17-305	376
9-17-305(d)	376
9-27-208(d)	408
9-27-303(11)	37
9-27-303(12)	5
9-27-316	4, 7
9-27-317(f)	452, 453, 469
9-27-318	138, 499
9-27-318(b)(1)	651
9-27-318(b)(2)	137, 142
9-27-318(b)(2)(I)	142
9-27-318(b)(2)(J)	142
9-27-318(b)(2)(M)	639
9-27-318(c)	470
9-27-318(e)	136, 137, 140, 143, 410, 498, 499, 500, 635, 639, 650, 653, 654, 655
9-27-318(e)(1)	141, 142, 407, 654, 655
9-27-318(f)	140, 410, 653
9-27-318(h)	499, 651
9-27-325(f)	362, 363
9-27-331(a)(1)	654
9-27-331(d)	551, 553
9-27-339(f)	556
9-28-206	654
9-28-208(d)	411
11-9-101—1001	367
11-9-102(12)(A)(iii)	367
11-9-105	260
11-9-410	260
11-9-410(b)	259, 262
12-12-501—518	404
12-12-504(b)	405
12-12-507	392, 403
12-12-507(b)	404
12-12-507(c)	404
12-12-703	465
12-12-704	473
14-52-301	478-B
14-52-301 to 307	478-B
14-52-303(7)	478-A, 478-B
14-56-402	341
14-56-402—425	336
16-4-101	294

16-10-101 .....	809	16-114-206(a) .....	270, 275, 277
16-10-102 .....	809	16-114-206(a)(1) .....	320
16-13-603(d)(2) .....	812	16-114-207(3) .....	401, 780, 781, 784
16-13-1002(a)(1)(ii) .....	670	16-116-101—107 .....	252, 256
16-13-1002(b) .....	670	16-118-106 .....	46, 52, 56
16-14-206(a)(1) .....	396	18-12-103 .....	581
16-17-209(a) .....	86	18-60-309 .....	507
16-17-703 .....	87	19-10-305 .....	787, 788
16-17-704(a)(2) .....	83	19-10-305(a) .....	787
16-22-101(a) .....	203	20-9-213 .....	420
16-22-206 .....	202	20-77-101 .....	158
16-22-309 .....	381	20-77-301 .....	774, 793, 794, 795
16-22-310 .....	378, 379, 381, 383, 385, 388	20-77-304 .....	774, 776, 793, 795
16-22-310(a) .....	385	20-77-304(3) .....	795
16-32-206 .....	257	20-77-306 .....	794, 795
16-44-203 .....	220	20-77-307 .....	774, 795
16-56-105 .....	50	23-1-101 .....	721
16-56-111(b) .....	411, 412, 417, 418, 419, 420	23-62-104 .....	110
16-56-112 .....	411, 417, 418, 419	23-62-105 .....	110
16-58-120 .....	294	23-66-205 .....	109
16-58-121 .....	294	23-66-206 .....	109
16-61-112 .....	501, 505	23-66-201—408 .....	111
16-62-102 .....	285	23-79-210 .....	787
16-63-206 .....	377	23-79-210(a) .....	787, 788
16-64-123 .....	198	23-79-210(a)(1) .....	787
16-85-301(a) .....	604	23-89-301 et seq. ....	109
16-85-302 .....	587, 600	23-89-303 .....	25, 26, 115
16-85-407(a) .....	587, 600	23-89-303(b) .....	26
16-85-407(b) .....	586, 600	23-89-303(e) .....	111
16-85-410 .....	587, 588, 601, 603	23-89-303(e)(2) .....	106, 115
16-85-701 .....	602	23-89-304 .....	115
16-85-701 and -702 .....	587, 602	25-15-206 .....	111
16-85-706 .....	595	25-15-207 .....	111
16-85-708 .....	584, 594	25-15-212 .....	111
16-89-107(b)(1) .....	87	26-18-406(a)(1) .....	715
16-89-111(d) .....	472	26-18-506(a) & (d) .....	713, 720
16-89-111(e)(1) .....	454, 472, 518, 519	26-18-506(d) .....	720
16-90-111 .....	571, 614, 615	26-35-902 .....	495
16-90-111(a) .....	570, 571, 572, 573	26-35-902(a) .....	492, 494
16-90-111(b)(1) .....	615	26-52-103 .....	718
16-90-804 .....	606, 612	26-52-103(a)(2)(E) .....	723
16-90-804(a)(1), (a)(2)(A), (a)(3), and (c)(1) .....	611	26-52-103(a)(3)(B) .....	712, 717
16-90-804(a)(3) .....	606, 611	26-52-103(a)(3)(E) .....	715
16-90-804(d)(2) .....	611	26-52-103(a)(4) .....	713, 719, 723
16-111-101 et seq. ....	700	26-52-301 .....	721
16-111-103(a)(2) .....	700	26-52-301(2) .....	714, 715, 721
16-114-201(1) .....	277	26-57-901—909 .....	14
16-114-201(3) .....	268, 270, 392, 402	26-57-904(b)(2) .....	14
16-114-202 .....	283, 284, 286	26-57-906(a)(1) .....	15
16-114-202—209 .....	266	26-57-909(a) .....	14
15-114-203 .....	793	27-53-401 .....	175
16-114-203(a) .....	285	28-1-102(11) .....	479, 480, 481, 482
16-114-206 .....	263, 264, 265, 267, 268, 269, 270, 271, 272, 273, 274, 281, 406, 773, 779, 790	28-1-116(a) and (b) .....	481
		28-48-105(a)(2) .....	482
		28-51-301(c) .....	479, 481
		28-53-119(a)(1) .....	481
		28-65-107(a) .....	317, 318
		28-65-401 .....	318
		28-69-102 .....	152, 155, 156, 158

28-69-102(b) . . . . . 151, 156, 160

Arkansas Code of Judicial Conduct:

Canon 5(A)(3)(d)(ii) . . . . . 806

Code of Federal Regulations:

29 C.F.R. § 1928.57 . . . 365, 368, 370,  
372

59 C.F.R. § 6564-6570 . . . . . 18

United States Code:

28 U.S.C. 1738A . . . 482, 483, 484, 488

28 U.S.C. 1738A(b)(3) . . . . . 488

28 U.S.C. 1738A(b)(4) . . . . . 490

28 U.S.C. 1738A(c) . . . . . 490

28 U.S.C. 1738A(c)(2) . . . . . 489

28 U.S.C. 1738A(c)(2)(B) . . . . . 490

28 U.S.C. 1738A(c)(2)(C) . . . . . 491

28 U.S.C. 1738A(g) . . . . . 490

28 U.S.C. 2254 . . . . . 739

CONSTITUTIONAL PROVISIONS:

Arkansas Constitution:

Amend. 14 . . . . . 274

Amend. 24 . . . . . 388

Amend. 60 . . . . . 501, 502, 506

Art. 2, § 2 . . . . . 698

Art. 2, § 3 . . . . . 698, 781

Art. 2, § 7 . . . . . 87

Art. 2, § 8 . . . . . 688, 789

Art. 2, § 10 . . . . . 83

Art. 2, § 13 . . . . . 781

Art. 2, § 18 . . . . . 274, 698, 781

Art. 2, § 22 . . . . . 619, 621, 623, 624

Art. 4, § 2 . . . . . 336

Art. 5, § 25 . . . . . 265, 274, 781

Art. 5, § 32 . . . . . 781

Art. 7, § 4 . . . . . 809

Art. 7, § 34 . . . . . 317, 318

Art. 7, § 43 . . . . . 84

Art. 14, § 1 . . . . . 698, 703

Art. 16, § 14 . . . . . 493, 494

Art. 19, § 13 . . . . . 502, 505, 506, 507

Due Process Clause . . . . . 688, 789

Education Clause . . . . . 694

Equal Protection  
Clause . . . . . 694, 700

United States Constitution:

Amend. 1 . . . . . 51, 52

Amend. 4 . . . . . 531, 532, 537, 538,  
539, 540

Amend. 5 . . . . . 530, 537, 538, 621,  
623, 789

Amend. 6 . . . . . 743, 747, 748, 749  
754, 756

Amend. 14 . . . . . 274, 356, 538, 694,  
743, 749, 754, 781,

Art. 1, §§ 9 and 10 . . . . . 551, 553

Art. 1, § 10, cl. 1 . . . . . 265, 273

Double Jeopardy Clause . . . . . 658, 673,  
679

Due Process Clause . . . . . 200, 558,  
561, 694, 734, 738,  
789

Equal Protection Clause . . . . . 470, 472,  
478-A, 694

Ex Post Facto Clause . . . . . 551, 553,  
554, 555, 556

Privileges and Immunities  
Clause . . . . . 781

Self-Incrimination Clause . . . . . 179, 186

Supremacy Clause . . . . . 683

INSTRUCTIONS:

Arkansas Model Jury Instructions  
(Civil):

AMI 404 . . . . . 96, 101, 198

AMI 610 . . . . . 784, 785

AMI 614 . . . . . 509, 510, 513, 514

AMI 2210 . . . . . 175

AMI 2217 . . . . . 104, 105, 190, 200

AMI 2222 through 2228 . . . . . 647

AMI 2229 . . . . . 644, 647

Arkansas Model Jury Instructions  
(Criminal):

AMCI 401 . . . . . 456, 462, 477

AMCI 2d 401 . . . . . 306

AMCI 402 . . . . . 677

AMCI 403 . . . . . 677, 678, 679

RULES:

Arkansas Rules of Appellate  
Procedure (Ark. Code Ann.  
Court Rules [1995]):

Rule 2 . . . . . 237, 238, 240, 241,  
698

Rule 2(a)(2) . . . . . 240

Rule 2(a)(9) . . . . . 493, 707

Rule 4(a) . . . . . 612, 613

Rule 4(c) . . . . . 366, 566, 645

Rule 5 . . . . . 42, 134

Rule 5(a) . . . . . 41

Rule 5(b) . . . . . 802

Rule 6(c) . . . . . 796

Arkansas Rules of Civil  
Procedure (Ark. Code Ann.  
Court Rules [Supp. 1995]):

A.R.C.P. 8(f) . . . . . 30, 33

A.R.C.P. 9(b) . . . . . 30, 33

- A.R.C.P. 11 ..... 45, 46, 49, 55  
 A.R.C.P. 12(a) ..... 575  
 A.R.C.P. 12(b) ..... 49, 195, 378, 385  
 A.R.C.P. 12(b)(6) ..... 623  
 A.R.C.P. 12(c) ..... 49, 385  
 A.R.C.P. 12(j) ..... 276  
 A.R.C.P. 15(a) ..... 573, 576  
 A.R.C.P. 15(b) ..... 813  
 A.R.C.P. 19(a) ..... 79  
 A.R.C.P. 23 ..... 493, 494, 495, 706,  
     707, 709  
 A.R.C.P. 23(c) ..... 492, 493, 494, 495  
 A.R.C.P. 24(a)(1) ..... 793  
 A.R.C.P. 26 ..... 778  
 A.R.C.P. 26(b)(4)(A)(ii) ..... 778  
 A.R.C.P. 32 ..... 16, 20, 769, 777,  
     778, 779  
 A.R.C.P. 32(a)(3) ..... 17, 769, 779  
 A.R.C.P. 32(a)(3)(D) ..... 19  
 A.R.C.P. 32(a)(3)(E) ..... 16, 19  
 A.R.C.P. 37(c) ..... 495  
 A.R.C.P. 50(a) ..... 643, 645  
 A.R.C.P. 52 ..... 339, 340, 695  
 A.R.C.P. 52(a) ..... 177, 257  
 A.R.C.P. 52(b) ..... 177  
 A.R.C.P. 54(b) ..... 64, 66, 79, 80,  
     237, 239, 240, 300,  
     740, 741, 742  
 A.R.C.P. 54(d) ..... 173, 177  
 A.R.C.P. 56 ..... 378, 385  
 A.R.C.P. 56(c) ..... 67, 385  
 A.R.C.P. 59 ..... 436, 612, 613, 646,  
     648, 649  
 A.R.C.P. 59(a) ..... 643, 646  
 A.R.C.P. 59(a)(4) ..... 649  
 A.R.C.P. 59(a)(5) ..... 649  
 A.R.C.P. 59(a)(6) ..... 437, 647  
 A.R.C.P. 59(b) ..... 645  
 A.R.C.P. 59(f) ..... 437, 643, 646, 647,  
     648, 649  
 A.R.C.P. 60(b) ..... 440  
  
**Federal Rules of Civil  
 Procedure:**  
 F.R.C.P. 15(b) ..... 813  
 F.R.C.P. 23 ..... 706, 709  
 F.R.C.P. 32 ..... 16, 20  
  
**Arkansas Rules of Criminal  
 Procedure (Ark. Code Ann.  
 Court Rules [Supp. 1995]):**  
 A.R.Cr.P. 2.3 ..... 453, 470, 471  
 A.R.Cr.P. 4.1(e) ..... 584, 593, 594  
 A.R.Cr.P. 8.1 ..... 593  
 A.R.Cr.P. 8.2 ..... 750  
 A.R.Cr.P. 8.3 ..... 595  
 A.R.Cr.P. 8.3(b) ..... 543  
 A.R.Cr.P. 8.3(c) ..... 593  
  
 A.R.Cr.P. 13.1 ..... 531, 539  
 A.R.Cr.P. 17 ..... 747, 752  
 A.R.Cr.P. 17.1 ..... 212, 213, 217, 218,  
     609  
 A.R.Cr.P. 17.1(a)(i) ..... 251  
 A.R.Cr.P. 17.1(a)(iv) ..... 251  
 A.R.Cr.P. 17.1(d) ..... 245, 251  
 A.R.Cr.P. 18.1 ..... 537, 540  
 A.R.Cr.P. 18.1(b) ..... 532, 540, 541,  
     542, 543  
 A.R.Cr.P. 19.2 ..... 213, 217, 218, 251,  
     256  
 A.R.Cr.P. 19.7 ..... 213, 218, 245, 251  
 A.R.Cr.P. 21.1 ..... 308  
 A.R.Cr.P. 21.1(b) ..... 308  
 A.R.Cr.P. 22.2 ..... 307  
 A.R.Cr.P. 22.2(a) ..... 308  
 A.R.Cr.P. 24.3(b) ..... 362, 363  
 A.R.Cr.P. 28.1 ..... 659  
 A.R.Cr.P. 28.2 ..... 808  
 A.R.Cr.P. 28.2(b) ..... 808  
 A.R.Cr.P. 28.3(b) ..... 663  
 A.R.Cr.P. 28.3(h) ..... 656, 662  
 A.R.Cr.P. 28.3(i) ..... 656, 657, 660,  
     663, 664, 669  
 A.R.Cr.P. 36.1 ..... 363  
 A.R.Cr.P. 36.1(a) ..... 362  
 A.R.Cr.P. 36.4 ..... 733, 734, 735, 736,  
     737, 738, 739  
 A.R.Cr.P. 36.9 ..... 803  
 A.R.Cr.P. 36.9(e) ..... 448  
 A.R.Cr.P. 37 ..... 130, 131, 132, 133,  
     233, 234, 363, 570,  
     571, 572, 614, 615,  
     616, 733, 734, 735,  
     736, 737, 738, 739,  
     743, 744, 745, 747,  
     748, 749, 751, 752,  
     758  
 A.R.Cr.P. 37.1 ..... 233  
 A.R.Cr.P. 37.1(e) ..... 130, 132  
 A.R.Cr.P. 37.2(a) ..... 570  
 A.R.Cr.P. 37.2(b) ..... 130, 132, 570,  
     571, 572, 573, 614,  
     615  
 A.R.Cr.P. 37.2(c) ..... 233, 234, 807,  
     572, 614, 615  
 A.R.Cr.P. 37.2(e) ..... 130, 132  
  
**Arkansas Rules of Evidence  
 (Ark. Code Ann. Court Rules [1995]):**  
 A.R.E. 103 ..... 184  
 A.R.E. 103(a) ..... 165  
 A.R.E. 105 ..... 354  
 A.R.E. 401 ..... 476  
 A.R.E. 403 ..... 212, 215, 302, 310,  
     770, 771, 783  
 A.R.E. 404 ..... 185, 771, 783

A.R.E. 404(a) ..... 184  
 A.R.E. 404(b) ..... 184, 211, 215, 216  
 A.R.E. 404(b) and 403 ..... 215  
 A.R.E. 405 ..... 179, 185  
 A.R.E. 405(a) ..... 179, 185  
 A.R.E. 405(b) ..... 179, 185  
 A.R.E. 608 ..... 771, 783  
 A.R.E. 611 ..... 185  
 A.R.E. 615 ..... 124, 178, 181, 186,  
 187, 212, 216, 217,  
 218, 220, 223  
 A.R.E. 616 ..... 124, 178, 181, 212,  
 216  
 A.R.E. 701 ..... 533, 549  
 A.R.E. 702 ..... 226, 231, 265, 275,  
 547  
 A.R.E. 703 ..... 454, 455, 474, 475  
 A.R.E. 800 ..... 556  
 A.R.E. 801 ..... 9, 12, 164, 361,  
 556  
 A.R.E. 801(c) ..... 164  
 A.R.E. 801(d)(1)(ii) ..... 353, 354, 359,  
 361  
 A.R.E. 801(d)(1)(iii) ..... 361  
 A.R.E. 803(2) ..... 164, 310  
 A.R.E. 803(4) ..... 219  
 A.R.E. 803(25) ..... 220

Arkansas Rules of Appellate  
 Procedure — Civil:

Rule 6(d) ..... 705

Arkansas Rules of Appellate  
 Procedure — Criminal:

Rule 2(e) ..... 803  
 Rule 5(a) ..... 705

Rules Governing Admission  
 to the Bar:

Rule XIII ..... 232  
 Rule XV(E)(1) ..... 126

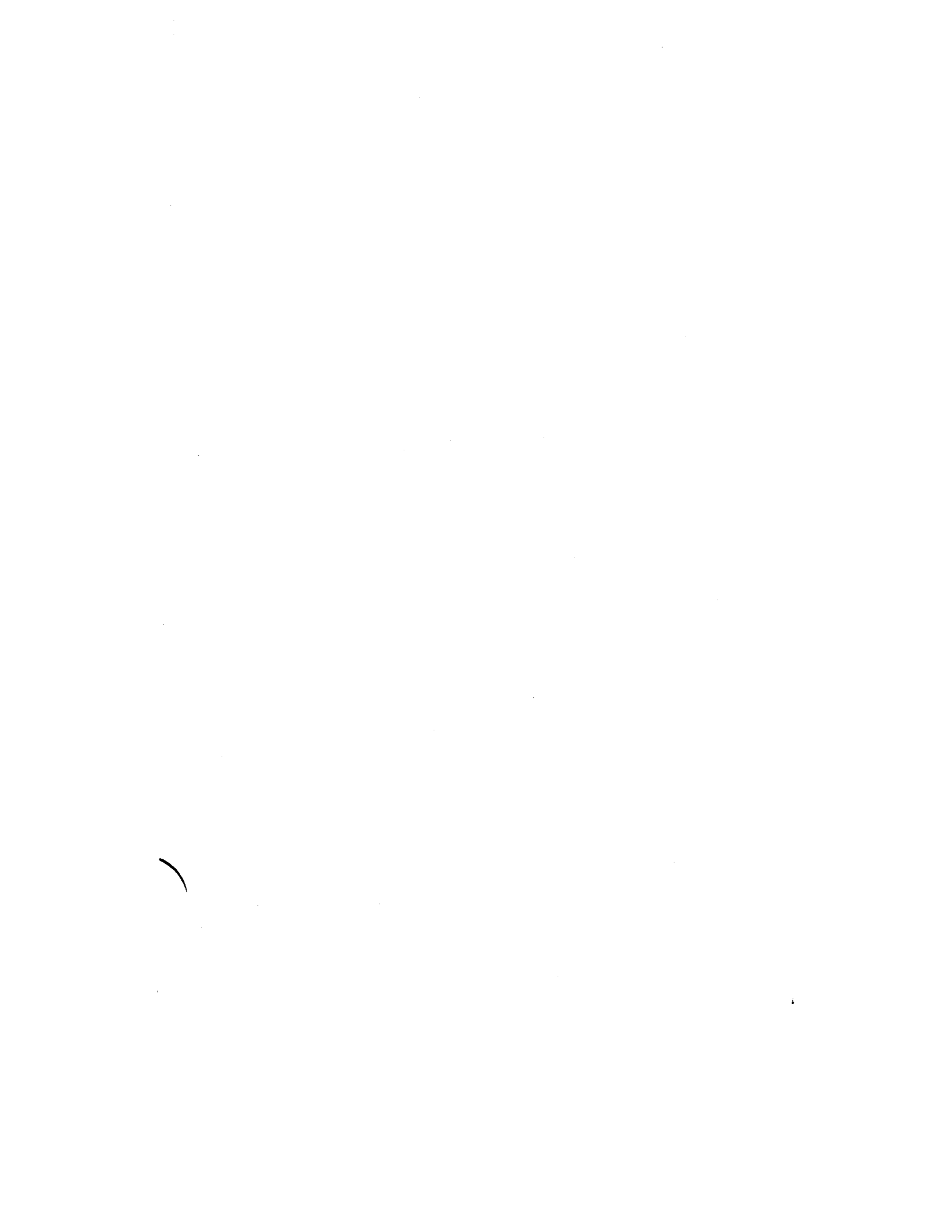
Rules of the Arkansas  
 Supreme Court and Court of Appeals  
 (Ark. Code Ann. Court Rules [1995]):

Rule 1-2(a)(1) ..... 741  
 Rule 1-2(a)(2) ..... 29, 180, 214, 590,  
 658  
 Rule 1-2(a)(3) ..... 24, 284, 312  
 Rule 1-2(a)(12) ..... 138, 651, 707  
 Rule 1-2(a)(13) ..... 503  
 Rule 1-2(a)(16) ..... 31, 226, 266, 284,  
 365  
 Rule 1-2(d)(1) ..... 312  
 Rule 1-5 ..... 505  
 Rule 3-5 ..... 569  
 Rule 4-2 ..... 434  
 Rule 4-2(a)(6) ..... 432, 434  
 Rule 4-2(b)(2) ..... 432, 433  
 Rule 4-3(h) ..... 60, 63, 211, 252,  
 357, 479, 498, 521,  
 598, 605, 668  
 Rule 5-3(c) ..... 234  
 Rule 9(d) ..... 434

STATUTES:

Arkansas Statutes Annotated:

27-1901 ..... 648  
 27-2127.5 ..... 647, 648  
 37-205 ..... 279  
 41-302 ..... 38  
 41-609 ..... 209  
 43-1031 ..... 601  
 57-618 ..... 314





ARKANSAS  
APPELLATE  
REPORTS

Volume 52

CASES DETERMINED  
IN THE

Court of Appeals  
of Arkansas

FROM  
January 10, 1996 — March 13, 1996  
INCLUSIVE

WILLIAM B. JONES, JR.  
REPORTER OF DECISIONS

CINDY M. ENGLISH  
ASSISTANT  
REPORTER OF DECISIONS

PUBLISHED BY THE  
STATE OF ARKANSAS  
1996

Set in Baskerville

DARBY PRINTING COMPANY  
6215 PURDUE DRIVE  
ATLANTA, GEORGIA 30336  
1996

---

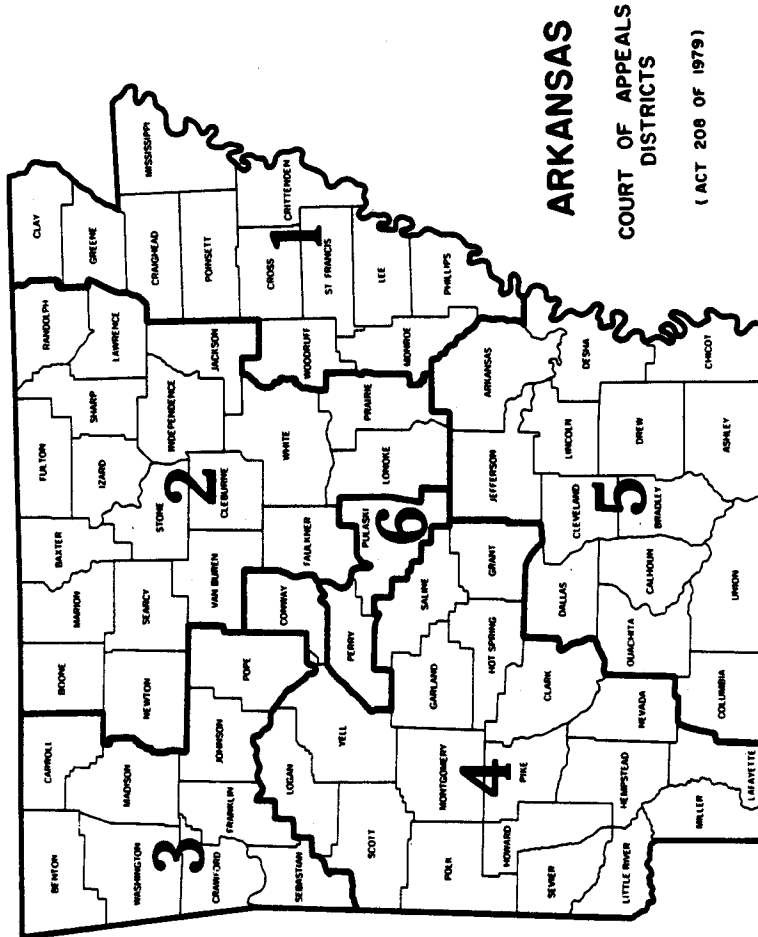
---

**CONTENTS**

---

---

	<b>Page</b>
MAP OF DISTRICTS FOR COURT OF APPEALS	iv
JUDGES AND OFFICERS OF THE COURT OF APPEALS	v
TABLE OF CASES REPORTED	
Alphabetical	vi
Opinions by Respective Judges of Court of Appeals and Per Curiam Opinions	x
STANDARDS FOR PUBLICATION OF OPINIONS	
Rule 5-2, Rules of the Supreme Court and Court of Appeals	xii
TABLE OF OPINIONS NOT REPORTED	xiv
TABLE OF CASES AFFIRMED WITHOUT WRITTEN OPINION	xx
OPINIONS REPORTED	1
INDEX	
Alphabetical Headnote Index	260
References to Acts, Codes, Constitutional Provisions, Rules & Statutes	268



# 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  
(January 10, 1996 —  
March 13, 1996, inclusive)

## JUDGES

JOHN E. JENNINGS	Chief Judge <sup>1</sup>
JOHN MAUZY PITTMAN	Judge <sup>2</sup>
JAMES R. COOPER	Judge <sup>3</sup>
JOHN B. ROBBINS	Judge <sup>4</sup>
MELVIN MAYFIELD	Judge <sup>5</sup>
JUDITH ROGERS	Judge <sup>6</sup>
JOHN F. STROUD, JR.	Judge <sup>7</sup>
OLLY NEAL	Judge <sup>8</sup>
WENDELL L. GRIFFEN	Judge <sup>9</sup>

## OFFICERS

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

<sup>1</sup>District 3.

<sup>2</sup>District 1.

<sup>3</sup>District 2.

<sup>4</sup>District 4.

<sup>5</sup>District 5.

<sup>6</sup>District 6.

<sup>7</sup>Position 7. Appointed effective January 1, 1996, by Governor Jim Guy Tucker.

<sup>8</sup>Position 8. Appointed effective January 1, 1996, by Governor Jim Guy Tucker.

<sup>9</sup>Position 9. Appointed effective January 1, 1996, by Governor Jim Guy Tucker.

## TABLE OF CASES REPORTED

---

### A

Arkansas State Highway & Transp. Dep't (*Phillips v.*) . . . 170

### B

B & M Constr. (*Barnard v.*) . . . . . 61  
*Barker v. State* . . . . . 248  
 Balch Motor Co. (*Sonny v.*) . . . . . 233  
*Barnard v. B & M Constr.* . . . . . 61  
*Bell (Hefin v.)* . . . . . 201  
*Benton Fire Dep't (Earp v.)* . . . . . 66  
*Best Western-Governor's Inn (Hubley v.)* . . . . . 226  
*Bevans (Harvill v.)* . . . . . 57  
*Black v. State* . . . . . 140  
*Bradford v. Bradford* . . . . . 81  
*Bradford (Bradford v.)* . . . . . 81  
*Brewer (United States Fidelity & Guar. Co. v.)* . . . . . 214  
*Burrow (Milligan v.)* . . . . . 20

### C

*Carolina Cas. Ins. Co. (Hartford Fire Ins. Co. v.)* . . . . . 35  
*Century 21 Caldwell Realty (Ingram v.)* . . . . . 101  
*City of Little Rock (Jenkins v.)* . . . . . 113  
*City of Little Rock (Thomas v.)* . . . . . 24  
*City of Russellville (Schaeffer v.)* . . . . . 184  
*City of Shannon Hills v. Sparks* . . . . . 188  
*Colonia Underwriters Ins. Co. (Dean v.)* . . . . . 91

### D

*Dean v. Colonia Underwriters Ins. Co.* . . . . . 91  
*Director (Fulgham v.)* . . . . . 197

Director (Moore *v.*) .....10  
 Director (Network Design Eng'g, Inc. *v.*) .....193  
 Director (Rucker *v.*) .....126

E

Earp *v.* Benton Fire Dep't .....66

F

Fulgham *v.* Director .....197

G

Gansky *v.* Hi-Tech Eng'g .....147  
 Green *v.* State .....244  
 Guthrie *v.* State .....145

H

Harp's Food Stores, Inc. (Heinrich *v.*) .....165  
 Hartford Fire Ins. Co. *v.* Carolina Cas. Ins. Co. ....35  
 Harvest Foods *v.* Washam .....72  
 Harvill *v.* Bevans .....57  
 Hawkins Constr. *v.* Maxwell .....116  
 Heflin *v.* Bell .....201  
 Heinrich *v.* Harp's Food Stores, Inc. ....165  
 Hi-Tech Eng'g (Gansky *v.*) .....147  
 Hoskins *v.* Rogers Cold Storage .....219  
 Hubley *v.* Best Western-Governor's Inn .....226

I

Ingram *v.* Century 21 Caldwell Realty .....101  
 Ivy *v.* State .....256

J

Jackson *v.* State .....7  
 James *v.* James .....29  
 Jenkins *v.* City of Little Rock .....113  
 Jones *v.* State .....179

## K

Kirby <i>v.</i> State .....	161
-----------------------------	-----

## L

Lemons ( <i>McJunkins v.</i> ) .....	1
--------------------------------------	---

## M

Mathis <i>v.</i> Mathis .....	155
Mathis ( <i>Mathis v.</i> ) .....	155
Maxwell ( <i>Hawkins Constr. v.</i> ) .....	116
McJunkins <i>v.</i> Lemons .....	1
Milligan <i>v.</i> Burrow .....	20
Moore <i>v.</i> Director .....	10

## N

Network Design Eng'g, Inc. <i>v.</i> Director .....	193
---	-----

## P

Phillips <i>v.</i> Arkansas State Highway & Transp. Dep't .....	170
Planters Bank & Trust Co. <i>v.</i> Smith .....	53

## Q

Quinn <i>v.</i> Webb Wheel .....	208
Quinn <i>v.</i> Webb Wheel .....	213-A

## R

Rogers Cold Storage ( <i>Hoskins v.</i> ) .....	219
Rose ( <i>State Farm Mut. Auto. Ins. Co. v.</i> ) .....	175
Rose ( <i>Stucco, Inc. v.</i> ) .....	42
Rucker <i>v.</i> Director .....	126

## S

Schaeffer <i>v.</i> City of Russellville .....	184
Smith ( <i>Planters Bank &amp; Trust Co. v.</i> ) .....	53



Sonny <i>v.</i> Balch Motor Co. ....	233
Sparks (City of Shannon Hills <i>v.</i> ) .....	188
State (Barker <i>v.</i> ) .....	248
State (Black <i>v.</i> ) .....	140
State Farm Mut. Auto. Ins. Co. <i>v.</i> Rose .....	175
State (Green <i>v.</i> ) .....	244
State (Gutherie <i>v.</i> ) .....	145
State (Ivy <i>v.</i> ) .....	256
State (Jackson <i>v.</i> ) .....	7
State (Jones <i>v.</i> ) .....	179
State (Kirby <i>v.</i> ) .....	161
State (Tabor <i>v.</i> ) .....	251
Stucco, Inc. <i>v.</i> Rose .....	42

T

Tabor <i>v.</i> State .....	251
Thomas <i>v.</i> City of Little Rock .....	24

U

United States Fidelity & Guar. Co. <i>v.</i> Brewer .....	214
---	-----

W

Washam (Harvest Foods <i>v.</i> ) .....	72
Webb Wheel (Quinn <i>v.</i> ) .....	208
Webb Wheel (Quinn <i>v.</i> ) .....	213-A

OPINIONS DELIVERED BY THE RESPECTIVE  
JUDGES OF THE ARKANSAS COURT OF APPEALS  
DURING THE PERIOD COVERED BY THIS  
VOLUME AND DESIGNATED FOR PUBLICATION

---

JOHN E. JENNINGS, CHIEF JUDGE:

Gutherie <i>v.</i> State .....	145
Thomas <i>v.</i> City of Little Rock .....	24

JOHN MAUZY PITTMAN, JUDGE:

Bradford <i>v.</i> Bradford .....	81
Gansky <i>v.</i> Hi-Tech Eng'g .....	147
Jackson <i>v.</i> State .....	7
Jones <i>v.</i> State .....	179
Schaeffer <i>v.</i> City of Russellville .....	184

JAMES R. COOPER, JUDGE:

Dean <i>v.</i> Colonia Underwriters Ins. Co. ....	91
Ingram <i>v.</i> Century 21 Caldwell Realty .....	101

JOHN B. ROBBINS, JUDGE:

City of Shannon Hills <i>v.</i> Sparks .....	188
Jenkins <i>v.</i> City of Little Rock .....	113
Mathis <i>v.</i> Mathis .....	155
Sonny <i>v.</i> Balch Motor Co. ....	233

MELVIN MAYFIELD, JUDGE:

Hawkins Constr. <i>v.</i> Maxell .....	116
James <i>v.</i> James .....	29

JUDITH ROGERS, JUDGE:

Green <i>v.</i> State .....	244
Harvill <i>v.</i> Bevans .....	57
McJunkins <i>v.</i> Lemons .....	1

Moore <i>v.</i> Director .....	10
Network Design Eng'g, Inc. <i>v.</i> Director .....	193
Rucker <i>v.</i> Price .....	126

JOHN F. STROUD, JR., JUDGE:

Barnard <i>v.</i> B & M Constr. ....	61
Earp <i>v.</i> Benton Fire Dep't. ....	66
Fulgham <i>v.</i> Director .....	197
Hartford Fire Ins. Co. <i>v.</i> Carolina Cas. Ins. Co. ....	35
Heflin <i>v.</i> Bell .....	201
Kirby <i>v.</i> State .....	161
Quinn <i>v.</i> Webb Wheel .....	208
Quinn <i>v.</i> Webb Wheel .....	213-A
United States Fidelity & Guar. Co. <i>v.</i> Brewer .....	214

OLLY NEAL, JUDGE:

Barker <i>v.</i> State .....	248
Heinrich <i>v.</i> Harp's Food Stores, Inc. ....	165
Phillips <i>v.</i> Arkansas State Hwy. & Transp. Dep't .....	170

WENDELL L. GRIFFEN, JUDGE:

Black <i>v.</i> State .....	140
Harvest Foods <i>v.</i> Washam .....	72
Hoskins <i>v.</i> Rogers Cold Storage .....	219
Hubley <i>v.</i> Best Western-Governor's Inn .....	226
Milligan <i>v.</i> Burrow .....	20
State Farm Mut. Auto. Ins. Co. <i>v.</i> Rose .....	175
Tabor <i>v.</i> State .....	251

BRUCE T. BULLION, SPECIAL JUDGE:

Stucco, Inc. <i>v.</i> Rose .....	42
-----------------------------------	----

PER CURIAM:

Ivy <i>v.</i> State .....	256
Planters Bank & Trust Co. <i>v.</i> Smith .....	53

## 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**

---

---

- AAA Bail Bond Co. *v.* State, CA 95-301 (Cooper, J.), affirmed March 13, 1996.
- Abel *v.* Kowalski, CA 94-988 (Per Curiam), Brief Time granted January 31, 1996.
- Alexander-Brown, Inc. *v.* Bale Chevrolet Co., CA 95-203 (Griffen, J.), affirmed February 28, 1996.
- American Bonding Co. *v.* City of Truman, CA 94-1206 (Rogers, J.), affirmed January 31, 1996.
- Anderson *v.* State, CA CR 95-246 (Neal, J.), affirmed January 31, 1996.
- Arnold Leham Builders, Inc. *v.* Thomas, CA 95-58 (Stroud, J.), affirmed February 28, 1996.
- Bell *v.* State, CA CR 94-1422 (Mayfield, J.), affirmed January 31, 1996.
- Blockburger *v.* State, CA CR 95-78 (Stroud, J.), affirmed January 31, 1996.
- Blount *v.* State, CA CR 94-1380 (Robbins, J.), affirmed January 10, 1996.
- Brackney *v.* McKee Foods, Inc., CA 95-276 (Griffen, J.), affirmed February 21, 1996.
- Brown *v.* Brown, CA 94-756 (Mayfield, J.), affirmed February 14, 1996.
- Brownlee *v.* Kemp, CA 94-1285 (Neal, J.), reversed and remanded February 28, 1996.
- Bumgardner *v.* Walls, CA 95-185 (Neal, J.), affirmed March 6, 1996.
- Caffey *v.* State, CA CR 95-90 (Jennings, J.), affirmed January 10, 1996.
- Cal-Ark Trucking *v.* Porter, CA 95-55 (Cooper, J.), affirmed February 7, 1996.
- Campbell *v.* State, CA CR 95-81 (Mayfield, J.), affirmed February 7, 1996.
- Cherry *v.* Cherry, CA 95-813 (Per Curiam), Appellee's Motion to Strike Appellant's Brief passed until case submitted January 31, 1996.
- Christian *v.* State, CA CR 95-395 (Neal, J.), affirmed February 28, 1996.

- City of Fort Smith *v.* McCurtain, CA 95-113 (Mayfield, J.), affirmed February 14, 1996.
- City of Fort Smith *v.* Willis, CA 95-290 (Neal, J.), affirmed March 13, 1996.
- City of Little Rock *v.* Ammons, CA 95-72 (Mayfield, J.), affirmed February 28, 1996.
- Cole *v.* Director, E 94-251 (Cooper, J.), affirmed March 6, 1996.
- Conley *v.* State, CA CR 95-111 (Robbins, J.), affirmed January 10, 1996.
- Cooper Tire & Rubber Co. *v.* Carr, CA 95-268 (Pittman, J.), affirmed March 6, 1996.
- Cox *v.* State, CA CR 95-35 (Robbins, J.), affirmed January 24, 1996.
- Crook *v.* State, CA CR 95-281 (Griffen, J.), affirmed February 14, 1996.
- Curran *v.* State, CA CR 95-68 (Robbins, J.), affirmed January 31, 1996.
- Davenport *v.* State, CA CR 95-36 (Bullion, S.J.), affirmed January 10, 1996.
- Dean *v.* Terrell, CA 95-678 (Per Curiam), Appellee's Motion to Dismiss Appeal and to Stay Brief Time denied February 7, 1996.
- Dickson *v.* Dickson, CA 94-1450 (Mayfield, J.), affirmed February 28, 1996.
- Edwards *v.* State, CA CR 95-545 (Cooper, J.), affirmed February 14, 1996.
- Farmer *v.* Excelsior Hotel, CA 96-16 (Per Curiam), Pro Se Motion for Rule on the Clerk to Lodge Transcript remanded February 28, 1996.
- Fast *v.* State, CA CR 95-4 (Cooper, J.), affirmed January 31, 1996.
- Foster *v.* Taylor, CA 94-1249 (Mayfield, J.), affirmed January 31, 1996.
- Fox *v.* State, CA CR 94-1315 (Robbins, J.), affirmed March 13, 1996.
- Foxx *v.* American Transp., CA 95-218 (Robbins, J.), affirmed February 7, 1996. Substituted Opinion upon Grant of Petition for Rehearing delivered June 19, 1996, reversed and remanded. *See* 54 Ark. App. 115 (1996).
- Garden *v.* State, CA CR 95-139 (Jennings, C.J.), affirmed as modified and remanded February 21, 1996.

- Gill *v.* Lasley, CA 95-540 (Per Curiam), Appellant' Motion to Supplement the Record and for Brief Time denied March 13, 1996.
- Gordon *v.* State, CA CR 94-978 (Pittman, J.), affirmed February 7, 1996.
- Gosvenor *v.* Smackover Motor Co., CA 95-292 (Rogers, J.), affirmed February 21, 1996.
- Grisham *v.* Faulkner Nursing Ctr., CA 95-207 (Pittman, J.), affirmed February 7, 1996.
- Harris *v.* State, CA CR 95-21 (Per Curiam), Motion to be Relieved as Counsel granted; substituted counsel appointed January 10, 1996.
- Harton *v.* State, CA CR 95-506 (Pittman, J.), affirmed March 6, 1996.
- Harvey *v.* State, CA CR 95-27 (Pittman, J.), affirmed January 10, 1996.
- Headley *v.* State, CA CR 95-93 (Robbins, J.), affirmed February 14, 1996.
- Hendrickson *v.* Tyson Foods, Inc., CA 95-101 (Rogers, J.), affirmed February 28, 1996.
- Hill *v.* Hill, CA 95-45 (Mayfield, J.), affirmed March 13, 1996.
- Hornbeck *v.* Hornbeck, CA 95-1210 (Per Curiam), Appellee's Motion to Remand moot January 31, 1996.
- Horton *v.* Rashdan, CA 94-1116 (Pittman, J.), affirmed February 4, 1996.
- Hunter *v.* White County Circuit Court, CA 95-229 (Stroud, J.), affirmed February 7, 1996.
- In Re: Estate of Williams, CA 95-74 (Rogers, J.), affirmed March 6, 1996.
- Jackson *v.* Jackson, CA 94-1213 (Cooper, J.), dismissed January 17, 1996.
- Jackson *v.* Perkins Supply, Inc., CA 95-1035 (Per Curiam), Appellee's Motion to Dismiss Appeal denied January 17, 1996.
- James *v.* Arkansas Dep't of Human Servs., CA 95-380 (Cooper, J.), affirmed February 28, 1996.
- Jeffers *v.* State, CA CR 94-1419 (Cooper, J.), reversed and remanded January 24, 1996.
- Jones *v.* Carl Finch Co., CA 95-314 (Robbins, J.), affirmed March 6, 1996.
- Kearney Co. *v.* Niccum, CA 95-256 (Neal, J.), affirmed February 21, 1996.



- Lawrence *v.* McDonald, CA 94-900 (Cooper, J.), affirmed January 17, 1996.
- Leach *v.* Bill Davis Trucking, CA 95-108 (Neal, J.), affirmed January 31, 1996.
- Lester *v.* State, CA CR 94-1312 (Per Curiam), Appellant's Pro Se Motion for Reconsideration of Order Denying Motion for Bond remanded February 28, 1996.
- Lloyd *v.* Cranford, CA 94-308 (Pittman, J.), affirmed January 24, 1996.
- London *v.* State, CA CR 94-1422 (Rogers, J.), affirmed January 31, 1996.
- Long *v.* State, CA CR 95-176 (Rogers, J.), affirmed January 10, 1996.
- Maxwell *v.* State, CA CR 95-216 (Griffen, J.), affirmed February 7, 1996.
- McCaster *v.* State, CA CR 95-202 (Griffen, J.), affirmed February 28, 1996.
- McCauley *v.* State, CA CR 94-1382 (Jennings, C.J.), affirmed February 28, 1996.
- McClusky *v.* Estate of McClusky, CA 94-1413 (Robbins, J.), affirmed February 14, 1996.
- McKee Foods, Inc. *v.* Reed, CA 95-236 (Cooper, J.), affirmed February 14, 1996.
- Meyer *v.* Riverdale Harbor Mun. Property Owners Improvement Dist. No. 1, CA 95-12 (Neal, J.), affirmed February 21, 1996.
- Moore *v.* John Brown E & C, CA 95-99 (Mayfield, J.), affirmed February 7, 1996.
- Morrison *v.* State, CA CR 94-1360 (Robbins, J.), affirmed February 7, 1996.
- Moses *v.* State, CA CR 94-1353 (Jennings, C.J.), affirmed January 10, 1996.
- Murphy *v.* State, CA CR 95-54 (Rogers, J.), affirmed February 7, 1996.
- Nash *v.* State, CA CR 95-243 (Pittman, J.), affirmed January 10, 1996.
- Nations *v.* Rector Sportswear Corp., CA 95-84 (Rogers, J.), affirmed January 24, 1996.
- Nelson *v.* State, CA CR 95-460 (Rogers, J.), remanded March 6, 1996.
- Nutt *v.* State, CA CR 95-140 (Rogers, J.), affirmed February 28, 1996.

- Oliver *v.* State, CA CR 95-122 (Griffen, J.), affirmed January 31, 1996.
- Palmer *v.* State, CA CR 95-346 (Robbins, J.), affirmed February 21, 1996.
- Patton *v.* State, CA CR 94-570 (Per Curiam), Appellant's Motion to Reinstate Appeal granted February 28, 1996.
- Pearrow *v.* State, CA CR 95-50 (Jennings, C.J.), affirmed January 31, 1996.
- Peevy *v.* State, CA CR 95-362 (Mayfield, J.), affirmed March 13, 1996.
- Pettis *v.* State, CA CR 94-1441 (Neal, J.), affirmed February 7, 1996.
- Planters Bank & Trust Co. *v.* Smith, CA 95-1156 (Per Curiam), Appellee's Motion to Dismiss Appeal denied February 7, 1996.
- Plummer *v.* State, CA CR 94-1241 (Bullion, S.J.), affirmed January 10, 1996.
- POM, Inc. *v.* Taylor, CA 95-360 (Robbins, J.), affirmed February 28, 1996.
- Reed *v.* Director, E 94-128 (Stroud, J.), affirmed February 21, 1996.
- Reed *v.* Methodist Hosp. of Jonesboro, CA 95-285 (Cooper, J.), affirmed February 28, 1996.
- Reinhardt *v.* McLean, CA 95-255 (Cooper, J.), affirmed on appeal; reversed and remanded on cross appeal February 21, 1996.
- Riverside Furniture *v.* Duvall, CA 94-1321 (Jennings, C.J.), affirmed January 24, 1996.
- Rodgers *v.* State, CA CR 95-266 (Robbins, J.), affirmed February 28, 1996.
- Rogers *v.* Booneville Human Dev., CA 95-76 (Rogers, J.), affirmed February 7, 1996.
- Ross *v.* Hooten Equip. Co., CA 94-1308 (Jennings, C.J.), affirmed January 31, 1996.
- Schwartz *v.* Moody, CA 94-708 (Per Curiam), Appellant's Motion to Reinstate Appeal denied February 21, 1996.
- Schwarz *v.* Moody, CA 94-695 (Per Curiam), Motion to Enforce Supersedeas denied February 21, 1996.
- Sebastian *v.* State, CA CR 95-107 (Mayfield, J.), affirmed January 10, 1996.
- Shabazz *v.* State, CA CR 95-97 (Pittman, J.), affirmed March 6, 1996.

- Shorter *v.* Tyson Foods, Inc., CA 95-374 (Neal, J.), affirmed March 6, 1996.
- Sierra Corp. *v.* Fleming, CA 95-161 (Stroud, J.), affirmed March 6, 1996.
- Sims *v.* Hawkins, CA 95-11 (Robbins, J.), affirmed February 14, 1996.
- Smith, Charlotte *v.* Aetna Cas. & Surety Co., CA 94-1359 (Per Curiam), dismissed February 21, 1996.
- Smith, Clayton *v.* Kentucky Fried Chicken, CA 95-384 (Jennings, C.J.), affirmed March 6, 1996.
- Smith, Jerry L. *v.* State, CA CR 94-1128 (Jennings, C.J.), affirmed February 28, 1996.
- Smith, Ladonna Nita *v.* Smith, CA 94-1454 (Robbins, J.), affirmed February 28, 1996.
- Smith, Ricky Allen *v.* State, CA CR 95-119 (Rogers, J.), affirmed February 7, 1996.
- Steed *v.* Farmers Ins. Exchange, CA 94-1170 (Mayfield, J.), affirmed January 31, 1995.
- Stout *v.* State, CA CR 95-142 (Mayfield, J.), affirmed February 7, 1996.
- Stubbs *v.* State, CA CR 95-240 (Neal, J.), affirmed February 14, 1996.
- Thrower *v.* Georgia-Pacific Corp., CA 95-2 (Rogers, J.), affirmed February 14, 1996.
- Towler *v.* State, CA CR 95-181 (Mayfield, J.), affirmed January 24, 1996.
- TTC, Inc. *v.* Gatrell, CA 95-330 (Jennings, C.J.), affirmed February 14, 1996.
- Webster *v.* State, CA CR 94-431 (Cooper, J.), affirmed March 6, 1996.
- White *v.* White, CA 95-1121 (Per Curiam), Appellant's Motion to Supplement the Record granted January 31, 1996.
- White *v.* White, CA 95-1202 (Per Curiam), Appellant's Petition for Writ of Certiorari to Complete the Record and to Stay Brief Time granted January 31, 1996.
- Wimberly *v.* State, CA CR 95-275 (Stroud, J.), affirmed February 14, 1996.
- Winston Gilleylen Oil Co. *v.* Hendrix, CA 95-302 (Rogers, J.), affirmed March 13, 1996.
- Wright *v.* State, CA CR 94-1227 (Mayfield, J.), affirmed February 7, 1996.

CASES AFFIRMED BY THE ARKANSAS  
COURT OF APPEALS WITHOUT WRITTEN  
OPINION PURSUANT TO RULE 5-2(b),  
RULES OF THE ARKANSAS SUPREME COURT  
AND COURT OF APPEALS

---

- Acme Agri Supply, Inc. v. Director of Labor*, E 94-261, January 10, 1996.
- Beatty v. Director of Labor*, E 95-018, February 21, 1996.
- Bentley Plastics, Inc. v. Director of Labor*, E 95-110, February 28, 1996.
- Betts v. Director of Labor*, E 94-275, January 10, 1996.
- Brown v. Director of Labor*, E 95-091, February 21, 1996.
- Canada v. Director of Labor*, E 95-125, February 28, 1996.
- Carter v. Director of Labor*, E 95-010, January 24, 1996.
- Christian v. Director of Labor*, E 95-108, February 28, 1996.
- Clifton v. Director of Labor*, E 94-308, January 10, 1996.
- Conner v. Director of Labor*, E 95-017, February 21, 1996.
- Cook v. Director of Labor*, E 95-009, February 21, 1996.
- Davis v. Director of Labor*, E 95-107, February 28, 1996.
- Drewry v. Director of Labor*, E 95-015, February 21, 1996.
- Dunn v. Director of Labor*, E 95-102, February 28, 1996.
- Fox v. Director of Labor*, E 94-296, January 24, 1996.
- Freer v. Director of Labor*, E 95-008, February 21, 1996.
- Hall v. Director of Labor*, E 94-300, February 21, 1996.
- Herrera v. Director of Labor*, E 95-013, February 21, 1996.
- Hughes v. Director of Labor*, E 95-112, February 28, 1996.
- Hunter v. Director of Labor*, E 95-113, February 28, 1996.
- Jones v. Director of Labor*, E 95-115, February 28, 1996.
- Kennedy v. Director of Labor*, E 95-098, February 21, 1996.
- Larsen v. Director of Labor*, E 95-095, February 21, 1996.
- Lewis v. Director of Labor*, E 95-122, February 28, 1996.
- Love v. Director of Labor*, E 95-111, February 28, 1996.
- Marshall v. Director of Labor*, E 94-306, January 10, 1996.
- Matthews v. Director of Labor*, E 94-301, January 24, 1996.
- McKinney v. Director of Labor*, E 95-005, February 21, 1996.
- Newsom v. Director of Labor*, E 94-302, February 21, 1996.
- Parsons v. Director of Labor*, E 95-096, February 21, 1996.
- Phelps v. Director of Labor*, E 95-094, February 21, 1996.
- Phillips v. Director of Labor*, E 94-293, January 24, 1996.

- Pratt *v.* Director of Labor, E 95-006, February 28, 1996.  
Reed *v.* Director of Labor, E 95-090, January 24, 1996.  
S-B Power Tool Co. *v.* Director of Labor, E 95-011, February 21, 1996.  
Salmon *v.* Director of Labor, E 95-104, February 28, 1996.  
Spiltech Servs., Inc. *v.* Director of Labor, E 95-121, February 28, 1996.  
Strickland *v.* Director of Labor, E 95-099, February 28, 1996.  
Swint *v.* Director of Labor, E 95-004, February 21, 1996.  
Teague *v.* Director of Labor, E 94-299, January 24, 1996.  
Turner *v.* Director of Labor, E 94-279, January 10, 1996.  
Watson *v.* Director of Labor, E 94-243, February 21, 1996.  
Woodbury *v.* Director of Labor, E 94-294, January 10, 1996.



Alphabetical  
HEADNOTE  
INDEX

## HEADNOTE INDEX

---

### ADMINISTRATIVE LAW & PROCEDURE:

- Failure to exhaust administrative remedies, appeal failed at threshold level. *Milligan v. Burrow*, 20.
- State purchasing law adopts exhaustion doctrine for disputes for state services. *Id.*
- Appellants not justified in assuming that state employee's assertion that purchasing law no longer applied to bid was correct, litigants under duty to investigate extent of available administrative remedies before resorting to courts. *Id.*
- Appellants sought wrong remedy, violation of competitive-bidding statute does not give rise to claim for damages. *Id.*
- Administrative Procedure Act does not prohibit an agency from reconsidering its own decision, *res judicata* should not apply with equal force to administrative proceedings. *Earp v. Benton Fire Dep't*, 66.
- Circuit court found appellee did not reopen the issue of appellant's retirement benefits, appellant presented no evidence of fraud, mistake or misconception of facts that would have supported reopening the earlier claim. *Id.*
- Res judicata* defense not waived by appellee, appellee continued to maintain that appeal was untimely. *Id.*

### ADVERSE POSSESSION:

- Title to an alley cannot be acquired by adverse possession. *Thomas v. City of Little Rock*, 24.

### APPEAL & ERROR:

- Issue not reached, abstract flagrantly deficient. *McJunkins v. Lemons*, 1.
- Chancery cases tried *de novo* on appeal, appellate court may also remand for further action, case remanded in part. *Id.*
- Record on appeal confined to that which is abstracted. *Hartford Fire Ins. Co. v. Carolina Cas. Ins. Co.*, 35.
- Supplemental-abstract reimbursement awarded. *Id.*
- No prejudice shown as result of alleged error in reporter's notes, case did not involve interpretation or construction of rule, no need for certification. *Planters Bank & Trust Co. v. Smith*, 53.
- Argument not raised or ruled upon by the trial court, argument not reached by appellate court. *Harvill v. Bevans*, 57.
- Timely filing of appeal is jurisdictional, appellant failed to timely file a notice of appeal, dismissal with prejudice was correct. *Earp v. Benton Fire Dep't*, 67.
- Argument not articulated at trial, argument not reached at appeal. *Bradford v. Bradford*, 81.
- Issue raised for the first time on appeal not reached. *Id.*
- Unsupported argument not considered. *Dean v. Colonia Underwriters Ins. Co.*, 91.
- Appellant's burden to abstract record that demonstrates error. *Id.*
- Appellant failed to show that trial court's allocation of recovery was clearly erroneous. *Id.*
- Appeals court without authority to overrule decisions of supreme court. *Id.*
- Mootness, moot issues not ordinarily decided, exceptions. *Black v. State*, 140.
- Mootness, involuntary-commitment statute provides for short-term commitment, not enough time for appeal to be decided, mootness not determinative of result. *Id.*
- Appellant's second argument not addressed. *Gansky v. Hi-Tech Eng'g*, 147.
- Review of chancery cases *de novo*. *Mathis v. Mathis*, 155.
- Appellant in criminal case has duty to abstract pertinent parts of record, documents not abstracted will not be considered unless court can gain sufficient knowledge of issue from briefs and appendices. *Kirby v. State*, 161.
- Terms of suspension not abstracted, sufficient information was provided for court to reach merits of case. *Id.*



- Cause reversed and remanded for retrial, trial court directed to make appropriate discovery orders. *Heinrich v. Harp's Food Stores, Inc.*, 165.
- Commission's finding that appellant failed to meet her burden of proof was *obiter dictum*, matter reversed and remanded. *Phillips v. Arkansas State Highway & Transp. Dep't*, 170.
- Notice of appeal, untimely appeal deprives appellate court of jurisdiction. *Schaeffer v. City of Russellville*, 184.
- Notice of appeal filed prior to entry of order, premature notice of appeal dismissed. *Id.*
- Trial court's decision from the bench insufficient to trigger the running period in which notice of appeal could properly be filed, appellant's argument without merit. *Id.*
- Argument case erroneously transferred not reached, appellant failed to bring up a record sufficient to demonstrate reversible error. *City of Shannon Hills v. Sparks*, 188.
- Chancery cases, standard of review. *Heflin v. Bell*, 201.
- Appellant's burden to bring up record showing that trial court erred. *Id.*
- Motion for reinstatement of appeal, matter remanded to settle record regarding appellant's conditional guilty plea. *Tabor v. State*, 251.

## ATTORNEY &amp; CLIENT:

- Fees, issue tried by express or implied consent of parties, trial court did not err in treating reimbursement issue as having been properly raised. *Hartford Fire Ins. Co. v. Carolina Cas. Ins. Co.*, 36.
- Fees, whether insurer that has denied coverage is liable for attorney's fees paid by insurer and another insurer depends on whether fees incurred were reasonable. *Id.*
- Fees, insufficient evidence of trial court's determination of which portion of attorney's fees was reasonable, matter remanded. *Id.*

## ATTORNEY'S FEES:

- Appellant's abstract sufficient to permit understanding of issues, appellee's motion denied. *Sonny v. Balch Motor Co.*, 233.

## CIVIL PROCEDURE:

- Appellant filed only a motion for modification, appellee not required to file an answer. *James v. James*, 29.
- Bank's ratification pursuant to Ark. R. Civ. P. 17 (a) cured any alleged defect in the parties, trial court's ruling not in error. *Harvill v. Bevans*, 57.
- All litigants must conform to the rules of procedure. *Bradford v. Bradford*, 81.
- Ordinarily there must be pleadings in support of the relief awarded by the court, objective of rules of procedure. *Id.*
- Party seeking intervention must state in a separate pleading the claim or defense to be advanced, appellee adequately complied with the rule. *Id.*
- Intervention, requirements that must be met in order to intervene as a matter of right. *Id.*
- Appellee adequately demonstrated that he was entitled to intervene as a matter of right, intervention properly allowed. *Id.*
- Timeliness in intervention is a matter lying within the trial court's discretion, factors to be considered when determining timeliness. *Id.*
- Appellee's petition not filed after entry of final judgment, chancellor did not abuse his discretion in allowing petition. *Id.*

## CONSTITUTIONAL LAW:

- Sovereign immunity, concept is well grounded in Arkansas law. *Milligan v. Burrow*, 20.
- Sovereign immunity, action filed nominally against state employees was tantamount to action against state, sovereign immunity applied. *Id.*
- Double jeopardy, when it may be invoked. *Green v. State*, 244.

Double jeopardy, determination as to whether double jeopardy has occurred rests on facts of each case. *Id.*  
 Double jeopardy, examples of overruling necessity. *Id.*  
 Double jeopardy, overruling necessity found, second trial not barred by double jeopardy. *Id.*

#### CONTRACTS:

Construction of, unambiguous contract is question of law for court. *Hartford Fire Ins. Co. v. Carolina Cas. Ins. Co.*, 35.  
 Parol evidence, when admissible. *Ingram v. Century 21 Caldwell Realty*, 101.  
 Agreement was ambiguous as to certain points, circuit court did not err in admitting parol evidence. *Id.*

#### COURTS:

Rule-making authority, Arkansas Supreme Court's constitutional and inherent power to regulate procedure in courts. *Planters Bank & Trust Co. v. Smith*, 53.  
 Rule-making authority, amendment of reporter's notes by per curiam opinions. *Id.*  
 Rule-making authority, correction of notes lies within jurisdiction of supreme court. *Id.*  
 Findings of fact of circuit judge, when they will be set aside. *Ingram v. Century 21 Caldwell Realty*, 101.

#### CRIMINAL LAW:

Revocation of suspended sentence, what is required. *Kirby v. State*, 161.  
 Exceptions to revocation of suspension rule inapplicable, trial court without authority to revoke suspension. *Jones v. State*, 179.

#### DAMAGES:

Treble damages properly disallowed, appellee made no argument that appellants' failure to vacate was wrongful. *Harvill v. Bevans*, 57.

#### DEDICATION:

Public may use dedicated property for any use not inconsistent with common purposes of easement. *Thomas v. City of Little Rock*, 24.  
 Good-faith construction of valuable improvements upon alley a prerequisite to acquiring title by abandonment, appellants made no improvements, order granting summary judgment affirmed. *Id.*

#### DISCOVERY:

Discretion of trial court, review. *Heinrich v. Harp's Food Stores, Inc.*, 165.  
 Discretion of trial court, abuse found where there has been undue limitation of substantial rights under circumstances. *Id.*  
 Scope of, should be broader where appellant must prove claim by documents kept by appellee, factor in deciding whether there has been abuse of discretion. *Id.*  
 Goal of, not met in present case, appellant denied fair trial. *Id.*

#### DIVORCE:

Appellant's claim barred, rule prevents multiplicity of suits arising out of the same set of circumstances. *McJunkins v. Lemons*, 1.  
 Reference to child support chart mandatory, chancellor has discretion to adjust the amount pursuant to the individual facts. *Id.*  
 Court imputed income to appellant, amount imputed not required to be specified. *Id.*  
 Chancellor did not refer to family support chart, award of support cannot stand. *Id.*  
 Appellant not prejudiced by remaining in the same position in regards to providing medical insurance as before, chancellor's holding affirmed. *James v. James*, 29.  
 Appellant's support obligation continued, even after child turned eighteen, without a motion to modify support Act 326 terminated this support obligation by operation of law on the effective date of the act. *Id.*  
 Interest of former spouse in retirement benefits, property placed in both names presumed to be held in tenancy by the entirety. *Mathis v. Mathis*, 155.

Presumption of tenancy by the entirety existed as to retirement lump sum, chancellor's decision not clearly erroneous. *Id.*

Applicable law, division of property, statute in effect at time of entry of decree. *Hefin v. Bell*, 201.

Applicable law, modification of child support, statute or per curiam order in effect at time of hearing on modification. *Id.*

Child support, change in payor income warranting modification, applicable statute. *Id.*

Child support, determination regarding changed circumstances, factors on review. *Id.*

Child support, chancellor acted properly in reviewing circumstances to determine if adjustment in child support was warranted. *Id.*

Child support, no abuse of discretion in chancellor's ordering retroactive support payments. *Id.*

## EVIDENCE:

Circumstantial evidence sufficient to prove possession with intent to deliver, trial court has discretion to determine what is relevant. *Jackson v. State*, 7.

Admission of cash and pager proper, possession of these items was relevant to the question of appellant's intent to deliver the cocaine he also possessed. *Id.*

Evidence of mismanagement and bad faith by appellant clearly existed, trial court did not err in finding appellant was terminated for cause. *Ingram v. Century 21 Caldwell Realty*, 101.

Clear and convincing evidence defined. *Black v. State*, 140.

Sufficiency of evidence discussed, factors on review. *Gutherie v. State*, 145.

In misdemeanor cases, testimony of accomplice sufficient to support conviction, witness's credibility for jury to determine, evidence was sufficient to support conviction. *Id.*

Quantum of evidence required for conviction higher than that required for revocation, evidence here sufficient for revocation of appellant's suspended sentence. *Kirby v. State*, 161.

Notice of danger or defect, similar occurrences admissible where events arose out of same or similar circumstances. *Heinrich v. Harp's Food Stores, Inc.*, 165.

Proof that defendant had or should have had knowledge of dangerous condition is relevant, any accidents arising out of same or similar circumstances would have been admissible. *Id.*

Relevant evidence, admission or rejection left to sound discretion of trial court. *Sonny v. Balch Motor Co.*, 233.

Relevant evidence, evidence of prior lawsuit admissible in light of appellant's counterclaim for malicious prosecution, trial court did not abuse discretion. *Id.*

## INSURANCE:

Doubt or uncertainty decided against insurer. *Hartford Fire Ins. Co. v. Carolina Cas. Ins. Co.*, 35.

Unambiguous policy, rules of construction not applicable. *Id.*

Exclusionary provision must be read in light of entire policy. *Id.*

Subrogation, appellee insurer entitled to pursue its subrogation claim, neither policy nor statute restricted insurer's right of reimbursement. *Dean v. Colonia Underwriters Ins. Co.*, 91.

Subrogation, trial court erred in allowing appellee medical plan to share equally in awards. *Id.*

Subrogation, award to medical plan reversed. *Id.*

Set-off denied for disability payments made by appellant, motion for set-off properly denied. *State Farm Mut. Auto. Ins. Co. v. Rose*, 175.

Denial of appellant's motion for set-off for medical expenses paid to appellee in error, trial court's decision reversed. *Id.*

Admittance of evidence of medical bills while denying evidence of medical payments portrays a "false and misleading" financial condition. *Id.*

## JUDGMENT:

- Appeals court may divide two causes of action in circuit judgment. *Dean v. Colonia Underwriters Ins. Co.*, 91.
- When summary judgment should be granted, factors on review. *Jenkins v. City of Little Rock*, 113.
- Appellee was entitled to summary judgment as a matter of law, trial court's determination not in error. *Id.*

## JURY:

- Batson* challenge, principle extended to protect private litigants in civil cases. *Sonny v. Balch Motor Co.*, 233.
- Batson* challenge, inference of racial bias established, explanations given for peremptory strikes were sufficient. *Id.*

## MOTIONS:

- When motion to dismiss treated as one for summary judgment. *Earp v. Benton Fire Dep't*, 66.
- Motion for summary judgment, factors on review. *Id.*
- Motion for directed verdict granted, factors on review. *City of Shannon Hills v. Sparks*, 188.
- Directed verdict properly granted, appellant failed to provide any proof of damages. *Id.*
- State's motion to file brief under seal denied, appellant ordered to rebrief in manner earlier specified by court. *Ivy v. State*, 256.

## MUNICIPAL CORPORATIONS:

- Statutory authority to vacate public streets and alleys. *Thomas v. City of Little Rock*, 24.

## PLEADINGS:

- Chancellor has broad discretion in allowing or denying amendments to the pleadings, no abuse of discretion. *Bradford v. Bradford*, 81.

## PUBLIC HEALTH &amp; WELFARE:

- Involuntary admission, additional periods, criteria. *Black v. State*, 140.
- Involuntary admission, no clear and convincing evidence that appellant posed clear and present danger to herself or others, order reversed and dismissed. *Id.*

## RECORDS:

- Parties cannot agree to seal entire brief, strong presumption exists in favor of public right of access to court records. *Ivy v. State*, 256.
- Closed proceedings in domestic relations matters authorized by statute, circumstances supported partial and selective sealing of appellant's brief. *Id.*

## SENTENCING:

- Suspended imposition of sentence, general rule regarding revocation of suspension and exceptions. *Jones v. State*, 179.
- Burden of proof in revocation proceedings for suspended sentences, factors on review. *Id.*
- Trial court found appellant possessed a firearm in violation of state law, trial court's findings not against the preponderance of the evidence. *Id.*

## SPECIFIC PERFORMANCE:

- Requirements for, when it will be granted. *City of Shannon Hills v. Sparks*, 188.

## STATUTES:

- Statutes construed as having only prospective operation, legislature must specify if statutes are to be applied retroactively. *James v. James*, 29.
- Language of act did not express intention to operate retroactively, act applied prospectively only. *Id.*

## TORTS:

Malicious prosecution, lack of probable cause and malice are essential elements. *Sonny v. Balch Motor Co.*, 233.

## TRIAL:

Trial court denied motion for mistrial, when decision will be reversed. *Barker v. State*, 248.

Prosecutor had no good faith basis for believing appellant had two prior DWI convictions, trial court's denial of mistrial motion resulted in manifest prejudice to appellant. *Id.*

## UNEMPLOYMENT COMPENSATION:

Board of Review did not exceed parameters of defined issues. *Moore v. Director*, 10.

Board's decision supported by substantial evidence. *Id.*

Findings of fact of Board of Review are conclusive if supported by substantial evidence, factors on review. *Rucker v. Price*, 126.

Disqualification for benefits, misconduct discussed. *Id.*

Three-part test for determining whether an employee's off-duty conduct will be considered misconduct in connection with work. *Id.*

Three-part test inapplicable here, misconduct may also be found for the intentional violation of the employer's rules. *Id.*

Appellant not discharged for off-duty conduct, Board's decision of disqualification was supported by substantial evidence. *Id.*

Payment of unemployment insurance taxes, proof required to qualify for exemption as independent contractors. *Network Design Eng'g, Inc. v. Director*, 193.

Review of Board of Review's decision, when decision will be affirmed. *Id.*

Substantial evidence supported Board's finding that the inspector's were not free from appellant's control and direction, Board's decision affirmed. *Id.*

Factors involved in misconduct, mere good faith errors in judgment are not normally considered misconduct. *Fulgham v. Director*, 197.

Review of findings of the Board of Review, factors on appeal. *Id.*

Employer may be justified in having a rule discharging employees who engage in fights, existence of such a rule does not necessarily mean that the discharged employee is guilty of misconduct within the meaning of employment security law. *Id.*

Evidence insufficient to show appellant manifested the requisite culpability for her violation of her employer's rules to constitute misconduct, Board of Review's findings not supported by substantial evidence. *Id.*

## WORKERS' COMPENSATION:

Employee who is rendered permanently totally disabled should receive benefits at the permanent total rate, co-payments by the Second Injury Fund not provided for and would run afoul of the statutory maximum limits imposed on compensation payments. *Stucco, Inc. v. Rose*, 42.

Second Injury Fund statutes, interpretation of. *Id.*

Employer was required to make payment at the permanent total rate, Commission's ruling not in error. *Id.*

Controversion of claim a question of fact for the Commission to resolve, when the Commission's finding will be reversed. *Id.*

Investigation of claim by Fund does not require a finding of controversion, no error in Commission's finding that the Fund had not controverted the claim. *Id.*

Standard of review. *Barnard v. B & M Constr.*, 61.

Scheduled permanent injuries, loss of vision, use of corrective lenses may be taken into consideration in evaluating extent of loss. *Id.*

Weighing medical evidence, commission's duty. *Id.*

Commission's findings supported by substantial evidence. *Id.*

Commission's finding of temporary total disability, standard of review. *Harvest Foods v. Washam*, 72.

Substantial evidence defined, considerations on review. *Id.*

- Healing period defined, factual determination to be made by Commission. *Id.*  
 Healing period, substantial evidence that appellee had not reached end of. *Id.*  
 Challenge to award of benefits not reviewed because decision was res judicata,  
 notice of appeal from order must be filed within thirty days. *Id.*  
 Failure to begin paying benefits within statutory period gives rise to twenty-percent  
 penalty, appellants offered no proof that payments were made. *Id.*  
 Indemnity benefits for temporary disability, public-policy considerations. *Id.*  
 Controversion, attorney's fees, public-policy considerations. *Id.*  
 Imposition of statutory penalty for nonpayment and award of attorney's fees not  
 erroneous. *Id.*  
 Standard of review. *Hawkins Constr. v. Maxwell*, 116.  
 Distinction between recurrence and aggravation, substantial evidence supported  
 Commission's finding that employer was liable for aggravation of employee's old  
 injury. *Id.*  
 Second Injury Fund liability, prerequisites. *Id.*  
 Substantial evidence supported Commission's finding that appellant's pre-existing  
 disability and most recent impairment did not combine to produce greater  
 disability than would have been caused by last injury alone. *Id.*  
 Impairment rating merely aid to Commission, medical evidence not essential. *Id.*  
 Commission did not err under circumstances. *Id.*  
 Apportionment, application of concept, matter for factual determination by  
 Commission. *Id.*  
 Standard of review, substantial evidence defined. *Gansky v. Hi-Tech Eng'g*, 147.  
 Medical opinions, Commission has authority to accept or reject. *Id.*  
 What constitutes reasonable and necessary medical treatment is fact question for  
 Commission. *Id.*  
 Commission's findings and denial of medical benefits supported by substantial  
 evidence. *Id.*  
 Sexual harassment, Arkansas Workers' Compensation statutes do not exclude such  
 claims. *Phillips v. Arkansas State Highway & Transp. Dep't*, 170.  
 Non-traumatically induced mental illness, when compensable. *Id.*  
 Non-traumatically induced mental illness, allegation of continuous sexual  
 harassment by employer, Commission failed to inquire whether claimant  
 sustained injury arising out of and in course of employment. *Id.*  
 Injuries arising out of employment, risk increased by nature or setting of work. *Id.*  
 Sexual harassment as risk related to nature of work environment, decided on case-  
 by-case basis, Commission erred in finding it did not have jurisdiction. *Id.*  
 General Assembly, not appellate court or Commission, should decide whether sexual  
 harassment claims should be excluded from coverage. *Id.*  
 Remand for additional evidence, Commission vested with discretion. *Quinn V. Webb*  
*Wheel*, 208.  
 Remand for additional evidence, prerequisites. *Id.*  
 Remand for additional evidence, Commission was free to develop record further. *Id.*  
 Remand for additional evidence, fact of appellant's death was relevant, actual life  
 span was best evidence for assessment of probable life span. *Id.*  
 Appellant's counsel never obtained ruling on constitutionality of statute, issue not  
 preserved for appeal, constitutional questions must first be presented to  
 administrative law judge or Commission. *Id.*  
 Prohibition of presentation of constitutional arguments for first time on appeal.  
*United States Fidelity & Guar. Co. v. Brewer*, 214.  
 Modification of awards, when Commission may modify final award. *Id.*  
 Modification of awards, appellant's attempt to offer new evidence was outside scope  
 of statute allowing modification of award due to change in physical condition. *Id.*  
 Finality of order or award, Commission correct in finding that it had no authority  
 to vacate prior order. *Id.*  
 Standard of review. *Hoskins v. Rogers Cold Storage*, 219.  
 Compensation for death, determination of dependency. *Id.*  
 Statutory definition of "child" applicable to dependency determinations. *Id.*

Compensation for death, determination of dependency, issue of fact to be resolved upon facts present at time of compensable injury. *Id.*

Compensation for death, Commission's decision to deny claim for death benefits to stepchild supported by substantial evidence. *Id.*

Substantial evidence test discussed, factors on review. *Hubley v. Best Western-Governor's Inn*, 226.

Commission's decision not supported by substantial evidence, Commission failed to properly weigh conflicting medical evidence. *Id.*

Aggravation of a pre-existing non-compensable condition by a compensable injury is compensable, Commission's decision in error. *Id.*

Remand for additional evidence, prerequisites. *Quinn v. Webb Wheel*, 213-A.

Remand for additional evidence, Commission was free to develop record further. *Id.*

Remand for additional evidence, fact of appellant's death was relevant, actual life span was best evidence for assessment of probable life span. *Id.*

Remand for additional evidence, Commission did not abuse its discretion. *Id.*

Constitutional challenge. *Id.*

---



Index to  
Acts, Codes, Constitutional  
Provisions, Rules, and  
Statutes Cited

INDEX TO  
ACTS, CODES, CONSTITUTIONAL PROVISIONS,  
INSTRUCTIONS, RULES, AND  
STATUTES CITED

ACTS:	
Acts by Name:	
Arkansas Administrative Procedure Act . . . . .	66, 70
Federal Drug-Free Workplace Act . . . . .	138, 139
Arkansas Acts:	
Act 38 of 1973 . . . . .	54, 55
Act 252 of 1979, § 2 . . . . .	17
Act 948 of 1989 . . . . .	204
Act 326 of 1993 . . . . .	30, 33, 34
Act 796 of 1993, § 2 . . . . .	232
Act 796 of 1993, § 41 . . . . .	232
Act 1184 of 1995 . . . . .	204
11-9-301(f) . . . . .	213-C, 49
11-9-501 . . . . .	47, 50, 52
11-9-501(d)(1) . . . . .	48
11-9-501—506 . . . . .	46, 50
11-9-521 . . . . .	65
11-9-521(c) . . . . .	62
11-9-522(a) . . . . .	48
11-9-525 . . . . .	42, 43, 45, 47, 50, 51
11-9-525(b)(3) . . . . .	122, 125
11-9-525(b)(5) . . . . .	46, 51
11-9-527(c) . . . . .	219, 221, 222, 224
11-9-527(h) . . . . .	219, 221, 224
11-9-704(b)(7) . . . . .	209, 211, 212, 213-A, 213-C, 213-D
11-9-704(e) . . . . .	211, 213-C
11-9-711(b) . . . . .	215, 218
11-9-711(b)(1) . . . . .	73, 78
11-9-711(b)(4) . . . . .	76, 77
11-9-713 . . . . .	214, 215, 217, 218
11-9-715(b) . . . . .	80
11-9-802(c) . . . . .	73, 75, 76, 79
11-9-804 . . . . .	210, 213-C
11-9-804(a) . . . . .	210, 213-C
11-9-804(b) . . . . .	209, 210, 212, 213-B, 213-C, 213-D
11-10-107(a) . . . . .	134
11-10-210(e) . . . . .	193, 194, 195, 196
11-10-210(e)(1) through (3) . . . . .	193, 195
11-10-256 . . . . .	18
11-10-513 . . . . .	12, 14
11-10-513(a)(1) . . . . .	11
11-10-513(a)(2) . . . . .	14
11-10-514 . . . . .	11, 14, 135, 137, 139, 198
11-10-514(a) and (b) . . . . .	135
11-10-514(a) . . . . .	14, 127, 129, 135, 199
11-10-514(a)(1) . . . . .	11
11-10-514(b) . . . . .	129, 132, 133, 134
11-10-525(a)(2) . . . . .	15, 16
11-1-526(a)(1) . . . . .	18
11-10-529 . . . . .	17
14-301-301 . . . . .	24, 27
14-301-303 . . . . .	24
16-13-318 . . . . .	257, 258
CODES:	
(See also RULES and STATUTES)	
Arkansas Code Annotated:	
5-1-112 . . . . .	246
5-4-303(f) . . . . .	179, 182
5-4-307 . . . . .	181
5-4-309(d) . . . . .	179, 181, 182
5-4-309(e) . . . . .	179, 181
5-73-103(a)(1) . . . . .	180, 182
9-12-312 . . . . .	1, 2, 4, 6
9-12-312(a) . . . . .	204
9-12-312(a)(2) . . . . .	33, 34
9-12-314(b), (c) . . . . .	33
9-14-107 . . . . .	204
9-14-107(a) . . . . .	202, 204, 205, 206
9-14-234(a), (b) . . . . .	33
9-14-237 . . . . .	33
9-14-237(b)(1) . . . . .	33, 34
9-14-237(b)(2) . . . . .	33, 34
11-9-102(4) . . . . .	173
11-9-102(6) . . . . .	77
11-9-102(10) . . . . .	219, 221
11-9-102(13) . . . . .	73, 76, 77
11-9-102(16) . . . . .	232
11-9-113 . . . . .	174
11-9-201 . . . . .	209, 212, 213-B, 213-F
11-9-201(a)(1) . . . . .	213
11-9-201(a)(2) . . . . .	213
11-9-207(a)(10) . . . . .	209, 211, 213-A,

16-56-105	115		
16-56-111	115		
16-89-111(e)(2)	146	A.R.A.P. 4(d)	188
17-82-191	230	A.R.A.P. 4(e)	185
17-93-201	230	A.R.A.P. 6(e)	255
17-93-202	230	A.R.A.P. 7	18
18-60-309	57, 61	A.R.A.P. 7a	17
19-10-305(a)	22	A.R.A.P. 9	17, 18
19-11-201—261	22		
19-11-244	21, 23	Arkansas Inferior Court Rules	
19-11-247	21, 23	(Ark. Code Ann. Court Rules [1995]):	
19-11-261	22	Inferior Court Rule 9(a)	69
20-47-207(c)	141, 142		
20-47-215	142	Arkansas Rules of Civil	
20-47-215(c)(3)	141, 142	Procedure (Ark. Code Ann. Court	
23-89-202	96	Rules [Supp. 1995]):	
23-89-202(1) and (2)	96	A.R.C.P. 1	87
23-89-207	92, 96	A.R.C.P. 5	88
24-11-815	69	A.R.C.P. 5(b)	89
24-11-819(a)(1)	68	A.R.C.P. 7(a)	32
24-11-819(a)(2)(A)	68	A.R.C.P. 7(b)	29, 32
24-11-819(a)(2)(B)(i)	68	A.R.C.P. 8(f)	87
25-15-210	70	A.R.C.P. 12(a)	32
		A.R.C.P. 12(b)(6)	22
United States Code Annotated:		A.R.C.P. 13	1, 3, 4
41 U.S.C.A. 701-707	138, 139	A.R.C.P. 13(a)	4
41 U.S.C.A. 701	139	A.R.C.P. 14	32
		A.R.C.P. 15(b)	36, 41, 54, 55, 56
CONSTITUTIONAL PROVISIONS:		A.R.C.P. 17(a)	57, 59, 60
Arkansas Constitution:		A.R.C.P. 24	83, 86, 87, 88, 90
Art. 2, § 8	246	A.R.C.P. 24(a)	83, 89, 90
Art. 2, § 13	216	A.R.C.P. 24(b)	89
Art. 5, § 20	22	A.R.C.P. 24(c)	82, 88
United States Constitution:		A.R.C.P. 50(b)	187
Amend. 5	246	A.R.C.P. 52	6
Double Jeopardy		A.R.C.P. 52(a)	103
Clause	244	A.R.C.P. 52(b)	102, 104, 187
Equal Protection		A.R.C.P. 56(c)	69
Clause	234, 238	A.R.C.P. 59	185, 187
		A.R.C.P. 59(b)	187
INSTRUCTIONS:		A.R.C.P. 60(b)	86
Arkansas Model Jury Instructions		Federal Rules of	
(Civil):		Civil Procedure:	
AMI 210	177	F.R.C.P. 15(b)	55
AMI 2201	177		
AMI 2218	177	Arkansas Rules of Criminal	
		Procedure (Ark. Code Ann. Court	
RULES:		Rules [1995]):	
Arkansas Rules of Appellate		A.R.Cr.P. 24.3(b)	251, 252, 253, 256
Procedure (Ark. Code Ann. Court		A.R.Cr.P. 24.5	252
Rules [1995]):		A.R.Cr.P. 37	256
A.R.A.P. 4(a)	185, 188	Arkansas Rules of Evidence	
A.R.A.P. 4(b)	187, 188	(Ark. Code Ann. Court Rules [1994]):	
A.R.A.P. 4(c)	184, 185, 186, 187,	A.R.E. 401	8

A.R.E. 403 .....	233, 237	Rule 4-3(g) .....	163
A.R.E. 404(b) .....	233, 234, 237, 238	STATUTES:	
Rules of the Arkansas Supreme Court and Court of Appeals (Ark. Code Ann. Court Rules [1995]):		Arkansas Statutes Annotated:	
Rule 1-2(3) .....	42, 56	19-3831 .....	7
Rule 1-2(d) .....	42, 54, 56	81-1107(d)(3) .....	15
Rule 4-2 .....	163	81-1107(d)(4) .....	18
Rule 4-2(b) .....	42	81-1348(a) .....	49