ARKANSAS REPORTS
VOLUME 337

ARKANSAS
APPELLATE REPORTS
VOLUME 66

[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 337

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
March 18, 1999 — May 27, 1999
INCLUSIVE[1]

AND

ARKANSAS APPELLATE REPORTS

Volume 66

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

FROM
March 17, 1999 — May 26, 1999
INCLUSIVE[2]

PUBLISHED BY THE
STATE OF ARKANSAS
1999

---

[1]Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 611. Cite as 337 Ark. ___ (1999).

[2]Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 through 379. Cite as 66 Ark. App. ___ (1999).

Set in Bembo

Joe Christensen Printing Company
1540 Adams Street
Lincoln, Nebraska 68521
1999

ARKANSAS REPORTS

Volume 337

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
March 18, 1999 — May 27, 1999
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1999

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.	xii
STANDARDS FOR PUBLICATION OF OPINIONS	
Rule 5-2, Rules of the Supreme Court and Court of Appeals	xvi
TABLE OF OPINIONS NOT REPORTED	xviii
OPINIONS REPORTED	1
APPENDIX	
Rules Adopted or Amended by Per Curiam Orders	613
Appointments to Committees	659
INDEX	
Alphabetical Headnote Index	663
References to Acts, Codes, Constitutional Provisions, Rules, and Statutes	683

JUSTICES AND OFFICERS
OF THE
SUPREME COURT OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(March 18, 1999 — May 27, 1999, inclusive)

JUSTICES

W.H. "DUB" ARNOLD	Chief Justice
TOM GLAZE	Justice
DONALD L. CORBIN	Justice
ROBERT L. BROWN	Justice
ANNABELLE CLINTON IMBER	Justice
RAY THORNTON	Justice
LAVENSKI R. SMITH	Justice

OFFICERS

MARK PRYOR	Attorney General
LESLIE W. STEEN	Clerk
TIMOTHY N. HOLTHOFF	Librarian
WILLIAM B. JONES, JR.	Reporter of Decisions

TABLE OF CASES REPORTED

A

A & A Masonry, Inc. (United States Fidelity & Guaranty Co. *v.*) 366
Arkansas Dep't of Human Servs. *v.* Arkansas Health Care Ass'n 351
Arkansas Dep't of Human Servs. (Wade *v.*) 353
Arkansas Health Care Ass'n (Arkansas Dep't of Human Servs. *v.*) 351
Arkansas State Bd. of Architects (McQuay *v.*) 339
Armstrong *v.* Norris 169
Arthur *v.* Zearley 125
Ashley (Ashley *v.*) 362
Ashley *v.* Ashley 362

B

Baker (Minnesota Mining & Mfg. *v.*) 94
Barrett (Hamilton *v.*) 460
Barton (City of Dover *v.*) 186
Bell (Blunt *v.*) 535
Bilyeu *v.* State 304
Bledsoe *v.* State 403
Blunt *v.* Bell 535
Buchte *v.* State 591
Burke (Elmore *v.*) 235
Byrd *v.* State 413

C

Cadillac Cowboy, Inc. (Jackson *v.*) 24
Camargo *v.* State 105
City of Dover *v.* Barton 186
City of Fort Smith (Rankin *v.*) 599
County of Scott (Massongill *v.*) 281

D

Dawson *v.* Temps Plus, Inc. 247
Doty *v.* Payne 326
Duncan *v.* State 306

E

Ellis *v.* Price 542
Elmore *v.* Burke 235

F

Fisher (Huffman *v.*) 58
Fouse *v.* State 13
Fritts *v.* State 607
Fulmer *v.* State 177

G

George *v.* Jefferson Hosp. Ass'n, Inc. 206

H

Haase *v.* Starnes 193
Hamilton *v.* Barrett 460
Havens (State *v.*) 161
Henderson *v.* State 518
Henry *v.* State 310
Hill *v.* State 219
Hinson (Norton *v.*) 487
Hodges *v.* Lamora 470
Holloway *v.* Ray White Lumber Co. 524
Holloway Constr. Co. (Suneson *v.*) 571
Hudson *v.* Purifoy 146
Huffman *v.* Fisher 58

I

In Re: $3,166,199 74
In Re: Estate of Seay 516
In Re: Meurer 608
In Re: Williams 541

J

Jackson *v.* Cadillac Cowboy, Inc. 24
Jefferson Hosp. Ass'n, Inc. (George *v.*) 206
Johnson, James I. *v.* State 196
Johnson, Randy Turrell *v.* State 477
Johnson, Stacey Eugene *v.* State 609
Jones *v.* State 309

K

Kirby *v.* State 537

L

Lamora (Hodges *v.*) 470
Lewis (Walton *v.*) 45

M

Martin *v.* State 451
Massongill *v.* County of Scott 281
McDaniel *v.* State 431
McDonald *v.* Pettus 265
McFarland *v.* State 386
McLennan *v.* State 83
McQuay *v.* Arkansas State Bd. of Architects 339
Merchants Bonding Co. *v.* Starkey 229
Mid-South Rd. Builders, Inc. (Sunrise Enters., Inc. *v.*) ... 6
Minnesota Mining & Mfg. *v.* Baker 94
Muhammad *v.* State 291
Multi-Purpose Facilities Bd. (Quality Fixtures, Inc. *v.*) 115
Munhall *v.* State 41

N

Nooner *v.* State 538
Norris (Armstrong *v.*) 169
Norris (Renshaw *v.*) 494
Norton *v.* Hinson 487

O

Osborn (State *v.*) 172

P

Payne (Doty *v.*) 326
Payne (Sutter *v.*) 330
Pettus (McDonald *v.*) 265
Porocel Corp. (Saforo & Associates, Inc. *v.*) 553
Price (Ellis *v.*) 542
Price (Price *v.*) 372
Price *v.* Price 372
Purifoy (Hudson *v.*) 146

Q

Quality Fixtures, Inc. *v.* Multi-Purpose Facilities Bd. 115

R

Rakes (Springdale Winnelson Co. *v.*) 154
Rankin *v.* City of Fort Smith 599
Ray White Lumber Co. (Holloway *v.*) 524
Renshaw *v.* Norris 494
Robbins (State *v.*) 227

S

Saforo & Associates, Inc. *v.* Porocel Corp. 553
Scott *v.* State 320
Sentry Ins. (Stockton *v.*) 507
Shaw (Shaw *v.*) 530
Shaw *v.* Shaw 530
Sheppard (State *v.*) 1
Shivey (Shivey *v.*) 262
Shivey *v.* Shivey 262
Singleton *v.* State 503
Smith (Smith *v.*) 583
Smith *v.* Smith 583
Smith *v.* State 239
Southland Racing Corp. (Woodend *v.*) 380

Springdale Winnelson Co. *v.* Rakes 154
Starkey (Merchants Bonding Co. *v.*) 229
Starnes (Haase *v.*) 193
State (Bilyeu *v.*) 304
State (Bledsoe *v.*) 403
State (Buchte *v.*) 591
State (Byrd *v.*) 413
State (Camargo *v.*) 105
State (Duncan *v.*) 306
State (Fouse *v.*) 13
State (Fritts *v.*) 607
State (Fulmer *v.*) 177
State (Henderson *v.*) 518
State (Henry *v.*) 310
State (Hill *v.*) 219
State (Johnson, James I. *v.*) 196
State (Johnson, Randy Turrell *v.*) 477
State (Johnson, Stacey Eugene *v.*) 609
State (Jones *v.*) 309
State (Kirby *v.*) 537
State (Martin *v.*) 451
State (McDaniel *v.*) 431
State (McFarland *v.*) 386
State (McLennan *v.*) 83
State (Munhall *v.*) 41
State (Nooner *v.*) 538
State (Scott *v.*) 320
State (Singleton *v.*) 503
State (Smith *v.*) 239
State (Sublett *v.*) 374
State (Wells *v.*) 586
State (Willett *v.*) 457
State (Williams *v.*) 373
State *v.* Havens 161
State *v.* Osborn 172
State *v.* Robbins 227
State *v.* Sheppard 1
Stockton *v.* Sentry Ins. 507
Sublett *v.* State 374

Suneson *v.* Holloway Constr. Co. 571
Sunrise Enters., Inc. *v.* Mid-South Rd. Builders, Inc. 6
Sutter *v.* Payne 330

T

Temps Plus, Inc. (Dawson *v.*) 247

U

United States Fidelity & Guaranty Co. *v.* A & A Masonry, Inc. 366

V

VanWagner (Wal-Mart Stores, Inc. *v.*) 443

W

Wade *v.* Arkansas Dep't of Human Servs. 353
Wal-Mart Stores, Inc. *v.* VanWagner 443
Walton *v.* Lewis 45
Warnock (Warnock *v.*) 540
Warnock *v.* Warnock 540
Wells *v.* State 586
Willett *v.* State 457
Williams *v.* State 373
Woodend *v.* Southland Racing Corp. 380

Z

Zearley (Arthur *v.*) 125

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

W. H. "DUB" ARNOLD, Chief Justice:

Armstrong *v.* Norris 169
Ellis *v.* Price 542
Henderson *v.* State 518
Merchants Bonding Co. *v.* Starkey 229
Minnesota Mining & Mfg. *v.* Baker 94
Saforo & Assocs. Inc. *v.* Porocel Corp. 553
State *v.* Sheppard 1
Sublett *v.* State 374
Wade *v.* Arkansas Dep't of Human Servs. 353

TOM GLAZE, Justice:

Ashley *v.* Ashley 362
Elmore *v.* Burke 235
Henry *v.* State 310
Holloway *v.* Ray White Lumber Co. 524
State *v.* Osborn 172
Suneson *v.* Holloway Constr. Co. 571
Woodend *v.* Southland Racing Corp. 380

DONALD L. CORBIN, Justice:

Camargo *v.* State 105
Fulmer *v.* State 177
Hamilton *v.* Barrett 460
Scott *v.* State 281
Smith *v.* Smith 583
Smith *v.* State 239
Sunrise Enters., Inc. *v.* Mid-South Rd. Builders, Inc. 6
Wells *v.* State 586

ROBERT L. BROWN, JUSTICE:

City of Dover *v.* Barton 186
Dawson *v.* Temps Plus, Inc. 247
Doty *v.* Payne 326
Fouse *v.* State 13
Hodges *v.* Lamora 470
Jackson *v.* Cadillac Cowboy, Inc. 24
McFarland *v.* State 386
Munhall *v.* State 41
Quality Fixtures, Inc. *v.* Multi-Purpose Facilities Bd. 115
Shivey *v.* Shivey 262

ANNABELLE CLINTON IMBER, JUSTICE:

Arthur *v.* Zearley 125
Bledsoe *v.* State 403
Haase *v.* Starnes 193
Hudson *v.* Purifoy 146
Johnson, James I. *v.* State 196
Johnson, Randy Turrell *v.* State 477
McDonald *v.* Pettus 265
Norton *v.* Hinson 487
Sutter *v.* Payne 330
Walton *v.* Lewis 45

RAY THORNTON, JUSTICE:

Byrd *v.* State 413
Huffman *v.* Fisher 58
Massongill *v.* County of Scott 281
McQuay *v.* Arkansas State Bd. of Architects 339
Renshaw *v.* Norris 169
Shaw *v.* Shaw 530
Singleton *v.* State 503
Springdale Winnelson Co. *v.* Rakes 154
State *v.* Havens 161

LAVENSKI R. SMITH, JUSTICE:

Buchte *v.* State 591
George *v.* Jefferson Hosp. Ass'n, Inc. 206
Hill *v.* State 219
In Re: $3,166,199 74
McDaniel *v.* State 431
McLennan *v.* State 83
Muhammad *v.* State 291
Rankin *v.* City of Fort Smith 599
Stockton *v.* Sentry Ins. 507
United States Fid. & Guar. Co. *v.* A & A Masonry, Inc. 366
Wal-Mart Stores, Inc. *v.* VanWagner 443

PER CURIAM:

Arkansas Dep't of Human Servs. *v.* Arkansas Health Care Ass'n 351
Bilyeu *v.* State 304
Blunt *v.* Bell 535
Duncan *v.* State 306
Fritts *v.* State 607
In Re: Estate of Seay 516
In Re: Meurer 608
In Re: Williams 541
Johnson, Stacey Eugene *v.* State 609
Jones *v.* State 309
Kirby *v.* State 537
Martin *v.* State 451
Nooner *v.* State 538
Price *v.* Price 372
State *v.* Robbins 227
Warnock *v.* Warnock 540
Willett *v.* State 457
Williams *v.* State 373

APPENDIX

RULES ADOPTED OR AMENDED BY PER CURIAM ORDERS:

In Re: Adoption of Administrative Order Number 13 (Per Curiam) 613

In Re: Revision of Mandate Forms (Per Curiam) 613
In Re: Mandatory Continuing Education for Certified Court Reporters (Per Curiam) 615
In Re: Rule 33.1, Rules of Criminal Procedure (Per Curiam) 621
In Re: Rules of Criminal Procedure, Rules 8.2 and 8.6 (Per Curiam) 622
In Re: Rule 28.3, Rules of Criminal Procedure (Per Curiam) 624
In Re: Rules of Criminal Procedure—Rules 28, 29, and 30—Speedy Trial (Per Curiam) 627
In Re: Amendment of the Arkansas Model Rules of Professional Conduct by Addition of Rule 1.17—Sale of Law Practice (Per Curiam) 635
In Re: Amendment of Rule 5.4 of the Arkansas Model Rules of Professional Conduct (Per Curiam) 640
In Re: Amendment of Rule 5.6 of the Arkansas Model Rules of Professional Conduct (Per Curiam) 642
In Re: Amendment of the Arkansas Model Rules of Professional Conduct, Rules 7.1, 7.2, and 7.3—Information About Legal Services (Per Curiam) 643
In Re: Rules Governing Professional Conduct (Per Curiam) 653
In Re: Rules Governing Admission to the Bar of Arkansas (Per Curiam) 654

APPOINTMENTS TO COMMITTEES:

In Re: Supreme Court Alternate Committee on Professional Conduct (Per Curiam) 659
In Re: Supreme Court Committee on Model Jury Instructions—Criminal (Per Curiam) 659
In Re: Supreme Court Committee on Model Jury Instructions—Civil (Per Curiam) 660
In Re: Arkansas Judicial Discipline and Disability Comm'n (Per Curiam) 661

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.

Abernathy *v.* State, CR 98-1328 (Per Curiam), Pro Se Motion for Belated Appeal of Order dismissed April 8, 1999.

Andrews *v.* State, CR 97-1509 (Per Curiam), reversed and remanded March 18, 1999.

Baker *v.* State, CR 96-502 (Per Curiam), rebriefing ordered May 27, 1999.

Bennett *v.* State, CR 99-141 (Per Curiam), Pro Se Motion for Extension of Time to File Brief and Pro Se Motion for Appointment of Counsel denied and appeal dismissed May 20, 1999.

Bilal *v.* State, TEN 98-19 (Per Curiam), Pro Se Motion for Reconsideration; tender declined April 22, 1999.

Bishop *v.* State, CR 97-250 (Per Curiam), affirmed April 29, 1999.

Bradford *v.* Reed, 98-1462 (Per Curiam), Pro Se Motion for Reconsideration; motion denied April 29, 1999.

Bradford *v.* State, CR 99-7 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's brief; denied and appeal dismissed May 13, 1999.

Brown *v.* State, CR 99-194 (Per Curiam), Petition for review denied April 15, 1999.

Brown *v.* State, CR 99-194 (Per Curiam), Pro Se Motion for Transcript; denied May 13, 1999.

Bryant *v.* State, CR 98-53 (Per Curiam), affirmed May 13, 1999.

Choate *v.* State, CR 98-1371 (Per Curiam), Pro Se Motion to Dismiss Appeal Without Prejudice granted in part; appeal dismissed with prejudice March 25, 1999.

Cook *v.* McCullough, 99-160 (Per Curiam), Pro Se Appellant's Motion to Dismiss Appeal granted March 25, 1999.

Eason *v.* Keith, CR 99-290 (Per Curiam), Pro Se Petition for Writ of Mandamus moot April 8, 1999.

Eason *v.* State, CA CR 95-707 (Per Curiam), Pro Se Motion for Photocopy at Public Expense; denied May 6, 1999.

Emery *v.* State, CR 97-993 (Per Curiam), rebriefing ordered May 13, 1999.

Epps *v.* State, CR 97-1490 (Per Curiam), affirmed in part; rebriefing ordered April 22, 1999.

Fegans *v.* Norris, 99-161 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief; granted May 27, 1999.

Foster *v.* Davis, CR 99-328 (Per Curiam), Pro Se Petition for Writ of Mandamus; moot May 6, 1999.

Hale *v.* State, 97-1058 (Per Curiam), affirmed March 25, 1999.

Hancock *v.* State, CR 98-919 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief granted April 8, 1999.

Hawthorne *v.* State, CR 98-1434 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied April 22, 1999.

Hicks *v.* State, CR 98-353 (Per Curiam), Pro Se Motion to Supplement Appellant's Brief; denied April 29, 1999.

Hilderbrand *v.* State, CR 99-112 (Per Curiam), Pro Se Motion for Extension of Time to File Brief granted; Motion for Duplication of Brief denied; and Motion and Amended Motion for Appointment of Counsel denied April 29, 1999

Holbrook *v.* Burnett, CR 99-341 (Per Curiam), Pro Se Petition for Writ of Mandamus moot April 15, 1999.

Jackson *v.* State, CR 98-386 (Per Curiam), Pro Se Motion to Relieve Counsel denied April 15, 1999.

Jones *v.* Norris, 98-1329 (Per Curiam), Pro Se Motion to Supplement Record and Pro Se Motion for Appointment of Counsel denied May 20, 1999.

McArty *v.* State, CR 93-1071 (Per Curiam), petition for rehearing denied April 8, 1999.

McCoy *v.* State, CR 99-167 (Per Curiam), Motion to Correct Record denied; Pro Se Motion for Appointment of Counsel denied; Pro Se Motion for Extension of Time granted; April 15, 1999.

McCready *v.* State, 98-1125 (Per Curiam), Pro Se Motion for Reconsideration; denied May 27, 1999.

Miller *v.* Culpepper, CR 99-454 (Per Curiam), Pro Se Petition for Writ of Mandamus denied May 20, 1999.

Mills *v.* State, CR 98-894 (Per Curiam), Pro Se Motions to Supplement Appellant's Brief denied and for Extension of Time to File Pro Se Brief moot March 25, 1999.

Moore *v.* Pope, CR 99-387 (Per Curiam), Pro Se Petition for Writ of Mandamus denied April 22, 1999.

Nash *v.* State, CR 97-989 (Per Curiam), affirmed March 18, 1999.

Neal *v.* State, CR 99-176 (Per Curiam), Pro Se Motion for Rule on Clerk to Proceed with Belated Appeal of order; denied May 13, 1999.

Nooner *v.* State, CR 98-577 (Per Curiam), Pro Se Motion for Leave to Proceed in Eighth Circuit Court of Appeals denied; Pro Se Motion to Relieve Counsel denied; Pro Se petition for Writ of Mandamus to Compel Board of Apportionment to Act denied; and Pro Se Petition for Writ of Mandamus to Compel Interpreter for the Deaf to Correct Cause of Warrant denied April 22, 1999.

Nooner *v.* State, CR 98-577 (Per Curiam), Pro Se Motions to Compel Investigation by State Police; for a "Brief of Amicus Curiae"; for a Preliminary Injunction; to Preclude Certain Persons from Employment at Prison and for Complaint to be Prosecuted; motions denied May 27, 1999.

Norton *v.* State, CR 98-84 (Per Curiam), reversed and remanded May 27, 1999.

Orsini *v.* Beck, 98-1011 (Per Curiam), Pro Se Motion to File Enlarged Reply Brief; denied May 6, 1999.

Orsini *v.* Norris, 98-1119 (Per Curiam), Pro Se Motion for Duplication of Reply Brief at Public Expense; denied May 6, 1999.

Pitts *v.* State, CR 80-40 (Per Curiam), Pro Se Petition for Rehearing denied May 20, 1999.

Poyner *v.* State, CR 85-198 (Per Curiam), Pro Se Motion for Photocopy at Public Expense denied May 20, 1999.

Prince *v.* State, CR 97-1362 (Per Curiam), affirmed May 6, 1999; rehearing denied June 10, 1999.

Profit *v.* State, CR 99-334 (Per Curiam), Pro Se Motion for Rule on Clerk denied; Pro Se Motion for Appointment of Counsel; moot May 27, 1999.

Rayford *v.* State, CR 98-1322 (Per Curiam), Pro Se Motion to Supplement Abstract and File Substituted Brief granted May 20, 1999.

Reynolds *v.* State, CR 98-1184 (Per Curiam), Pro Se Motion to Supplement Appellant's Brief moot April 8, 1999.

Rhoades *v.* State, CR 93-1096 (Per Curiam), Pro Se Petition for Leave to Proceed in Circuit Court with Petition for Writ of Error Coram Nobis; denied May 6, 1999.

Robinson *v.* State, CR 97-100 (Per Curiam), affirmed April 29, 1999.

Salley *v.* State, CR 97-1061 (Per Curiam), reversed and remanded April 29, 1999.

Thomas *v.* State, CR 98-1084 (Per Curiam), Pro Se Motion for Evidentiary Hearing denied March 25, 1999.

Thomas *v.* State, CR 96-528 (Per Curiam), reversed and remanded April 22, 1999.

Thompson *v.* State, CR 97-1091 (Per Curiam), reversed and remanded March 25, 1999.

Troup *v.* State, CR 99-174 (Per Curiam), Pro Se Motion for Belated Appeal of Judgment; remanded May 13, 1999.

Tucker *v.* State, CA CR 94-156 (Per Curiam), Pro Se Motion for Photocopy of Trial Transcript at Public Expense; denied April 29, 1999.

Watson *v.* State, CR 94-267 (Per Curiam), Pro Se Petition for Leave to Proceed in Circuit Court with Petition for Writ of Error Coram Nobis denied May 20, 1999.

Wright *v.* State, CR 98-926 (Per Curiam), Pro Se Motion to have a Court-appointed Counsel File Supplemental Abstract denied April 8, 1999.

Tyler *v.* Neal, 99-385 (Per Curiam), Pro Se motion for Rule on Clerk; dismissed May 13, 1999.

APPENDIX

Rules Adopted or Amended by Per Curiam Orders

IN RE: ADOPTION OF ADMINISTRATIVE ORDER NUMBER 13

Supreme Court of Arkansas
Delivered March 25, 1999

PER CURIAM. Pursuant to the general superintending control over all courts as conferred by Article 7, Section 4, of the Constitution, we adopt, effective immediately, Administrative Order Number 13.

ADMINISTRATIVE ORDER NUMBER 13 — JUDICIAL EXEMPTION FROM JURY SERVICE

During their term of office, Supreme Court Justices, Court of Appeals Judges, and judges of general jurisdiction trial courts shall not serve as grand or petit jurors in the courts of this State.

IN RE: REVISION OF MANDATE FORMS

Supreme Court of Arkansas
Delivered March 25, 1999

PER CURIAM. We have reviewed the various mandate forms issued by the Court of Appeals and Supreme Court, and have determined that certain changes are in order. Accordingly, we adopt, effective immediately, the forms for mandates that are attached to this order, and we authorize the Clerk of the Supreme Court and Court of Appeals to adapt as necessary these approved forms to the circumstances of a particular case.

AFFIRMED
[CIRCUIT, CHANCERY, ORIGINAL ACTION, WCC]

This appeal was submitted to the Arkansas [Supreme Court] [Court of Appeals] on the record of the _____ Court of _____ County and [briefs] [petition and response] of the respective parties. After due consideration, it is the decision of the Court that the [judgment] [order] [decree] of the [trial court] [Commission] [Board] is affirmed.

It is also ordered that the appellant(s) pay the appellee(s) _____ dollars for brief costs in this appeal.

AFFIRMED CRIMINAL

This criminal appeal was submitted to the Arkansas [Supreme Court] [Court of Appeals] on the record of the Circuit Court of _____ County and briefs of the respective parties. After due consideration, it is the decision of the Court that the [conviction] [order] is affirmed.

It is also ordered that the appellant shall immediately surrender to the Sheriff of _____ County. If the surrender is not immediate, his/her bond is declared forfeited and a warrant shall issue for appellant's arrest.

REVERSED
[CIRCUIT, CHANCERY, WCC]

This case was submitted to the Arkansas [Supreme Court] [Court of Appeals] on the record of the _____ Court of _____ County and briefs of the respective parties. After due consideration, it is the decision of the Court that the case be [reversed] [reversed and remanded] [affirmed in part and reversed and remanded in part] [reversed and dismissed] [other applicable disposition] for the reasons set out in the attached opinion.

It is also ordered that appellee(s) pay the appellant(s) _____ dollars for the costs on appeal.

DISMISSED APPEAL

This case was submitted to the Arkansas [Supreme Court] [Court of Appeals] on the record of the _____ Court of _____ County and briefs of the respective parties. After due consideration, it is the decision of the Court that this appeal be dismissed for the reasons set out in the attached opinion.

It is also ordered . . . .

IN RE: MANDATORY CONTINUING EDUCATION for CERTIFIED COURT REPORTERS

Supreme Court of Arkansas
Delivered April 8, 1999

PER CURIAM. On December 11, 1997, we appointed a Committee to develop and implement mandatory continuing education for court reporters in response to a recommendation from our Board of Certified Court Reporter Examiners (Board). The five-member committee, which consisted of the three court reporter Board members and two other certified court reporters, was instructed to work with the Director of the Office of Professional Programs (Director) in this endeavor, and the Board was directed to use its budget to pay the necessary expenses of this task.

Working from a proposal presented to the Board by representatives of the Arkansas Court Reporter Association, the Committee and the Director met several times during 1998 and made periodic reports to the Board regarding its progress.

On January 23, 1999, the Committee and the Director presented its Proposal to the Board, which contained both the requirements of continuing education as well as the procedure for enforcement. Specifically, the Proposal would amend Section 3 of

the Rule Providing for Certification of Court Reporters, giving the Board authority to enforce a continuing education requirement and would add Section 10, which sets out the particulars of the continuing education requirement. The Board then sought comment from all Arkansas certified court reporters and circuit, chancery and circuit/chancery judges. At its next meeting on March 6, 1999, the Board approved the Proposal as written.

The Board now recommends that we adopt the Proposal. Being mindful of the importance of maintaining the competency and professionalism of certified court reporters in Arkansas and having carefully considered this proposal, we adopt and publish amended Section 3 and new Section 10 of the Rule Providing for Certification of Court Reporters. Section 3 is effective immediately, and Section 10 will take effect on January 1, 2000. We direct that the Board, in cooperation with the Director, proceed as necessary to ensure timely implementation of this requirement, including an agreement on program costs of the Office of Professional Programs to be absorbed by the Board.

The Court thanks the Committee, the Director, and the Board for their diligence and hard work in this important endeavor to assist certified court reporters in Arkansas in maintaining the competency of this important profession.

SECTION 3.
Duties of the Board.

The Board is charged with the duty and invested with the power and authority:

A. To determine the eligibility of applicants for certification.

B. To determine the content of examinations to be given to applicants for certification as certified court reporters.

C. To determine the applicant's ability to make a verbatim record of court proceedings by any recognized system designated by the Board.

D. To issue certificates to those found qualified as certified court reporters.

E. To establish standards and conditions for reciprocity and for temporary waivers of certifications requirements of eligible applicants.

F. To set a fee to be paid by each applicant at the time the application is filed and an annual license fee.

G. To develop a records retention schedule for official court reporters of state trial courts.

H. To develop, implement, and enforce a continuing education requirement for court reporters certified pursuant to this Rule.

I. To promulgate, amend and revise regulations relevant to the above duties and to implement this Rule. Such regulations are to be consistent with the provisions of this Rule and shall not be effective until approved by this Court. [Adopted by per curiam July 5, 1983, effective February 1, 1984; amended by per curiam October 16, 1995.]

SECTION 10.

Continuing Education Requirement.

Reporters certified pursuant to this rule must acquire thirty (30) continuing education credits every three years through activities approved by the Board or a committee of the Board. Such three year period shall be known as the "reporting period." Each reporting period shall begin on January 1 and extend through December 31 three years hence. The reporting period for reporters newly certified pursuant to this Rule shall begin January 1 following certification by the Board. Excess credits earned during any reporting period shall not carry forward to any subsequent reporting period.

A continuing education credit is presumed to be 60 minutes in length. However, the Board in its discretion may grant greater or lesser credits per hour of education as each individual program may warrant. Court reporters certified pursuant to this rule who maintain a residence address outside the State of Arkansas are subject to this requirement. However, continuing education activities

approved by the appropriate authority in their resident jurisdiction shall be applicable to this requirement.

To establish compliance with this continuing education requirement the Board may accept continuing education hours acquired to meet the continuing education requirements of the National Court Reporters Association or the National Verbatim Reporters Association.

Exceptions to Requirement

In cases where extreme hardship or extenuating circumstances are shown, the Board may grant a waiver of the continuing education requirement or extensions of time within which to fulfill the requirements. Such waivers or extensions shall be considered only upon written request from the certificate holder. As a condition of any waiver or extension, the Board may set such terms and conditions as may be appropriate under the circumstances.

Any reporter certified pursuant to this rule who attains age 65 or 30 years of certification, during any reporting period, is exempt from all requirements of this rule for that reporting period as well as all subsequent reporting periods.

At any time during a reporting period a reporter may take inactive status as it pertains to the continuing education requirement of this rule. Inactive status means that a reporter will not practice court reporting until such time as the reporter returns to active status. Election of inactive status must be in writing. Election of inactive status must be annually renewed and the Board shall provide a form for renewal of inactive status. Such annual renewal shall be filed with the Board on or before March 31 of each year subsequent to the year of election of inactive status. For the purpose of this paragraph court reporting means "verbatim reporting" as defined in Section 1 of the "Regulations of the Board of Certified Court Reporter Examiners" and, verbatim reporting regardless of the context, including administrative or regulatory proceedings and non-judicial proceedings. A reporter may return to active status at any time upon written notice to the Board. In such case the reporter shall be subject to the thirty hour requirement of this rule for the reporting period beginning the following January 1.

Continuing Education Activities
Content

Continuing education credit may be obtained by attending or participating in Board approved seminars, conventions, or workshops, or other activities approved by the Board. To be approved for continuing education credit the activity must: be presented by individuals who have the necessary experience or academic skills to present the activity; include quality written materials; and, the course must be subject to evaluation. The continuing education activity must contribute directly to the competence and professionalism of court reporters. The Board is authorized to approve continuing education activities which include but are not limited to the following subject areas: language; academic knowledge; statutes and regulations; reporting technology and business practice; and, ethical practices-professionalism.

Administrative Procedures

The Board shall be the authority for approval of continuing education programs. Such authority may be delegated by the Board to a committee. It is presumed that program approval will be sought and determined well in advance of the educational activity. However, the Board or its committee may approve an educational activity after the event.

The Board is authorized to develop appropriate forms and other administrative procedures as necessary to efficiently administer this continuing education requirement.

The Board shall require that reporters certified pursuant to this rule maintain and provide such records as necessary to establish compliance with this continuing education requirement. The Board may also require that sponsors provide evidence of attendance at programs in such form as the Board may direct.

On or before January 31 after the conclusion of the immediately preceding reporting period, the Board shall provide a final report by first class mail to reporters whose reporting period concluded the preceding December 31. The number of continuing education credits stated on the final report shall be presumed correct unless the reporter notifies the Board otherwise. In the event the final report shows that the reporter has failed to acquire 30

continuing education credits for the applicable reporting period, the reporter shall be in noncompliance with the requirements of this rule.

In the event of noncompliance, the certificate of the affected reporter shall be subject to suspension as set forth in the following section. Prior to initiation of suspension proceedings, the Board shall provide notice to allow the reporter to achieve compliance. Board approved continuing education credits obtained subsequent to the relevant reporting period and prior to a vote of suspension shall be accepted in order to cure noncompliance. However, such hours will be subject to a late filing fee in an amount not to exceed $100.00.

Suspension of License — Reinstatement

Section 7 of this rule — "Revocation or Suspension" and Section 19 of the "Regulations of the Board of Certified Court Reporter Examiners" shall govern suspension or revocation proceedings for failure to comply with the continuing education requirements set out in Section 10 of this rule.

After a Board vote of suspension or revocation of a certificate, the Board shall notify the affected reporter by way of certified mail, restricted delivery, return receipt requested. In addition, the Board shall file the order of suspension with the Clerk of this Court and provide such other notice as the Board may consider appropriate.

A reporter whose certificate has been suspended pursuant to this Section who desires reinstatement shall file a petition for reinstatement with the Board. The petition shall be properly acknowledged by a notary public or an official authorized to take oaths. It shall be in such form as the Board may direct. The petitioner may request a hearing before the Board. Upon appropriate notice and hearing, the Board may take action on the petition for reinstatement. In the event the certificate is reinstated, the Board may set additional educational requirements, including successful completion of a certification examination, as a condition of reinstatement and may assess reinstatement fees in an amount not to exceed $250.00.

IN RE: RULE 33.1, RULES of CRIMINAL PROCEDURE

Supreme Court of Arkansas
Delivered April 8, 1999

PER CURIAM. Our Committee on Criminal Practice has recommended changes to Rule 33.1 of the Rules of Criminal Procedure. The principal change is to require defendants in both jury and bench trials to notify the trial court of the particular reasons why the state's evidence is insufficient in order to preserve that issue for appeal. We accept this recommendation. In incorporating this change, the entire rule has been rewritten for ease of understanding.

We hereby adopt, effective immediately, these amendments and republish Rule 33.1 as set out below.

RULE 33.1. Motions for Directed Verdict and Motions for Dismissal.

(a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.

(b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

(c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the

offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

Reporter's Notes: The rule was divided into subsections for ease of reference. Subsection (a) applies to jury trials, subsection (b) to bench trials, and subsection (c) to both. In both jury and bench trials, the defendant is required to notify the trial court of the particular reasons why the state's evidence is insufficient in order to preserve that issue for appeal. This requirement in a bench trial is a change in previous procedure and overrules the decision in *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995). *See generally* Note, *An Analysis of Arkansas's Exceptional Treatment of the Contemporaneous Objection Rule in Criminal Bench Trials*, 19 U. Ark. Little Rock L.J. 291 (1997).

IN RE: RULES OF CRIMINAL PROCEDURE, RULES 8.2 and 8.6

Supreme Court of Arkansas
Delivered April 15, 1999

PER CURIAM. Our Committee on Criminal Practice recommended a change to Rule 8.2 and the adoption of a new Rule 8.6. Previously, these proposals were published for comment.

We now adopt the amendment to Rule 8.2, and this amendment is effective immediately. Rule 8.2 is republished in its entirety below.

We also adopt Rule 8.6, and it shall become effective July 1, 1999. It is published below.

RULE 8. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE

RULE 8.2. Appointment of Counsel.

(a) An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable.

(b) Whenever an indigent accused is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel to represent him, the court shall appoint counsel to represent him unless he is charged with a misdemeanor and the court has determined that under no circumstances will imprisonment be imposed as a part of the punishment if he is found guilty.

(c) Attorneys appointed by municipal courts, city courts, police courts, and justices of the peace may receive fees for services rendered upon certification by the presiding judicial officer if provision therefor has been made by the county or municipality in which the offense is committed or the services are rendered. Attorneys so appointed shall continue to represent the indigent accused until relieved for good cause or until substituted by other counsel.

Reporter's Notes: The addition of the last sentence to Rule 8.2(c) is intended to ensure that where counsel is appointed in municipal court, the appointment continues for purposes of this rule even in circuit court proceedings unless and until appointed counsel is relieved or new counsel is appointed.

RULE 8.6. Time for Filing Formal Charge.

If the defendant is continued in custody subsequent to the first appearance, the prosecuting attorney shall file an indictment or information in a court of competent jurisdiction within sixty days of the defendant's arrest. Failure to file an indictment or information within sixty days shall not be grounds for dismissal of

the case against the defendant, but shall, upon motion of the defendant, result in the defendant's release from custody unless the prosecuting attorney establishes good cause for the delay. If good cause is shown, the court shall reconsider bail for the defendant.

Reporter's Notes: This rule is intended to address the problem identified in *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W. 2d 915 (1996), *modified on rehearing*, 327 Ark. 287, 938 S.W. 2d 815 (1997), wherein the person was arrested without a warrant, was continued in custody beyond his first appearance in municipal court, but waited over two months before his case was formally filed in circuit court by the filing of an information. This rule contemplates that, in the typical case, formal charges should be filed within a reasonable time following an arrest with sufficient latitude being given for circumstances that are beyond the prosecuting attorney's control and which necessitate a delay in the filing of formal charges. Nothing in this rule shall be construed to abrogate the defendant's privilege to file an application for writ of habeas corpus or any other applicable extraordinary remedy.

IN RE: RULE 28.3, RULES of CRIMINAL PROCEDURE

Supreme Court of Arkansas
Delivered April 22, 1999

PER CURIAM. Our Committee on Criminal Practice has recommended amendments to Rule 28.3 of the Rules of Criminal Procedure. These amendments have twice been published for comment. *In Re Rule 28.3*, 329 Ark. 639 (June 16, 1997); *In Re Rules of Criminal Procedure—Speedy Trial*, 335 Ark. 628 (December 17, 1998).

As explained in the accompanying Reporter's Notes, these amendments are intended to clarify the rule and to address recurrent problems arising in its application. We express our gratitude

to the members of the Criminal Practice Committee for their work on this matter.

We adopt, effective immediately, these amendments to Rule 28.3, and republish the rule in its entirety as set out below.

RULE 28.3. EXCLUDED PERIODS.

The following periods shall be excluded in computing the time for trial. Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below. The number of days of the excluded period or periods shall be added to the time applicable to the defendant as set forth in Rules 28.1 and 28.2 to determine the limitations and consequences applicable to the defendant.

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period.

(b) The period of delay resulting from a continuance attributable to congestion of the trial docket if in a written order or docket entry at the time the continuance is granted:

(1) the court explains with particularity the reasons the trial docket does not permit trial on the date originally scheduled;

(2) the court determines that the delay will not prejudice the defendant; and

(3) the court schedules the trial on the next available date permitted by the trial docket.

(c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances

granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.

(d) The period of delay resulting from a continuance (calculated from the date the continuance is granted until the subsequent date contained in the order or docket entry granting the continuance) granted at the request of the prosecuting attorney, if:

(1) the continuance is granted because of the unavailability of evidence material to the state's case, when due diligence has been exercised to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(2) the continuance is granted in a felony case to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional complexity of the particular case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

(f) The time between a dismissal or nolle prosequi upon motion of the prosecuting attorney for good cause shown, and the time the charge is later filed for the same offense or an offense required to be joined with that offense.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant acting with due diligence shall be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause.

Reporter's Notes to 1999 Amendments: Subsection (b) has been amended and subsection (i) has been moved to the opening

paragraph. These changes have been made to address recurrent problems arising in cases. *E.g.*, *Hicks v. State*, 305 Ark. 393, 808 S.W. 2d 348 (1991).

The opening paragraph was added which includes language formerly in subsection (i), but further provides that the trial court may determine the excluded periods when the defendant has moved for dismissal pursuant to Rule 28.1 rather than at an earlier date although the judge is still free to do so earlier. This finding is a determination of the excluded periods.

Subsection (b) was amended to make more practical a continuance granted because of congestion of the trial docket. The three-pronged finding was substituted for the previous standard which required a finding of "exceptional circumstances." This requirement of the entry of a contemporaneous written order explaining the reasons for the continuance, finding that the defendant is not prejudiced, and scheduling a new trial date is in addition to the finding required as to the periods to be excluded. Typically, the period to be excluded under subsection (b) will be from the date on which the trial was scheduled as specified in (b)(1) to the rescheduled date as specified in (b)(3).

IN RE: RULES of CRIMINAL PROCEDURE—RULES 28, 29, and 30—SPEEDY TRIAL

Supreme Court of Arkansas
Delivered April 22, 1999

PER CURIAM. On December 17, 1998, we published for comment a proposal to amend the speedy-trial rule. We thank all of those who took the time to review the proposal and submit comments.

We now publish for comment another proposal which takes a different approach from that previously published. The significant difference in the proposal which we publish today and the current

rule is that upon the trial court finding a violation of the speedy-trial rule, the court has the discretion to dismiss the case either with prejudice or without prejudice. This option is the federal practice and the practice in a number of states.

The proposal is further explained in the commentary which accompanies the proposed rules.

Comments and suggestions on these proposed rules may be made in writing prior to June 30, 1999. They should be addressed to:

Leslie Steen, Clerk
Arkansas Supreme Court
Attn: Criminal Procedure Rules
Justice Building
625 Marshall Street
Little Rock, AR 72201

RULE 28
SPEEDY TRIAL

RULE 28.21. When Time Commences to Run

The time for trial shall commence running, without demand by the defendant, from the following dates:

(a) from the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody or on bail or lawfully at liberty to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date of arrest;

(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 rein-

stated following an appeal, the time for trial shall commence running from the date the mandate is issued by the appellate court;

(c) if the defendant is to be retried following a mistrial, an order granting a new trial, or an appeal or collateral attack, the time for trial shall commence running from the date of the mistrial, the order granting a new trial, or the remand.

COMMENT: Current Rule 28.2; moved to 28.1 for better flow.

RULE 28.~~1~~2. Limitations and Consequences.

(a) Any defendant charged with an offense ~~in circuit court~~ and incarcerated in a city or county jail in this state pending trial shall be released on his own recognizance if not brought to trial within nine (9) months from the time provided in Rule 28.~~2~~1, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(b) Any defendant charged with an offense ~~in circuit court~~ and incarcerated in prison in this state pursuant to conviction of another offense shall be ~~entitled to have the charge dismissed with an absolute bar to prosecution if not~~ brought to trial within twelve (12) months from the time provided in Rule 28.~~2~~1, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(c) Any defendant charged with an offense ~~after October 1, 1987, in circuit court~~ and held to bail, or otherwise lawfully set at liberty, including released from incarceration pursuant to subsection (a) ~~hereof~~ of this rule, shall be ~~entitled to have the charge dismissed with an absolute bar to prosecution if not~~ brought to trial within twelve (12) months from the time provided in Rule 28.~~2~~1, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(d) If a defendant is not brought to trial within the time provided in subsection (b) or (c) of this rule, the defendant shall be entitled to have the charge dismissed on motion of the defendant. Such dismissal shall be either with or without prejudice. In determining whether to dismiss the charge with or without prejudice,

the trial court shall consider such factors as the following: (1) the seriousness of the offense charged, (2) the impact of reprosecution on the administration of justice, (3) the reasons for the delay, (4) the length of the delay in bringing the defendant to trial, (5) the efforts, if any, of the defendant to secure a speedy trial, and (6) the effect of any delay upon the defendant's ability to present a defense. The state shall have the burden of showing periods of necessary delay as provided in Rule 28.3, but the defendant shall have the burden of proof of supporting the motion.

~~(d)~~ (e) (1) If a ~~M~~motion for dismissal of a charge pursuant to subsection ~~(b) or (c) hereof~~ (d) of this rule ~~shall be made to the trial court, but if~~ is denied by the trial court, the defendant may ~~be presented to the Arkansas Supreme Court by~~ file a petition for writ of prohibition in the Arkansas Supreme Court.

(2) A defendant has no right to appeal an order of dismissal without prejudice.

(3) If a motion for dismissal is granted with prejudice, the state may appeal to the Supreme Court pursuant to Rule 3 of the Rules of Appellate Procedure—Criminal.

(4) The state has no right to appeal an order of dismissal without prejudice.

(f) Failure of a defendant to move for dismissal of a charge pursuant to subsection ~~(b) or (c)~~(d) of this rule ~~hereof~~ prior to a plea of guilty or trial shall constitute a waiver of ~~his~~ the defendant's rights under these rules.

(g) This rule shall have no effect in those cases which are expressly governed by the "Interstate Agreement on Detainers Act" (Act 705 of 1971, A.C.A. § 16-95-101 et seq.).

COMMENT: Reference to circuit court deleted so rule is clearly applicable to municipal court. See Whittle v. Washington County Circuit Court, *325 Ark. 136 (1996).*

Violation of speedy trial rule results in dismissal, but dismissal is not automatically with prejudice. In subsection (d), the factors for the court to consider in determining whether to dismiss with or without prejudice are derived from federal practice.

Subsection (e) addresses review of the trial court's decision.

RULE 28.3. Excluded Periods.

The following periods shall be excluded in computing the time for trial. Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below. The number of days of the excluded period or periods shall be added to the time applicable to the defendant as set forth in Rules 28.1 and 28.2 to determine the limitations and consequences applicable to the defendant.

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals by the defendant or the state, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period.

~~(b) The period of delay resulting from congestion of the trial docket when the delay is attributable to exceptional circumstances. When such a delay results, the court shall state the exceptional circumstances in its order continuing the case.~~

(b) The period of delay resulting from a continuance attributable to congestion of the trial docket if in a written order or docket entry at the time the continuance is granted: (1) the court explains with particularity the reasons the trial docket does not permit trial on the date originally scheduled; (2) the court determines that the delay will not prejudice the defendant; and (3) the court schedules the trial on the next available date permitted by the trial docket.

(c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.

(d) The period of delay resulting from a continuance (calculated from the date the continuance is granted until the subsequent date contained in the order or docket entry granting the continuance) granted at the request of the prosecuting attorney, if:

(1) the continuance is granted because of the unavailability of evidence material to the State's case, when due diligence has been exercised to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(2) the continuance is granted in a felony case to allow the prosecuting attorney additional time to prepare the State's case and additional time is justified because of the exceptional complexity of the particular case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the State for trial.

(f) The time between a dismissal or nolle prosequi upon motion of the prosecuting attorney for good cause shown, and the time the charge is later filed for the same offense or an offense required to be joined with that offense.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant acting with due diligence shall be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause.

~~(i) All excluded periods shall be set forth by the court in a written order or docket entry. The number of days of the excluded period or periods shall be added to the number of months applicable to the defendant as set forth in Rule 28.1 (a), (b) and (c) to determine the limitations and consequences applicable to the defendant.~~

COMMENT: Basically the same as current Rule 28.3. Opening paragraph added [which includes language formerly in subsection (i)], subsection (a) amended to clarify that interlocutory appeals by the state are included, and subsection (b) revised. These changes incorporate previous amendments recommended by Criminal Practice Committee.

RULE 28.4. Effect of Prior Dismissal.

(a) The dismissal of a charge without prejudice pursuant to subsection (d) of Rule 28.2 shall not be a bar to a subsequent prosecution for the same offense or any offense required by Rule 21.3 to be joined with the charge dismissed.

(b) If a charge is dismissed without prejudice pursuant to subsection (d) of Rule 28.2, and the defendant is subsequently charged with the same offense or any offense required by Rule 21.3 to be joined with the charge dismissed, the defendant shall be entitled to have the subsequent charge dismissed with prejudice if not brought to trial within ninety (90) days from the time provided in Rule 28.1 (b), excluding only such periods of necessary delay as are authorized in Rule 28.3. Failure of a defendant to move for dismissal of charges under this rule prior to a plea of guilty or trial shall constitute a waiver of the defendant's rights under this rule.

(c) The dismissal of a charge with prejudice pursuant to subsection (d) of Rule 28.2 or subsection (b) of this rule shall be an absolute bar to a subsequent prosecution for the same offense or any offense required by Rule 21.3 to be joined with the charge dismissed.

COMMENT: This rule is new and is necessary to address the effect of a dismissal without prejudice. Under subsection (b), if charges are refiled after a previous dismissal without prejudice, the defendant must be retried

within ninety (90) days from the date the dismissed charge is reinstated or the defendant is subsequently arrested or charged, whichever is earlier [see Rule 28.1 (b)]. In addition, the statute of limitations must be considered in determining whether charges may be refiled.

RULE 29. SPECIAL PROCEDURES: PERSON SERVING TERM OF IMPRISONMENT

RULE 29.1. Prosecutor's Obligations.

(a) If the prosecuting attorney has information that a person charged with a crime is imprisoned in a penal institution in the State of Arkansas, he shall promptly seek to obtain the presence of the prisoner for trial.

(b) If the prosecuting attorney has information that a person charged with a crime is imprisoned in a penal institution of a jurisdiction other than the State of Arkansas, he shall promptly cause a detainer to be filed with the official having custody of the prisoner and request such officer to advise the prisoner of the filing of the detainer and of the prisoner's right to demand trial.

(c) Upon receipt from a prisoner of a demand for trial upon a pending charge, the prosecuting attorney shall promptly seek to obtain the presence of the prisoner for trial.

~~RULE 30. CONSEQUENCES OF DENIAL OF SPEEDY TRIAL~~

~~RULE 30.1. Absolute Discharge.~~

~~(a) Subject to the provisions of subsection (b) hereof, a defendant not brought to trial before the running of the time for trial, as extended by excluded periods, shall be absolutely discharged. This discharge shall constitute an absolute bar to prosecution for the offense charged and for any other offense required to be joined with that offense.~~

~~(b) An incarcerated defendant not brought to trial before the running of the time for trial as provided by Rules 28.1 — 28.3 shall not be entitled to absolute discharge pursuant to subsection (a) hereof but shall be recognized or released on order to appear.~~

~~(c) The time for trial of a defendant released pursuant to subsection (b) hereof shall be computed pursuant to Rules 28.1 (b) and 28.2.~~

~~RULE 30.2. Waiver.~~

~~Failure of a defendant to move for dismissal of the charges under these rules prior to a plea of guilty or trial shall constitute a waiver of his rights under these rules.~~

IN RE: AMENDMENT of the ARKANSAS MODEL RULES of PROFESSIONAL CONDUCT by ADDITION of RULE 1.17 — SALE of LAW PRACTICE

Supreme Court of Arkansas
Delivered May 6, 1999

PER CURIAM. The Arkansas Bar Association petitioned this Court to consider amendment of the Arkansas Model Rules of Professional Conduct by adding provisions to permit restricted sales of law practices. As per our custom, this matter was referred to the Arkansas Supreme Court Committee on Professional Conduct for study and recommendation. The Committee responded by submitting its own petition recommending adoption of an alternate proposal for amendment of the Model Rules to permit the sale of a law practice. The two proposals were similar in a number of respects, but differed in other areas that the Court found to be significant.

Following comprehensive discussions and consideration of the matter, we made some changes to the proposal offered by the Committee, to include incorporation of some aspects of the Bar Association's proposal. We now approve and adopt Rule 1.17, Sale of Law Practice, a copy of which is appended to this Order and made a part hereof by reference, as an amendment to the Arkansas Model Rules of Professional Conduct by its addition

thereto, to become effective on the date of publication of this Per Curiam.

Adoption of Rule 1.17 requires minor amendment of Rules 5.4, 5.6, 7.2(c) and the Comment to 7.2(c) to conform with the purposes set out in Rule 1.17. These required amendments are being made by separate Per Curiams issued concurrently with this Order.

It is so ordered.

RULE 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in the State in which the practice has been conducted;

(b) The practice is sold as an entirety to another lawyer or law firm;

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and,

(3) the fact that the client's consent to the sale will be presumed if the client does not take any action or otherwise object within sixty (60) days of receipt of the notice.

The purchaser shall also cause an announcement or notice of the purchase and transfer of the practice to be published, on two consecutive weeks, in a newspaper of general circulation within the county in which the practice is located at least thirty days in advance of the effective date of the transfer.

(d) The purchaser shall honor the fee agreements that were entered into between the seller and the seller's clients. The fees charged clients shall not be increased by reason of the sale.

(e) In every instance in which a law practice is sold, the selling attorney, or the legal representative thereof, in the case of a deceased, disabled or disappeared attorney, shall within twenty (20) days of the completion of the sale, file an affidavit with the Committee on Professional Conduct that he or she has complied with the requirements of notice contained within this provision, to include proof of publication, along with a list of clients so notified and an exemplar of such notice. Such affidavit shall also contain the address where communications may thereafter be directed to the affiant.

Comment:

The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to a judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

The Rule permits a sale attendant upon retirement from the private practice of law within the state. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

Single Purchaser

The Rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

Client Confidences, Consent and Notice

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and must be told that the decision to consent or make other arrangements must be made within 60 days. If nothing is heard from the client within that time, consent to the sale is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule presumes consent if notice is sent to the client's last known address in the file and no response to the notice is

received, and if notice if published in accordance with this Rule. No client will be left without representation.

All the elements of client automony, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts, which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (See Rule 1.16).

Applicability of the Rule

This Rule applies to the sale of a law practice by representatives of a deceased, disabled, or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

IN RE: AMENDMENT of RULE 5.4 of the ARKANSAS MODEL RULES OF PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered May 6, 1999

PER CURIAM. Rule 5.4, Arkansas Model Rules of Professional Conduct, is amended by the addition of language to conform with the provisions of Rule 1.17, Sale of Law Practice, adopted by the Court this date. The amended Rule 5.4, a copy of which is appended to this Order and made a part hereof by reference, will be effective on the date of publication of this Per Curiam.

It is so ordered.

RULE 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the

deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer or law firm who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate of other representative of that lawyer an agreed-upon purchase price; and,

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

IN RE: AMENDMENT of RULE 5.6 of the ARKANSAS MODEL RULES of PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered May 6, 1999

PER CURIAM. Rule 5.6, Arkansas Model Rules of Professional Conduct, is amended by the addition of language to conform with the provisions of Rule 1.17, Sale of Law Practice, adopted by the Court this date. The amended Rule 5.6, a copy of which is appended to this Order and made a part hereof by reference, will be effective on the date of publication of this Per Curiam.

It is so ordered.

RULE 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning, EITHER benefits upon retirement **or an agreement pursuant to the provisions of Rule 1.17**; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

IN RE: AMENDMENT of the ARKANSAS MODEL RULES of PROFESSIONAL CONDUCT, RULES 7.1, 7.2, and 7.3 — INFORMATION ABOUT LEGAL SERVICES

Supreme Court of Arkansas
Delivered May 6, 1999

PER CURIAM. The Arkansas Bar Association petitioned this Court to consider amendment of the Arkansas Model Rules of Professional Conduct by adoption of substantial revisions to Rules 7.1, 7.2 and 7.3, Information About Legal Services, commonly referred to as the "advertising rules." As per our custom, this matter was referred to the Arkansas Supreme Court Committee on Professional Conduct for study and recommendation. Following informal discussions and coordination between the Committee and the Petitioners representatives, a supplemental petition incorporating some of the Committee's suggestions was filed with the Court.

After considerable deliberation and consideration, the Court modified and changed some of the provisions of the proposed amendments and published the proposed changes for public comment. A number of comments expressing widely diverse views were received from the bar and the public. All were carefully considered by the Court.

We now amend the Arkansas Model Rules of Professional Conduct by adoption of revised Rules 7.1, 7.2, and 7.3, the text of which is appended to this Order and made a part hereof by reference, to become effective on the date of publication of this Per Curiam. The present Rules 7.4 and 7.5 remain unchanged. The amendatory language to Rule 7.2(c) and the Comment thereto, necessitated by the Court's adoption of Rule 1.17, Sale of Law Practice, is incorporated into the appended Rules.

It is so ordered.

RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(d) contains a testimonial or endorsement.

Comment:

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about the results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

RULE 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical,

outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or communication shall be kept for five years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this rule and may pay the usual charges for not-for-profit lawyer referral service or other legal service organization; and may pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law.

(e) Advertisements may include photographs, voices or images of the lawyers who are members of the firm who will actually perform the services. If advertisements utilize actors or other individuals, those persons shall be clearly and conspicuously identified by name and relationship to the advertising lawyer or law firm and shall not mislead or create an unreasonable expectation about the results the lawyer may be able to obtain. Clients or former clients shall not be used in any manner whatsoever in advertisements. Dramatization in any advertisement is prohibited.

Comment:

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not

made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading, overreaching, or unduly intrusive.

This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone numbers; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by this Rule, and for the purchase of a law practice in accordance with Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

Paragraph (e) of this Rule is designed to ensure that the advertising is not misleading and does not create unreasonable or unrealistic expectations about the results the lawyer may be able to obtain in any particular case, and to encourage a focus on providing useful information to the public about legal rights and needs and the availability and terms of legal services. Thus, the Rule allows all lawyer advertisements in which the lawyer personally appears to explain a legal right, the services the lawyer is available to perform, and the lawyer's background and experience. Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner.

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not solicit, by any form of direct contact, in-person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) Notwithstanding the prohibitions described in Paragraph (a), a lawyer may solicit professional employment from a prospective client known to be in need of legal services in a partic-

ular matter by written communication. Such written communication shall:

(1) include on the bottom left hand corner of the face of the envelope the word "Advertisement" in red ink, with type twice as large as that used for the name of the addressee;

(2) only be sent by regular mail;

(3) not have the appearance of legal pleadings or other official documents;

(4) plainly state in capital letters "ADVERTISEMENT" on each page of the written communication;

(5) begin with the statement that "If you have already retained a lawyer, please disregard this letter";

(6) include the following statement in capital letters: "ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT, C/O CLERK, ARKANSAS SUPREME COURT, 625 MARSHALL STREET, LITTLE ROCK, ARKANSAS 72201"; and,

(7) shall comply with all applicable rules governing lawyer advertising.

(c) In death claims, the written communication permitted by paragraph (b) shall not be sent until 30 days after the accident.

(d) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

(e) Even when otherwise permitted by this rule, a lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence; or

(3) the prospective client is known to the lawyer to be represented in connection with the matter concerning the solicitation by counsel, except where the prospective client has initiated the contact with the lawyer.

(f) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment:

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written communications which may be mailed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(b) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence within the meaning of Rule 7.3(e)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(e)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(e).

Letters of solicitation and their envelopes should be clearly marked "Advertisement." This will avoid the recipient perceiving that he or she needs to open the envelope because it is from a

lawyer or law firm, only to find he or she is being solicited for legal services. With the envelope and letter marked "Advertisement," the recipient can choose to read the solicitation, or not to read it, without fear of legal repercussions.

Paragraph (c) allows targeted mail solicitation of potential plaintiffs or claimants in wrongful death causes of action, but only if mailed at least thirty days after the incident. This restriction is reasonably required by the sensitized state of the potential clients who may be grieving the loss of a family member, and the abuses which experience has shown exist in this type of solicitation.

In addition, the lawyer or law firm, should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the information source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding his or her particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge abut the recipient's matter if the lawyer does not.

Lawyers who use direct mail to solicit employment from accident victims or their survivors normally find the names of these persons, whom they believe may need legal services, in accident reports, newspaper reports, television or radio news, or other publicly available information. Some accident victims later die from their injuries after the preparation of reports and news dissemination. In the event of such a death, an attorney, who relies in good faith upon all the reasonably and publicly available information which creates the appearance the victim is still alive at the time the lawyer sends a letter soliciting employment, is not in violation of the prohibition against sending written communications within thirty days in cases which may be the basis of wrongful death claims.

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's

firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement in Rule 7.3(b) that certain communications be marked "Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

Paragraph (f) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (f) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(e). See 8.4(a).

IN RE: RULES GOVERNING PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Opinion delivered May 21, 1999

PER CURIAM. On November 16, 1998, the Pulaski County Bar Association filed its petition herein in aid of implementing a Lawyers-Helping-Lawyers Program, and, on December 10, 1998, the petition was referred to this court's Professional Conduct Committee for that Committee's study. Since that referral, the Arkansas Bar Association has also indicated its interest in the same type of program. Because the respective bar associations are in the process of addressing various aspects of similar programs existing in other jurisdictions, and that information could be relevant and beneficial to the court's understanding of the Pulaski County Bar Association's petition filed with this court, we request the return of the petition to the court. This will permit the court to establish a format in which the court can best address the issues raised in the Pulaski County Bar Association's original petition and allow the court to schedule hearings to permit all interested parties to submit their studies and views on this matter. The court requests its Committee to continue its study so it can provide us with its work and recommendations.

IN RE: RULES GOVERNING ADMISSION TO THE BAR OF ARKANSAS

Supreme Court of Arkansas
Opinion delivered May 27, 1999

PER CURIAM. Presently an applicant for admission to the Bar of Arkansas may retain any Arkansas essay score or retain or transfer any Multistate Bar Examination (MBE) scaled score for a period of three (3) years or six (6) consecutive examinations, whichever is longer. The Arkansas State Board of Law Examiners (Board) has asked this Court to change those provisions to allow transfer or retention for the immediately succeeding examination only and to set a minimum score to be retained or transferred.

The Board argues that the existing provision unrealistically encourages applicants to bring forward marginal or failing scores on one-half of the examination with the faint hope that sometime in the future he or she will do sufficiently well on the other half in order to put together an overall passing score. Further, the existing provision allows an applicant to retain a failing or marginal essay average for several examinations, then change horses and retain a marginal MBE score for an additional period of time, and so on. The Board questions whether the acquisition of an overall passing score in this patch work fashion, over a long period of time, accurately depicts whether the applicant has established basic competence to practice law.

The Board also notes that the existing retention or transfer period is significantly longer than most other jurisdictions. Two other jurisdictions have a retention or transfer period similar to this jurisdiction. The majority however are substantially less, with many not allowing retention or transfer of scores at all.

The Court accepts the proposal submitted by the State Board of Law Examiners. The Court adopts and republishes the entirety of Rule IX of the Rules Governing Admission to the Bar as it appears on the attachment to this per curiam order.

The new retention and transfer provisions will be effective with scores initially obtained in any jurisdiction during the July 1999 bar examination period. Specific scores acquired before that date shall be subject to the previous provision if the applicant has elected to retain or transfer that score from any exam during the period beginning July 1996 and extending through the February 1999 examination.

Rule IX.

EXAMINATION — SUBJECTS — PASSING GRADE

A. GENERAL EXAMINATION

All examinations shall be in writing and shall cover the subjects hereinafter listed and such other subjects as the Board may direct, subject to prior Court approval.

BUSINESS ORGANIZATIONS

This subject heading may include corporations, partnerships, agency and master-servant relationships.

COMMERCIAL TRANSACTIONS

This subject heading may include the general coverage of the U.C.C. This will not include the general subject of contracts and will not include matters relating to warranties under product liability, both of which may be covered under other headings.

CRIMINAL LAW AND PROCEDURE

This subject heading may include constitutional law as it applies to criminal law and procedure.

CONSTITUTIONAL LAW

This subject heading may include both the Arkansas Constitution and the Constitution of the United States. This subject will not be primarily directed to matters relating to criminal law and procedure.

TORTS

This subject heading may include the entire field of Tort law and questions concerning product liability.

PROPERTY

This subject heading may include the law of real property and, or, personal property. Emphasis here should not be placed on the U.C.C. and other such questions arising primarily under the subject heading "Commercial Transactions."

WILLS, ESTATES, TRUSTS

Because of the broad scope of this subject heading, questions concerning taxation shall not be covered. Guardianship of both the person and the estate may be included.

EVIDENCE
PRACTICE AND PROCEDURE

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

EQUITY AND DOMESTIC RELATIONS
CONTRACTS

This subject heading should place emphasis upon the traditional basics of contract law. Only where duplication cannot be avoided, should matters such as the application of the Uniform Commercial Code be covered under this heading.

NOTE: Conflict of Laws is not included as a separate subject on the examination. However, conflict questions may arise in the subjects included on the examination and should be recognized as such.

Applicants must make a combined average grade of 75 percent on all subjects in order to pass.

The Board shall destroy all examination papers, including questions and answers, at the time of the next succeeding bar

examination. However, the original copy of each question shall be maintained in accordance with Rule III.

A bar examination applicant may retain: the applicant's Arkansas essay score of 75% or more; or, the applicant's Multistate Bar Examination scaled score of 135 or more. The retained score may be used in the immediately succeeding examination only. An applicant may transfer from another jurisdiction a Multistate Bar Examination scaled score of 135 or more for use in the immediately succeeding examination only.

B. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

The provisions of Section A of this rule, titled GENERAL EXAMINATION, and the provisions of Rules II and IV of the Rules Governing Admission to the Bar shall govern the semiannual general examinations conducted by the Arkansas State Board of Law Examiners.

As a prerequisite for admission to the Bar of Arkansas each applicant shall be required to attain a scaled score of 75 or more on the Multistate Professional Responsibility Examination (MPRE). This score shall be considered independent of the combined average grade as set out in Rule IV of these rules, and Section A of this rule. Any applicant may take the MPRE prior to a general examination, or within one (1) year from conduct of a general examination at which the applicant receives a passing score. Individuals who successfully complete the MPRE are allowed to retain, or transfer from another jurisdiction, their passing score for a period not exceeding three years from the date upon which the individual took the MPRE. There is no limit on the number of times that an applicant may take the MPRE without passing. (Per Curiam November 1, 1971; amended by Per Curiam June 18, 1984; amended by Per Curiam April 4, 1988; amended by Per Curiam May 18, 1992; amended by Per Curiam June 7, 1993; amended by Per Curiam January 18, 1994; amended by Per Curiam May 15, 1995; amended by Per Curiam May 27, 1999.)

Appointments to Committees

IN RE: SUPREME COURT ALTERNATE COMMITTEE on PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Delivered April 8, 1999

PER CURIAM. The Court adjusted the terms for members of the Alternate Committee on Professional Conduct by the Per Curiam Order issued January 7, 1999. Contrary to the information contained in Appendix B of that Order, the term of David Solomon, Esq., of the First Congressional District should be extended to March 30, 2000.

Jacqueline J. Johnston, Attorney-at-Law, of Fort Smith is appointed to fill the unexpired term of Ms. Stacey DeWitt. This term expires on March 30, 2006 and is an at-large position. The Court thanks Ms. Johnston for accepting appointment to this most important Committee.

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

Supreme Court of Arkansas
Delivered April 8, 1999

PER CURIAM. Larry Carpenter, Esq., of North Little Rock, Dale Adams, Esq., of Little Rock, and Lea Ellen Fowler, Attorney-at-Law, of Little Rock are hereby reappointed to the Supreme Court Committee on Model Jury Instructions—Criminal. D. Scott Hickam, Esq., of Hot Springs is appointed to the Committee. The term for each of the foregoing is three years, to expire on February 28, 2002. Scott Stafford, a current member of the Committee, is hereby designated to serve as the Chairman of the Committee.

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

We also express our gratitude to Jackson Jones, whose term has expired, for his years of service to the Committee, and especially for his work as its chairman.

IN RE: SUPREME COURT COMMITTEE on MODEL JURY INSTRUCTIONS—CIVIL

Supreme Court of Arkansas
Delivered April 22, 1999

PER CURIAM. The Honorable Kim Smith of Fayetteville, Donis Hamilton, Esq., of Paragould, Paul Rainwater, Esq., of Crossett, and Thomas Ray, Esq., of Little Rock, are hereby appointed to the Committee on Model Jury Instructions—Civil for three-year terms to expire on April 30, 2002.

The Court extends its thanks to Judge Smith, Messrs. Hamilton, Rainwater, and Ray for accepting appointment to this most important Committee.

The Court expresses its appreciation to Judge David Bogard of Little Rock, Robert L. Jones, Esq., of Fort Smith, Phillip Carroll, Esq., of Little Rock, and David Blair, Esq., of Batesville, whose terms have expired, for their service as members of this Committee.

Peter Kumpe, a current member of the Committee, is hereby designated to serve as the Chairman of the Committee.

IN RE: ARKANSAS JUDICIAL DISCIPLINE and DISABILITY COMMISSION

Supreme Court of Arkansas
Delivered May 13, 1999

PER CURIAM. In accordance with Amendment 66 of the Constitution of Arkansas and Act 637 of 1989, the Court appoints the Honorable Larry Chandler, Circuit/Chancery Judge, of Magnolia to the Arkansas Judicial Discipline and Disability Commission for a six-year term to expire on June 30, 2005. Judge Chandler replaces the Honorable Kim Smith of Fayetteville, whose term has expired.

The Court thanks Judge Chandler for accepting appointment to this most important Commission.

The Court expresses its gratitude to Judge Smith for his dedicated and faithful service as a member of the Commission.

Alphabetical Headnote Index

HEADNOTE INDEX

ADMINISTRATIVE LAW & PROCEDURE:

Appellees failed to exhaust administrative remedies, chancery court was not appropriate jurisdiction to hear Act 1336 claim. *City of Dover v. Barton*, 186

Standard of review, limited in scope. *McQuay v. Arkansas State Bd. of Architects*, 339

Licensing authority, legislature may delegate discretionary power. *Id.*

Unlawful delegation of powers by statute, what constitutes. *Id.*

Unlawful delegation of powers by statute, constitutional challenge must be raised before agency. *Id.*

Constitutional challenge to statute not properly developed before appellee board, not reviewed on appeal. *Id.*

Agency's decision must be supported by substantial evidence, appellant's burden. *Id.*

Unauthorized practice of architecture, substantial evidence supported appellee board's decision that appellant was engaged in unlicensed practice. *Id.*

Arbitrary & capricious action, what constitutes. *Id.*

Unauthorized practice of architecture, imposition of penalty by appellee board not arbitrary or capricious. *Id.*

Unauthorized practice of architecture, assessment of penalty for each day until hearing was arbitrary & capricious, reversed & remanded for additional findings. *Id.*

APPEAL & ERROR:

No objection raised below, issue not preserved for appeal. *Sunrise Enters., Inc. v. Mid-South Rd. Builders, Inc.*, 6

Denial of motion to compel arbitration, immediately appealable order. *Walton v. Lewis*, 45

Standing, general rule. *In Re: $3,166,199*, 74

Standing, means by which nonparty may gain to pursue review of trial court's orders. *Id.*

Standing, appellant had pecuniary interest & thus standing to bring appeal. *Id.*

Criminal cases, standard of review. *McLennan v. State*, 83

Petition for review, treated as if originally filed in supreme court. *Minnesota Mining & Mfg. v. Baker*, 94

Law of case, doctrine discussed. *Camargo v. State*, 105

Case tried by circuit court without jury, inquiry on appeal. *Springdale Winnelson Co. v. Rakes*, 154

Review of issue of statutory interpretation, supreme court not bound by decision of circuit court. *State v. Havens*, 161

Trial court erred in denying appellant's petition, reversed & remanded. *Fulmer v. State*, 177

Final order, what constitutes. *Haase v. Starnes*, 193

Evidentiary rulings, not appealable orders. *Id.*

Order deferring determination as to damages, not final. *Id.*

Judgment appealed from not final, appeal dismissed. *Id.*

Contemporaneous objection necessary, point concerning testimony of witnesses not preserved for appeal. *Hill v. State*, 219

Abstracting requirements, appellant responsible for producing sufficient abstract. *Id.*

Case reversed, award of attorney's fees & costs reversed. *Elmore v. Burke*, 235

Chancery cases, *de novo* review. *Dawson v. Temps Plus, Inc.*, 247

Petition for review granted, how treated. *Shivey v. Shivey*, 262
Notice of appeal not timely filed, Rule 60 motion did not extend time for filing. *Id.*
Time for filing notice of appeal, not extended by Ark. R. App. P.—Civ. 4(b). *Id.*
Abstracting deficiencies must be substantial, appellant's abstract adequate. *Massongill v. County of Scott*, 281
Law-of-case doctrine discussed. *Id.*
Matter affirmed in part & reversed in part, remanded for determination of amounts to be refunded. *Id.*
Petition for review, case treated as if originally filed in supreme court. *Muhammad v. State*, 291
Award of good time discretionary, circuit court did not err in denying petitions for declaratory relief & for writ of mandamus. *Duncan v. State*, 306
Motion for rule on clerk, when granted. *Jones v. State*, 309
Motion for rule on clerk, denied. *Id.*
Matters outside record not considered. *Scott v. State*, 320
Issue raised for first time on appeal, not considered. *Sutter v. Payne*, 330
New issues raised, whether factual or legal not determinative, argument not considered. *Id.*
Order appealed from must be final, motion to strike denied, case remanded to settle record. *Arkansas Dep't of Human Servs. v. Arkansas Health Care Ass'n*, 351
Chancery cases, *de novo* review. *Wade v. Arkansas Dept. of Human Servs.*, 353
Supplemental record, sufficient evidence existed to affirm without. *Id.*
Divorce decree void, motion for rule on clerk denied. *Price v. Price*, 372
Motion for rule on clerk, good cause for granting. *Williams v. State*, 373
Unsupported argument, exception to general rule for appeal of life sentence. *Sublett v. State*, 374
Record must show prejudicial error, unsupported argument not considered. *McFarland v. State*, 386
Doctrine of mootness, death-penalty questions moot when death penalty not imposed. *Id.*
Court views only evidence most favorable to verdict, circumstantial evidence may be sufficient. *Byrd v. State*, 413
Unresolved matters may not be raised on appeal, appellant obtained no ruling on objection. *Id.*
Favorable ruling, party who received cannot complain. *Id.*
No prejudice shown due to trial court's overruling objection, any error harmless. *Id.*
Petition for review, treatment by supreme court. *McDaniel v. State*, 431
Petition for review, treatment by supreme court. *Wal-Mart Stores, Inc. v. VanWagner*, 443
Error alleged, appellant has burden of abstracting record. *Martin v. State*, 451
No abstract of revocation proceeding, no way to determine whether departure from sentencing guidelines justified. *Id.*
Petition for review, case treated as though originally filed with supreme court. *Hamilton v. Barrett*, 460
Chancery cases, *de novo* review. *Id.*
Chancery cases, deference to chancellor in judging witness credibility. *Id.*
Assignments of error unsupported by authority, not considered on appeal. *Hodges v. Lamora*, 470
Issue raised for first time on appeal, not reviewed. *Johnson v. State*, 477

Unsupported assignments of error not considered. *Id.*
Affidavit set forth sufficient facts on three claims, reversed & remanded. *Stockton v. Sentry Ins.*, 507
Unsupported argument not considered. *Henderson v. State*, 518
Argument raised for first time on appeal, not considered. *Shaw v. Shaw*, 530
Motion for belated appeal, good cause for granting. *Kirby v. State*, 537
Postconviction relief, appellant's motion to relieve & waive counsel denied, counsel's motion to incorporate trial record granted. *Nooner v. State*, 538
Unsupported argument, sufficient reason to affirm on issue in question. *Ellis v. Price*, 542
Chancery cases, *de novo* review. *Saforo & Associates, Inc. v. Porocel Corp.*, 553
Order appealed from must be final. *Smith v. Smith*, 583
Final order, what constitutes. *Id.*
Matters not in record, not considered. *Id.*
Presumption of legitimacy insufficient to turn nonappealable order into final judgment, appeal dismissed. *Id.*
Probate proceedings, standard of review. *Buchte v. State*, 591
Mootness, consideration of appeal not barred. *Id.*
Motion for belated appeal, good cause for granting. *Fritts v. State*, 607
Motion to file belated brief, good cause for granting. *Johnson v. State*, 609

ARBITRATION:
Enforcement of agreement, concurrent jurisdiction of state & federal courts. *Walton v. Lewis*, 45
Denial of motion to compel arbitration, *de novo* standard of review. *Id.*
Appellate review, guiding principles. *Id.*
NASD Code, when court is required to compel arbitration. *Id.*
NASD Code, dispute over bonus-plan proceeds did not arise out of appellee's employment with subject company. *Id.*
NASD Code, dispute over bonus-plan proceeds did not arise in connection with business of subject company. *Id.*
Unambiguous language of agreement did not require arbitration of appellee's tort claims, trial court's denial of motion to compel arbitration affirmed. *Id.*

ATTORNEY & CLIENT:
Attorney's fees, reversed & remanded for reconsideration. *Dawson v. Temps Plus, Inc.*, 247

BONDS:
Construction of, sureties only chargeable according to terms of bond. *Merchants Bonding Co. v. Starkey*, 229
Guardian's bond, purpose of. *Id.*
Guardian's bond, Texas law specific & strictly applied. *Id.*
Bond given pursuant to statutes of another state, prerequisite to maintenance of action. *Id.*
Construed, as if law were written into them. *Id.*
Not enforceable in Arkansas court, probate court did not have subject-matter jurisdiction, reversed. *Id.*

BUSINESS & COMMERCIAL LAW:
Arkansas Franchise Practices Act, construction. *Stockton v. Sentry Ins.*, 507

Trade secret, definition. *Saforo & Associates, Inc. v. Porocel Corp.*, 553
Trade secret, six-factor analysis adopted for determining. *Id.*
Trade secret, first of six test factors satisfied. *Id.*
Trade secret, second of six test factors satisfied. *Id.*
Trade secret, third of six test factors satisfied. *Id.*
Trade secret, fourth of six test factors satisfied. *Id.*
Trade secret, fifth of six test factors satisfied. *Id.*
Trade secret, sixth of six test factors satisfied. *Id.*
Trade secret, appellee's process constituted trade secret, affirmed. *Id.*
Trade secret, evidence supported trial court's finding of willful misappropriation. *Id.*

CIVIL PROCEDURE:
Depositions of party, may be used by adverse party. *Arthur v. Zearley*, 125
Ark. R. Civ. P. 54(b), does not obviate finality requirement. *Haase v. Starnes*, 193
Relation back, trial court's decision that amendment did not relate back to original complaint affirmed. *George v. Jefferson Hosp. Ass'n, Inc.*, 206
Common-defense doctrine, provisions of. *Sutter v. Payne*, 330
Common-defense doctrine, test for. *Id.*
Common-defense doctrine, applications of. *Id.*
Common-defense doctrine, applicable here. *Id.*
Common-defense doctrine, defaulting defendant can rely upon answer of co-defendant who is no longer in case, subsequent dismissal does not "erase" answer. *Id.*
Appellant answered before co-defendant withdrew answer, trial court erred in ruling that common-defense doctrine did not apply, reversed & remanded. *Id.*
Appellant failed to state facts upon which relief could be granted, conspiracy claim properly dismissed. *Hodges v. Lamora*, 470
Probate code does not provide for procedure different from Ark. R. Civ. P. 56, Rule 56 & relevant standard of review applicable. *Norton v. Hinson*, 487
Summary judgment, motion's opponent must meet proof with proof. *Rankin v. City of Fort Smith*, 599

CONSTITUTIONAL LAW:
Erroneous interpretation of law applied in first trial, Double Jeopardy Clause does not prohibit retrial. *State v. Havens*, 161
Retrial allowed, no double jeopardy violation. *Id.*
Ex Post Facto Clause, when law violates. *Duncan v. State*, 306
Retroactive application of act, not prohibited by *Ex Post Facto* Clause. *Id.*
Statute repealing award of meritorious good time, when retroactive application of violates *Ex Post Facto* Clause. *Id.*
Violation of rights in another state, no evidence set forth. *McFarland v. State*, 386
Waiver of right to counsel, when defendant may proceed *pro se*. *Bledsoe v. State*, 403
Waiver of right to counsel, how effectively waived. *Id.*
Waiver of right to counsel, determining whether intelligent waiver has been made. *Id.*
Waiver of right to counsel, not knowingly & intelligently made. *Id.*
Waiver of right to counsel, when assistance of standby counsel rises to level where defendant deemed to have had counsel for defense. *Id.*
Appellant denied right to counsel, reversed & remanded. *Id.*
Claim of ineffective assistance of counsel, proof required. *Martin v. State*, 451

Claim of ineffective assistance of counsel, presumption exists that counsel's conduct reasonable. *Id.*
Illegal exaction, misapplication of public funds discussed. *Hodges v. Lamora*, 470
"Public funds" illegal exaction alleged, facts insufficient to constitute. *Id.*
Failure to collect restitution for theft did not qualify as misapplication of public funds for illegal-exaction purposes, appellant had no standing to bring claim. *Id.*

CONTEMPT:
Show-cause order issued. *Kirby v. State*, 537
Professional Conduct Committee's petition granted, respondent attorney ordered to appear before supreme court. *In Re: Williams*, 541
Amended petition of Committee on Professional Conduct granted, attorney ordered to appear. *In Re: Meurer*, 608
Show-cause order issued. *Johnson v. State*, 609

CONTRACTS:
Restraint of trade, when unreasonable. *Dawson v. Temps Plus, Inc.*, 247
Covenants not to compete, employment contracts subject to stricter scrutiny. *Id.*
Covenants not to compete, burden on party challenging. *Id.*
Covenants not to compete, case-by-case review. *Id.*
Covenants not to compete, not enforced unless covenantee has legitimate interest to be protected. *Id.*
Covenants not to compete, appellee had legitimate business interest to protect. *Id.*
Covenants not to compete, nothing inherently restrictive about five-year restriction. *Id.*
Covenants not to compete, time & geographical restrictions not unreasonable. *Id.*
Covenants not to compete, appellant's sale of substantial interest in appellee business involved transfer of goodwill, covenant was ancillary to sale & enforceable. *Id.*
Covenants not to compete, evidence sufficient that appellant had breached non-compete agreement. *Id.*
Covenants not to compete, person not party in not liable for breach. *Id.*
Covenants not to compete, cross-appellant could not show public interest favored extending injunction. *Id.*
Covenants not to compete, legitimate competition will not be shackled by extending non-compete agreement to third parties. *Id.*
Legal-malpractice action, indirect privity argument rejected. *McDonald v. Pettus*, 265
Privity requirement of lawyer-immunity statute not satisfied, trial court's dismissal of children's malpractice claims affirmed. *Id.*
Legal malpractice, privity requirement satisfied as to personal representatives of estate. *Id.*
Breach of contract, action for does not depend on survival statute for continued existence. *Id.*
Indemnification action, "jurisdictional unavailability" rejected as defense. *United States Fid. & Guar. Co. v. A & A Masonry, Inc.*, 366
Indemnification action, out-of-state federal court's lack of personal jurisdiction over appellees did not bar suit in circuit court. *Id.*
Controlling law, law in effect forms part of contract. *Woodend v. Southland Racing Corp.*, 380
Franchises, business relationship created by contract was not franchise within statutory meaning. *Stockton v. Sentry Ins.*, 507

Franchises, dismissal of appellant's franchise claim affirmed. *Id.*

COURTS:

Jurisdiction, one court's lack of jurisdiction did not prevent any other court with jurisdiction from acting. *United States Fid. & Guar. Co. v. A & A Masonry, Inc.*, 366

Unjust judicially created rule, judiciary should modify. *Suneson v. Holloway Constr. Co.*, 571

CRIMINAL LAW:

Forfeiture, initial jurisdiction of *res* vested in circuit court of county where seized. *In Re: $3,166,199*, 74

Forfeiture, finding that prosecutor's office was seizing law enforcement agency reversed, circuit court's attempted exercise of jurisdiction over seized property affirmed. *Id.*

Continuing-course-of-conduct crime, only prosecuted under one charge. *McLennan v. State*, 83

Continuing offense, test for determining. *Id.*

Terroristic act, each of appellant's shots required separate conscious act & was punishable as separate offense. *Id.*

Appellant's firing three shots into apartment constituted three separate terroristic acts, trial court's ruling affirmed. *Id.*

Death penalty, constitutionality of Ark. Code Ann. § 5-4-603(a) reaffirmed. *Camargo v. State*, 105

Challenge to constitutionality of Ark. Code Ann. § 5-4-603(a), Rule 4-3(h) review was law of case on issue. *Id.*

Mitigating-circumstance instruction, supreme court's decision in prior appeal was binding in subsequent appeal. *Id.*

Overdrafts, language of statutes clear that notice to drawer of hot check not required before criminal charges brought. *State v. Havens*, 161

Ark. Code Ann. § 5-37-304(a)(2)(B), language clear concerning prosecutor's power to file charges. *Id.*

Ark. Code Ann. § 16-93-1207 (Supp. 1997), power of circuit court to expunge criminal record. *Fulmer v. State*, 177

Death penalty, petition to recall mandate & for stay of execution granted. *State v. Robbins*, 227

Intent necessary to sustain first-degree murder conviction, may be inferred. *Smith v. State*, 239

First-degree murder, testimony constituted substantial evidence to support verdict of. *Id.*

Defense of justification, proof required. *Id.*

Rape, forcible compulsion, definition. *Sublett v. State*, 374

Rape, forcible compulsion, test for determining whether physical force was employed. *Id.*

Rape, forcible compulsion, sufficient evidence presented. *Id.*

Rape, forcible compulsion, victim's age & relationship are key factors. *Id.*

Rape, forcible compulsion, effect of assailant standing *in loco parentis* to victim. *Id.*

Rape, corroboration not necessary to support conviction. *Id.*

Rape, jury chose to believe two victims & their mother, substantial evidence supported appellant's conviction. *Id.*

Capital murder, premeditation & deliberation may be inferred from circumstantial evidence. *McFarland v. State*, 386

Capital murder, sufficient evidence of appellant's premeditation & deliberation to commit capital murder. *Id.*
Kidnapping, statute speaks in terms of restraint & not removal. *Id.*
Kidnapping, acts constituting in this case. *Id.*
First-degree felony murder not lesser included offense of premeditated capital murder, appellant did not request instruction on purposeful first-degree murder. *Id.*
Lesser included offenses, three criteria. *Byrd v. State*, 413
Lesser included offense, when trial court's decision to exclude instruction on lesser included offense affirmed. *Id.*
First-degree murder, proof required. *Id.*
First-degree murder, "knowingly" discussed. *Id.*
Second-degree murder, not lesser included offense of first-degree murder. *Id.*
Indictment for greater offense does not contain allegations of all ingredients of lesser offense, conviction on lesser offense cannot be sustained. *Id.*
Second-degree murder is not lesser included offense of first-degree murder, trial court's ruling affirmed. *Id.*
Sentencing & probation, discussed. *Martin v. State*, 451
Appellant placed on supervised probation, court was free to use sentencing guidelines to determine appropriate punishment. *Id.*
Accomplice testimony, test for corroborating evidence. *Henderson v. State*, 518
Capital murder, substantial evidence to support appellant's conviction. *Id.*
1989 probation controlled by Ark. Code Ann. § 16-93-401, appellant illegally sentenced to ten years' probation. *Wells v. State*, 586
Trial court exceeded its authority, judgment of revocation reversed & dismissed. *Id.*

CRIMINAL PROCEDURE:
Voluntariness of confessions, due process requirements. *State v. Sheppard*, 1
Voluntariness of confessions, factors on review. *Id.*
Custodial statement, question of reliability is for fact-finder. *Id.*
Voluntariness of confessions, circumstances relate to issue. *Id.*
Motion to suppress, standard of review. *Fouse v. State*, 13
Search warrants, requirements for nighttime searches. *Id.*
Search warrants, when nighttime searches invalidated. *Id.*
Search warrants, when nighttime searches upheld. *Id.*
Search warrant deficient, probable cause lacking to justify nighttime search. *Id.*
Execution of search warrant, test used to determine good faith. *Id.*
Nighttime search, establishing probable cause. *Id.*
Nighttime search, probable cause not found. *Id.*
Nighttime search not justified by facts in affidavit, smell of ether insufficient to justify, reversed & remanded. *Id.*
Validity of statement, standard of review. *McLennan v. State*, 83
Waiver of rights, totality-of-circumstances test. *Id.*
Custodial confessions, State's burden. *Id.*
Voluntariness of confessions, factors considered. *Id.*
Voluntariness of confessions, trial court did not err in admitting appellant's statement. *Id.*
Speedy trial, when time begins to run in appeal from municipal court. *Johnson v. State*, 196

Speedy-trial right not violated, trial occurred within one year of perfection of appeal to circuit court. *Id.*
Ark. R. Crim. P. 37 petitions, denied without written findings, when affirmed. *Bilyeu v. State*, 304
Petition for postconviction relief, assertions of fact precluded summary dismissal, motion to remand granted. *Id.*
Ark. R. Crim. P. 17.1, discussed. *Henry v. State*, 310
Discovery, defendant cannot rely upon as substitute for investigation. *Id.*
Mistrial denied & continuance granted, no abuse of discretion found. *Id.*
Speedy trial, rules governing. *Scott v. State*, 320
Speedy trial, time necessary to complete mental examination requested by defendant is excluded. *Id.*
Speedy trial, no merit to appellant's argument that delay resulting from mental examination should not be excluded. *Id.*
Custodial statements, State's burden. *McFarland v. State*, 386
Custodial statements, appellant knowingly waived rights. *Id.*
Custodial statements, trial court's decision not to suppress affirmed. *Id.*
Death penalty, procedure to be followed upon waiver of appeal. *Willett v. State*, 457
Death penalty, standard for competency to elect execution different from standard for competency to stand trial. *Id.*
Death penalty, trial court erred in allowing appellant to waive right to postconviction relief without competency examination, reversed & remanded for examination & hearing. *Id.*
Speedy trial, when time begins to run. *Johnson v. State*, 477
Same speedy-trial calculation applied to all charges stemming from same offense, three-month continuance properly excluded. *Id.*
Sentencing, trial court lacked jurisdiction further to modify corrected forty-year sentence. *Renshaw v. Norris*, 494
Sentencing, appellant's thirty-year sentence was invalid on its face. *Id.*
Sentencing, original ten-year sentence could not be modified. *Id.*
Sentencing, remedy for illegal sentence. *Id.*
Sentencing, trial court lacked subject-matter jurisdiction to change ten-year sentence from concurrent to consecutive. *Id.*
Sentencing, appellant illegally detained to extent sentences were excessive, reversed & remanded. *Id.*

DAMAGES:
Breach of contract, general rule. *Dawson v. Temps Plus, Inc.*, 247
Breach of contract, when consequential damages are recoverable. *Id.*
Breach of contract, appellant inconsistently held liable for lost profits caused by stranger to contract. *Id.*
Breach of contract, damages from any breach by appellant not proved, reversed. *Id.*
Survival action, distinguished from wrongful-death action. *McDonald v. Pettus*, 265
Alleged excessive award, review of. *Ellis v. Price*, 542
Remittitur, when appropriate. *Id.*
Punitive damages, review of award. *Id.*
Punitive damages, purpose of. *Id.*

Punitive damages, jury could have concluded that appellant's acts were done with deliberate intent to injure appellee. *Id.*
Punitive damages, award did not shock conscience. *Id.*
Compensatory damages, award not excessive. *Id.*
Trade secret, complainant may recover lost profits or defendant's profits, reversed & remanded for modification. *Saforo & Associates, Inc. v. Porocel Corp.*, 553
Breach of implied contract, trial court's decision affirmed. *Id.*

DEFAMATION:
Reputational injury, must be proved. *Ellis v. Price*, 542
Reputational injury, proof required. *Id.*

DIVORCE:
Property divisible upon divorce, Uniformed Services Former Spouses Protection Act. *Ashley v. Ashley*, 362
Appellant waived military retirement pay in order to receive veterans' disability payments, appellee not entitled to amount earlier awarded. *Id.*
Death of party, nullifies validity of divorce decree. *Price v. Price*, 372
Divorced wife not entitled to dower, election statute allows only surviving spouse to take against will. *Shaw v. Shaw*, 530

ELECTIONS:
Challenge, appellants presented no proof that ballot was misleading or that outcome would have been different. *Doty v. Payne*, 326
Challenge, ballot complied with statutory format. *Id.*
Challenge, appellants failed to contest propriety of ballot before election. *Id.*

EQUITY:
Laches, appellees failed to demonstrate that doctrine should apply. *Massongill v. County of Scott*, 281
Unjust enrichment, cases cited as authority for appellees' argument not shown to be applicable. *Id.*

EVIDENCE:
Trial court clearly erred in excluding investigator's testimony regarding appellee's verbal statements, reversed. *State v. Sheppard*, 1
Balancing relevance & probative value against unfair prejudice, trial court's discretion. *McLennan v. State*, 83
Subsequent crimes or wrongs, trial court did not err in admitting evidence of appellant's attempted bribe. *Id.*
Trial court's rulings, when reversed. *Arthur v. Zearley*, 125
When relevant, when excluded. *Id.*
Deposition testimony, relevant & admissible. *Id.*
Deposition testimony, trial court did not abuse discretion in admitting. *Id.*
Collateral matters, what constitutes. *Id.*
Rebuttal testimony shed light on central issue, testimony not collateral. *Id.*
Ark. R. Evid. 611(a), vests discretion in trial court in regulation of interrogation of witnesses & presentation of evidence. *Id.*

Trial court had authority to dictate order in which evidence was presented, trial court's decision to deviate from traditional order of proceedings not abuse of discretion. *Id.*
Testimony properly admitted, trial court's ruling not abuse of discretion. *Id.*
Ark. R. Evid. 606(b), purpose of. *State v. Osborn*, 172
Juror's testimony as to mental processes in reaching verdict, purpose underlying exclusion of. *Id.*
Juries, may not testify about what affected them during deliberations. *Id.*
Juror's misunderstandings based on erroneous representations may not be considered under Ark. R. Evid. 606(b), reversed & remanded. *Id.*
Sufficiency of, challenge to must be reviewed first. *Johnson v. State*, 196
Sufficiency of, test for determining. *Id.*
DWI charge, observations of police officers can constitute competent evidence to support. *Id.*
DWI, refusal to be tested is admissible evidence. *Id.*
Determination of weight of evidence & credibility of witnesses, province of fact-finder. *Id.*
DWI, evidence was sufficient to support trial court's finding that appellant was intoxicated. *Id.*
Witness-exclusion rule, mandatory. *Hill v. State*, 219
Witness-exclusion rule, exceptions. *Id.*
Witness-exclusion rule, exceptions, trial court did not err in permitting foster parents & caseworker to be present during hearing. *Id.*
Sufficiency, test for determining. *Smith v. State*, 239
Circumstantial evidence discussed. *Id.*
Conflicts or inconsistencies, trier of fact resolves. *Id.*
Witnesses, jury entitled to believe State & to disbelieve appellant. *Id.*
Circumstances connected with particular crime, may be shown even if circumstances constitute separate crime. *Henry v. State*, 310
Excited utterance admissible, taped conversations completed picture of crime. *Id.*
State's evidence described only shooting with which appellant was charged, tape was relevant evidence that described crime. *Id.*
Probative value of evidence not outweighed by danger of unfair prejudice, no abuse of discretion in admission of tape. *Id.*
Sufficiency of, review of challenge to. *Sublett v. State*, 374
Circumstantial evidence, basis to support conviction. *Id.*
Sufficiency of, standard of review. *McFarland v. State*, 386
Challenge to sufficiency of, factors on review. *Byrd v. State*, 413
Sufficient to show that appellant struck & shook child knowing that result could be serious injury or death, directed-verdict motion properly denied. *Id.*
Ark. R. Evid. 613, discussed. *Id.*
No prejudice resulted from granting State's objection, any error harmless. *Id.*
Ark. R. Evid. 404(b), exceptions not exclusive. *Johnson v. State*, 477
Prior relationship, independently relevant under Ark. R. Evid. 404(b). *Id.*
Other crimes, when excluded. *Id.*
Slight probative value of evidence was substantially outweighed by danger of unfair prejudice, admission of challenged portions of confession under Rule 403 was abuse of discretion. *Id.*

Error, when harmless. *Id.*
Evidence of guilt overwhelming, trial court's error in admitting statement about felony conviction & incarceration was slight, error was harmless. *Id.*
Challenge to sufficiency of, standard of review. *Henderson v. State*, 518
Substantial evidence, definition. *Id.*
Circumstantial evidence, requirements. *Id.*
Exclusion of, standard of review. *Ellis v. Price*, 542
Exclusion of, trial court's denial of appellant's motion in limine affirmed. *Id.*
Sufficient for case to go to jury, trial court did not err in denying directed-verdict motion. *Id.*
Substantial evidence, definition. *Id.*

EXECUTORS & ADMINISTRATORS:
Certain actions may be brought after decedent's death, rights & liabilities under contract pass to executor. *McDonald v. Pettus*, 265
Breach-of-contract claim brought under probate code does not require either pre-death breach or pre-death damages, personal representatives may bring claim on decedent's behalf. *Id.*
Claim by personal representative proper, trial court's grant of summary judgment in error. *Id.*

FRAUD:
Elements of, must be specifically alleged. *Woodend v. Southland Racing Corp.*, 380
No factual allegations made covering required elements, fraud claim failed. *Id.*
No justifiable reliance shown, fraud claim failed. *Id.*

GAMING:
Racing Commission rules governed, appellant held no winning ticket. *Woodend v. Southland Racing Corp.*, 380

HABEAS CORPUS:
Review proper by appeal only. *Armstrong v. Norris*, 169
Rule 37 petition not pending when habeas corpus petition filed. *Id.*
Petition properly filed in county where appellant was incarcerated, efficacy of petition guaranteed by Arkansas Constitution. *Id.*
Appellant's petition for writ not procedurally barred, reversed & remanded. *Id.*
When writ is appropriate. *Renshaw v. Norris*, 494
Writ provides protection for petitioners confined longer than permitted by statute. *Id.*
When writ will issue. *Id.*
Petition alleging void or illegal sentence, review of. *Id.*
No time limit place by constitution or statute on pursuing writ. *Id.*
Petition for writ should be granted where original trial judge illegally sentenced appellant to thirty-year term. *Id.*

HOSPITALS:
Charitable immunity, appellee provided free services to those unable to pay. *George v. Jefferson Hosp. Ass'n, Inc.*, 206
Charitable immunity, profit not determinative of status. *Id.*

Charitable immunity, appellee's use of surplus consistent with overall charitable purposes. *Id.*
Charitable immunity, appellee's financial structure did not negate charitable purpose. *Id.*
Charitable immunity, minimal bonus compensation to officers & directors did not affect appellee's status. *Id.*
Charitable immunity, appellee met requirements of charitable entity. *Id.*

IMMUNITY:
Legislative immunity, long-recognized principle. *Massongill v. County of Scott*, 281
Sovereign immunity, tension with right of people to contest illegal exaction. *Id.*
Legislative immunity, when inapplicable as defense to repayment of illegal exaction. *Id.*
Legislative immunity, trial court erred in applying, ruling reversed. *Id.*
Grant of, within domain of prosecuting attorney. *Hodges v. Lamora*, 470
Sheriff did not grant immunity, prosecuting attorney free to pursue investigation into theft. *Id.*

INJUNCTION:
Grant or denial, chancery court's discretion. *Dawson v. Temps Plus, Inc.*, 247
Permanent injunction, grounds for. *Id.*

INTOXICATING LIQUORS:
High-risk groups, no distinction between minors & intoxicated persons with respect to causation. *Jackson v. Cadillac Cowboy, Inc.*, 24
Vendors' duty of care, prohibition of sale of alcohol to intoxicated persons. *Id.*
Vendors' duty of care, breached by serving alcohol to intoxicated person knowing he intended to drive motor vehicle. *Id.*
Duty of care, liability does not extend to social hosts. *Id.*
Question of breach of duty for fact-finder, evidence of vendor's sale of alcohol to intoxicated person some evidence of negligence, reversed & remanded. *Id.*

JUDGES:
May not be both judge & witness. *Huffman v. Fisher*, 58
Recusal, duty not to recuse where no prejudice exists. *Massongill v. County of Scott*, 281
Recusal, decision within court's discretion. *Id.*
Recusal, trial court's refusal to recuse affirmed. *Id.*
Assignment, parties' or trial court's responsibility to apprise supreme court of necessity. *In Re: Estate of Seay*, 516
Objection to appointment not timely filed, motion for reassignment denied. *Id.*

JUDGMENT:
Appellees' argument of alternative basis for affirming summary judgment had no merit, reversed & remanded. *City of Dover v. Barton*, 186
Summary judgment, when granted. *George v. Jefferson Hosp. Ass'n, Inc.*, 206
Summary judgment, standard of review. *Id.*
Trial court correctly set aside summary-judgment order, execution according to appellate mandate. *Massongill v. County of Scott*, 281
Summary judgment, when granted. *United States Fid. & Guar. Co. v. A & A Masonry, Inc.*, 366
Summary judgment, standard of review. *Id.*

Summary judgment properly granted, affirmed. *Woodend v. Southland Racing Corp.*, 380
Summary judgment, factors on review. *Norton v. Hinson*, 487
Summary judgment, when properly granted. *Stockton v. Sentry Ins.*, 507
Summary judgment, factors on review. *Id.*
Summary judgment, when movant is entitled to. *Id.*
Summary judgment, when granted. *Rankin v. City of Fort Smith*, 599
Summary judgment, review of grant. *Id.*

JURISDICTION:
Supreme court, duty of. *Haase v. Starnes*, 193
Suit instituted on bond given in Texas, suit could be brought only where bond was issued. *Merchants Bonding Co. v. Starkey*, 229

JURY:
Misconduct, request for new trial due to. *Sunrise Enters., Inc. v. Mid-South Rd. Builders, Inc.*, 6
Misconduct, extraneous material brought into courtroom. *Id.*
Misconduct, does not always result in prejudice. *Id.*
Misconduct, reasonable possibility prejudice resulted. *Id.*
Instructions, mitigating circumstance unanimously found by jury not enumerated on instruction forms. *Camargo v. State*, 105
Instructions, jury instructed that it could consider evidence of mental retardation as mitigating circumstance even if it concluded appellant had not proven retardation by preponderance. *Id.*
Instructions to, when proper. *Arthur v. Zearley*, 125
Instruction for future medical expenses, proof required. *Id.*
Instruction for future medical expenses given, instruction inappropriate. *Id.*
Loss-of-future-earnings instruction, proof required. *Id.*
Loss-of-future-earnings instruction given, instruction inappropriate. *Id.*
Loss-of-earning-capacity instruction, proof required. *Id.*
Loss-of-earning-capacity instruction given, instruction inappropriate. *Id.*
Giving of erroneous instructions, prejudice presumed. *Id.*
Instructions, must be given when evidence warrants. *McFarland v. State*, 386
Instructions, no abuse of discretion in trial court's refusal to instruct jury on first-degree felony murder. *Id.*
May use common sense, may infer defendant's guilt from improbable explanations. *Byrd v. State*, 413

JUVENILES:
Accomplice-corroboration rule, inapplicable in juvenile proceedings. *Munhall v. State*, 41
Accomplice-corroboration rule, factors considered in finding it inapplicable. *Id.*
Purpose of Arkansas Juvenile Code, specific rights afforded juveniles by statute. *Id.*
Accomplice-corroboration rule, extension to juveniles must be by legislative enactment. *Id.*

LIMITATION OF ACTIONS:
Public policy, legislative domain. *Minnesota Mining & Mfg. v. Baker*, 94
Public policy, legislature did not intend no limitations for scheduled injuries. *Id.*

Proof of application of statute of limitations not presented, summary-judgment grant to certain appellees reversed. *United States Fid. & Guar. Co. v. A & A Masonry, Inc.*, 366

MISTRIAL:
Extreme remedy, when granted. *Arthur v. Zearley*, 125
Refusal to grant, no abuse of discretion found. *Id.*
Drastic remedy, when appropriate. *Henry v. State*, 310
References in State's opening statement not surprising, no error found. *Id.*

MOTIONS:
Motion to dismiss, factors on review. *Jackson v. Cadillac Cowboy, Inc.*, 24
Directed verdict, when granted. *Arthur v. Zearley*, 125
Denial of directed-verdict motion, affirmed. *Id.*
Directed verdict, challenge to sufficiency of evidence. *Smith v. State*, 239
Summary judgment, review of. *McDonald v. Pettus*, 265
Summary judgment, when proper. *Id.*
Summary judgment erroneous, material questions of fact remained unanswered. *Id.*
Motion to suppress, review of denial. *Muhammad v. State*, 291
Directed verdict, challenges to sufficiency of evidence. *McFarland v. State*, 386
Directed verdict, trial court did not err in refusing on either capital murder or kidnapping charges. *Id.*
Directed verdict, challenge to sufficiency of evidence. *Byrd v. State*, 413
Motion to suppress, review of denial. *McDaniel v. State*, 431
Motion to suppress, trial court's denial affirmed. *Id.*
Motion to dismiss, review of grant. *Hodges v. Lamora*, 470
For release of *supersedeas* bond, denied. *Warnock v. Warnock*, 540
Directed verdict, when granted. *Ellis v. Price*, 542
Judgment notwithstanding verdict, standard of review. *Id.*
Judgment notwithstanding verdict, trial court did not err in refusing to grant appellant's motion. *Id.*

MUNICIPAL CORPORATIONS:
Municipal sewage systems, Act 1336 of 1997 not pertinent where construction by appellant began before effective date. *City of Dover v. Barton*, 186
Municipal sewage systems, manner in which appellant city proceeded with construction of sewage-treatment facility was appropriate under then-existing law. *Id.*
Municipal sewage systems, Act 1336 of 1997 not given retroactive effect. *Id.*

NEGLIGENCE:
Proximate cause, proof of. *Arthur v. Zearley*, 125
Proximate cause, circumstantial evidence may be sufficient. *Id.*
Proof of causation sufficient, injuries proximately caused by use of ceramic spacer. *Id.*

NEW TRIAL:
Grant of, test on review. *Sunrise Enters., Inc. v. Mid-South Rd. Builders, Inc.*, 6
Granted, no abuse of discretion found. *Id.*

PARENT & CHILD:
Change of child's surname, best interest of child considered. *Huffman v. Fisher*, 58

Name change for minor child, Ark. Code Ann. § 20-18-401(e)(3) (Supp. 1989) interpreted. *Id.*
Name change for minor child, compelling factors needed for change. *Id.*
Name change for minor child, factors considered when addressing petition for change of surname. *Id.*
Change of surname for minor child, burden of proof. *Id.*
Change of surname for minor child, factor stressed by chancellor not one used for determining child's best interest. *Id.*
Presumption in favor of surname chosen for child by custodial parent not adopted, best interest of child not served by inflexibility. *Id.*
Chancellor to be given opportunity to readdress issue in light of holding, case reversed & remanded. *Id.*
Custody, conflicting jurisdictions. *Hudson v. Purifoy*, 146
Custody, preference given to state with continuing jurisdiction. *Id.*
Custody, residence defined, Arkansas court entered original order. *Id.*
Termination of parental rights, extreme remedy. *Wade v. Arkansas Dept. of Human Servs.*, 353
Termination of parental rights, clear & convincing evidence required. *Id.*
Termination of parental rights, appellant failed to participate in appellee's efforts to rehabilitate home. *Id.*
Termination of parental rights, second statutory ground for. *Id.*
Termination of parental rights, appellant not prejudiced by trial court's ruling on second ground. *Id.*
Termination of parental rights, trial court did not err in finding that appellee had proved its grounds. *Id.*
Termination of parental rights, loss of jurisdiction would not follow upon failure to comply with statutory period for entry of written order. *Id.*
Termination of parental rights, appellant suffered no prejudice where order issued after statutory period was simply written judgment of what court had announced. *Id.*
Custody, deference to chancellor greater. *Hamilton v. Barrett*, 460
Custody, appellate conclusion regarding change of circumstances. *Id.*
Custody, best interest of child is primary consideration. *Id.*
Custody, when award may be modified. *Id.*
Custody, more stringent standards imposed for modification. *Id.*
Custody, case relied upon by appellant not controlling. *Id.*
Custody, purpose of noncohabitation order. *Id.*
Material change in circumstances, chancellor's award of custody to appellee not clearly erroneous. *Id.*
Custody, issue of chancellor's previous knowledge irrelevant. *Id.*
Order directing parties to obtain blood tests, not final. *Smith v. Smith*, 583
Issue of paternity undecided, order not final, supreme court lacked jurisdiction to hear appeal. *Id.*

PLEADINGS:
Answer withdrawn, when it remains part of record. *Sutter v. Payne*, 330

PROFESSIONS & BUSINESSES:
Contractors, appellee contractor's bid could not have been considered until its license was in order. *Quality Fixtures, Inc. v. Multi-Purpose Facilities Bd.*, 115
Contractors, trial court correctly differentiated between submission of bids & consideration by appellee board. *Id.*
Contractors, General Assembly did not enact laws voiding bid of party that does not have license at time of submission. *Id.*
Contractors, nothing prohibited appellee board from awarding contract to appellee contractor after renewal of license. *Id.*
Contractors, no statutory prohibition against waiver of defect in subsequently corrected bid. *Id.*
Contractors, appellee board's treatment of expired license as formality was not arbitrary & capricious. *Id.*

PROHIBITION, WRIT OF:
When issued, when appropriate. *Hudson v. Purifoy*, 146
Factual dispute as to residency of party, writ of prohibition denied. *Id.*
Petitioner's petition denied, respondents' motion to dismiss proceedings in petitioner's county of residence denied. *Blunt v. Bell*, 535

PUBLIC HEALTH & WELFARE:
Involuntary commitment, probable-cause hearing in immediate-confinement cases. *Buchte v. State*, 591
Involuntary commitment, statement of rights. *Id.*
Involuntary commitment, appellant not afforded due process, reversed & dismissed. *Id.*

SEARCH & SEIZURE:
Fourth Amendment protection, only unreasonable searches & seizures forbidden. *Muhammad v. State*, 291
Standard of reasonableness, experiential inferences may be used. *Id.*
Vehicular stop, appellant extended by authorizing search. *Id.*
Search of appellant's person, reasonable for officer's safety. *Id.*
Request for consent to search, neither probable cause nor reasonable suspicion necessary. *Id.*
Search of appellant's person, reasonable under totality of circumstances. *Id.*
Automobile exception to warrant requirement, bright-line rule. *McDaniel v. State*, 431
Probable cause, odor of marijuana emanating from vehicle sufficient to provide. *Id.*
Probable cause, present for search of appellant's vehicle. *Id.*
Scope of warrantless search, dimensions. *Id.*
Probable cause, exigent circumstances. *Id.*

STATUTES:
Construction, basic rule. *Minnesota Mining & Mfg. v. Baker*, 94
Construction, first rule. *Springdale Winnelson Co. v. Rakes*, 154
Construction, basic rule. *State v. Havens*, 161
Construction of, use of "shall." *Fulmer v. State*, 177
Provisions of mandatory or directory, how determined. *Id.*

Ark. Code Ann. § 16-90-905 (Supp. 1997), legislature placed chief importance on uniformity of order granting expungement. *Id.*
Order, purpose of. *Id.*
Petition, purpose of. *Id.*
Petition provided all information required in order, Ark. Code Ann. § 16-90-905 substantially complied with. *Id.*
Ark. Code Ann. § 16-90-905, when expungement may be granted based upon petition that substantially complies with requirements of. *Id.*
Prospective application, presumption. *City of Dover v. Barton*, 186
Notice provision of FOIA, notification required for special & emergency meetings. *Elmore v. Burke*, 235
Emergency meetings, no request for notification made, FOIA not violated. *Id.*
Construction, words given ordinary & usually accepted meaning. *McDonald v. Pettus*, 265
Legal malpractice, Ark. Code Ann. § 16-22-310 discussed. *Id.*
Legal malpractice, plaintiff must be in direct privity. *Id.*
Legal malpractice, third-party beneficiaries had no standing to bring claim. *Id.*
Public policy, determination of. *Id.*
Meaning of legal-malpractice statute clear, appellants failed to meet requirements. *Id.*
Construction of, words given ordinary meaning in common language. *Norton v. Hinson*, 487
Determination of public policy, almost entirely within legislative domain. *Id.*
Construction, words to be given plain & ordinary meaning. *Shaw v. Shaw*, 530
Interpretation, standard of review. *Id.*
Requirements for taking against will, "continuously" defined. *Id.*
Construction, basic rule. *Saforo & Associates, Inc. v. Porocel Corp.*, 553
Two acts on same subject, construction of. *Wells v. State*, 586
Two conflicting acts on same subject, later act controls. *Id.*
Legislature aware of precedent, five-year limitation on periods of probation intentionally reenacted. *Id.*
Interpretation of Ark. Code Ann. § 14-304-209(c). *Rankin v. City of Fort Smith*, 599

TAXATION:
Gross receipts, burden of payment for uncollected sales tax rests upon seller. *Springdale Winnelson Co. v. Rakes*, 154
Gross receipts, appellant liable for unpaid taxes in absence of good-faith reliance upon appellee's having tax-exempt status. *Id.*
Gross receipts, finding that appellant did not rely in good faith upon appellee's tax-exempt status not clearly against preponderance of evidence. *Id.*
Illegal-exaction case, burden of proof. *Rankin v. City of Fort Smith*, 599
Appellant failed to contest validity of appellees' assertion that parking-facilities revenue exceeded its debt service, no error in grant of appellees' motion for summary judgment. *Id.*
Income derived from parking facilities was accounted for separately in compliance with Ark. Code Ann. § 14-304-209(c), judgement of trial court affirmed. *Id.*

TORTS:
Charitable immunity, essence of doctrine. *George v. Jefferson Hosp. Ass'n, Inc.*, 206
Charitable immunity, narrow construction. *Id.*

Charitable immunity, eight factors. *Id.*
No injuries suffered by decedent prior to death, claim under survival statute failed. *McDonald v. Pettus*, 265
Outrage, elements of. *Stockton v. Sentry Ins.*, 507
Outrage, discharge of employee. *Id.*
Outrage, dismissal of appellant's outrage claim affirmed. *Id.*
Battery, dismissal of appellant's battery affirmed. *Id.*
Accepted-work doctrine, general rule. *Suneson v. Holloway Constr. Co.*, 571
Accepted-work doctrine, exceptions to. *Id.*
Accepted-work doctrine, based on virtually extinct privity-of-contract theory. *Id.*
Owner-contractor situations, foreseeability & negligence rules may be applied. *Id.*
Accepted-work doctrine outmoded & unjust, trial court's grant of summary judgment reversed. *Id.*

TRIAL:
Court erroneously instructed jury on three elements of damages, no proof erroneous instructions were harmless, case reversed & remanded. *Arthur v. Zearley*, 125
Waiver of right to jury trial, appellant's right waived. *Johnson v. State*, 196
By jury, no right in municipal court. *Id.*
Inspections of property by fact-finder, when permissible & proper. *Id.*
Trial court's record of visit to arrest site, complied with law. *Id.*
Opening statements, made in anticipation of possible testimony. *Henry v. State*, 310
Mistrial, when granted. *McFarland v. State*, 386
Mistrial, not warranted. *Id.*

VENUE:
Change of, statutory requirements. *Singleton v. State*, 503
Change of, examination of jury appropriate. *Id.*
Change of, jury surveyed for prejudice. *Id.*
Petition for change of venue denied, no abuse of discretion found. *Id.*

WILLS:
Statutory requirements, when substantial compliance sufficient. *Norton v. Hinson*, 487
Statutory requirements, when strict compliance necessary. *Id.*
Statute clearly required two attesting witnesses, will properly ruled invalid. *Id.*
Requirements of Ark. Code Ann. § 28-25-102 policy determination by legislature, determination of public policy lies almost exclusively in legislative domain. *Id.*
Spouse's right to take against, statute clear. *Shaw v. Shaw*, 530
Appellant's previous marriages terminated by divorce, appellant not continuously married for sufficient period to elect to take against will. *Id.*

WITNESSES:
Expert, qualification as. *Johnson v. State*, 196
Expert testimony, test for admissibility. *Id.*
Trial judge refused to qualify witness as expert, no abuse of discretion found. *Id.*
Expert, error to allow testimony that crime victim is telling truth. *Hill v. State*, 219
Caseworker in sexual-abuse investigation, witness's testimony was valid evidence of agency procedures. *Id.*

Credibility, jury believed corroborating testimony. *Henderson v. State*, 518

WORKERS' COMPENSATION:
Standard of review. *Minnesota Mining & Mfg. v. Baker*, 94
Medical evidence, within Commission's province to weigh. *Id.*
Substantial evidence supported finding that appellee proved hearing loss was caused by employment with appellant. *Id.*
Time of injury, when injury becomes compensable. *Id.*
Statute of limitations, "compensable injury" elements must be met. *Id.*
Arkansas is "compensable injury" state. *Id.*
Scheduled injury, permanent injury affecting only hearing could be reduced to. *Id.*
Scheduled injury, compensation payable without regard to subsequent earning capacity. *Id.*
Work-related noise-induced hearing loss, statute of limitations begins to run when loss becomes apparent to claimant. *Id.*
Statute of limitations, supreme court cannot extend period despite merits of claim. *Id.*
Statute of limitations, appellee's claim barred. *Id.*
Standard of review. *Wal-Mart Stores, Inc. v. VanWagner*, 443
Compensable injury, objective medical evidence necessary to establish existence & extent of injury. *Id.*
Witnesses, credibility within Commission's province. *Id.*
Compensable injury, Commission's finding in claimant's favor supported by substantial evidence. *Id.*
Standard of review, substantial evidence defined. *Holloway v. Ray White Lumber Co.*, 524
Commission has duty to weigh evidence, resolution of conflicts question of fact for Commission. *Id.*
Findings of fact, error in involved relevant medical evidence that Commission expressly relied upon in reaching its decision. *Id.*
Commission has duty to resolve conflicting evidence, resolution given force of jury verdict. *Id.*
Commission erred in translating relevant medical evidence, reversed & remanded. *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:

Administrative Procedure Act 342, 349
Alcoholic Beverage Control Act (ABC) 24, 29
Arkansas Arbitration Act 49
Arkansas Architectural Act 342
Arkansas Franchise Practices Act 507, 509, 510, 511
Arkansas Gross Receipts Act of 1941 ..... 155, 157
Arkansas Hot Check Law 162, 163, 164, 166, 167, 168, 452
Arkansas Trade Secrets Act 555, 559, 561, 563
Community Punishment Act ... 177, 181, 182, 184
Federal Arbitration Act ... 45, 49, 50, 56, 57
Freedom of Information Act (FOIA) 235, 236, 237, 238, 239
Habitual Child Sex Offender Registration Act 43
Parental Kidnapping Prevention Act (PKPA) 146, 150, 151, 152, 153
Public Accountancy Act of 1975 273
Sales Tax Act 159
Uniform Child Custody Jurisdiction Act (UCCJA) 146, 149, 150, 151
Uniform Trade Secrets Act 559
Uniformed Services Former Spouses Protection Act (USFSPA) 362, 363, 364, 365
Workers' Compensation Act ... 103

ARKANSAS ACTS:

Act 233 of 1935 159
Act 496 of 1965 ..... 516, 517
Act 818 of 1973 588
Act 280 of 1975 588
§ 1205 588
Act 772 of 1977 588
Act 620 of 1981 ..... 588, 590
Act 899 of 1983 168
Act 843 of 1985 238
Act 52 of the First Extraordinary Session of 1987 426
Act 695 of 1989 ..... 24, 25, 28, 29, 32, 33, 36, 38
Act 586 of 1991 589
Act 683 of 1991 430
Act 531 of 1993 180
Act 536 of 1993 ..... 306, 307, 308
Act 558 of 1993 ..... 306, 307, 308
Act 796 of 1993 444
Act 875 of 1993 37
Act 358 of 1995 157
Act 1319 of 1995 119
Act 391 of 1997 ..... 157, 158
§ 5 158
Act 1336 of 1997 .... 186, 187, 188, 189, 190, 191, 192
Act 1245 of 1999 593

CODES:

(See also RULES and STATUTES):

ARKANSAS CODE ANNOTATED:

3-3-202 37
3-3-202(b) 36

3-3-202(b)(1) 40
3-3-209 ..... 24, 25, 29, 33, 34, 38, 39, 40
3-3-218 ..... 36, 40
3-3-218(a) 28, 29, 36
3-3-218(b) 28, 29, 36, 38
3-8-206 ..... 327, 329
3-8-304(d) 330
4-72-201 *et seq.* 507, 511
4-72-202(1) 508, 512
4-75-601 ..... 558, 568
4-75-601 *et seq.* 559
4-75-601(4) 553, 559
4-75-606 ..... 556, 565, 566
4-75-606(a) 565
4-75-606(b) 565
4-75-607 563
4-86-101 581
5-1-110 88
5-1-110(a)(5) 83, 85, 88, 90
5-2-202 ..... 413, 421
5-2-202(1) 242
5-2-202(2) 427, 429, 430
5-2-304 323
5-2-305 323
5-2-305(a) 321, 323, 325
5-2-311 323
5-2-607 246
5-4-101(2) 451
5-4-101(2) 454
5-4-103 454
5-4-306 ..... 589, 590
5-4-306(a) 587, 588
5-4-603(a) 105, 106, 108, 109, 110
5-4-603(a)(1) 105, 108
5-4-603(a)(2) 105, 108, 109
5-4-603(a)(3) 105, 108, 109
5-10-101 396
5-10-101(a)(4) 393
5-10-101(a)(9) 430
5-10-102(a)(2) 242, 387, 396, 429
5-10-102(a)(3) 415, 420, 426, 427, 429
5-10-103 425
5-10-103(a)(1) 415, 427, 428
5-10-103(a)(3) 419
5-11-102 ..... 387, 395
5-11-102(a) 394
5-11-102(a)(4) 394
5-11-102(a)(5) 394
5-13-201(a)(3) 430
5-13-301 90
5-13-310 ..... 84, 89, 90, 91
5-13-310(a) 89
5-13-310(a)(2) 84, 85, 88, 89
5-14-101(2) 374, 377
5-14-103 377
5-14-103(a)(1) 376
5-26-401 89
5-37-301 — 5-37-307 164
5-37-302 163
5-37-302 *et seq.* 456
5-37-303 ..... 162, 163, 164, 165, 166, 167
5-37-303(a) 164, 167, 168
5-37-303(b) 165
5-37-304 ..... 162, 163, 164, 165, 166, 167
5-37-304(a) 165
5-37-304(a)(1) 165
5-37-304(a)(2)(A)(i) 165
5-37-304(a)(2)(A)(ii) 164, 165
5-37-304(a)(2)(B) 162, 163, 165, 166, 168
5-37-304(a)(2)(ii) 166
5-37-307 ..... 162, 166, 167
5-37-307(a) 166
5-37-307(b) 166
5-37-307(b)(1) 167
5-37-307(b)(2) 167
5-37-307(c) 167
5-64-401(a)(1)(i) 495, 496, 499
5-64-401(a)(1)(ii) 495, 496, 500
5-64-505 ..... 74, 75, 79, 80, 82
5-64-505(d) 75, 82
5-64-505(k)(2)(iii) 74, 79
5-65-102(1) 202
5-65-103 184
5-70-104—106 89
5-71-214 89
6-65-103 201
6-65-103(a) 201
6-93-1207(b)(1) 177

7-5-206 330
7-5-209 330
7-5-407 191
8-4-203(a) 191
8-4-201(a)(1) 191
8-4-201(a)(4) 192
8-4-222 66
9-13-101 ..... 146, 149, 150
9-13-201 to 228 151
9-13-202(5) 151
9-13-203(a)(1) 150
9-13-206 148
9-13-206(c) 44
9-27-302(4) 44
9-27-316 44
9-27-319 44
9-27-321 45
9-27-325(h)(2)(A) 44
9-27-326 358
9-27-341 358
9-27-341(b) 358
9-27-341(b)(1) 354, 358, 359
9-27-341(b)(2) 354, 358, 359
9-27-341(b)(2)(A) 354, 359
9-27-341(b)(2)(B) 354, 360
9-27-341(d) 448
11-9-1-2(16) 444
11-9-102 448
11-9-102(5)(A) 444, 446, 448
11-9-102(5)(A)(i) 444, 446, 448
11-9-102(5)(D) 444, 448
11-9-102(5)(E) 446, 448
11-9-102(5)(E)(i) 95, 102
11-9-521(a) 96, 102, 103
11-9-521(a)(16) 95, 96, 100, 101, 103, 104
11-9-702(a)(1) 527
11-9-811 ..... 283, 288
14-14-1205(c) 186, 188, 189, 190
14-235-203 190
14-235-203(c)(1) 190
14-235-203(d) 604
14-304-206 ..... 600, 602, 605, 606
14-304-209(c) 517
16-10-101 ..... 198, 205, 206
16-13-510 194
16-14-206 279
16-16-102 203
16-17-703 475
16-21-103 260
16-22-308 ..... 265, 266, 267, 269, 270, 271, 272, 273, 274, 275, 276
16-22-310 ..... 266, 271, 272
16-22-310(a) 271, 274
16-22-310(a)(1) 266, 271, 274, 275
16-22-310(a)(2) 271, 274
16-22-310(A)(2)(A) 271, 274, 275
16-22-310(a)(2)(B) 476
16-43-601 through 606 371
16-56-105 ..... 276, 279
16-62-101 ..... 277, 278
16-62-101(a) 277
16-62-101(b) 303
16-81-201(1) 298
16-81-202 299
16-81-203 298
16-81-203(1) 298
16-81-203(2) 298
16-81-203(3) 298
16-81-203(4) 298
16-81-203(5) 298
16-81-203(6) 298
16-81-203(7) 299
16-81-203(8) 299
16-81-203(9) 299
16-81-203(10) 299
16-81-203(11) 299
16-81-203(12) 299
16-81-203(13) 299
16-81-203(14) 505
16-88-201 504
16-88-204 ..... 503, 505
16-88-204(a) 41, 42, 43, 45, 520
16-89-111(e)(1) 497, 500, 503, 590
16-90-111 ..... 496, 497, 501, 502,
16-90-111(a) 454
16-90-803(a)(1) 455
16-90-804(a)(2)(A) 455
16-90-804(d) 182
16-90-901 *et seq.* .....

16-90-901 to -906 185
16-90-904(b) 184
16-90-904(d) 178, 184
16-90-905 ..... 177, 178, 182, 183, 184, 185
16-90-905(a)(1) 182
16-90-905(a)(2) 178, 184
16-90-905(a)(3) 178, 182, 184, 185
16-90-905(a)(3)(A) 182
16-90-905(a)(3)(B) 182
16-90-905(a)(3)(C) 182
16-90-905(a)(3)(D) 182
16-90-905(a)(3)(E) 182
16-90-905(a)(3)(F) 182
16-91-113(a) 506
16-93-401 ..... 587, 588, 589, 590
16-93-1201 to -1210 ..... 177, 181
16-93-1202(l) 181
16-93-1207 ..... 177, 179, 180, 181, 182, 185
16-93-1207(a) 180
16-93-1207(a)(1) 180
16-93-1207(a)(1)(B) 181
16-93-1207(b)(1) 177, 179, 180, 181, 185
16-93-1207(b)(1)(C) 181
16-93-1207(b)(3) 182
16-97-103 43
16-112-101 — 16-12-123 497
16-114-203 210
16-114-302 273
16-114-302(1) 273
16-114-302(2) 273
16-114-302(2)(A) 273
16-114-302(2)(B) 273
16-114-303 270
16-118-103 ..... 381, 385
17-12-101 *et seq.* 273
17-12-702 274
17-14-101 *et seq.* 342
17-14-102 ..... 342, 348
17-14-203 ..... 342, 343
17-14-203(d) 343, 344
17-14-301 ..... 342, 348
17-25-103 ..... 119, 122
17-25-103(a)(1) 118
17-25-103(a)(3) 118
17-25-103(a)(5) 118
17-25-313 ..... 115, 119, 120, 122, 124
17-25-313(d) 119
18-16-108 ..... 8, 9, 12
20-18-401(e)(3) 58, 66, 67
20-47-101 *et seq.* 595
20-47-201 through 20-47-222 .. 592, 595
20-47-205 593
20-47-205(b) 595
20-47-205(g) 596
20-47-207 595
20-47-209 ..... 592, 595, 597
20-47-209(a)(1) 596
20-47-209(b)(1) through (3) ... 598
20-47-210 ..... 595, 596, 597
20-47-210(b)(3) 598
20-47-211 ..... 592, 596, 598
20-47-214 ..... 595, 596
22-9-203(c)(2)(A) 121
22-9-203(d) 116, 119, 120
22-9-203(g) 119, 121
23-79-210 215
23-111-204 384
25-15-212 ..... 343, 349
25-15-212(g) 342, 343, 349
25-15-212(h) 343
25-15-212(h)(1) 343
25-15-212(h)(2) 343
25-15-212(h)(3) 343
25-15-212(h)(4) 343
25-15-212(h)(5) 343
25-15-212(h)(6) 343
25-19-106(b)(2) 235, 236, 237, 238, 239
25-19-107(d) 239
26-52-101—26-52-1507 155
26-52-517 157
26-52-519 ..... 156, 157
26-52-519(a) 158
26-52-519(b) 158
26-52-519(c) 158
28-25-102 ..... 488, 489, 491
28-25-102(a) 491, 492, 493
28-25-103 ..... 488, 489, 491

28-25-103(a) 491, 492
28-39-104(a) 531
28-39-401 ..... 530, 532
28-39-401(a) 532, 533
28-39-401(b) 532
28-39-401(b)(1) 532
28-40-117(a) 492
28-49-104 ..... 267, 278
28-49-104(a) 278
28-49-104(b) 278
28-65-202 536
28-65-202(b)(1) 536
29-9-203(d) 122, 124

UNITED STATES CODE:

9 U.S.C. § 2 56
9 U.S.C. § 3 56
9 U.S.C. § 4 56
10 U.S.C. § 1408 362
10 U.S.C. § 1408(a)(4) 364
10 U.S.C. § 1408(a)(4)(B) 364
38 U.S.C. § 3105 364
28 U.S.C.S. § 1738A 146, 151
28 U.S.C.S. § 1738A(b)(4) 151
28 U.S.C.S. § 1738A(c) 151
28 U.S.C.S. § 1738A(c)(1) 151
28 U.S.C.S. § 1738A(d) 146, 152
28 U.S.C.S. § 1738A(f) 146, 151
28 U.S.C.S. § 1738A(f)(1) 151
28 U.S.C.S. § 1738A(f)(2) 151
49 U.S.C. § 1429(a) 350

CONSTITUTIONAL PROVISIONS:

ARKANSAS CONSTITUTION:

Amend. 21, § 1 ..... 387, 396, 475
Amend. 55, § 1 ..... 283, 288
Amend. 65 604
Art. 2, § 11 ..... 169, 172, 497, 499
Art. 2, § 17 308
Art. 5, § 20 573
Art. 16, § 13 ..... 473, 474, 604

UNITED STATES CONSTITUTION:

Amend. 4 ... 292, 296, 433, 436, 441, 442
Amend. 5 (Double Jeopardy Clause 85, 88, 162, 168
Amend. 6 ..... 451, 453
Amend. 8 113
Amend. 14 (Due Process Clause) 1, 4
Art. 1, § 10 307
Ex Post Facto Clause 306, 307, 308

INSTRUCTIONS:

ARKANSAS MODEL JURY INSTRUCTIONS (CIVIL):

AMI 2204 ..... 129, 142
AMI 2206 ..... 142, 143
AMI 2207 ..... 142, 143
AMI 3d 501 35
AMI 3d 502 35
AMI 3d 503 ..... 35, 582
AMI 3d 601 35

ARKANSAS MODEL JURY INSTRUCTIONS (CRIMINAL):

AMCI 1502 395
AMCI 2d 1009 ..... 106, 114

RULES:

ARKANSAS RULES OF APPELLATE PROCEDURE — CIVIL:

Ark. R. App. P.—Civ. 2 .... 584, 586
Ark. R. App. P.—Civ. 2(a) 195
Ark. R. App. P.—Civ. 2(a)(1) . 583, 585
Ark. R. App. P.—Civ. 3(e) 263
Ark. R. App. P.—Civ. 4 263
Ark. R. App. P.—Civ. 4(a) 264, 372
Ark. R. App. P.—Civ. 4(b) ... 262, 264
Ark. R. App. P.—Civ. 4(c) 262, 264
Ark. R. App. P.—Civ. 6(b) ... 351, 352

ARKANSAS RULES OF APPELLATE PROCEDURE — CRIMINAL:

Ark. R. App. P.—Crim. 3(a) ... 2
Ark. R. App. P.—Crim. 3(c) ... 173

ARKANSAS RULES OF CIVIL PROCEDURE:

ARCP Rule 4(i) 215
ARCP Rule 12 ..... 78, 333
ARCP Rule 12(a) 335
ARCP Rule 12(b) 368
ARCP Rule 12(b)(6) 24, 26, 29, 368, 369, 471, 473, 476, 510
ARCP Rule 12(b)(8) 169, 170, 171, 172
ARCP Rule 15(b) 466
ARCP Rule 15(c) 210, 215, 216
ARCP Rule 15(c)(1) 215
ARCP Rule 15(c)(2) 215
ARCP Rule 15(c)(2)(A) 215
ARCP Rule 15(c)(2)(B) 215
ARCP Rule 19 ..... 74, 79
ARCP Rule 24 ..... 74, 79
ARCP Rule 32(a)(2) 127, 139
ARCP Rule 50(b) 264
ARCP Rule 52(a) 72, 357, 358, 490, 562
ARCP Rule 54(a) 510
ARCP Rule 52(b) 257, 264
ARCP Rule 54(b) 193, 194, 195
ARCP Rule 55(c) 331, 335
ARCP Rule 56 ..... 369, 487, 491, 511, 599, 603
ARCP Rule 56(c) 192
ARCP Rule 59(a) 6, 11
ARCP Rule 59(b) 264
ARCP Rule 60 ..... 262, 263, 264
ARCP Rule 60(k) 74, 79
ARCP Rule 65 77
ARCP Rule 81(a) 490

ARKANSAS RULES OF CRIMINAL PROCEDURE:

A.R.Cr.P. Rule 2.1 298
A.R.Cr.P. Rule 2.2 302
A.R.Cr.P. Rule 3.1 ..... 292, 297, 298, 299
A.R.Cr.P. Rule 3.1(1) 297
A.R.Cr.P. Rule 3.1(2) 297
A.R.Cr.P. Rule 3.2 302
A.R.Cr.P. Rule 3.4 ... 292, 297, 298, 299, 301
A.R.Cr.P. Rule 13.1(b) 13, 17
A.R.Cr.P. Rule 13.2(c) ... 13, 14, 15, 18, 21, 22, 23
A.R.Cr.P. Rule 13.2(c)(i) 18
A.R.Cr.P. Rule 13.2(c)(ii) 18
A.R.Cr.P. Rule 13.2(c)(iii) 18
A.R.Cr.P. Rule 17 317
A.R.Cr.P. Rule 17.1 ..... 311, 317
A.R.Cr.P. Rule 19.7 ..... 311, 317
A.R.Cr.P. Rule 24.3(b) 15, 433
A.R.Cr.P. Rule 28 481
A.R.Cr.P. Rule 28.1 325
A.R.Cr.P. Rule 28.1(c) 197, 320, 322
A.R.Cr.P. Rule 28.2 ..... 479, 485, 486
A.R.Cr.P. Rule 28.2(a) 320, 322, 486
A.R.Cr.P. Rule 28.3 ..... 203, 321, 325, 479, 485, 486
A.R.Cr.P. Rule 28.3(a) 321, 323, 324, 325
A.R.Cr.P. Rule 31.2 203
A.R.Cr.P. Rule 37 ... 169, 170, 171, 227, 228, 304, 305, 453, 458, 459, 460, 496, 497, 501, 502, 539, 590
A.R.Cr.P. Rule 37.1 502
A.R.Cr.P. Rule 37.1(a) 502
A.R.Cr.P. Rule 37.1(b) 502
A.R.Cr.P. Rule 37.1(c) 502
A.R.Cr.P. Rule 37.1(d) 502
A.R.Cr.P. Rule 37.2 502
A.R.Cr.P. Rule 37.3(a) 304, 305
A.R.Cr.P. Rule 37.5 ..... 458, 460
A.R.Cr.P. Rule 37.5(b)(1) 458

ARKANSAS RULES OF EVIDENCE:

A.R.E. Rule 401 ..... 93, 127, 138, 140

A.R.E. Rule 402 93
A.R.E. Rule 403 .... 83, 88, 93, 138, 141, 311, 317, 477, 478, 481, 482, 483, 484, 542, 547
A.R.E. Rule 404(b) ... 222, 316, 477, 479, 481, 482, 483
A.R.E. Rule 406 ..... 127, 139
A.R.E. Rule 605 69
A.R.E. Rule 606(b) ... 172, 173, 174, 175, 176, 177
A.R.E. Rule 611 ..... 127, 140
A.R.E. Rule 611(a) 127, 140
A.R.E. Rule 611(a)(1) 140
A.R.E. Rule 611(a)(2) 140
A.R.E. Rule 611(a)(3) 140
A.R.E. Rule 613 414
A.R.E. Rule 615 ..... 220, 225
A.R.E. Rule 616 ..... 220, 225, 226
A.R.E. Rule 801(d)(1)(i) 423
A.R.E. Rule 801(d)(2) 139
A.R.E. Rule 803(1) 315
A.R.E. Rule 803(2) 310, 315

DEPARTMENT OF FINANCE AND ADMINISTRATION GROSS-RECEIPTS TAX REGULATIONS:

Rule GR-74 159

RULES OF THE ARKANSAS SUPREME COURT AND COURT OF APPEALS:

Ark. Sup. Ct. R. 1-2(a)(2) 241, 322, 376, 416, 519
Ark. Sup. Ct. R. 1-2(a)(7) 107, 510
Ark. Sup. Ct. R. 1-2(a)(8) 2
Ark. Sup. Ct. R. 1-2(b) 383
Ark. Sup. Ct. R. 1-2(b)(1) 236, 584, 603
Ark. Sup. Ct. R. 1-2(b)(2) 603
Ark. Sup. Ct. R. 1-2(b)(4) ... 8, 236
Ark. Sup. Ct. R. 1-2(b)(5) ... 8, 179, 526, 572, 584
Ark. Sup. Ct. R. 1-2(b)(6) 85, 179, 584, 588, 603
Ark. Sup. Ct. R. 1-2(d) 163, 236
Ark. Sup. Ct. R. 1-2(e) 63, 462
Ark. Sup. Ct. R. 1-2(e)(i) 63, 444
Ark. Sup. Ct. R. 1-2(e)(ii) 526
Ark. Sup. Ct. R. 1-2(g) 209
Ark. Sup. Ct. R. 4-2(a)(6) 223
Ark. Sup. Ct. R. 4-3(h) ... 106, 109, 110, 115, 226, 246, 320, 326, 379, 402, 428, 478, 485, 486, 506, 524

STATUTES:

ARKANSAS STATUTES ANNOTATED:

12-2805 ..... 237, 238
41-1205 ..... 588, 589
43-2331 ..... 587, 588, 589, 590
48-901 ..... 38, 39
71-713 119
81-1319(i) 527

ARKANSAS APPELLATE REPORTS

Volume 66

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

FROM
March 17, 1999 — May 26, 1999
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1999

ERRATA

65 Ark. App. at 278, first paragraph, line one:
The word "In" should be inserted immediately before the *Adams v. Arthur* citation.

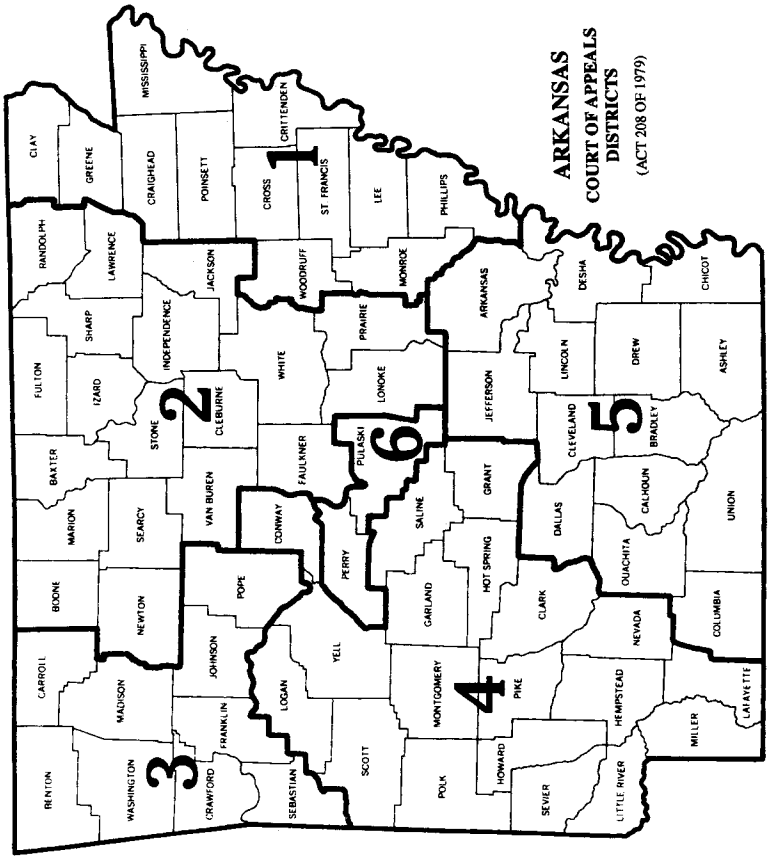
54 Ark. App. at 348, second paragraph, line four:
Subsection number "502" should be "522."

Set in Bembo

Joe Christensen Printing Company
1540 Adams Street
Lincoln, Nebraska 68521
1999

CONTENTS

	Page
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	xiii
TABLE OF OPINIONS NOT REPORTED	xv
TABLE OF CASES AFFIRMED WITHOUT WRITTEN OPINION	xxiv
OPINIONS REPORTED	1
INDEX	
Alphabetical Headnote Index	381
References to Acts, Codes, Constitutional Provisions, Rules, and Statutes	393


ARKANSAS
COURT OF APPEALS
DISTRICTS
(ACT 208 OF 1979)
1
2
3
4
5
6
MISSISSIPPI
CRITTENDEN
CLAY
GREENE
CRAIGHEAD
POINSETT
CROSS
ST FRANCIS
LEE
PHILLIPS
RANDOLPH
LAWRENCE
JACKSON
WOODRUFF
MONROE
ARKANSAS
DESHA
CHICOT
SHARP
INDEPENDENCE
WHITE
PRAIRIE
LINCOLN
DREW
ASHLEY
FULTON
IZARD
STONE
CLEBURNE
LONOKE
JEFFERSON
CLEVELAND
BRADLEY
BAXTER
FAULKNER
PULASKI
GRANT
MARION
SEARCY
VAN BUREN
CONWAY
SALINE
DALLAS
CALHOUN
UNION
BOONE
NEWTON
POPE
PERRY
HOT SPRING
OUACHITA
CARROLL
JOHNSON
YELL
GARLAND
CLARK
NEVADA
COLUMBIA
MADISON
FRANKLIN
LOGAN
MONTGOMERY
PIKE
HEMPSTEAD
LAFAYETTE
BENTON
WASHINGTON
CRAWFORD
SEBASTIAN
SCOTT
POLK
HOWARD
SEVIER
LITTLE RIVER
MILLER

JUDGES AND OFFICERS
OF THE
COURT OF APPEALS
OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(March 17, 1999 — May 26, 1999, inclusive)

JUDGES

JOHN B. ROBBINS	Chief Judge[1]
JOHN MAUZY PITTMAN	Judge[2]
JOSEPHINE LINKER HART	Judge[3]
JOHN E. JENNINGS	Judge[4]
SAM BIRD	Judge[5]
JUDITH ROGERS	Judge[6]
JOHN F. STROUD, JR.	Judge[7]
OLLY NEAL	Judge[8]
WENDELL L. GRIFFEN	Judge[9]
TERRY CRABTREE	Judge[10]
MARGARET MEADS	Judge[11]
ANDREE LAYTON ROAF	Judge[12]

OFFICERS

MARK PRYOR	Attorney General
LESLIE W. STEEN	Clerk
TIMOTHY N. HOLTHOFF	Librarian
WILLIAM B. JONES, JR.	Reporter of Decisions

1 District 4.
2 District 1.
3 District 2.
4 District 3.
5 District 5.
6 District 6.
7 Position 7.
8 Position 8.
9 Position 9.
10 Position 10.
11 Position 11.
12 Position 12.

TABLE OF CASES REPORTED

A

Adams (Ward *v.*) 208
Allen Eng'g Co. (Dalton *v.*) 201
Arkansas Dep't of Health (Kimbrell *v.*) 245
Arkansas Dep't of Human Servs. *v.* Welborn 122
Arkansas Pulpwood Co. (Dugal Logging, Inc. *v.*) 22
Arkansas Pulpwood Co. (Santifer *v.*) 145

B

Barker (Barker *v.*) 187
Barker *v.* Barker 187
Beaver *v.* Benton County Child Support Unit 153
Benton County Child Support Unit (Beaver *v.*) 153
Bharodia *v.* Pledger 349
Boatmen's Ark., Inc. *v.* Farmer 240
Brewer *v.* State 324
Brooks (Fred's Stores *v.*) 38
Brown *v.* State 215

C

Camp *v.* State 134
Casteel *v.* State Farm Mut. Auto. Ins. Co. 220
Continental Express, Inc. *v.* Freeman 102

D

Dalton *v.* Allen Eng'g Co. 201
Dugal Logging, Inc. *v.* Arkansas Pulpwood Co. 22
Dunavant (Dunavant *v.*) 1
Dunavant *v.* Dunavant 1

E

Ellison *v.* Therma-Tru 286

F

Farmer (Boatmen's Ark., Inc. *v.*) 240
Fortson *v.* State 225
Foster *v.* State 183
Fred's Stores *v.* Brooks 38
Freeman (Continental Express, Inc. *v.*) 102
Frigon (Frigon *v.*) 343
Frigon *v.* Frigon 343
Frito Lay, Inc. (Patterson *v.*) 159

G

Georgia-Pac. Corp. (White *v.*) 337
Guidry *v.* Harp's Food Stores, Inc. 93

H

Hafer (Mountain Home Mfg. *v.*) 127
Harp's Food Stores, Inc. (Guidry *v.*) 93
Hart *v.* State 82
Henslee *v.* Ratliff 109

I

International Paper Co. (Rogers *v.*) 34
Ishmael *v.* Ismail 232
Ismail (Ishmael *v.*) 232

J

Jaynes *v.* State 43
Jobe *v.* Wal-Mart Stores, Inc. 114
Johnston (Wilson *v.*) 193

K

Kimbrell *v.* Arkansas Dep't of Health 245
Kinnebrew *v.* Little John's Trucks, Inc. 90

L

Langley *v.* State 311
Leaks *v.* State 254
Linder (McDaniel *v.*) 362
Little John's Trucks, Inc. (Kinnebrew *v.*) 90
Lloyd's of London *v.* Warren 370

M

Mattocks (Mattocks *v.*) 77
Mattocks *v.* Mattocks 77
Maxey *v.* Tyson Foods, Inc. 301
McDaniel *v.* Linder 362
McKay (McKay *v.*) 268
McKay *v.* McKay 268
Metcalf *v.* Texarkana Sch. Dist. 70
Mountain Home Mfg. *v.* Hafer 127
Mow (Mow *v.*) 374
Mow *v.* Mow 374

P

Patterson *v.* Frito Lay, Inc. 159
Peterson Family Enters., Inc. (Thomsen Family Trust *v.*) .. 294
Pledger (Bharodia *v.*) 349
Presley (Presley *v.*) 316
Presley *v.* Presley 316

R

Ratliff (Henslee *v.*) 109
Ray *v.* University of Arkansas 177
River Oaks Water Improv. Dist. (Worley *v.*) 170
Rogers *v.* International Paper Co. 34
Rogers *v.* State 283

S

Sanders (Stine *v.*) 49
Santifer *v.* Arkansas Pulpwood Co. 145
Schumacher (Schumacher *v.*) 9

Schumacher *v.* Schumacher 9
Shavers *v.* State 173
State (Brewer *v.*) 324
State (Brown *v.*) 215
State (Camp *v.*) 134
State (Fortson *v.*) 225
State (Foster *v.*) 183
State (Hart *v.*) 82
State (Jaynes *v.*) 43
State (Langley *v.*) 311
State (Leaks *v.*) 254
State (Rogers *v.*) 283
State (Shavers *v.*) 173
State (Weaver *v.*) 249
State (Webb *v.*) 367
State Farm Mut. Auto. Ins. Co. (Casteel *v.*) 220
Stine *v.* Sanders 49

T

Texarkana Sch. Dist. (Metcalf *v.*) 70
Therma-Tru (Ellison *v.*) 286
Thomsen Family Trust *v.* Peterson Family Enters., Inc. ... 294
Tyson Foods, Inc. (Maxey *v.*) 301

U

University of Arkansas (Ray *v.*) 177

W

Wal-Mart Stores, Inc. (Jobe *v.*) 114
Ward *v.* Adams 208
Warren (Lloyd's of London *v.*) 370
Weaver *v.* State 249
Webb *v.* State 367
Welborn (Arkansas Dep't of Human Servs. *v.*) 122
White *v.* Georgia-Pac. Corp. 337
Wilson *v.* Johnston 193
Worley *v.* River Oaks Water Improv. Dist. 170

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

JOHN B. ROBBINS, CHIEF JUDGE:

Dalton *v.* Allen Eng'g Co. 201
Mountain Home Mfg. *v.* Hafer 127
Thomsen Family Trust *v.* Peterson Family Enters., Inc. ... 294
Ward *v.* Adams 208

JOHN MAUZY PITTMAN, JUDGE:

Bharodia *v.* Pledger 349
Boatmen's Ark., Inc. *v.* Farmer 240
Brown *v.* State 215
Camp *v.* State 134
Henslee *v.* Ratliff 109
McDaniel *v.* Linder 362
Stine *v.* Sanders 49

JOSEPHINE LINKER HART, JUDGE:

Dunavant *v.* Dunavant 1
Santifer *v.* Arkansas Pulpwood Co. 145

JOHN E. JENNINGS, JUDGE:

Casteel *v.* State Farm Mut. Auto. Ins. Co. 220
Jobe *v.* Wal-Mart Stores, Inc. 114
Webb *v.* State 367
Worley *v.* River Oaks Water Improv. Dist. 170

SAM BIRD, JUDGE:

Fortson *v.* State 225
Kimbrell *v.* Arkansas Dep't of Health 245
Maxey *v.* Tyson Foods, Inc. 301
Metcalf *v.* Texarkana Sch. Dist. 70
Schumacher *v.* Schumacher 9
Weaver *v.* State 249

JUDITH ROGERS, JUDGE:

Beaver *v.* Benton County Child Support Unit 153
Dugal Logging, Inc. *v.* Arkansas Pulpwood Co. 22
Langley *v.* State 311
Leaks *v.* State 254
Presley *v.* Presley 316
Shavers *v.* State 173

JOHN F. STROUD, JR., JUDGE:

Brewer *v.* State 324
Mattocks *v.* Mattocks 77
McKay *v.* McKay 268
White *v.* Georgia-Pac. Corp. 337

OLLY NEAL, JUDGE:

Frigon *v.* Frigon 343
Hart *v.* State 82
Rogers *v.* State 283

WENDELL L. GRIFFEN, JUDGE:

Ellison *v.* Therma-tru 286
Ray *v.* University of Arkansas 177
Rogers *v.* International Paper Co. 34

TERRY CRABTREE, JUDGE:

Arkansas Dep't of Human Servs. *v.* Welborn 122
Foster *v.* State 183
Fred's Stores *v.* Brooks 38
Kinnebrew *v.* Little John's Trucks, Inc. 90
Lloyd's of London *v.* Warren 370
Patterson *v.* Frito Lay, Inc. 159

MARGARET MEADS, JUDGE:

Barker *v.* Barker 187
Guidry *v.* Harp's Food Stores, Inc. 93
Wilson *v.* Johnston 193

ANDREE LAYTON ROAF, JUDGE:

Continental Express, Inc. *v.* Freeman 102
Ishmael *v.* Ismail 232
Jaynes *v.* State 43
Mow *v.* Mow 374

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

Abbott *v.* State, CA CR 98-1256 (Hart, J.), affirmed May 12, 1999.

Adams *v.* Adams, CA 98-987 (Rogers, J.), affirmed May 19, 1999.

Adaway *v.* State, CA CR 97-1022 (Crabtree, J.), rebriefing ordered April 21, 1999.

Ball *v.* American Standard Oil/Trane, CA 98-1162 (Stroud, J.), affirmed April 28, 1999.

Barron *v.* State, CA CR 98-934 (Hart, J.), rebriefing ordered March 17, 1999.

Bass *v.* Potlatch Corp., CA 98-1326 (Robbins, C.J.), affirmed May 12, 1999.

Blair *v.* State, CA CR 98-761 (Pittman, J.), affirmed April 7, 1999.

Bratton *v.* State, CA CR 98-1252 (Jennings, J.), affirmed May 26, 1999.

Brooks *v.* Brewer, CA 98-913 (Griffen, J.), affirmed April 28, 1999.

Brooks *v.* Citibank, CA 98-747 (Bird, J.), affirmed April 7, 1999.

Brown *v.* State, CA CR 98-1105 (Neal, J.), affirmed March 24, 1999.

Bryant *v.* Virco Mfg. Co., CA 98-1219 (Bird, J.), affirmed May 26, 1999.

Bunn *v.* State, CA CR 98-412 (Bird, J.), affirmed April 28, 1999.

Burgess *v.* Allen, CA 98-931 (Bird, J.), affirmed May 5, 1999. Rehearing denied June 9, 1999.

Burns *v.* Arkansas Dep't of Human Servs., CA 98-541 (Jennings, J.), affirmed April 28, 1999.

Caffey *v.* State, CA CR 98-1008 (Crabtree, J.), affirmed May 5, 1999.

Carney-Reeves *v.* Ney, CA 98-825 (Robbins, C.J.), affirmed in part; reversed and remanded in part May 5, 1999.

Carroll *v.* Pulaski County Child Support, CA 98-1221 (Pittman, J.), affirmed April 28, 1999.

Casey *v.* State, CA CR 98-501 (Pittman, J.), affirmed April 14, 1999.

Castillo *v.* State, CA CR 98-1413 (Jennings, J.), affirmed May 26, 1999.

Chase *v.* State, CA CR 98-1481 (Robbins, C.J.), affirmed May 26, 1999.

Clark *v.* Bakker, CA 98-1151 (Bird, J.), affirmed May 26, 1999.

Clayton *v.* Ideal Chem. & Supply, CA 98-1145 (Griffen, J.), affirmed May 12, 1999. Rehearing denied June 16, 1999.

Cleveland *v.* City of Little Rock, CA 98-1129 (Pittman, J.), affirmed May 19, 1999.

Cole *v.* State, CA 98-1190 (Crabtree, J.), affirmed May 19, 1999. Rehearing denied June 23, 1999.

Colonial Life & Accident Ins. Co. *v.* Sisco, CA 98-832 (Neal, J.), reversed and remanded April 28, 1999.

Colonial Life & Accident Ins. Co. *v.* Sisco, CA 98-751 (Jennings, J.), affirmed May 19, 1999.

Conger *v.* State, CA CR 98-892 (Griffen, J.), affirmed May 19, 1999.

Cox *v.* Jeffers, CA 98-1372 (Roaf, J.), reversed and remanded May 19, 1999.

Cranford *v.* Cranford, CA 98-884 (Rogers, J.), affirmed May 26, 1999.

Crook *v.* State, CA CR 98-1355 (Pittman, J.), affirmed May 26, 1999.

Crutchfield *v.* Russ-Mar, Inc., CA 98-901 (Jennings, J.), affirmed March 17, 1999.

Cummins *v.* Hays, CA 98-1150 (Roaf, J.), appeal dismissed May 12, 1999.

DeLoach *v.* Manpower, Inc., CA 98-1220 (Stroud, J.), affirmed April 28, 1999.

Dickinson *v.* Ketcheside, CA 98-1092 (Roaf, J.), affirmed April 14, 1999.

Dillard *v.* State, CA CR 98-1083 (Pittman, J.), Motion of Counsel to Withdraw denied; remanded for rebriefing May 19, 1999.

Eisner *v.* Fields, CA 98-1271 (Bird, J.), reversed and dismissed May 12, 1999.

Estrada *v.* Furr's Cafeteria, Inc., CA 98-1258 (Hart, J.), reversed and remanded April 28, 1999.

Ethyl Corp. *v.* McBroom, CA 98-596 (Neal, J.), affirmed May 12, 1999.

Farver *v.* State, CA CR 98-634 (Hart, J.), affirmed March 24, 1999.

Fields *v.* Griffen, CA 98-1361 (Hart, J.), affirmed May 26, 1999. Rehearing denied June 16, 1999.

Foster *v.* Heffington, CA 98-811 (Neal, J.), affirmed April 7, 1999. Rehearing granted June 30, 1999.

Frit Indus. *v.* Ditto, CA 98-1166 (Stroud, J.), affirmed in part; reversed in part April 7, 1999.

Gaddie *v.* State, CA CR 98-1074 (Hart, J.), remanded for rebriefing April 7, 1999.

Gagliani *v.* State, CA CR 98-1225 (Pittman, J.), affirmed April 28, 1999.

Gilliam *v.* Gilliam, CA 98-831 (Neal, J.), affirmed April 14, 1999.

Girley *v.* State, CA CR 98-1108 (Meads, J.), affirmed as modified March 24, 1999.

Griffin *v.* Trans State Lines, CA 98-964 (Crabtree, J.), affirmed April 21, 1999.

Haglid *v.* State, CA CR 98-988 (Neal, J.), affirmed April 28, 1999.

Hall *v.* Junction City Sch. Dist., CA 98-150 (Hart, J.), reversed and remanded March 24, 1999. Rehearing denied April 28, 1999.

Haltiwanger *v.* State, CA CR 98-1183 (Rogers, J.), affirmed April 14, 1999.

Harris *v.* State, CA CR 98-788 (Griffen, J.), affirmed April 14, 1999.

Hefley *v.* State, CA CR 98-1006 (Rogers, J.), affirmed March 24, 1999.

Henry *v.* Cross, CA 98-733 (Jennings, J.), affirmed May 19, 1999.

Higgins *v.* State, CA CR 98-1146 (Meads, J.), affirmed April 14, 1999.

Hill *v.* State, CA CR 98-827 (Stroud, J.), affirmed March 24, 1999.

Hinkle *v.* McCastlain, CA 98-1109 (Crabtree, J.), affirmed May 12, 1999.

Hobbs *v.* State, CA CR 98-1106 (Meads, J.), affirmed May 19, 1999.

Hoffman *v.* State, CA CR 98-643 (Jennings, J.), affirmed May 26, 1999.

Hollingsworth *v.* State, CA CR 98-1045 (Jennings, J.), affirmed April 7, 1999.

Hooker *v.* Producers Tractor Co., CA 98-665 (Stroud, J.), dismissed April 14, 1999.

Horner *v.* State, CA CR 98-1229 (Roaf, J.), affirmed May 26, 1999.

Howsen *v.* Mega Market/Jitney Jungle Stores, CA 98-1155 (Griffen, J.), affirmed April 14, 1999.

Hudson *v.* State, CA CR 98-725 (Stroud, J.), affirmed May 5, 1999.

Hulett *v.* Lovelace, CA 98-1198 (Robbins, C.J.), affirmed April 28, 1999. Rehearing denied June 2, 1999.

Hunter *v.* Harvill, CA 98-1195 (Hart, J.), reversed and remanded May 12, 1999.

Ivy *v.* Ivy, CA 98-798 (Griffen, J.), affirmed March 17, 1999. Bird

Jackson *v.* Jackson, CA 98-875 (Griffen, J.), affirmed April 21, 1999.

Jackson County Sheriff's Dep't *v.* Driver, CA 98-1033 (Pittman, J.), affirmed May 5, 1999.

Jarrett *v.* State, CA CR 98-1022 (Bird, J.), affirmed April 14, 1999.

Johnson *v.* Payton, CA 98-813 (Jennings, J.), affirmed April 14, 1999.

Johnson, Elton Eddie *v.* State, CA CR 98-1188 (Roaf, J.), affirmed May 12, 1999.

Johnson, Harold *v.* State, CA CR 98-1111 (Meads, J.), affirmed May 26, 1999.

Jones *v.* Ashley County Rd. Dep't, CA 98-1067 (Pittman, J.), affirmed May 5, 1999.

Jordan *v.* Prescolite, CA 98-1206 (Roaf, J.), affirmed April 28, 1999.

Joslin *v.* Long, CA 98-822 (Meads, J.), dismissed May 5, 1999. Rehearing denied June 2, 1999.

Kile *v.* State, CA CR 98-989 (Rogers, J.), dismissed March 17, 1999.

King *v.* State, CA CR 98-941 (Jennings, J.), affirmed March 17, 1999.

Lamb *v.* Hoffman, CA 98-1284 (Robbins, C.J.), dismissed May 26, 1999.

Langston *v.* State, CA CR 96-1471 (Neal, J.), affirmed May 19, 1999.

Lawrence *v.* Sunlite Casual Furniture, Inc., CA 98-1063 (Neal, J.), affirmed April 14, 1999.

Lewis *v.* Worth James Constr., CA 98-1201 (Robbins, C.J.), affirmed May 5, 1999.

London *v.* State, CA CR 98-1100 (Griffen, J.), affirmed March 24, 1999.

Lynn *v.* State, CA CR 98-879 (Meads, J.), affirmed May 19, 1999. Rehearing denied June 23, 1999.

Maier *v.* State, CA CR 98-1079 (Jennings, J.), affirmed April 7, 1999.

Malone *v.* State, CA CR 98-945 (Crabtree, J.), dismissed May 12, 1999.

Marple *v.* Monroe Auto Equip., CA 98-697 (Hart, J.), affirmed March 17, 1999.

Martin *v.* Martin, CA 97-1446 (Pittman, J.), reversed and remanded April 28, 1999.

Martin *v.* State, CA CR 97-1416 (Griffen, J.), affirmed May 19, 1999.

Matthews *v.* State, CA CR 98-1233 (Robbins, C.J.), affirmed as modified and remanded May 5, 1999.

McConnell *v.* Halstead Indus., Inc., CA 98-951 (Rogers, J.), affirmed March 17, 1999.

McCullor *v.* Democrat Printing & Lithographic, CA 98-1034 (Meads, J.), affirmed March 17, 1999.

McGowen *v.* State, CA CR 98-955 (Pittman, J.), affirmed May 5, 1999.

McHolan *v.* McHolan, CA 98-721 (Hart, J.), affirmed April 7, 1999.

Miller *v.* State, CA CR 98-1257 (Robbins, C.J.), affirmed May 19, 1999.

Miller *v.* TIG Ins. Co., CA 98-492 (Rogers, J.), dismissed without prejudice April 14, 1999.

Mize *v.* State, CA CR 98-1085 (Neal, J.), affirmed April 7, 1999.

Moore *v.* State, CA CR 98-1072 (Meads, J.), affirmed April 28, 1999.

Moulin *v.* Consolidated Stores, CA 98-1061 (Neal, J.), affirmed March 17, 1999. Rehearing denied April 14, 1999.

Myers *v.* Director, E 98-237 (Pittman, J.), reversed and remanded April 7, 1999.

Neal *v.* State, CA CR 98-1318 (Bird, J.), affirmed May 19, 1999.

Nease *v.* State, CA CR 98-981 (Bird, J.), affirmed March 17, 1999.

Odom *v.* Odom, CA 98-1500 (Per Curiam), reversed and dismissed April 7, 1999.

Ogden *v.* State, CA CR 98-997 (Robbins, C.J.), affirmed March 24, 1999.

Orr, Tommy *v.* Arkansas Nat'l Bank, CA 98-348 (Rogers, J.), dismissed March 17, 1999.

Orr, Tommy *v.* Arkansas Nat'l Bank, CA 98-348 (Per Curiam), Supplemental Opinion Upon Denial of Rehearing May 26, 1999.

Patel *v.* Phan, CA 98-853 (Bird, J.), affirmed May 19, 1999.

Patman *v.* State, CA CR 98-1043 (Rogers, J.), affirmed May 5, 1999.

Pearson *v.* State, CA CR 98-1059 (Stroud, J.), affirmed March 17, 1999.

Peters *v.* State, CA CR 98-1102 (Crabtree, J.), affirmed March 24, 1999.

Phico Ins. Co. *v.* Shirley, CA 98-392 (Robbins, C.J.), affirmed April 28, 1999. Rehearing denied June 16, 1999.

Raglin *v.* State, CA CR 98-869 (Pittman, J.), affirmed March 17, 1999.

Rainey *v.* Holland, CA 98-1112 (Bird, J.), affirmed on direct appeal; affirmed on cross-appeal May 12, 1999.

Ramos *v.* State, CA CR 98-730 (Roaf, J.), affirmed April 7, 1999.

Randolph *v.* State, CA CR 98-948 (Robbins, C.J.), affirmed March 17, 1999.

Rasul *v.* State, CA 98-1187 (Griffen, J.), affirmed May 5, 1999.

Reddick *v.* Binkley Co., CA 98-1031 (Crabtree, J.), affirmed March 17, 1999.

Reese *v.* State, CA CR 98-1238 (Hart, J.), affirmed in part; reversed and dismissed in part May 26, 1999.

Richard *v.* State, CA CR 98-1044 (Meads, J.), affirmed May 5, 1999.

Ring *v.* Lamb, CA 98-1153 (Stroud, J.), affirmed May 5, 1999.

Robinson *v.* Atlas In Home Care, CA 98-1007 (Griffen, J.), affirmed May 5, 1999.

Rose *v.* State, CA CR 98-1103 (Roaf, J.), affirmed May 5, 1999.

Rossi *v.* P&P Indus., Inc., CA 98-789 (Jennings, J.), affirmed May 5, 1999.

Rowe *v.* City of Little Rock, CA 98-1149 (Hart, J.), reversed and remanded April 14, 1999.

Sanders *v.* National Park Med. Ctr., CA 98-1172 (Roaf, J.), affirmed April 14, 1999.

Senia *v.* American Limo Mfg., CA 98-1264 (Jennings, J.), affirmed April 28, 1999.

Shackleford *v.* State, CA CR 98-1062 (Crabtree, J.), affirmed April 14, 1999.

Shook *v.* Shook, CA 98-1116 (Stroud, J.), dismissed May 12, 1999.

SMI Steel *v.* Holtzclaw, CA 98-1302 (Jennings, J.), affirmed May 12, 1999.

Smith *v.* Smith, CA 98-847 (Stroud, J.), reversed March 17, 1999.

Smith, Ann Tonette *v.* State, CA CR 98-1156 (Roaf, J.), affirmed as modified April 7, 1999.

Smith, Marvin *v.* State, CA CR 98-535 (Pittman, J.), affirmed March 17,1999.

Smith, Michael *v.* State, CA CR 98-134 (Crabtree, J.), affirmed May 19, 1999.

Stanfield *v.* Stanfield, CA 98-1040 (Roaf, J.), affirmed April 21, 1999.

Strickland *v.* Georgia Pacific, CA 98-1075 (Rogers, J.), affirmed March 24, 1999.

Stucky *v.* Dotson, CA 98-1214 (Robbins, C.J.), reversed and remanded May 12, 1999.

Stumborg *v.* Rice-Hanlan, CA 98-835 (Rogers, J.), affirmed April 14, 1999.

Subiaco Abbey *v.* Green, CA 98-1244 (Stroud, J.), affirmed May 12, 1999.

Swanigan *v.* State, CA CR 98-360 (Robbins, C.J.), affirmed April 28, 1999.

Sweeney *v.* Storthz, CA 98-1300 (Stroud, J.), affirmed May 26, 1999.

Tate *v.* State, CA CR 98-1173 (Jennings, J.), affirmed May 12, 1999.

Thomas *v.* State, CA CR 98-1078 (Roaf, J.), affirmed April 28, 1999.

Terry *v.* State, CA CR 98-1387 (Hart, J.), affirmed May 26, 1999.

Thielemier *v.* East Ark. Area Agency on Aging, CA 98-1376 (Griffen, J.), affirmed May 26, 1999.

Turner *v.* State, CA CR 98-992 (Crabtree, J.), affirmed May 26, 1999.

Valdez *v.* Gray, CA 98-1131 (Neal, J.), affirmed as modified May 26, 1999. Rehearing denied June 30, 1999.

Varner *v.* Waterloo Indus., Inc., CA 98-893 (Crabtree, J.), affirmed April 28, 1999.

Verser *v.* Verser, CA 98-36 (Robbins, C.J.), affirmed March 17, 1999.

Vetter *v.* Hearne, CA 98-1181 (Neal, J.), affirmed May 5, 1999.

Viper Boats, Inc. *v.* Storie, CA 98-549 (Meads, J.), affirmed May 12, 1999.

Voyles *v.* Legal Impressions, Inc., CA 98-982 (Griffen, J.), affirmed May 5, 1999.

Wal-Mart Stores, Inc. *v.* Verner, CA 98-1331 (Meads, J.), affirmed in part; reversed in part May 19, 1999.

Waldon *v.* State, CA CR 98-1182 (Bird, J.), affirmed April 7, 1999.

Walker *v.* Independent Case Management, CA 98-977 (Jennings, J.), reversed and remanded April 7, 1999.

Ward *v.* Loomis, CA 98-1094 (Bird, J.), affirmed March 17, 1999.

Washington *v.* State, CA CR 98-728 (Neal, J.), affirmed May 5, 1999. Rehearing denied June 9, 1999.

Watkins *v.* Calvin Watkins Concrete, CA 98-946 (Neal, J.), affirmed April 21, 1999.

West *v.* State, CA CR 98-1141 (Robbins, C.J.), affirmed April 7, 1999.

Wetherington *v.* Davis, CA 98-1334 (Meads, J.), affirmed April 28, 1999.

Wheeler *v.* State, CA CR 98-709 (Meads, J.), affirmed April 7, 1999.

Whitson *v.* Tinkle, CA 98-983 (Robbins, C.J.), reversed March 24, 1999.

Williams *v.* Clark, CA 98-1186 (Stroud, J.), affirmed May 19, 1999.

Williams *v.* Henry, CA 98-1047 (Pittman, J.), affirmed May 19, 1999.

Wilson *v.* State, CA CR 97-1523 (Stroud, J.), affirmed April 28, 1999.

Wolfe *v.* First Bank of Arkansas, CA 98-959 (Neal, J.), affirmed May 12, 1999.

Woods *v.* Arkansas Dep't of Human Servs., CA 98-1147 (Stroud, J.), affirmed April 7, 1999.

Woods *v.* State, CA CR 98-1245 (Hart, J.), affirmed May 5, 1999.

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

Bond *v.* Director of Labor, E 98-281, April 21, 1999.
Briggs *v.* Director of Labor, E 99-8, May 19, 1999.
Brighton *v.* Director of Labor, E 98-283, April 21, 1999.
Brink *v.* Director of Labor, E 99-2, May 19, 1999.
Brooks *v.* Director of Labor, E 98-266, March 24, 1999.
Buy Wright Auto Sales *v.* Director of Labor, E 98-291, May 12, 1999.
Carvlin *v.* Director of Labor, E 98-294, May 12, 1999.
Chappell *v.* Director of Labor, E 99-3, May 19, 1999.
Clark *v.* Director of Labor, E 98-183, May 12, 1999.
Corbit *v.* Director of Labor, E 98-236, April 21, 1999.
Diello *v.* Director of Labor, E 98-190, May 12, 1999.
Dix *v.* Director of Labor, E 98-280, April 21, 1999.
Drew *v.* Director of Labor, E 98-287, May 12, 1999.
Drye *v.* Director of Labor, E 99-4, May 19, 1999.
Eastern Personnel *v.* Director of Labor, E 98-240, April 21, 1999. Rehearing denied May 19, 1999.
Elliott *v.* Director of Labor, E 98-293, May 12, 1999.
Fox *v.* Director of Labor, E 98-297, May 19, 1999.
Geyer *v.* Director of Labor, E 98-278, April 21, 1999.
Gray *v.* Director of Labor, E 98-282, April 21, 1999.
Green *v.* Director of Labor, E 99-1, May 19, 1999.
Greenwalt *v.* Director of Labor, E 98-225, May 12, 1999.
Hawthorne *v.* Director of Labor, E 98-296, May 19, 1999.
Huffman *v.* Director of Labor, E 99-9, May 19, 1999.
Isom *v.* Director of Labor, E 99-6, May 19, 1999.
Jimerson *v.* Director of Labor, E 98-292, May 19, 1999.
Jones, Mary A. *v.* Director of Labor, E 98-284, April 21, 1999.
Jones, Shalonda F. *v.* Director of Labor, E 98-269, March 24, 1999.
Lansdell *v.* Director of Labor, E 98-194, May 12, 1999.
Mackey *v.* Director of Labor, E 98-279, April 21, 1999.
Mason *v.* Director of Labor, E 98-288, March 24, 1999.

McKnight *v.* Director of Labor, E 98-272, March 24, 1999.
Mensie *v.* Director of Labor, E 99-10, May 19, 1999.
Miller *v.* Director of Labor, E 98-286, April 21, 1999.
Moore *v.* Director of Labor, E 98-295, May 19, 1999.
Niederhauser *v.* Director of Labor, E 98-265, March 24, 1999.
Phelps *v.* Director of Labor, E 98-285, April 21, 1999.
Porter *v.* Director of Labor, E 97-32, May 12, 1999.
Queen *v.* Director of Labor, E 98-289, May 12, 1999.
Rhodes *v.* Director of Labor, E 98-277, March 24, 1999.
Smith, Earlene *v.* Director of Labor, E 98-275, March 24, 1999.
Smith, Roger D. *v.* Director of Labor, E 98-274, April 21, 1999.
Waller *v.* Director of Labor, E 98-273, March 24, 1999.
Weaver *v.* Director of Labor, E 98-189, May 12, 1999.
Wesson *v.* Director of Labor, E 98-290, May 12, 1999.
Whitsitt *v.* Director of Labor, E 98-264, March 24, 1999.
Wilburd *v.* Director of Labor, E 98-271, March 24, 1999.
Williams *v.* Director of Labor, E 98-276, March 24, 1999.
Worley *v.* Director of Labor, E 98-268, March 24, 1999.

Alphabetical Headnote Index

HEADNOTE INDEX

ADMINISTRATIVE LAW & PROCEDURE:
State agency's interpretation of federal law, not entitled to deference. *Arkansas Dep't of Human Servs. v. Welborn*, 122

ADVERSE POSSESSION:
How established, adverse use not asserted. *Ward v. Adams*, 208

APPEAL & ERROR:
Chancery opinion dividing property, standard on review. *Dunavant v. Dunavant*, 1
Argument changed on appeal, issue not reached. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 22
Argument unsupported by authority, not addressed. *Id.*
Issue of intent question of fact, when findings of fact reversed. *Id.*
Objection not made at trial, issue not reached on appeal. *Id.*
Court of appeals may not overturn supreme court decision. *Metcalf v. Texarkana Sch. Dist.*, 70
Overwhelming evidence of guilt, any error harmless. *Hart v. State*, 82
Standards used by federal court lenient, Arkansas state law claims not subject to same analysis. *Guidry v. Harp's Food Stores, Inc.*, 93
Ruling by trial court based on federal findings, summary judgment reversed as to this finding. *Id.*
Appellate court, authority to affirm trial court's decision on different basis. *Id.*
Appellate court not convinced that arguments relating to merits of state causes of action were fully developed below, summary judgment reversed & remanded. *Guidry v. Harp's Food Stores, Inc.*, 93
Chancery cases, review of. *Henslee v. Ratliff*, 109
Conflicting evidence, chancellor's findings persuasive. *Id.*
Question of law, standard of review. *Arkansas Dep't of Human Servs. v. Welborn*, 122
De novo review, circuit judge affirmed. *Id.*
One of trial court's grounds for having admitted testimony not challenged on appeal, whether trial court erred in admitting evidence not decided. *Camp v. State*, 134
Bench trial, standard of review. *Santifer v. Arkansas Pulpwood Co.*, 145
Appeal affidavit, when waiver occurs. *Worley v. River Oaks Water Improv. Dist.*, 170
Appeal affidavit, appellee waived statutory requirement, reversed & remanded. *Id.*
Even constitutional arguments not addressed for first time on appeal. *Foster v. State*, 183
Chancery cases, *de novo* review. *Wilson v. Johnston*, 193
Chancery cases, review of boundary-line case. *Ward v. Adams*, 208
Contemporaneous objection, required to preserve point for review. *Casteel v. State Farm Mut. Auto. Ins. Co.*, 220
No objection made at trial, issue waived on appeal. *Id.*
Burden of obtaining ruling on movant, unresolved objections waived. *Id.*
Counsel must make specific objection to preserve issue when trial court declines to rule on motion in limine. *Id.*
No ruling obtained or objection made at trial, issues not preserved. *Id.*

Trial court erred by ordering restitution for economic loss that was caused by crime with which appellant was never charged, reversed & remanded. *Fortson v. State*, 225
Chancery cases, *de novo* review. *Ishmael v. Ismail*, 232
Reversible error, objection requirement. *Leaks v. State*, 254
Errors arising from improper argument, frequently curable by admonition. *Id.*
Trial court not afforded opportunity to correct error, argument waived. *Id.*
Appellate court cannot overrule supreme court precedent. *Id.*
Issue must be ruled on before appellate court will consider it. *McKay v. McKay*, 268
Issues raised must have been presented to trial court. *Rogers v. State*, 283
Issue not raised below not preserved for appeal. *Thomsen Family Trust v. Peterson Family Enters., Inc.*, 294
Law-of-case defense cannot be raised for first time on appeal. *Presley v. Presley*, 316
Unsupported argument not addressed. *Id.*
Chancery cases, standard of review. *Id.*
Transcripts of trial proceedings, abuses by indigent defendants in obtaining. *Brewer v. State*, 324
Chancery court, standard of review. *Bharodia v. Pledger*, 349
Appellee could submit request for remittitur, affirmed as modified. *McDaniel v. Linder*, 362
Issue not raised below, argument not reached on appeal. *Lloyd's of London v. Warren*, 370

ATTORNEY & CLIENT:
Attorney's fees, chancellor's award not abuse of discretion. *Bharodia v. Pledger*, 349

BUSINESS & COMMERCIAL LAW:
Two appellees not parties to conveyance of third appellee's stock, chancellor did not err in granting motions to dismiss. *Thomsen Family Trust v. Peterson Family Enters., Inc.*, 294

CIVIL PROCEDURE:
Introduction of proof on issue not raised in pleadings, implied consent to trial on issue. *McKay v. McKay*, 268

CONSTITUTIONAL LAW:
Double jeopardy, when right may be invoked. *Jaynes v. State*, 43
Double jeopardy, case-by-case standard. *Id.*
Federal action brought under 42 U.S.C. § 1983, purpose of. *Guidry v. Harp's Food Stores, Inc.*, 93
Federal action brought under 42 U.S.C. § 1983, improper arrest alleged, persons entitled to qualified immunity. *Id.*

CONTRACTS:
Enforcement of, language of contract & intent of parties looked to. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 22
Agreement clear, findings of trial judge not clearly erroneous. *Id.*
Payment for reconveyance cannot be compelled, transaction regarded as conditional sale. *Henslee v. Ratliff*, 109
Language unambiguous, construction. *Boatmen's Arkansas, Inc. v. Farmer*, 240
Construction of, intention of parties gathered from entire agreement. *Id.*

Payment of initiation fee part of "compensation" section of agreement, appellant not obligated to reimburse former employee, reversed & remanded. *Id.*
Breach of contract, finding not reversed unless clearly erroneous. *Bharodia v. Pledger*, 349
Breach of contract, waiver. *Id.*
Time limit, waiver. *Id.*
Breach of contract, chancellor's finding of waiver not clearly erroneous. *Id.*

CONVERSION:
Suit brought in circuit court, evidence of ownership of property properly allowed. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 22
Probate records used to establish chain of title, no error found. *Id.*

CORPORATIONS:
Corporate entity, corporation & stockholders are separate & distinct. *Thomsen Family Trust v. Peterson Family Enters., Inc.*, 294
Corporate entity, corporate facade may be disregarded. *Id.*
Corporate entity, piercing corporate veil. *Id.*
Stockholders, no estate in corporation acquired by virtue of stock ownership. *Id.*
Corporate entity, no evidence to warrant disregarding corporate form. *Id.*

COURTS:
Chancery court required to make verbatim record of all proceedings pertaining to contested matter, no exception for child-custody matters. *Mattocks v. Mattocks*, 77
Record must be made of *in camera* interviews in child-custody matters, chancellor erred in not causing record to be made of *in camera* interview with minor children, reversed & remanded. *Id.*
Rule-making authority, province of supreme court. *Brewer v. State*, 324

CRIMINAL LAW:
Imposition of sentence suspended, trial court intended that no sentence be entered. *Shavers v. State*, 173
Trial court properly sentenced appellant, revocation of suspended sentence affirmed. *Id.*
Theft by receiving, proof required. *Fortson v. State*, 225
Defendants cannot be convicted of or plead guilty to crimes with which they were never charged. *Id.*
Subpoena power of prosecuting attorney, purpose of. *Weaver v. State*, 249
Records subpoenaed to investigate reports that appellant violated Ark. Code Ann. § 5-14-123 (Repl. 1993), subpoena used as tool for investigation. *Id.*
Search warrant unnecessary, motion to suppress properly denied. *Id.*
First-degree murder, appellant's conviction affirmed where any error was harmless due to overwhelming evidence of guilt. *Leaks v. State*, 254
Sentence placed into execution, modification or amendment of. *Webb v. State*, 367
Revocation of probation, imposition of sentence. *Id.*
Original terms of probation to run concurrently, sentence of imprisonment may run consecutively upon revocation of probation. *Id.*

CRIMINAL PROCEDURE:
Speedy trial, State's burden to prove delay justified. *Rogers v. State*, 283
Speedy trial, right waived where appellant failed to move for dismissal before trial. *Id.*

Nighttime search warrant, prerequisites to issuance. *Langley v. State*, 311
Nighttime search warrant, standard of review. *Id.*
Nighttime search warrant, good-faith reliance will avoid application of exclusionary rule. *Id.*
Nighttime search warrant, test for good-faith reliance. *Id.*
Nighttime search warrant, affidavit insufficient, reversed & remanded. *Id.*
Indigency, burden of establishing on defendant. *Brewer v. State*, 324
Indigency, factors to be considered in determining. *Id.*
Indigency, ability of bystanders to assist is not factor in determining status. *Id.*

DAMAGES:
For conversion, no error found. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 22
Burden of recovering amount paid for stumpage on joint tortfeasor rather than injured parties, no error found. *Id.*
Exemplary damages, award affirmed. *Stine v. Sanders*, 49
Award upheld, mitigation argument meritless. *Santifer v. Arkansas Pulpwood Co.*, 145
Damage to vehicle, measure of damages. *McDaniel v. Linder*, 362
Appraisals of market value introduced by appellee, trial judge erred in basing award on estimated cost of repairs. *Id.*

DEEDS:
When treated as mortgage, burden of proof. *Henslee v. Ratliff*, 109
Construed with separate agreement, factors considered. *Id.*
Chancellor found deed effected conveyance, finding not clearly erroneous. *Id.*

DIVORCE:
Marital property, stock options, when marital property. *Dunavant v. Dunavant*, 1
Marital property, fifth stock option properly treated as. *Id.*
Marital property, appellee entitled to interest in first stock option to extent marital funds were expended. *Id.*
Marital property, second stock option was nonmarital property. *Id.*
Marital property, purchase of real property. *Id.*
Marital property, separate interest in third option extinguished by purchase of real property in both names. *Id.*
Marital property, fourth option was premarital property. *Id.*
Marital property, appellant's expenditure of premarital funds on marital home presumed gift. *Id.*
Martial property, vested retirement plan properly divided between spouses. *Id.*
Marital property, matching funds paid by employer were employee benefit, chancellor's award affirmed. *Id.*
Child support, reference to family-support chart mandatory. *Schumacher v. Schumacher*, 9
Child support, considerations for deviation from amount set by family-support chart. *Id.*
Child support, change of circumstances not relevant factor where appellate court was not modifying existing award. *Id.*
Child support, order reversed & remanded for consideration of relevant factors pertaining to deviation from family-support chart. *Id.*
Alimony, purpose. *Id.*
Alimony, award within chancellor's discretion. *Id.*

Alimony, factors considered in awarding. *Id.*
Alimony, when award reversed. *Id.*
Alimony, all relevant factors should be considered. *Id.*
Alimony, appellee showed need for, chancellor did not abuse discretion in awarding. *Id.*
Alimony, order reversed & remanded for consideration of all relevant factors when determining amount to be awarded. *Id.*
Marital property, chancellor's discretion in awarding innocent party possession of home. *Id.*
Alimony, award not mandatory. *Barker v. Barker*, 187
Alimony, purpose of. *Id.*
Alimony, factors considered in awarding. *Id.*
Alimony, award justified. *Id.*
Alimony, award resulted in greater disparity in incomes, reversed & remanded. *Id.*
Attorney's fees, chancellor's discretion to award. *Ishmael v. Ismail*, 232
Attorney's fees, no abuse of discretion in chancellor's award. *Id.*
Property division, how nonmarital status can be destroyed. *McKay v. McKay*, 268
Property division, money placed in joint account. *Id.*
Property division, chancellor's finding that appellant gave interest in houseboat to appellee not clearly erroneous. *Id.*
Property division, chancellor's refusal to award appellee interest in property purchased through joint checking account not clearly erroneous. *Id.*
Alimony, chancellor erred in setting aside award. *Id.*
Child support, amount lies within chancellor's discretion. *Frigon v. Frigon*, 343
Child support, pensions included in definition of income for purposes of support calculations. *Id.*
Child support, either party has right to request modification of award. *Id.*
Child support, trial court's finding that withdrawals from appellant's pension plan were included as income for determining support. *Id.*

EASEMENTS:
Express easement, how created. *Wilson v. Johnston*, 193
Appurtenant easement, dominant & servient tenements distinguished. *Id.*
Express easement, chancellor could neither diminish area nor restrict usage. *Id.*
Express easement, not lost by mere nonuser or partial use. *Id.*
Express easement, appellant entitled to use entire area of easement as private way, chancellor reversed. *Id.*
Repairs & improvements, appellant's responsibility. *Id.*
Repairs & improvements, chancellor erred in finding appellees responsible, remanded to determine reasonableness of paving. *Id.*
Erection of structure, rules governing. *Id.*
Erection of structure, chancellor's denial of appellant's request to extend fence affirmed. *Id.*

ELECTION OF REMEDIES:
Affirmative defense, must be raised in answer. *Bharodia v. Pledger*, 349
Defense not raised in answer, no error. *Id.*

ESTOPPEL:
Collateral estoppel, discussed. *Guidry v. Harp's Food Stores, Inc.*, 93
Collateral estoppel, elements of. *Id.*
Issue sought to be precluded not same as issue litigated in federal court, collateral estoppel applies only to issues actually litigated in first action. *Id.*
When collateral estoppel does not bar subsequent action, appellant's right to litigate claims in future reserved. *Id.*
Issue not actually litigated in federal action, issue not barred. *Id.*
Affirmative defense, must be raised at trial. *Santifer v. Arkansas Pulpwood Co.*, 145
Issue procedurally barred, appellants failed to raise theory or obtain ruling. *Id.*
Four elements. *Id.*
Trial court erred in concluding appellant husband was estopped from denying liability for breach of warranty-of-title provision of contract, affirmed in part, reversed & dismissed in part. *Id.*

EVIDENCE:
Denial of directed verdict, appellate review. *Fred's Stores v. Brooks*, 38
Sufficiency of, standard of review. *Stine v. Sanders*, 49
Appellee's credibility was question for jury, testimony constituted substantial evidence that agreement had been reached. *Id.*
Admission or rejection of, introduction of testimony of other crimes, wrongs, or acts. *Hart v. State*, 82
Circumstances of crime, all part of *res gestae*. *Id.*
Witness's testimony relevant, part of *res gestae*. *Id.*
Testimony relevant, appellant not unfairly prejudiced, affirmed. *Id.*
Prejudice not presumed, cumulative evidence not prejudicial. *Camp v. State*, 134
Information in affidavit cumulative, any error in admission not prejudicial. *Id.*
Relevant evidence, admission within sound discretion of trial court. *Brown v. State*, 215
Opinion on ultimate issue, admissibility. *Id.*
Opinion testimony, trial court did not abuse discretion in allowing doctor to state opinion that manner of child's death was homicide. *Id.*
Cumulative evidence, not prejudicial. *Id.*
No affirmative duty on trial court subsequently to make evidentiary rulings on its own motion, issue not preserved for appeal. *Casteel v. State Farm Mut. Auto. Ins. Co.*, 220
Denial of motion to suppress, review of. *Weaver v. State*, 249
Admissibility, trial court's discretion. *Leaks v. State*, 254
Exclusion of, proffer necessary for challenge. *Id.*
Exclusion of, appellate court could not find abuse of discretion absent proffer of expected testimony. *Id.*
Clear & convincing evidence, standard of review. *McKay v. McKay*, 268

FAMILY LAW:
Marital property, funds deposited by appellant into joint checking account prior to parties' divorce subject to division. *Schumacher v. Schumacher*, 9
Marital property, credit card debts subject to division. *Id.*
Marital property, shares of stock constituted. *Id.*
Marital property, matter reversed & remanded for award to appellee of one-half of appellant's work-related bonus for two-year period. *Id.*

FRAUD:
Liability, each party to scheme responsible for acts of others. *Stine v. Sanders*, 49
Statute of frauds, does not abrogate common-law remedy where fraudulent misrepresentation not in writing. *Id.*
Statute of frauds, not allowed to be instrument of fraud. *Id.*
Statute of frauds, to interpret as barring action for damages resulting from fraudulent representation would allow statute to be used as instrument of fraud. *Id.*
Nondisclosure of material facts, when basis of recovery. *Id.*
Basis for setting aside judgment, requirements. *Mow v. Mow*, 374
Basis for setting aside judgment, burden of proof. *Id.*
Alleged fraud was intrinsic, chancellor's dismissal of appellant's motion to modify decree affirmed. *Id.*

HUSBAND & WIFE:
Tenancy by entirety, presumption. *McKay v. McKay*, 268

JUDGMENTS:
Prejudgment interest, when awarded. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 22
Prejudgment interest awarded, no error found. *Id.*
Summary judgment, when approved. *Guidry v. Harp's Food Stores, Inc.*, 93
Construction of, determinative factor. *Shavers v. State*, 173
Summary judgment, when appropriate. *Boatmen's Arkansas, Inc. v. Farmer*, 240
Summary judgment, denial of motion not subject to review. *Bharodia v. Pledger*, 349

JURISDICTION:
Objection to, waived in absence of motion to transfer unless court wholly without jurisdiction. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 22
Exercised by trial judge, not in error. *Id.*

JURY:
Instruction, no error where correct statement of applicable law. *Casteel v. State Farm Mut. Auto. Ins. Co.*, 220
Instructions, jurors presumed to follow. *Leaks v. State*, 254

MASTER & SERVANT:
Employee at will, right to compensation. *Boatmen's Arkansas, Inc. v. Farmer*, 240

MOTIONS:
Directed verdict, when granted. *Fred's Stores v. Brooks*, 38
Motion to suppress, appellate review. *Foster v. State*, 183
Substitution of counsel, granted. *Brewer v. State*, 324
Character of, not pleading. *Mow v. Mow*, 374
Both parties agreed that motions could be decided without hearing, appellant's motion received due consideration. *Id.*

NEGLIGENCE:
Slip & fall, plaintiff's burden to show violation of duty of care. *Fred's Stores v. Brooks*, 38
Slip & fall, insufficient evidence to show substance on store floor due to appellant's negligence. *Id.*

Slip & fall, plaintiff's burden to show substantial interval between time substance placed on floor & time of accident. *Id.*
Slip & fall, insufficient evidence that substance had been on store floor for substantial period. *Id.*
Slip & fall, jury left to speculation or conjecture, reversed & dismissed. *Id.*

NEW TRIAL:
Denial of motion for, test on appeal. *Stine v. Sanders*, 49
Avoidance of, entry of remittitur where trial error relates to separable item of damages. *McDaniel v. Linder*, 362
When granted, discretion of trial court limited. *Lloyd's of London v. Warren*, 370
Grant of, standard of review. *Id.*
Permissible reason for granting, affirmed. *Id.*

PARENT & CHILD:
Custody & visitation determinations, governing principle. *Ishmael v. Ismail*, 232
Custody & visitation determinations, appellate deference to chancellor. *Id.*
Custody & visitation determinations, appellate court cannot revisit finding concerning witness's credibility. *Id.*
Best interest of child considered, chancellor did not err in ordering continued supervised visitation. *Id.*
Custody, appellate deference to chancellor. *Presley v. Presley*, 316
Custody, primary consideration. *Id.*
Custody, material change in circumstances must be shown for modification of order. *Id.*
Custody, chancellor's denial of appellant's request for change of custody not clearly erroneous. *Id.*

PROPERTY:
Boundary lines, boundary by acquiescence. *Ward v. Adams*, 208
Boundary lines, how established by acquiescence. *Id.*
Boundary lines, appellant failed to meet burden of proof to show acquiescence. *Id.*
Boundary lines, conclusion regarding aerial photos not clearly erroneous. *Id.*
Boundary lines, no error found in chancellor's dismissal of complaint. *Id.*

SCHOOLS & SCHOOL DISTRICTS:
Teacher Fair Dismissal Act, effect of signing superseding contract. *Metcalf v. Texarkana Sch. Dist.*, 70

SEARCH & SEIZURE:
No-knock entry, requirements. *Foster v. State*, 183
Knock & announce, court's duty to determine whether facts justified waiving requirement. *Id.*
No-knock entry, justified under circumstances. *Id.*
Knock & announce, police complied with requirement. *Id.*
Motion to suppress correctly denied, affirmed. *Id.*

SPECIFIC PERFORMANCE:
Jurisdiction of court of equity, not dependent upon inadequacy of legal remedy where estate or interest in land is subject matter. *Bharodia v. Pledger*, 349

STATUTES:
Adoption Assistance Agreement for Federal IV-E Funded Assistance, purpose of. *Arkansas Dep't of Human Servs. v. Welborn*, 122
Adoption Assistance Agreement for Federal IV-E Funded Assistance, statute does not require termination of subsidy if parents fail to provide emotional support to children. *Id.*
42 U.S.C. § 673(a)(4), reference to support did not include emotional as well as financial support. *Id.*
Construction, basic rule. *Maxey v. Tyson Foods, Inc.*, 301
Construction, strict construction discussed. *Id.*

TORTS:
Duty owed invitees, ordinary care. *Fred's Stores v. Brooks*, 38
Deceit, elements. *Stine v. Sanders*, 49
Deceit, credibility of witnesses vital in determining liability. *Id.*
Deceit, when rule concerning future-conduct promise will not apply. *Id.*
Deceit, evidence sufficient to permit jury to find appellant did not intend to purchase business when he had promised to do so. *Id.*
Deceit, evidence of two deceptions practiced upon appellees. *Id.*
Deceit, misrepresentations need not be sole cause of loss to be actionable. *Id.*
Deceit, sufficient evidence to support jury's finding of deceit against appellants. *Id.*
Negligence, foreseeability. *McDaniel v. Linder*, 362
Negligence, explosion reasonably foreseeable. *Id.*

TRIAL:
Bench trial, standard of review. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 22
Trial judge found that wrongful cutting was due to mistake, finding not clearly erroneous. *Id.*
Manifestly incorrect decision to grant mistrial will bar subsequent prosecution, appellant's second trial constituted double jeopardy warranting reversal & dismissal. *Jaynes v. State*, 43
Mistrial, opening statement outlining admissible testimony of witness does not entitle party to. *Id.*
Closing argument, trial court's discretion. *Leaks v. State*, 254
Mistrial, motions must be made at first opportunity. *Id.*
Closing argument, appellant could not show prejudice from prosecutor's remarks. *Id.*
Voir dire, essential step in trial. *Rogers v. State*, 283

WORKERS' COMPENSATION:
Arkansas Rules of Civil Procedure inapplicable, Arkansas Rule of Appellate Procedure inapplicable. *Rogers v. International Paper Co.*, 34
Time for appeal, matter for legislature. *Id.*
Notice of appeal, when timely. *Id.*
Language of statute clear & controlling, Commission's dismissal of claim affirmed. *Id.*
Standard of review, substantial evidence defined. *Kinnebrew v. Little John's Trucks, Inc.*, 90
Claimant injured while performing personal task, appellant was not performing employment services at time of injury. *Id.*
Compensable injury, how established. *Continental Express, Inc. v. Freeman*, 102
Objective medical evidence, muscle spasms can constitute. *Id.*

Standard of review, substantial evidence defined. *Id.*
Objective findings, defined. *Id.*
Physical therapists, trained to detect muscle spasms. *Id.*
Similarity between tests not decisive, employment circumstances that aggravate preexisting conditions are compensable. *Id.*
Standard of review, substantial evidence defined. *Jobe v. Wal-Mart Stores, Inc.*, 114
Rapid repetitive motion, proof required. *Id.*
Denial of claim for compensable injury, Commission's opinion showed substantial basis. *Id.*
Factors on review, substantial evidence defined. *Mountain Home Mfg. v. Hafer*, 127
Commission's decision based on more than unusual circumstances, Ark. Code Ann. § 11-9-114 properly construed. *Id.*
Commission's decision, supported by substantial evidence. *Id.*
Causation, supported by evidence. *Id.*
Factors on review. *Beaver v. Benton County Child Support Unit*, 153
Act 796 of 1993, requires strict construction of statutes. *Id.*
Employment services, when performed. *Id.*
Appellant not engaged in performing employment services at time of injury, Commission's decision supported by substantial evidence. *Id.*
Standard of review, substantial evidence defined. *Patterson v. Frito Lay, Inc.*, 159
Witness credibility, Commission determines. *Id.*
Testimony, Commission not required to believe. *Id.*
Appellate review, insulation of Commission decisions. *Id.*
Untruthful claimant, benefits not always denied. *Id.*
Commission's logic flawed, decision regarding percentage of time appellant put pressure on knees was error. *Id.*
Rapid & repetitive movement, requirements for determination. *Id.*
Testimony, neither party's considered uncontroverted. *Id.*
Appellant's activities constituted rapid & repetitive movement, Commission's decision on issue reversed. *Id.*
Appellant's activities were major cause of gradual-onset injury, Commission's decision on issue reversed. *Id.*
Testimony, Commission may not arbitrarily disregard. *Id.*
Testimony, Commission arbitrarily disregarded & reached conclusion on basis of speculation & conjecture. *Id.*
Insufficient evidence to support Commission's decision, reversed & remanded. *Id.*
Compensable injury defined, test for determining whether employee acted within course of employment. *Ray v. University of Arkansas*, 177
Factors on review, function of Commission. *Id.*
Standard of review, substantial evidence defined. *Id.*
Employment services, defined. *Id.*
Employment services, discussed. *Id.*
Appellant performing employment services at time of injury, no substantial basis for denial of benefits, reversed & remanded. *Id.*
Standard of review, substantial evidence defined. *Dalton v. Allen Eng'g Co.*, 201
Entitlement to benefits, appellant bears burden of proof. *Id.*
Denial of benefits for medication, no substantial basis to support Commission's finding that none of claimed treatment was compensable. *Id.*

Appellant established need for further medication, reversed & remanded. *Id.*
Muscle spasms constitute objective finding, spasm defined. *Kimbrell v. Arkansas Dep't of Health*, 245
Muscle tenderness, defined. *Id.*
Muscle spasms & muscle tenderness, compared. *Id.*
Appellant failed to demonstrate compensable injury by objective medical evidence, Commission's decision affirmed. *Id.*
Factors on review, when Commission's decision reversed. *Ellison v. Therma-tru*, 286
Law applicable on date of injury, causal relationship between work-related accident & disability need not be established by medical evidence. *Id.*
Commission used law not in effect at time of injury, Commission's decision reversed. *Id.*
Claim for permanent disability based on incapacity to earn, evidence to be considered. *Id.*
Wage-loss disability determination reversed, preexisting conditions not considered. *Id.*
Total disability, odd-lot category discussed. *Id.*
Odd-lot doctrine abolished after appellant's injury, Commission reversed. *Id.*
Commission erred in finding that combined effect of appellant's work-related injury & her pre-existing conditions did not combine to produce current disability, reversed & remanded. *Id.*
Standard of review, substantial evidence defined. *Maxey v. Tyson Foods, Inc.*, 301
Substantial basis for finding appellant not permanently & totally disabled, affirmed on direct appeal. *Id.*
Ark. Code Ann. § 11-9-521 (Supp. 1997), terms not ambiguous. *Id.*
Second Injury Fund, applicable statutes. *Id.*
Second Injury Fund, purpose of. *Id.*
Statutes harmonious, claimant's recovery restricted to appropriate scheduled amount. *Id.*
Wage-loss disability benefits, entitlement to. *Id.*
Commission's order that Second Injury Fund is liable for wage-loss benefits, reversed on cross-appeal. *Id.*
Standard of review, substantial evidence defined. *White v. Georgia-Pacific Corp.*, 337
Employment services, construed. *Id.*
Employment services not being performed at time of injury, Commission's decision affirmed. *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 Fraudulent Transfer Act 294, 298
First Offenders Act 175
Teacher Fair Dismissal Act 70, 71, 72, 75, 76
Workers' Compensation Act ... 201, 206, 303, 310

ARKANSAS ACTS:

Act 346 of 1975 175
Act 796 of 1993 ... 90, 92, 117, 120, 153, 155, 156, 157, 158, 160, 163, 166, 181, 286, 287, 288, 290, 291, 292, 293, 294, 338, 339, 343

CODES:

(See also RULES and STATUTES):

ARKANSAS CODE ANNOTATED:

4-59-201 through 4-59-213 ... 298
4-59-204 298
4-59-204(a) 298
4-59-204(a)(1) 298
4-59-204(a)(2) 298
4-59-204(a)(2)(i) 298
4-59-204(a)(2)(ii) 298
4-59-204(b) 298
4-59-204(b)(1) 298
4-59-204(b)(2) 298
4-59-204(b)(3) 299
4-59-204(b)(4) 299
4-59-204(b)(5) 299
4-59-204(b)(6) 299
4-59-204(b)(7) 299
4-59-204(b)(8) 299
4-59-204(b)(9) 299
4-59-204(b)(10) 299
4-59-204(b)(11) 299
4-59-207 ..... 294, 299
4-59-208 ..... 294, 299
5-1-112 46
5-1-112(3) 46
5-4-205 ..... 229, 230
5-4-205(a)(1) 228, 230
5-4-205(a)(1)-(3) 228
5-4-205(a)(2) 228, 230
5-4-205(a)(3)(A) 228, 230
5-4-301(d)(1) 368
5-4-307(b) 368, 370
5-4-309(d) 176
5-4-309(f) 173, 175, 176, 369, 370
5-4-401(a)(5) 176
5-4-501(a) 255, 261, 265
5-5-205(a)(1) 230
5-5-205(a)(2) 230
5-5-205(a)(3)(A) 230
5-14-123 ..... 250, 253, 254
5-36-106 ..... 226, 231
5-36-106(a) 229
5-39-201(a)(1) 229
6-17-303 72
6-17-1504 75
6-17-1506 ..... 72, 75
6-17-1506(a) 71, 72
6-17-1510 75
9-12-315 ..... 11, 18, 19
9-12-315(b) 6, 18
9-12-315(b)(1) 18, 268
9-12-315(b)(2) 18, 268, 273

9-12-315(b)(3) 18
9-12-315(b)(4) 18
9-12-315(b)(5) 18
9-12-315(b)(6) 18, 274
9-12-315(b)(7) 18
9-14-106 15
11-2-117(a) 120
11-9-101 158
11-9-102 ..... 104, 157, 247
11-9-102(5) 106
11-9-102(5)(A) 106, 117, 179, 247
11-9-102(5)(A)(i) 106, 117, 118, 157, 179, 247, 339
11-9-102(5)(A)(ii) 117, 163
11-9-102(5)(A)(ii)(a) 115, 117, 118, 163
11-9-102(5)(A)(ii)(b) 118
11-9-102(5)(A)(ii)(c) 118
11-9-102(5)(A)(iii) 118
11-9-102(5)(A)(iv) 118
11-9-102(5)(A)(v) 118
11-9-102(5)(B)(iii) 155, 339
11-9-102(5)(D) 106, 248
11-9-102(16) 105, 106, 248
11-9-102(16)(A)(i) 106, 248
11-9-102(16)(A)(ii) 248
11-9-102(16)(B) 105
11-9-102(F) 290
11-9-102(F)(ii)(a) 291
11-9-102(F)(ii)(b) 291
11-9-113 118
11-9-114 ..... 118, 127, 128, 131
11-9-114(a) 129
11-9-114(b)(1) 128, 129, 131
11-9-114(b)(2) 129
11-9-508(a) 206
11-9-519(b) 308
11-9-519(e)(1) 306
11-9-521 .... 302302, 303, 307, 308, 309, 310
11-9-521(a) 308, 309
11-9-521(g) 302, 308, 309, 310
11-9-522 290
11-9-522(e) 292
11-9-523 ..... 116, 118
11-9-525 ..... 288, 289, 292, 302, 303, 307, 308, 310
11-9-525(b)(3) 308
11-9-704(c)(3) 155
11-9-711 ..... 34, 35, 36, 37
11-9-711(a) 36, 37
11-9-711(a)(1) 36
11-9-711(b) 37
14-15-404(b) 148
16-13-510 ..... 77, 79, 80, 81
16-13-510(a) 77, 80
16-13-510(b) 77, 80, 81
16-13-510(c) 333
16-22-308 ..... 350, 357, 361
16-43-212(a) 252
16-67-201(a) 171
16-67-201(c) 170, 171, 172
16-82-101 253
16-93-303 175
18-60-102 26
20-15-904 ..... 252, 253
20-15-904(a) 253
20-15-904(b) 253
20-15-904(c) 253
518-61-101(a) 212

UNITED STATES CODE:

26 U.S.C. § 61(a) 344, 348
26 U.S.C. § 61(a)(11) 344, 348
28 U.S.C. § 1367(c)(3) 96
42 U.S.C. § 673 ..... 123, 124, 127
42 U.S.C. § 673(a)(4) 122, 125
42 U.S.C. § 673(a)(4)(A) ... 123, 125, 126
42 U.S.C. § 673(a)(4)(B) ... 123, 125, 126
42 U.S.C. § 1983 ..... 93, 94, 96, 99, 100, 101

CONSTITUTIONAL PROVISIONS:

ARKANSAS CONSTITUTION:

Art. 2, § 8 46

UNITED STATES CONSTITUTION:

Amend. 4 ..... 183, 185, 251
Confrontation Clause 137, 144

INSTRUCTIONS:

ARKANSAS MODEL JURY INSTRUCTIONS (CIVIL):

AMI 601 222

RULES:

ARKANSAS RULES OF APPELLATE PROCEDURE — CIVIL:

Ark. R. App. P.—Civ. 1..... 36
Ark. R. App. P.—Civ. 4..... 34, 36
Ark. R. App. P.—Civ. 6(d) ... 79

ARKANSAS RULES OF APPELLATE PROCEDURE — CRIMINAL:

Ark. R. App. P.—Crim. 14.... 135, 136, 141
Ark. R. App. P.—Crim. 16 ... 329, 332, 334, 336

ARKANSAS RULES OF CIVIL PROCEDURE:

ARCP Rule 6(c) 379
ARCP Rule 7 ..... 375, 379
ARCP Rule 7(b)(1)..... 379
ARCP Rule 9(b)..... 376
ARCP Rule 10 ..... 375, 379
ARCP Rule 12(b)..... 376
ARCP Rule 12(b)(6).. 295, 297, 299, 379
ARCP Rule 12(c)..... 376
ARCP Rule 15(b)..... 270, 275
ARCP Rule 55(c)..... 377
ARCP Rule 59 ..... 371, 373
ARCP Rule 59(a) 371, 373
ARCP Rule 59(a)(5)..... 371
ARCP Rule 59(a)(6)..... 370, 371, 372, 373
ARCP Rule 60 375
ARCP Rule 60(c).... 375, 376, 377, 379
ARCP Rule 60(c)(4)..... 375, 377

ARKANSAS RULES OF CRIMINAL PROCEDURE:

A.R.Cr.P. Rule 13.2(c).... 311, 312, 314, 315, 316
A.R.Cr.P. Rule 13.2(c)(i) ... 311, 314
A.R.Cr.P. Rule 13.2(c)(ii) .. 311, 314
A.R.Cr.P. Rule 13.2(c)(iii) .. 311, 314
A.R.Cr.P. Rule 16.2..... 251
A.R.Cr.P. Rule 24.3..... 251
A.R.Cr.P. Rule 24.3(b)..... 184, 312
A.R.Cr.P. Rule 28 284
A.R.Cr.P. Rule 28.1..... 284
A.R.Cr.P. Rule 28.1(c)..... 284
A.R.Cr.P. Rule 28.1(f)..... 285
A.R.Cr.P. Rule 28.2(a)..... 284
A.R.Cr.P. Rule 28.3..... 285

ARKANSAS RULES OF EVIDENCE:

A.R.E. Rule 103(a)(2)..... 258
A.R.E. Rule 403..... 82, 85, 87, 88
A.R.E. Rule 404(b).... 82, 84, 87, 88
A.R.E. Rule 503..... 251
A.R.E. Rule 704..... 215, 218
A.R.E. Rule 803(2)... 135, 136. 139, 140, 141, 142
A.R.E. Rule 803(8)(i)..... 140
A.R.E. Rule 804..... 142
A.R.E. Rule 804(b)..... 140
A.R.E. Rule 804(b)(5) 135, 136, 137, 139, 140, 141, 142, 143, 144

RULES OF THE ARKANSAS SUPREME COURT AND COURT OF APPEALS:

Ark. Sup. Ct. R. 4-2(a)(6) 138
Ark. Sup. Ct. R. 4-3(h) 135
Ark. Sup. Ct. R. 4-6(a)..... 334

STATUTES:

ARKANSAS STATUTES ANNOTATED:

43-2332 369