ARKANSAS REPORTS
VOLUME 339

ARKANSAS
APPELLATE REPORTS
VOLUME 68

[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 339

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
October 21, 1999 — December 16, 1999
INCLUSIVE[1]

AND

ARKANSAS APPELLATE REPORTS

Volume 68

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

FROM
October 20, 1999 — December 22, 1999
INCLUSIVE[2]

PUBLISHED BY THE
STATE OF ARKANSAS
1999

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[1]Arkansas Supreme Court Cases (ARKANSAS REPORTS) are in the front section pages 1 through ___. Cite as 339 Ark. ___ (1999).

[2]Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 though ___. Cite as 68 Ark. App. ___ (1999).

ERRATA

338 Ark. at 220-226; style of case and running heads:
The name "Vaughn" should be "Vaughan."

328 Ark. at 576; third paragraph, line one:
The word "grandparent's" should be "grandparents'."

328 Ark. at 577; second paragraph, line four:
The word "grandparent's" should be "grandparents'."

334 Ark. at 291; second paragraph, line six:
The word "laying" should be "lying."

Set in Bembo

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1999

ARKANSAS REPORTS

Volume 339

CASES DETERMINED
IN THE

Supreme Court of Arkansas

FROM
October 21, 1999 — December 16,1999
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1999

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JUSTICES AND OFFICERS
OF THE
SUPREME COURT OF ARKANSAS

DURING THE PERIOD COVERED BY THIS VOLUME

(October 21, 1999 — December 16, 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

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RULES ADOPTED OR AMMENDED BY PER CURIAM ORDER:

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RULES OF THE ARKANSAS SUPREME COURT AND COURT OF APPEALS

OPINIONS

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

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

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

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall 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 continu-

ing 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

Ashlock *v.* State, CR 99-972 (Per Curiam), Pro Se Motions to Relieve Counsel and to Appoint Other Counsel denied; Motion for Extension of Time moot December 9, 1999.

Askins *v.* State, CR 98-874 (Per Curiam), affirmed November 11, 1999.

Barrett *v.* Norris, CR 98-700 (Per Curiam), affirmed October 21, 1999.

Bell *v.* Green, 99-840 (Per Curiam), Appellant's Pro Se Motion for Extention of Time to File Pro Se Brief; granted October 21, 1999.

Brown *v.* State, 97-722 and 97-723 (Per Curiam), Pro Se Motion for Photocopy of Transcripts at Public Expense; denied November 4, 1999.

Burton *v.* State, CR 99-1008 (Per Curiam), Pro Se Motion for Appointment of Counsel denied and appeal dismissed December 16, 1999.

Cole *v.* State, CR 98-791 (Per Curiam), affirmed October 28, 1999.

Doss *v.* State, CR 98-1128 (Per Curiam), affirmed December 16, 1999.

Early *v.* State, CR 99-1113 (Per Curiam), Pro Se Motion for Rule on Clerk to Proceed with Belated Appeal of Order; denied November 18, 1999.

Emery *v.* State, CR 97-993 (Per Curiam), Motion to Withdraw granted; affirmed November 4, 1999.

Farris *v.* State, CR 99-765 (Per Curiam), Pro Se Motion to File Belated Reply Brief; denied and appeal dismissed November 18, 1999.

Gilliam *v.* State, CR 87-116 (Per Curiam), Pro Se Motion for Photocopies at Public Expense; denied October 21, 1999.

Gipson *v.* State, CR 98-911 (Per Curiam), reversed and remanded October 28, 1999.

Grabow *v.* Rogers, CR 99-1157 (Per Curiam), Pro Se Petition for Writ of Mandamus moot October 28, 1999.

Greene *v.* State, CR 96-362 (Per Curiam), Petition to Stay Execution Pending Appeal granted; Petition for Writ of Certiorari granted; Motion for Permission to Withdraw and for Substitution of Counsel granted December 9, 1999.

Hill *v.* State, CR 97-1462 (Per Curiam), Pro Se Motion to Recall Mandate; denied November 11, 1999.

Hill *v.* State, CR 99-1341 (Per Curiam), Pro Se Motion to Relieve Counsel and to Appoint Other Counsel; denied and appeal dismissed December 9, 1999.

Hunes *v.* State, CR 99-82 (Per Curiam), Pro Se Motion for Appointment of Counsel; denied and appeal dismissed October 21, 1999.

Hussey *v.* State, CR 99-1004 (Per Curiam), Pro Se Motion for Rule on Clerk to Proceed with Belated Appeal of Order; denied November 4, 1999.

Jones *v.* State, CR 98-924 (Per Curiam), reversed and remanded November 4, 1999.

Kidd *v.* State, CR 97-586 (Per Curiam), Pro Se Petition for Leave to Proceed in Circuit Court with Petition for Writ of Error Coram Nobis; denied November 18, 1999.

Lewis *v.* State, CR 99-657 (Per Curiam), Pro Se Motion to File Substituted Abstract and Brief granted; Motion for Photocopy of Trial Transcript treated as motion for access to appeal record and granted October 28, 1999.

MacKintrush *v.* State, CR 99-952 (Per Curiam), Pro Se Motion for Rule on Clerk to File a Belated Motion for Extension of Time treated as Motion to File a Belated Brief and granted; Motion to Stay Appeal moot; Motion to Amend Motion for Rule on Clerk treated as Motion to Supplement Record with Transcript of 1995 Trial and denied December 9, 1999.

McArty *v.* Judicial Discipline & Disability Comm'n, 99-1225 (Per Curiam), Pro Se Motion to Proceed in Forma Pauperis; granted December 16, 1999.

McCoy *v.* State, CR 99-167 (Per Curiam), Pro Se Motion for Reply Brief to be Duplicated at Public Expense denied; Motion for Leave to Amend Tendered Reply Brief moot December 16, 1999.

McGhee *v.* State, CR 99-554 (Per Curiam), Pro Se Motion to Amend Appellant's Brief; granted October 28, 1999.

Morris *v.* State, CR 97-1003 (Per Curiam), Motion for Reconsideration; denied October 28, 1999.

Muldrew *v.* State, CR 99-411 (Per Curiam), Pro Se Motion to Reinstate Appeal; denied November 11, 1999.

Murphy *v.* State, CR 99-1388 (Per Curiam), Petition for Review denied December 16, 1999.

Neal *v.* Davis, CR 99-1252 (Per Curiam), Pro Se Petition for Writ of Mandamus; moot November 11, 1999.

Neely *v.* State, CR 99-386 (Per Curiam), Pro Se Motion to File Overlength Brief-In-Chief denied; Motion for Extension of Time to File Brief; final extension granted December 9, 1999.

Norman *v.* State, CR 98-582 (Per Curiam), Motion to Withdraw and Substitute Counsel; denied October 21, 1999.

Patton *v.* State, CR 98-1046 (Per Curiam), affirmed November 18, 1999.

Raglin *v.* State, CR 97-402 (Per Curiam), reversed and remanded; motion to withdraw denied November 11, 1999.

Randall *v.* State, CR 77-59 (Per Curiam), Pro Se Motion for Photocopy of Transcript at Public Expense; denied October 28, 1999.

Ray *v.* State, CR 99-847 (Per Curiam), Pro Se Motion for Extention of Time to File Brief; denied and appeal dismissed October 21, 1999.

Richards *v.* State, CR 97-1536 (Per Curiam), rebriefing ordered November 11, 1999.

Rushing *v.* State, CR 99-1046 (Per Curiam), Pro Se Motion for Rule on Clerk to Proceed with Belated Appeal of Order; denied November 11, 1999.

Sawyer *v.* State, CA CR 96-897 (Per Curiam), Pro Se Motion for Photocopy of Transcript at Public Expense; denied December 2, 1999.

Shibley *v.* State, 99-289 (Per Curiam), Pro Se Motion to File Belated Brief; granted November 4, 1999.

Skinner *v.* State, CR 99-1068 (Per Curiam), Pro Se Motion for Duplication of Appellant's Briefs at Public Expense; denied and appeal dismissed December 2, 1999.

Snyder *v.* State, CR 98-748 (Per Curiam), affirmed December 9, 1999.

Tidwell *v.* Bryant, 98-1026 (Per Curiam), affirmed December 9, 1999.

Vaughn *v.* State, CR 98-741 (Per Curiam), affirmed October 21, 1999.

West *v.* State, CR 99-961 (Per Curiam), Pro Se Motion for Belated Appeal of Order; denied October 21, 1999.

White *v.* State, CR 98-925 (Per Curiam), affirmed December 9, 1999.

Whitney *v.* State, CR 98-922 (Per Curiam), dismissed November 11, 1999.

Williams *v.* State, CR 97-1499 (Per Curiam), Pro Se Motion for Leave to Amend Pro Se Brief; granted November 11, 1999.

Williams *v.* State, CR 98-740 (Per Curiam), affirmed October 21, 1999.

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Williams *v.* State, CR 98-1014 (Per Curiam), affirmed December 9, 1999.

Wright *v.* State, CR 98-926 (Per Curiam), dismissed in part; affirmed in part November 18, 1999.

APPENDIX

Rules Adopted or Amended by Per Curiam Orders

IN RE: RULE 6, RULES OF APPELLATE PROCEDURE—CRIMINAL

Supreme Court of Arkansas
Delivered October 21, 1999

PER CURIAM. Our Committee on Criminal Practice has recommended a change to Rule 6 (c) (2) of the Rules of Appellate Procedure—Criminal to provide that the circuit clerk be notified when an appeal is dismissed. We agree. Accordingly, effective immediately, Rule 6 (c) (2) is so amended and this provision is republished below.

Rule 6. BAIL ON APPEAL

. . . .

(c) . . . .

(2) Following the affirmance or reversal of a conviction, or the dismissal of an appeal, the Clerk of the Supreme Court shall immediately make and forward to the clerk of the circuit court of the county in which the defendant was convicted a certified copy of the mandate of the Supreme Court.

IN RE: RULES GOVERNING ADMISSION to the BAR

Supreme Court of Arkansas
Delivered November 11, 1999

PER CURIAM. On June 2, 1997, we amended Rule x of the Rules Governing Admission to the Bar. In that order, we changed the filing deadline to April 1 preceding the July examination. It has been brought to our attention that applicants who have taken the previous February exam do not receive their results until late March. Hence, applicants who fail that examination have an inordinately short period of time in which to acquire, complete, and file their application for the following July examination by April 1.

We amend and publish Rule X as it appears on the attachment to this order to provide that applicants failing the February Arkansas bar examination shall have until the following May 15 to file for the immediately subsequent July examination.

RULE X

All applications for leave to take the examination shall be filed with the Executive Secretary on or before November 15 of the year which precedes the February examination and April 1 which precedes the July examination. Applicants who fail the February Arkansas examination shall have until the following May 15 to file an application for the immediately subsequent July examination. If such date falls on a Saturday, Sunday, or legal holiday, the application deadline shall be on the next day which is not a Saturday, Sunday1 or legal holiday. (Per Curiam January 18, 1965; amended by Per Curiam January 15, 1979; amended by Per Curiam May 18, 1992; amended by Per Curiam June 2, 1997; amended by Per Curiam November 11, 1999.)

IN RE: ARKANSAS RULES of CIVIL PROCEDURE 5, 6, 8, 12, 45, and 60; and ARKANSAS RULES OF APPELLATE PROCEDURE—CIVIL 2, 4, and 5

Supreme Court of Arkansas
Delivered December 9, 1999

PER CURIAM. The Arkansas Supreme Court Committee on Civil Practice has submitted its annual proposals and recommendations for changes in the Arkansas Rules of Civil Procedure and the Arkansas Rules of Appellate Procedure—Civil.

We publish the Committee's suggested changes to the Rules and the Reporter's Notes for comment from the bench and bar. For ease of reference, the changes are also presented in "line-in, line-out" fashion. We note that the proposed amendment to Ark. R. Civ. P. 12 (h)(3) will, if adopted, result in Ark. Code Ann. § 21-6-403(b), as amended by Act 1081 of 1999, being deemed superseded.

We express our gratitude to the Chair of the Committee, Judge John Ward, its Reporter, Professor John J. Watkins, and the Committee members for their faithful and helpful work with respect to the Rules.

Comments on the suggested rules changes should be made in writing prior to January 15, 2000, and they should be addressed to:

Clerk, Supreme Court of Arkansas
Attn: Civil Procedure Rules
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201.

General comments and suggestions about the Arkansas Rules of Civil Procedure should be addressed to:

Professor John J. Watkins
Leflar Law Center
University of Arkansas
Fayetteville, Arkansas 72701.

Arkansas Rules of Civil Procedure

1. Subdivision (c)(1) of Rule 5 is amended to read as follows:

> (c) *Filing.* (1) All papers after the complaint required to be served upon a party or his attorney shall be filed with the clerk of the court either before service or within a reasonable time thereafter. The clerk shall note the date and time of filing thereon. However, p roposed findings of fact, proposed conclusions of law, trial briefs, proposed jury instructions, and responses thereto may but need not be filed unless ordered by the court. Depositions, interrogatories, requests for production or inspection, and answers and responses thereto shall not be filed unless ordered by the court. When such discovery documents are relevant to a motion, they or the relevant portions thereof shall be submitted with the motion and attached as an exhibit unless such documents have already been filed. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form.

The Reporter's Notes accompanying Rule 5 are amended by adding the following:

> Addition to Reporter's Notes, 2000 Amendment: Subdivision (c)(1) of the rule has been amended to provide that discovery materials, except for requests for admission, shall not be filed with the clerk unless the court so orders. This is the practice in the federal district courts in Arkansas and in several states. *See* Rule 5.5(f), Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas; Rule 2-401(d)(2), Md. R. Civ. P.; Rule 191.4, Tex. R. Civ. P. Under the prior version of the rule, the filing of such materials was optional absent a court order.

2. The third sentence of subdivision (a) of Rule 6 is amended by replacing "eleven (11)" with "fourteen (14)."

The Reporter's Notes accompanying Rule 6 are amended by adding the following:

> Addition to Reporter's Notes, 2000 Amendment: The time period in the third sentence of subdivision (a) has been changed from eleven days to fourteen days, the intent being to eliminate confusion in the computation of response time when a motion has been served by mail under subdivision (d).

3. Subdivision (a) of Rule 8 is amended to read as follows:

(a) *Claims for Relief.* (1) A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross claim or third party claim, shall contain (A) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (B) a demand for the relief to which the pleader considers himself entitled. Relief in the alternative may be demanded.

(2) In claims for unliquidated damages, a demand containing no specified amount of money shall limit recovery to an amount less than required for federal court jurisdiction in diversity of citizenship cases, unless language of the demand indicates that the recovery sought is in excess of such amount. An insufficient demand for purposes of this paragraph is correctable only by amendment pursuant to Rule 15(a) filed within 60 days of the original pleading.

The Reporter's Notes accompanying Rule 8 are amended by adding the following:

Addition to Reporter's Notes, 2000 Amendment: Subdivision (a) has been rearranged slightly and divided into two paragraphs. New language in the second paragraph is intended to overturn *Interstate Oil & Supply Co. v. Troutman Oil Co.*, 334 Ark. 1, 972 S.W.2d 941 (1998). That case held that the plaintiff's failure to demand a specific sum of money where damages were unliquidated, or to plead that the recovery sought was in excess of the amount required for federal diversity jurisdiction, did not limit the plaintiff's recovery because the issue was tried by implied consent under Rule 15(b), Ark. R. Civ. P.

Under the *Troutman* decision, a plaintiff could effectively defeat a defendant's right to removal yet suffer no penalty, a result at odds with the intent of Rule 8(a). Accordingly, the rule has been amended to provide that an inadequate demand for unliquidated damages may be corrected only by a formal amendment filed within 60 days of the original pleading. Because such an amendment is the only method for curing the defect, Rule 15(b) is inapplicable.

4. Subdivision (h)(3) of Rule 12 is amended by adding the following new sentence at the end: "No filing or transfer fee may be imposed by the clerk of the court to which a case is transferred." Subdivision (h)(3) is further amended by replacing the introductory phrase "Whenever it appears" in the second sentence with the phrase "Upon a determination."

The Reporter's Notes accompanying Rule 12 are amended by adding the following:

> Addition to Reporter's Notes, 2000 Amendment: A new sentence has been added to subdivision (h)(3) making plain that neither a filing fee nor a transfer fee may be imposed by the clerk of the court to which a case is transferred. A statute setting a $50 fee when a case is transferred from one county to another is deemed superseded. *See* Ark. Code Ann. § 21-6-403(b), as amended by Act 1081 of 1999. Imposition of a fee would seriously burden plaintiffs and impede operation of the transfer mechanism provided in subdivision (h)(3). The second sentence of subdivision (h)(3) has been amended by replacing the introductory phrase "whenever it appears" with "upon a determination." This change eliminates the unintended suggestion in the original version of the sentence that a motion to dismiss for improper venue, like a motion to dismiss for lack of subject matter jurisdiction, can be made at any time. As subdivision (h)(1) of the rule makes plain, improper venue is a waivable defense.

> 5. Subdivision (a) of Rule 45 is amended by adding the following new sentence at the end: "An attorney admitted to practice in this State, as an officer of the court, may also issue and sign a subpoena in any action pending in a court of this State in which the attorney is counsel of record." Subdivisions (d) and (e) of the rule are amended by adding the following new sentence after the first sentence in each subdivision: "The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule."

The Reporter's Notes accompanying Rule 45 are amended by adding the following:

> Addition to Reporter's Notes, 2000 Amendment: Subdivision (a) has been amended to permit an attorney admitted to practice in Arkansas, as an officer of the court, to issue subpoenas in Arkansas cases in which he or she is counsel of record. Cross-references to subdivision (a) have also been added to subdivisions (d) and (e) of the rule. This authority does not apply to subpoenas pursuant to subdivision (f), which governs depositions for use in out-of-state proceedings; accordingly, a subpoena under subdivision (f) may be issued only by the clerk. The phrase "admitted to practice" in amended subdivision (a) refers not only to attorneys licensed in Arkansas, but also to those admitted *pro hac vice.*

> In 1991, the corresponding federal rule was amended to allow attorneys to issue subpoenas. *See* Rule 45(a)(3), Fed. R. Civ. P. The federal rule expressly provides for sanctions, including lost

earnings and reasonable attorneys' fees, against an attorney "responsible for issuance and service of a subpoena" that "impos[es] an undue burden or expense on the person subject to that subpoena." Rule 45(c)(1), Fed. R. Civ. P. While a similar provision has not been added to the Arkansas rule, the courts have inherent authority to sanction attorneys who abuse their power to issue subpoenas.

Subpoena Form

The following form for subpoenas is adopted and shall be published in the notes immediately following Rule 45 in the Court Rules volume of the Arkansas Code:

Issued by the

_____ COURT

_____ County, Arkansas

_____

v.

_____

SUBPOENA IN A CIVIL CASE

CASE NUMBER _____

TO: _____

☐ YOU ARE COMMANDED to appear in the _____ Court of _____ County, Arkansas, at the place, date, and time specified below to testify in the above case.

Place of Testimony	Courtroom
	Date and Time

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the taking of a deposition in the above case.

Place of Deposition	Date and Time

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

Place	Date and Time

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Arkansas Rules of Civil Procedure 30(b)(6).

Issuing Officer Signature and Title (Indicate if Attorney for Plaintiff or Defendant)	Date

Issuing Officer's Name, Address, and Phone Number

_____

PROOF OF SERVICE

Date Place

SERVED

Served On (Print Name) Manner of Service

Served By (Print Name) Title

DECLARATION OF SERVER

I declare, under penalty of perjury under the laws of the State of Arkansas that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

NOTICE TO PERSONS SUBJECT TO SUBPOENAS

Regardless of his or her county of residence, a witness subpoenaed for examination at a trial or hearing must be properly served with a subpoena at least two days prior to the trial or hearing, or within a shorter time if the court so orders. The subpoena must be accompanied by a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the trial or hearing. Rule 45(d), Ark. R. Civ. P.

A witness subpoenaed in connection with a deposition must be properly served with a subpoena at least five business days prior to a deposition, or within a shorter time if the court so orders. The witness is required to attend a deposition at any place within 100 miles of where he or she resides, is employed, or transacts business in person, or at such other convenient place set by court order. The subpoena must be accompanied by a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the deposition. Rule 45(e), Ark. R. Civ. P.

A subpoena may command the person to whom it is directed to produce for inspection any books, papers, documents, or tangible things designated in the subpoena. The person subpoenaed may ask the court to quash or modify the subpoena if it is unreasonable or oppressive or to require that the person on whose behalf the subpoena is issued pay the reasonable cost of such production. Rule 45(b), Ark. R. Civ. P. If the subpoena is issued in connection with a deposition, the person subpoenaed may object in writing to inspection or copying of any or all of the designated materials or seek a protective order from the court. If a written objection is made within ten days of service of the subpoena or on or before the time specified for compliance if such time is less than ten days, the party causing the subpoena to be issued is not entitled to inspect the materials unless the court so orders. Rule 45(d), Ark. R. Civ. P.

When a witness fails to attend in obedience to a subpoena or intentionally evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court to give testimony and answer for contempt. Rule 45(g), Ark. R. Civ. P.

6. Subdivisions (a) and (b) of Rule 60 are amended to read as follows:

> (a) Ninety-Day Limitation. To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.
>
> (b) Exception; Clerical Errors. Notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Subdivision (c)(1) of the rule is amended by changing the cross-reference from "Rule 59(c)" to "Rule 59(b)," and subdivision (c)(4) is amended to read as follows:

> (4) For fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Subdivision (c) is further amended by adding new paragraph (8) as follows:

> (8) To otherwise prevent the miscarriage of justice, but not more than one year after entry of the judgment, decree, or order.

The Reporter's Notes accompanying Rule 60 are amended by adding the following:

> Addition to Reporter's Notes, 2000 Amendment: Subdivisions (a) and (b) of the rule have been revised in response to case law. In addition, subdivision (c) has been amended by changing the cross-reference in paragraph (1) from Rule 59(c) to Rule 59(b), by revising paragraph (4), and by adding new paragraph (8).
>
> As originally adopted, subdivision (a) provided that the trial court could "at any time" correct clerical mistakes and errors "arising from oversight or omission." Under subdivision (b), the trial court could "correct any error or mistake or to prevent the miscarriage of justice" by modifying or setting aside a judgment, decree or order within 90 days of its having been filed with the clerk. Despite this apparent dichotomy, the Supreme Court held

that the 90-day limitation in subdivision (b) also applied to subdivision (a). *See, e.g., Ross v. Southern Farm Bureau Cas. Ins. Co.*, 333 Ark. 227, 968 S.W.2d 622 (1998); *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991).

As amended, subdivision (a) is a slightly modified version of former subdivision (b). It states the general rule that the court may, with prior notice to all parties, modify a judgment, decree or order within 90 days of its filing with the clerk to "correct errors or mistakes or to prevent the miscarriage of justice." Revised subdivision (b) expressly states an exception for "clerical mistakes" and errors "arising from oversight or omission," which may be corrected at any time with prior notice to all parties. New paragraph (8) of subdivision (c) allows the court to act after the expiration of the 90-day period, but not more than one year after entry of the judgment, decree or order, "to otherwise prevent the miscarriage of justice."

Amended paragraph (4) of subdivision (c) allows a judgment, decree or order to be modified or set aside "[f]or fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." This language, taken from Rule 60(b)(3) of the Federal Rules of Civil Procedure, eliminates the distinction between intrinsic and extrinsic fraud, a distinction that has been described as "shadowy, uncertain, and somewhat arbitrary." *Howard v. Scott*, 125 S.W. 1158, 1166 (Mo. 1909). *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2861 (1995) (distinction is "very troublesome and unsound").

Under the prior rule, only extrinsic fraud was a ground for setting aside or modifying a judgment. This has resulted in unfairness. *See, e.g., Ward v. McCord*, 61 Ark. App. 271, 966 S.W.2d 925 (1998) (husband's concealment of bank account from wife during negotiations leading to property settlement in divorce action was not extrinsic fraud); *Office of Child Support Enforcement v. Mitchell*, 61 Ark. App. 54, 964 S.W.2d 218 (1998) (mother's failure to mention in affidavit filed in paternity case that a man other than defendant could have been the father of her child was not extrinsic fraud); *Office of Child Support Enforcement v. Offutt*, 61 Ark. App. 207, 966 S.W.2d 275 (1998) (conduct of attorney in preparing precedent containing findings not made by the court and mailing it to the judge with a letter requesting that he sign the order if no objection was received from opposing counsel did not constitute extrinsic fraud).

Arkansas Rules of Appellate Procedure—Civil

1. Subdivision (a) of Rule 2, Ark. R. App. P.—Civ., is amended by replacing the period at the end of paragraph 9 with a semicolon and by adding the following new paragraphs:

> 10. An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;
>
> 11. An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the trial court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay; and
>
> 12. An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all probate court orders, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator).

The Reporter's Notes accompanying Rule 2 is amended by adding the following:

> Addition to Reporter's Notes, 1999 Amendment: The Supreme Court added subdivisions (c) and (d) to Rule 2 in 1999 and redesignated former subdivision (c) as (e). Also, appeals under subdivisions (c)(3) and (d) were added to the list of civil cases that "take precedence" in the appellate court. These changes were recommended by an ad hoc committee on foster care and adoption. *See In re Rules of Appellate Procedure—Civil, Rule 2*, 336 Ark. Appx. (1999).
>
> Addition to Reporter's Notes, 2000 Amendment: Three changes, all of which restate present law, have been made in Rule 2(a). New paragraph 10 provides that an immediate appeal lies from an order "denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official." This provision is a codification of case law. *See, e.g., Ozarks Unlimited Resources Coop., Inc. v.*

Daniels, 333 Ark. 214, 969 S.W.2d 169 (1998);*Newton v. Ethoch*, 332 Ark. 325, 965 S.W.2d 96 (1998); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

New paragraph 11 is a restatement of Rule 54(b) of the Arkansas Rules of Civil Procedure. Because noncompliance with Rule 54(b) continues to be a problem, this provision was added as a reminder to counsel. New paragraph 12 reflects the Supreme Court's holding that Rule 2(a) preserves all statutory rights of appeal in existence as of July 1, 1979, the effective date of the Rules of Appellate Procedure. *See Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994); *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994). The original Reporter's Note to Rule 2 contains a statement to that effect, but the Committee on Civil Practice deemed it desirable to include specific language in the text of the rule. Paragraph 12 also includes two examples of statutes that fall within its scope.

2. Subdivision (a) of Rule 4 is amended by replacing the reference to "subdivision (b)" in the first sentence with "subdivisions (b) and (c)", by redesignating subdivision (c) as subdivision (d), and by adding new subdivision (c) as follows:

(c) *Exception for Election Cases.* If a statute of this State pertaining to elections prescribes a time period for taking an appeal, the period so prescribed shall apply in any case subject to the statute.

The Reporter's Notes accompanying Rule 4 are amended by adding the following:

Addition to Reporter's Notes, 2000 Amendment. Former subdivision (c) of the rule has been redesignated as subdivision (d) and a new subdivision (c) added. By virtue of the new provision and a cross-reference in subdivision (a), a statutory deadline for election cases is controlling as to the timeliness of an appeal, notwithstanding the 30-day period generally applicable under subdivision (a). The amendment reflects recent Supreme Court decisions to that effect. *See Citizens for a Safer Carroll County v. Epley*, 338 Ark. 61, 991 S.W.2d 562 (1999)(applying Ark. Code Ann. § 3-8-205(e)(1), which provides for a 10-day period in which to file a notice of appeal in cases involving the sufficiency of petitions in local option elections); *Weems v. Garth*, 338 Ark. 437, 993 S.W.2d 926 (1999) (applying Ark. Code Ann. § 7-5-810, which imposes a seven-day limit for an appeal from a circuit court in an election contest).

3. Rule 5 is amended by adding the following as new subdivision (c):

> (c) Partial record. Prior to the time the complete record on appeal is filed with the clerk of the Arkansas Supreme Court as provided in this rule, any party may docket the appeal to make a motion for dismissal or for any other intermediate order by filing a partial record with the clerk. At the request of the moving party, the clerk of the trial court shall certify the portion of the record designated by that party as being a true and correct copy. It shall be the responsibility of the moving party to transmit the certified partial record to the clerk of the Arkansas Supreme Court.

The Reporter's Notes accompanying Rule 5 are amended by adding the following:

> Addition to Reporter's Notes, 2000 Amendment: New subdivision (c) requires the filing of a partial record in the appellate court in connection with a motion to dismiss or for any other intermediate relief. It reflects prior case law and thus does not work any change in appellate practice. *See, e.g., Mitchell v. City of Mountain View*, 304 Ark. 585, 803 S.W.2d 556 (1991); *In re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992); *Green v. Williford*, 331 Ark. 533, 961 S.W.2d 766 (1998). The new provision is based on Rule 4(c) of the Arkansas Rules of Criminal Procedure—Criminal but departs from that rule by placing on the moving party the burden of transmitting the certified partial record to the appellate court. This requirement is consistent with Rule 7(b) of the Arkansas Rules of Appellate Procedure—Civil.

Arkansas Rules of Civil Procedure

Rule 5(c)(1), Ark. R. Civ. P.

(c) Filing. (1) All papers after the complaint required to be served upon a party or his attorney shall be filed with the clerk of the court either before service or within a reasonable time thereafter. The clerk shall note the date and time of filing thereon. However, ~~depositions, interrogatories, requests for production or inspection,~~ p roposed findings of fact, proposed conclusions of law, trial briefs, proposed jury instructions, and responses thereto may but need not be filed ~~with the clerk~~ unless ordered by the court. *Depositions, interrogatories, requests for production or inspection, and answers and responses thereto shall not be filed unless ordered by the court.* When such discovery documents are relevant to a motion, they or the relevant portions thereof shall be submitted with the motion

and attached as an exhibit unless such documents have already been filed. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form.

Addition to Reporter's Notes, 2000 Amendment: Subdivision (c)(1) of the rule has been amended to provide that discovery materials, except for requests for admission, shall not be filed with the clerk unless the court so orders. This is the practice in the federal district courts in Arkansas and in several states. *See* Rule 5.5(f), Rules of the U.S. District Courts for the Eastern and Western Districts of Arkansas; Rule 2-401(d)(2), Md. R. Civ. P.; Rule 191.4, Tex. R. Civ. P. Under the prior version of the rule, the filing of such materials was optional absent a court order.

Rule 6(a), Ark. R. Civ. P.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of the Court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than ~~eleven (11)~~ *fourteen (14)* days, intermediate Saturdays, Sundays, or legal holidays shall be excluded in the computation. As used in this rule and Rule 77(c), "legal holiday" means those days designated as a holiday by the President or Congress of the United States or designated by the laws of this State.

Addition to Reporter's Notes, 2000 Amendment: The time period in the third sentence of sub-division (a) has been changed from eleven days to fourteen days, the intent being to eliminate confusion in the computation of response time when a motion has been served by mail under subdivision (d).

Rule 8(a), Ark. R. Civ. P.

(a) Claims for Relief. *(1)* A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross claim or third party claim, shall contain ~~(1)~~ *(A)* a statement in ordinary and

concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and ~~(2)~~ *(B)*a demand for the relief to which the pleader considers himself entitled. *Relief in the alternative may be demanded.*

(2) In claims for unliquidated damage *s*, a demand containing no specified amount of money shall limit recovery to an amount less than required for federal court jurisdiction in diversity of citizenship cases, unless language of the demand indicates that the recovery sought is in excess of such amount. ~~Relief in the alternative may be demanded.~~ *An insufficient demand for purposes of this paragraph is correctable only by amendment pursuant to Rule 15(a) filed within 60 days of the original pleading.*

Addition to Reporter's Notes, 2000 Amendment: Subdivision (a) has been rearranged slightly and divided into two paragraphs. New language in the second paragraph is intended to overturn *Interstate Oil & Supply Co. v. Troutman Oil Co.*, 334 Ark. 1, 972 S.W.2d 941 (1998). That case held that the plaintiff's failure to demand a specific sum of money where damages were unliquidated, or to plead that the recovery sought was in excess of the amount required for federal diversity jurisdiction, did not limit the plaintiff's recovery because the issue was tried by implied consent under Rule 15(b), Ark. R. Civ. P.

Under the *Troutman* decision, a plaintiff could effectively defeat a defendant's right to removal yet suffer no penalty, a result at odds with the intent of Rule 8(a). Accordingly, the rule has been amended to provide that an inadequate demand for unliquidated damages may be corrected only by a formal amendment filed within 60 days of the original pleading. Because such an amendment is the only method for curing the defect, Rule 15(b) is inapplicable.

Rule 12(h)(3), Ark. R. Civ. P.

(h) Waiver or Preservation of Certain Defenses.

* * *

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or direct that the case be transferred to the proper court. ~~Whenever it appears~~ *Upon a determination* that venue is

improper, the court shall dismiss the action or direct that it be transferred to a county where venue would be proper, with the plaintiff having an election if the action could be maintained in more than one county. *No filing or transfer fee may be imposed by the clerk of the court to which a case is transferred.*

Addition to Reporter's Notes, 2000 Amendment: A new sentence has been added to subdivision (h)(3) making plain that neither a filing fee nor a transfer fee may be imposed by the clerk of the court to which a case is transferred. A statute setting a $50 fee when a case is transferred from one county to another is deemed superseded. *See* Ark. Code Ann. § 21-6-403(b), as amended by Act 1081 of 1999. Imposition of a fee would seriously burden plaintiffs and impede operation of the transfer mechanism provided in subdivision (h)(3). The second sentence of subdivision (h)(3) has been amended by replacing the intro-ductory phrase "whenever it appears" with "upon a determination." This change eliminates the unintended suggestion in the original version of the sentence that a motion to dismiss for improper venue, like a motion to dismiss for lack of subject matter jurisdiction, can be made at any time. As subdivision (h)(1) of the rule makes plain, improper venue is a waivable defense.

Rule 45, Ark. R. Civ. P.

Rule 45. Subpoena.

(a) Form and Issuance. Every subpoena shall be issued by the clerk, under seal of court, shall state the name of the court and title of the action, and shall command each person to whom it is directed to appear and give testimony at the time and place therein specified. *An attorney admitted to practice in this State, as an officer of the court, may also issue and sign a subpoena.*

* * *

(d) Subpoena for Trial or Hearing. At the request of any party the clerk of the court before which the action is pending shall issue a subpoena for a trial or hearing, or a subpoena for the production at a trial or hearing of documentary evidence, signed and sealed, but otherwise in blank, to the party requesting it, who shall fill it in before service. *The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule.* A witness, regardless of his county of

residence, shall be obligated to attend for examination on trial or hearing in a civil action anywhere in this State when properly served with a subpoena at least two (2) days prior to the trial or hearing. The court may grant leave for a subpoena to be issued within two (2) days of the trial or hearing. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the trial or hearing. In the event of telephone service of a subpoena by a sheriff or his deputy, the party who caused the witness to be subpoenaed shall tender the fee prior to or at the time of the witness' appearance at the trial or hearing. If a continuance is granted and if the witness is provided adequate notice thereof, reservice of the subpoena shall not be necessary. Any person subpoenaed for examination at the trial or hearing shall remain in attendance until excused by the party causing him to be subpoenaed or, after giving testimony, by the court.

(e) Subpoena for Taking Depositions: Place of Examination. Upon the filing of a notice of deposition upon oral examination pursuant to Rule 30(b), the clerk of the court in which the action is pending shall, upon the request of the party giving notice, issue a subpoena in accordance with the notice. *The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule.* The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of the rule. The witness must be properly served at least five (5) business days prior to the date of the deposition, unless the court grants leave for subpoena to be issued within that period. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the deposition.

The person to whom the subpoena is directed may, within ten (10) days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service, serve upon the attorney causing the subpoena to be issued written objection to inspection or copying of any or all of the designated materials. If objection is made, the party causing the subpoena to be issued shall not be entitled to inspect and copy the

materials except pursuant to an order of the court before which the deposition may be used. The party causing the subpoena to be issued may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition.

A witness subpoenaed under this subdivision may be required to attend a deposition at any place within 100 miles of where he resides, or is employed, or transacts his business in person, or at such other convenient place as is fixed by an order of court.

* * *

Addition to Reporter's Notes, 2000 Amendment: Subdivision (a) has been amended to permit an attorney admitted to practice in Arkansas, as an officer of the court, to issue subpoenas in Arkansas cases in which he or she is counsel of record. Cross-references to subdivision (a) have also been added to subdivisions (d) and (e) of the rule. This authority does not apply to subpoenas pursuant to subdivision (f), which governs depositions for use in out-of-state proceedings; accordingly, a subpoena under subdivision (f) may be issued only by the clerk. The phrase "admitted to practice" in amended subdivision (a) refers not only to attorneys licensed in Arkansas, but also to those admitted *pro hac vice.*

In 1991, the corresponding federal rule was amended to allow attorneys to issue subpoenas. *See* Rule 45(a)(3), Fed. R. Civ. P. The federal rule expressly provides for sanctions, including lost earnings and reasonable attorneys' fees, against an attorney "responsible for issuance and service of a subpoena" that "impos[es] an undue burden or expense on the person subject to that subpoena." Rule 45(c)(1), Fed. R. Civ. P. While a similar provision has not been added to the Arkansas rule, the courts have inherent authority to sanction attorneys who abuse their power to issue subpoenas.

Rule 60, Ark. R. Civ. P.

(a) Ninety-Day Limitation. *To correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.* ~~Clerical Mistakes.Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or~~

~~omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.~~

(b) *Exception; Clerical Errors.Notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court.*~~Ninety Day Limitation . To correct any error or mistake or to prevent the miscarriage of justice, a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk.~~

(c) Grounds for Setting Aside Judgment, Other than Default Judgment, After Ninety Days. The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:

(1) By granting a new trial where the grounds therefor were discovered after the expiration of ninety (90) days after the filing of the judgment, or, where the ground is newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule *59(b)*~~(c)~~, upon a motion for new trial filed with the clerk of the court not later than one year after discovery of the grounds or one year after the judgment was filed with the clerk of the court, whichever is the earlier; provided, notice of said motion has been served within the time limitations for filing the motion.

* * *

(4) For fraud *(whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.* ~~practiced by the successful party in obtaining the judgment.~~

* * *

(8) To *otherwise* prevent the miscarriage of justice, *but not more than one year after entry of the judgment, decree, or order.*

(d) * * *

Addition to Reporter's Notes, 2000 Amendment: Subdivisions (a) and (b) of the rule have been revised in response to case law. In addition, subdivision (c) has been amended by changing the cross-reference in paragraph (1) from Rule 59(c) to Rule 59(b), by revising paragraph (4), and by adding new paragraph (8).

As originally adopted, subdivision (a) provided that the trial court could "at any time" correct clerical mistakes and errors "arising from oversight or omission." Under subdivision (b), the trial court could "correct any error or mistake or to prevent the miscarriage of justice" by modifying or setting aside a judgment, decree or order within 90 days of its having been filed with the clerk. Despite this apparent dichotomy, the Supreme Court held that the 90-day limitation in subdivision (b) also applied to subdivision (a). *See, e.g., Ross v. Southern Farm Bureau Cas. Ins. Co.*, 333 Ark. 227, 968 S.W.2d 622 (1998); *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991).

As amended, subdivision (a) is a slightly modified version of former subdivision (b). It states the general rule that the court may, with prior notice to all parties, modify a judgment, decree or order within 90 days of its filing with the clerk to "correct errors or mistakes or to prevent the miscarriage of justice." Revised subdivision (b) expressly states an exception for "clerical mistakes" and errors "arising from oversight or omission," which may be corrected at any time with prior notice to all parties. New paragraph (8) of subdivision (c) allows the court to act after the expiration of the 90-day period, but not more than one year after entry of the judgment, decree or order, "to otherwise prevent the miscarriage of justice."

Amended paragraph (4) of subdivision (c) allows a judgment, decree or order to be modified or set aside "[f]or fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." This language, taken from Rule 60(b)(3) of the Federal Rules of Civil Procedure, eliminates the distinction between intrinsic and extrinsic fraud, a distinction

that has been described as "shadowy, uncertain, and somewhat arbitrary." *Howard v. Scott*, 125 S.W. 1158, 1166 (Mo. 1909). *See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE§ 2861 (1995) (distinction is "very troublesome and unsound").

Under the prior rule, only extrinsic fraud was a ground for setting aside or modifying a judgment. This has resulted in unfairness. *See, e.g., Ward v. McCord,* 61 Ark. App. 271, 966 S.W.2d 925 (1998) (husband's concealment of bank account from wife during negotiations leading to property settlement in divorce action was not extrinsic fraud); *Office of Child Support Enforcement v. Mitchell,* 61 Ark. App. 54, 964 S.W.2d 218 (1998) (mother's failure to mention in affidavit filed in paternity case that a man other than defendant could have been the father of her child was not extrinsic fraud); *Office of Child Support Enforcement v. Offutt,* 61 Ark. App. 207, 966 S.W.2d 275 (1998) (conduct of attorney in preparing precedent containing findings not made by the court and mailing it to the judge with a letter requesting that he sign the order if no objection was received from opposing counsel did not constitute extrinsic fraud).

Arkansas Rules of Appellate Procedure—Civil

Rule 2(a), Ark. R. App. P.—Civ.

(a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:

* * *

9. An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure~~.~~ ;

10. An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;

11. An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the trial court has directed entry of a final judgment as to one or more but fewer than all of the

claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay; and

12. An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all probate court orders, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator).

Addition to Reporter's Notes, 1999 Amendment: The Supreme Court added subdivisions (c) and (d) to Rule 2 in 1999 and redesignated former subdivision (c) as (e). Also, appeals under subdivisions (c)(3) and (d) were added to the list of civil cases that "take precedence" in the appellate court. These changes were recommended by an ad hoc committee on foster care and adoption. *See In re Rules of Appellate Procedure—Civil, Rule 2*, 336 Ark. Appx. (1999).

Addition to Reporter's Notes, 2000 Amendment: Three changes, all of which restate present law, have been made in Rule 2(a). New paragraph 10 provides that an immediate appeal lies from an order "denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official." This provision is a codification of case law. *See, e.g., Ozarks Unlimited Resources Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998); *Newton v. Ethoch*, 332 Ark. 325, 965 S.W.2d 96 (1998); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

New paragraph 11 is a restatement of Rule 54(b) of the Arkansas Rules of Civil Procedure. Because noncompliance with Rule 54(b) continues to be a problem, this provision was added as a reminder to counsel. New paragraph 12 reflects the Supreme Court's holding that Rule 2(a) preserves all statutory rights of appeal in existence as of July 1, 1979, the effective date of the Rules of Appellate Procedure. *See Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994); *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994). The original Reporter's Note to Rule 2 contains a statement to that effect, but the Committee on Civil Practice deemed it desirable to include specific language in the text of the rule. Paragraph 12 also includes two examples of statutes that fall within its scope.

Rule 4, Ark. R. App. P.—Civ.

(a) Time for Filing Notice of Appeal. Except as otherwise provided in subdivision *s* (b) *and (c)* of this rule, a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from. A notice of cross-appeal shall be filed within ten (10) days after receipt of the notice of appeal, except that in no event shall a cross-appellant have less than thirty (30) days from the entry of the judgment, decree or order within which to file a notice of cross-appeal. A notice of appeal filed after the trial court announces a decision but before the entry of the judgment, decree, or order shall be treated as filed on the day after the judgment, decree, or order is entered.

(b) Extension of Time for Filing Notice of Appeal. * * *

(c) Exception for Election Cases. If a statute of this State pertaining to elections prescribes a time period for taking an appeal, the period so prescribed shall apply in any case subject to the statute.

~~(c)~~ *(d)* When Judgment Is Entered. A judgment, decree or order is entered within the meaning of this rule when it is filed with the clerk of the court in which the claim was tried. A judgment, decree or order is filed when the clerk stamps or otherwise marks it as "filed" and denotes thereon the date and time of filing.

Addition to Reporter's Notes, 2000 Amendment. Former subdivision (c) of the rule has been redesignated as subdivision (d) and a new subdivision (c) added. By virtue of the new provision and a cross-reference in subdivision (a), a statutory deadline for election cases is controlling as to the timeliness of an appeal, notwithstanding the 30-day period generally applicable under subdivision (a). The amendment reflects recent Supreme Court decisions to that effect. *See Citizens for a Safer Carroll County v. Epley*, 338 Ark. 61, 991 S.W.2d 562 (1999)(applying Ark. Code Ann. § 3-8-205(e)(1), which provides for a 10-day period in which to file a notice of appeal in cases involving the sufficiency of petitions in local option elections); *Weems v. Garth*, 338 Ark. 437, 993 S.W.2d 926 (1999) (applying Ark. Code Ann. § 7-5-810, which imposes a seven-day limit for an appeal from a circuit court in an election contest).

Rule 5, Ark. R. App. P.—Civ.

* * *

(c) Partial record. Prior to the time the complete record on appeal is filed with the clerk of the Arkansas Supreme Court as provided in this rule, any party may docket the appeal to make a motion for dismissal or for any other intermediate order by filing a partial record with the clerk. At the request of the moving party, the clerk of the trial court shall certify the portion of the record designated by that party as being a true and correct copy. It shall be the responsibility of the moving party to transmit the certified partial record to the clerk of the Arkansas Supreme Court.

Addition to Reporter's Notes, 2000 Amendment: New subdivision (c) requires the filing of a partial record in the appellate court in connection with a motion to dismiss or for any other intermediate relief. It reflects prior case law and thus does not work any change in appellate practice. *See, e.g., Mitchell v. City of Mountain View*, 304 Ark. 585, 803 S.W.2d 556 (1991); *In re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992); *Green v. Williford*, 331 Ark. 533, 961 S.W.2d 766 (1998). The new provision is based on Rule 4(c) of the Arkansas Rules of Criminal Procedure-Criminal but departs from that rule by placing on the moving party the burden of transmitting the certified partial record to the appellate court. This requirement is consistent with Rule 7(b) of the Arkansas Rules of Appellate Procedure—Civil.

IN RE: QUALIFICATIONS AND STANDARDS OF PRACTICE FOR ATTORNEY AD LITEM APPOINTMENTS IN CHANCERY COURT CASES AND GUARDIANSHIP CASES

Supreme Court of Arkansas
Delivered December 9, 1999

PER CURIAM. Act 708 of 1999 established a program for the appointment and payment of attorneys ad litem in chancery court cases and guardianship cases where custody is an issue. The Act further provided that the Arkansas Supreme Court, with the advice of chancery and probate judges, adopt standards of practice and qualifications for service for all attorneys who seek to be appointed to provide legal representation for children in chancery court cases and guardianship cases where custody is an issue.

Toward that end, proposed qualifications and standards of practice for attorney ad litem appointments in chancery court cases and guardianship cases have been drafted, and comment has been sought and received from the chancery and probate judges. The proposal has also been reviewed by the Judicial Council's Committee on Ad Litem Representation in Chancery Courts.

We commend the Committee for its work and its dedication to improving chancery court and guardianship proceedings where custody is an issue. Having considered the proposed qualifications and standards of practice and the chancery and probate judges' comments, we adopt the following qualifications and standards of practice for attorneys ad litem who represent children in chancery court cases and guardianship cases where custody is an issue, effective April 1, 2000.

Qualifications and Standards of Practice for Attorneys Ad Litem in Chancery Court Cases and Guardianship Cases

Qualifications for Appointment

1. Licensed attorney in good standing with the Arkansas Supreme Court

2. Education to include training of not less than ten (10) hours (live or video tape) prior to appointment. Prerequisite training to include but not be limited to:

a. Child development;

b. Ad litem roles and responsibilities, including ethical considerations;

c. Relevant substantive state, federal and case law;

d. Custody and visitation; and

e. Family dynamics, including substance abuse, domestic abuse, and mental health issues.

Standards of Practice

1. An attorney ad litem shall conduct an independent investigation consisting of review of all relevant documents and records. The ad litem shall interview the child, parents, and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child during the pendency of the action are mandatory. Upon entry of a final order, the attorney ad litem's obligation to represent the minor child shall end, unless directed otherwise by the court.

2. An attorney ad litem shall determine the best interest of a child by considering such custody criteria as:

a. *Moral Fitness* factors: integrity, character, compassion, sobriety, religious training and practice, a newly acquired partner regarding the preceding elements;

b. *Stability* factors: emotional stability, work stability, financial stability, residence and school stability, health, partner stability;

c. *Love and Affection* factors: attention given, discipline, attitude toward education, social attitude, attitude toward access of the other party with the child, and attitude toward cooperation with the other party regarding the child's needs;

d. *Other Relevant Information* regarding the *child* such as stated preference, age, sex, health, testing and evaluation, child care arrangements; and regarding the *home* such as its location, size, and family composition.

3. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court, as well as the recommendations of the ad litem.

4. An attorney ad litem shall file appropriate pleadings on behalf of the child, call witnesses, participate fully in examination of witnesses, present relevant evidence, and advocate for timely hearings.

5. An attorney ad litem shall explain to the child the court proceedings and the role of the ad litem in terms that the child can understand.

6. An attorney ad litem shall make recommendations to the court for specific and appropriate services for the child and the child's family. All recommendations shall likewise be communicated to the attorneys for the parties, or if a party is *pro se*, then to the party.

7. An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child.

8. An attorney ad litem shall participate in prerequisite education prior to appointment which shall include ten (10) hours of training and shall participate in four (4) hours of annual continuing education in the areas of child development, custody and visitation, family dynamics and other areas affecting the child and family.

IN RE: ADMINISTRATIVE ORDER NUMBER 2(a)

Supreme Court of Arkansas
Delivered December 9, 1999

PER CURIAM. The coming of the year 2000 necessitates a change in Administrative Order Number 2 regarding the numbering of cases. Instead of two digits (99-1) for the docket year, the case number needs to be four digits (2000-1). Accordingly, subsection (a) of Administrative Order Number 2 is amended by substituting the word "four" in place of "last two" in the second sentence of that subsection.

We also direct that the Supreme Court Clerk make a similar change it its method of numbering cases filed in the Supreme Court and Court of Appeals.

The amendment to Administrative Order Number 2 shall be effective January 1, 2000.

Subsection (a) is republished below, as amended.

ADMINISTRATIVE ORDER NUMBER 2 — DOCKETS AND OTHER RECORDS

(a) Docket. The clerk shall keep a book known as a "civil docket," a book known as a "chancery docket," a book known as a "probate docket," and a book known as a "criminal docket," and a book known as a "juvenile docket," and shall enter therein each action. Cases shall be assigned docket numbers in the order of filing and beginning with the first case filed each year in each court, the four digits of the current year shall be entered, followed by a hyphen and the number assigned to the case, beginning with the number "1". For further identification, the court may direct that the letters "CIV" or "CR" precede the docket number for cases filed in circuit court, that the letters "E" or "J" precede the docket number for cases filed in chancery court, and that the letter "P" precede the docket number for cases filed in probate court.

All papers filed with the Clerk, all process issued and returns thereon, all appearances, orders, verdicts and judgments shall be noted chronologically in the dockets and filed in the folio assigned

to the action and shall be marked with its file number. These entries shall be brief, but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the Court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. Where there has been a demand for trial by jury it shall be shown on the docket along with the date upon which demand was made.

Appointments to Committees

IN RE: BOARD of LAW EXAMINERS

Supreme Court of Arkansas
Delivered November 11, 1999

PER CURIAM. Lucinda S. McDaniel, First Congressional District, is appointed to the State Board of Law Examiners for a seven (7) year term ending September 30, 2006.

Audrey Evans, Second Congressional District, is reappointed to the State Board of Law Examiners for a three (3) year term ending September 30, 2002.

The Court thanks Ms. McDaniel for accepting appointment to this Board. The Court thanks Ms. Evans for accepting reappointment to this Board.

The Court thanks Blair Arnold for his dedicated and faithful service as a member and Chairman of this Board.

IN RE: SUPREME COURT COMMITTEE on CHILD SUPPORT

Supreme Court of Arkansas
Delivered November 11, 1999

PER CURIAM. The Honorable Gary Arnold of Benton, and Senator Jodie Mahony of El Dorado, are hereby reappointed to the Supreme Court Committee on Child Support. These are four-year terms, which will expire on November 30, 2003. Mr. H.T. Moore, Esq., of Paragould, is hereby appointed to the Committee on Child Support for a four-year term to expire on November 30, 2003.

The Court thanks Judge Arnold and Senator Mahony for accepting reappointment and Mr. Moore for accepting appointment to this most important Committee.

The Court expresses its appreciation to Larry Carpenter, Esq., of North Little Rock, whose term has expired, for his dedicated service to this Committee.

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

Supreme Court of Arkansas
Delivered November 11, 1999

PER CURIAM. Don R. Elliott, Jr., Esq., of Fayetteville, is appointed, effective immediately, to the Committee on Model Jury Instructions—Civil to fill the unexpired term of Laurie Bridewell, Attorney at Law, who has resigned from the Committee. This term expires April 30, 2000.

The Court extends its thanks to Mr. Elliott for accepting appointment to this most important Committee.

The Court expresses its gratitude to Ms. Bridewell for her years of service to the Committee.

IN RE: APPOINTMENT of COUNSEL in CRIMINAL CASES

Supreme Court of Arkansas
Delivered December 2, 1999

PER CURIAM. Because appellants in criminal cases are entitled to counsel on direct appeal from a judgment of con-

viction, this Court on occasion must appoint attorneys to represent indigent appellants.

Attorneys who are desirous of such appointments should register with Sue Newbery, Criminal Justice Coordinator, Arkansas Supreme Court, Justice Building, 625 Marshall St., Little Rock, AR 72201.

Counsel will be paid a fee after determination of the case, upon a proper motion.

Professional Conduct Matters

IN RE: Daniel Howard HARMON, IV,
Arkansas Bar ID # 73051

4 S.W.3d 492

Supreme Court of Arkansas
Delivered November 4, 1999

PER CURIAM. Upon consideration of the Findings and Order of the Saline County Circuit Court in the matter of the disbarment of Daniel Howard Harmon, IV, Benton, Arkansas, and the Petition of the Supreme Court Committee on Professional Conduct seeking entry of an Order of Disbarment, we grant the Petition. The Court hereby revokes Mr. Harmon's license to practice law in the State of Arkansas. It is further ordered that his name shall be removed from the registry of licensed attorneys, and that he is permanently barred from engaging in the practice of law in this state.

It is so ordered.

IN RE: Perlesta Arthur HOLLINGSWORTH,
Arkansas Bar ID # 69034

4 S.W.3d 492

Supreme Court of Arkansas
Delivered November 11, 1999

PER CURIAM. Upon consideration of the Petition of the Supreme Court Committee on Professional Conduct seeking entry of an order of disbarment of Perlesta Arthur Hollingsworth, Little Rock, Arkansas, and pursuant to the Pulaski County Circuit Court's Order Upon Remand and this Court's opinion issued in this matter on June 24, 1999, we grant the Petition. The Court hereby revokes Mr. Hollingsworth's license to practice law in the State of Arkansas. It is further ordered that his name shall be

removed from the registry of licensed attorneys, and that he is barred from engaging in the practice of law in this state.

It is so ordered.

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SUPPLEMENTAL OPINION
ON DENIAL OF REHEARING
JUNE 3, 1996

***Printer's note*: The following supplemental opinion, *Tortorich v. Tortorich*, although placed in Volume 324 of the *Arkansas Reports* at page 134-A and listed in the Table of Cases, was inadvertently omitted from the hardbound volume published in 1996 by Darby Printing Company.**

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING JUNE 3, 1996

APPEAL & ERROR — EARLIER DECISION ALTERED TO REMOVE RELIANCE ON A.R.C.P. RULE 12(b)(8). — Although the supreme court did not concede appellee's point that it was in error in basing its earlier decision, in part, on A.R.C.P. Rule 12(b)(8), the court concluded that it was unnecessary to do so because Ark. Code Ann. § 9-12-303(c) (Supp. 1995) provided ample basis for holding that Saline County was not the proper venue for appellee's absolute-divorce suit; to prevent any sort of confusion, such as that evidenced in the petition for rehearing, the supreme court altered its earlier decision to remove the reliance on Rule 12(b)(8).

Rehearing denied.

Dodds, Kidd, Ryan & Moore, by: *Greg Alagood*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd., by: *Sam Hilburn* and *Dorcy Kyle Corbin*, for appellee.

PER CURIAM. In a petition for rehearing, Tony Tortorich contends our decision should not have been based on Ark. R. Civ. P. 12(b)(8) because that implies we do not recognize the distinctions among the actions for separate maintenance, divorce from bed and board, and absolute divorce. A further suggestion of the petition is that we have held the Saline County Chancery Court lacked jurisdiction to entertain Mr. Tortorich's claim for absolute divorce. Neither is so.

Rule 12(b)(8) provides a defense based on "pendency of another action between the same parties arising out of the same transaction or occurrence." Our holding was that, due to the fact that the appeal was pending in the Pulaski County action which involved the same transaction or occurrence, Rule 12(b)(8) applied. We did not suggest that the Saline County Chancery Court lacked jurisdiction of Mr. Tortorich's claim.

As Ms. Tortorich points out in response to the petition for rehearing, our decision concerned only proper venue. We based

the result not only on Rule 12(b)(8) but also on Ark. Code Ann. § 9-12-303(c) (Supp. 1995), which provides:

> When a spouse initiates an action against the other spouse for absolute divorce, divorce from bed and board, or separate maintenance, then the venue for the initial action shall also be the venue for any of the three (3) named actions filed by the other spouse, regardless of the residence of the other spouse.

We pointed out that the statute could be interpreted

> to mean that any claim available to the other spouse must be filed in the same venue as long as the initial action is still pending, or it might mean that any claim available to the other spouse must be filed in the same venue, without regard to whether the initial action is still pending.

We declined to choose between those two possible meanings because the statute would make Pulaski County the proper venue in this case, no matter which interpretation prevailed.

[1] While we do not concede Mr. Tortorich's point that we were in error in basing our decision, in part, on Rule 12(b)(8), we concluded it was unnecessary to do so as the statute provided ample basis for holding Saline County was not the proper venue for Mr. Tortorich's absolute divorce suit. To prevent any sort of confusion, such as that evidenced in the petition for rehearing, we alter our decision to remove the reliance on Rule 12(b)(8).

We continue to decline to interpret § 9-12-303(c) to say whether it applies to *any* pursuit of a marital action subsequent to one of the three types having been filed by the other spouse or only to the pursuit of a separate marital action *if* some aspect of the previous suit remains pending. In our opinion we concluded, upon authorities cited, that a suit is pending when an appeal has been filed. The wisdom of that conclusion is demonstrated by the fact that, in this case, the alimony order in Ms. Tortorich's Pulaski County divorce-from-bed-and-board suit was remanded to the Pulaski County Chancery Court, and the Court of Appeals held that the property division order was not yet ripe for decision. As the concurring opinion said, Mr. Tortorich's complaint should have been filed in the "same action."

We say again that for us to have sanctioned both trial proceedings could have, and in this case obviously would have, resulted in conflicting decisions about the ancillary aspects of the two types of marital claims. *i.e.*, alimony, child support, and division of property. Such a result would have been intolerable.

Rehearing denied.

CORBIN and BROWN, JJ., not participating.

GLAZE, J., would grant rehearing.

TOM GLAZE, Justice. In response to the rehearing petition of Tony Totorich, this court modifies its earlier majority opinion for no other apparent purpose than for clarification. Obviously, the majority court's original opinion is incorrect, but the court declines to say so. At least I understood the first opinion. Now, with the issuance of the supplemental opinion, I challenge any reader to tell me how an attorney or judge can know how to proceed in divorce or marital actions that are commonly filed like the ones in this case.

In his petition for rehearing, Tony Tortorich correctly points out that ARCP Rule 12(b)(8) is applicable, and in applying that rule, the majority court's opinion failed to recognize that absolute divorce, divorce from bed and board and separate maintenance are separate causes of action. *See Spencer v. Spencer*, 275 Ark. 112, 627 S.W.2d 550 (1982) (Dudley, J., concurring opinion).

As Tony points out, when our court held that, under Rule 12(b)(8), Pam's Pulaski County divorce from bed and board action precluded Tony's filing a new absolute divorce action (based on new rounds of eighteen-months separation) in Saline County, he was then unable to return to the Pulaski County action to assert his new cause. As this court held in *Price v. Price*, 215 Ark. 425, 220 S.W.2d 1021 (1949), a plaintiff may file an amendment alleging a cause of action which matured after the filing of the original complaint, but no such amendment or new cause can be filed after the trial has commenced. Here, the Pulaski County limited divorce action not only had commenced, it had been decided and appealed. *See also Dorris v. Dorris*, 249 Ark. 580, 460 S.W.2d 98 (1970). Thus, even though Tony had a new and separate cause of action for an absolute divorce to file against Pam, he had nowhere to file it. The majority court obviously now sees its error without mentioning it and tries

to correct the mistake by deleting Rule 12(b)(8) from its earlier opinion. However, the error still remains and confusion prevails now more than ever.

In sum, I still adhere to the interpretation of Ark. Code Ann. § 9-12-303(c) that I set out in my concurring opinion. If read properly, § 9-12-303(c) would permit these parties to resolve all their differences in one court — under the facts here, the Pulaski County Chancery Court. The majority court's supplemental opinion leaves the bar wondering not only what its two opinions now say, but also offers no clue as to how to interpret § 9-12-303(c) or how to proceed in these matters in the future. I would grant Tony's petition for rehearing and issue a new and correct opinion.

ARKANSAS APPELLATE REPORTS

Volume 68

CASES DETERMINED
IN THE

Court of Appeals of Arkansas

FROM
October 20, 1999 — December 22, 1999
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

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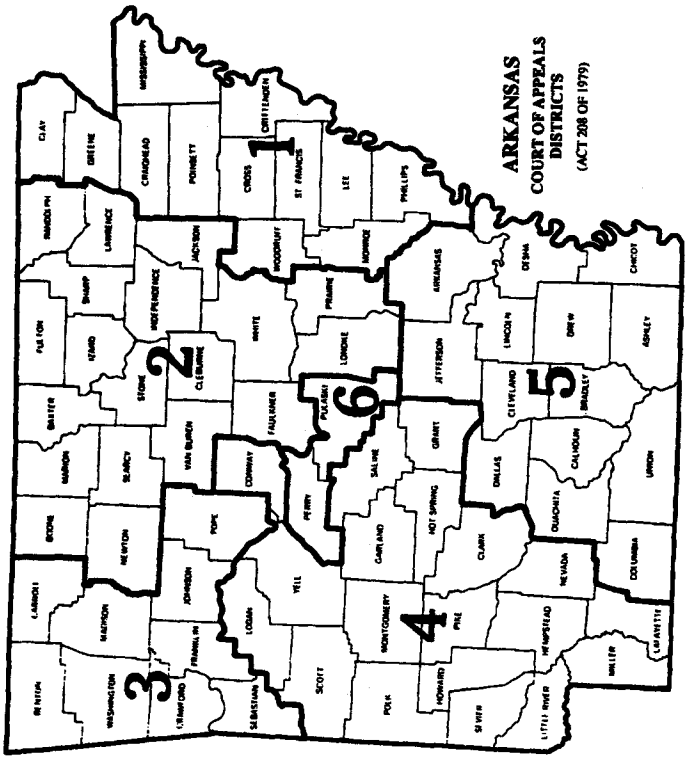
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COURT OF APPEALS
OF ARKANSAS

DURING THE PERIOD COVERED
BY THE VOLUME
(October 20, 1999 — December 22, 1999, inclusive)

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JOHN B. ROBBINS	Chief Judge[1]
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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]

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STANDARDS FOR PUBLICATION OF OPINIONS

Rule 5-2

RULES OF THE ARKANSAS SUPREME COURT AND COURT OF APPEALS

OPINIONS

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

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

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

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall 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 continu-

ing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.

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

OPINIONS NOT DESIGNATED FOR PUBLICATION

Alexander *v.* Hudson Enters., Inc., CA 98-1383 (Roaf, J.), reversed and remanded October 20, 1999.

Allen *v.* State, CA CR 99-390 (Griffen, J.), affirmed December 15, 1999.

American Storage, Inc. *v.* West, CA 99-570 (Bird, J.), affirmed December 22, 1999.

Arkansas Bankers Life Ins. Co. *v.* Tomerlin, CA 99-114 (Robbins, C.J.), affirmed December 1, 1999. Petition for rehearing denied January 12, 2000.

Arnold *v.* State, CA CR 99-35 (Robbins, C.J.), affirmed November 3, 1999. Petition for rehearing denied December 15, 1999.

Arrington *v.* Ramsey, CA 99-238 (Neal, J.), affirmed December 1, 1999.

Bailey *v.* State, CA 99-700 (Per Curiam), Appellee's Motion to Dismiss Appeal denied November 3, 1999.

Barfield *v.* State, CA CR 99-233 (Crabtree, J.), affirmed November 3, 1999.

Barnes *v.* Krupp, CA 99-293 (Hart, J.), reversed and remanded November 17, 1999.

Batts *v.* State, CA CR 99-468 (Hart, J.), affirmed December 22, 1999.

Bedford *v.* State, CA CR 99-227 (Roaf, J.), affirmed December 15, 1999.

Beech *v.* Crawford, CA 99-384 (Pittman, J.), affirmed November 10, 1999.

Bell *v.* Bell, CA 99-503 (Crabtree, J.), reversed and remanded December 22, 1999.

Benton *v.* Cooper Indus. Prods., CA 99-490 (Crabtree, J.), affirmed December 1, 1999.

Black *v.* Black, CA 99-223 (Griffen, J.), affirmed October 27, 1999.

Blueford *v.* State, CA CR 99-400 (Meads, J.), remanded for rebriefing December 1, 1999.

Bollen *v.* Beltran, CA 98-1534 (Stroud, J.), affirmed October 20, 1999.

Brandon *v.* State, CA CR 99-267 (Crabtree, J.), dismissed December 8, 1999.

Brooks *v.* Arkansas Dep't of Human Servs., CA 99-303 (Robbins, C.J.), dismissed November 3, 1999.

Brooks *v.* Shepherd, CA 98-1526 (Hays, S.J.), affirmed as modified November 10, 1999.

Brusstar *v.* University of Ark., CA 99-559 (Neal, J.), affirmed December 8, 1999.

Burnett *v.* State, CA CR 98-1440 (Stroud, J.), affirmed October 27, 1999.

Buie *v.* Government Employees Ins. Co., CA 99-269 (Jennings, J.), affirmed December 8, 1999. Petition for rehearing denied January 12, 2000.

Chapman *v.* State, CA 99-204 (Crabtree, J.), affirmed November 3, 1999.

Cotner *v.* Hartford Sch. Dist., CA 99-128 (Stroud, J.), affirmed November 10, 1999.

Cox *v.* Forrest City Housing, CA 99-261 (Hart, J.), affirmed November 10, 1999.

Crase *v.* Grooms, CA 99-342 (Griffen, J.), affirmed December 1, 1999.

Cullers *v.* State, CA CR 99-337 (Pittman, J.), affirmed December 22, 1999. Petition for rehearing denied January 26, 2000.

Dave's Transmission *v.* Humphries, CA 99-192 (Robbins, C.J.), affirmed November 10, 1999.

Davis *v.* Davis, CA 99-202 (Bird, J.), affirmed October 27, 1999.

Davis, Doris Ann *v.* State, CA CR 99-636 (Griffen, J.), affirmed December 22, 1999.

Davis, Eric *v.* State, CA CR 98-1135 (Robbins, C.J.), affirmed October 20, 1999.

Delancey *v.* Dollar General, CA 99-171 (Pittman, J.), affirmed December 15, 1999. Petition for rehearing denied January 19, 2000.

Devore *v.* Cloud Corp., CA 98-1307 (Jennings, J.), affirmed December 15, 1999.

Dierks *v.* Sanders, CA 99-270 (Meads, J.), affirmed December 1, 1999.

Dillard *v.* State, CA CR 98-1083 (Neal, J.), affirmed November 10, 1999.

Dixon *v.* Dixon, CA 99-463 (Meads, J.), affirmed December 22, 1999.

Dwyer *v.* State, CA CR 99-489 (Meads, J.), affirmed November 10, 1999.

Eddings *v.* Eddings, CA 99-662 (Stroud, J.), affirmed December 1, 1999.

Eldridge *v.* State, CA 99-177 (Robbins, C.J.), affirmed December 22, 1999.

Elliott *v.* State, CA CR 99-666 (Bird, J.), affirmed December 22, 1999.

Ellis *v.* State, CA CR 99-1 (Crabtree, J.), affirmed December 15, 1999.

England *v.* Sarah Lee Hosiery, CA 99-105 (Bird, J.), affirmed November 3, 1999. Petition for rehearing denied December, 15, 1999.

Evants *v.* Snider Telecom, CA 99-175 (Jennings, J.), affirmed November 3, 1999.

Farrow *v.* State, CA CR 99-569 (Meads, J.), affirmed December 15, 1999.

Flippo *v.* State, CA CR 99-442 (Jennings, J.), affirmed December 22, 1999. Petition for rehearing denied January 19, 2000.

Foust *v.* Wal-Mart Stores, Inc., CA 99-213 (Jennings, J.), affirmed November 10, 1999.

Fulton *v.* City of Fayetteville, CA 99-394 (Stroud, J.), affirmed December 8, 1999. Petition for rehearing denied January 12, 2000.

Gaddie *v.* State, CA CR 98-1074 (Hart, J.), affirmed December 15, 1999.

Gaffney *v.* State, CA CR 99-231 (Griffen, J.), affirmed December 1, 1999.

Gilchrist *v.* Director, E 99-177 (Hays, S.J.), reversed and remanded December 8, 1999.

Gordon *v.* Atlas Carriers, Inc., CA 99-453 (Jennings, J.), affirmed December 22, 1999. Petition for rehearing found moot February 16, 2000.

Hall *v.* State, CA CR 98-1537 (Robbins, C.J.), affirmed November 10, 1999.

Hamilton *v.* Rheem Air Conditioning Div., CA 99-610 (Neal, J.), affirmed December 22, 1999.

Harkins *v.* Heathcock, CA 99-313 (Crabtree, J.), affirmed October 20, 1999.

Hearn *v.* Arkansas Burial Ass'n Bd., CA 98-1439 (Hays, S.J.), affirmed November 10, 1999.

Hearn *v.* State, CA CR 99-45 (Griffen, J.), affirmed November 10, 1999.

Hirrill *v.* Director, E 99-110 (Hart, J.), reversed and remanded November 3, 1999.

Holt-Krock Clinic, PLC *v.* Bodiford, CA 99-347 (Stroud, J.), appeal dismissed November 17, 1999.

Hoots *v.* Hoots, CA 99-423 (Crabtree, J.), affirmed December 1, 1999.

Housing Auth. of Trumann *v.* Lively, CA 99-543 (Hays, S.J.), affirmed December 8, 1999.

Howard *v.* Dr. Pepper Bottling Co., CA 99-505 (Stroud, J.), affirmed November 3, 1999.

Hoyer *v.* State, CA CR 99-781 (Per Curiam), Appllee's Motion to Dismiss appeal denied October, 20, 1999.

Isenhour *v.* Lockwood Elec., CA 99-371 (Bird, J.), reversed and remanded with instructions to award benefits December 15, 1999.

J.F. *v.* State, CA 99-429 (Pittman, J.), affirmed December 1, 1999.

Jackson, Anarian Chad *v.* State, CA CR 99-232 (Griffen, J.), affirmed November 10, 1999.

Jackson, Donald *v.* State, CA CR 99-224 (Neal, J.), affirmed October 20, 1999.

Jackson, Larry Gene *v.* State, CA CR 99-146 (Neal, J.), affirmed November 17, 1999.

Jackson, Michael *v.* State, CA CR 99-325 (Roaf, J.), affirmed November 3, 1999.

James *v.* State, CA CR 99-469 (Bird, J.), affirmed December 22, 1999.

Jenkins *v.* State, CA CR 99-693 (Robbins, C.J.), affirmed December 15, 1999.

Jennings *v.* State, CA CR 98-1381 (Bird, J.), affirmed October 20, 1999.

Johnson *v.* Arkansas Dep't of Human Servs., CA 99-286 (Jennings, J.), affirmed December 22, 1999.

Jones *v.* State, CA CR 99-320 (Jennings, J.), affirmed December 22, 1999.

Kelly *v.* State, CA CR 99-159 (Meads, J.), affirmed November 17, 1999.

Kelsay *v.* Wise, CA 98-1487 (Meads, J.), affirmed December 8, 1999.

Kennedy *v.* State, CA CR 99-193 (Griffen, J.), affirmed November 17, 1999.

King *v.* Johnson, CA 99-575 (Neal, J.), affirmed December 15, 1999.

LaGrone *v.* State, CA CR 99-79 (Hays, S.J.), affirmed October 20, 1999.

Lamere *v.* State, CA CR 99-291 (Roaf, J.), affirmed December 8, 1999.

Lanier *v.* Arkansas Dep't of Human Servs., CA 99-113 (Hart, J.), reversed and remanded November 17, 1999.

Leath *v.* Leath, CA 99-229 (Griffen, J.), affirmed December 8, 1999.

Lee *v.* Asher, CA 99-144 (Per Curiam), dismissed November 17, 1999.

Lee *v.* State, CA CR 99-298 (Roaf, J.), affirmed November 17, 1999.

Lewis *v.* State, CA CR 99-348 (Pittman, J.), affirmed December 1, 1999.

Lloyd *v.* Georgia-Pacific Corp., CA 99-461 (Hays, S.J.), affirmed December 8, 1999.

Lockard *v.* State, CA CR 99-51 (Pittman, J.), affirmed October 20, 1999.

McLaughlin *v.* State, CA CR 98-1208 (Griffen, J.), reversed and remanded December 15, 1999.

Martin *v.* Employment Sec. Dep't, E 99-166 (Griffen, J.), reversed and remanded December 1, 1999.

Morrison *v.* Arkansas Dep't of Human Servs., CA 99-419 (Robbins, C.J.), affirmed December 15, 1999.

Moses *v.* State, CA CR 98-1489 (Bird, J.), affirmed November 3, 1999.

Murphy *v.* State, CA CR 99-375 (Jennings, J.), affirmed November 17, 1999.

Nunley *v.* Jacuzzi Bros., Inc., CA 99-465 (Jennings, J.), affirmed December 1, 1999.

Olson *v.* Olson, CA 99-568 (Hart, J.), affirmed December 15, 1999.

Owen *v.* State, CA CR 99-480 (Stroud, J.), affirmed December 22, 1999. Petition for rehearing denied January 26, 2000.

Partee *v.* Washington, CA 99-457 (Crabtree, J.), affirmed November 3, 1999.

Patterson *v.* State, CA CR 99-498 (Jennings, J.), affirmed December 1, 1999.

Payton *v.* State, CA CR 99-412 (Pittman, J.), affirmed December 22, 1999.

Pedco, Inc. *v.* Ergo-Tech, Inc., CA 99-450 (Stroud, J.), affirmed December 8, 1999.

Perry *v.* State, CA CR 98-1460 (Pittman, J.), affirmed November 3, 1999.

Plumlee *v.* State, CA CR 99-300 (Meads, J.), affirmed December 8, 1999.

Pocrass *v.* Arkansas Dep't of Human Servs., CA 99-240 (Griffen, J.), affirmed November 17, 1999.

Poyner *v.* Arkansas Contractors Licensing Bd., CA 98-952 (Jennings, J.), affirmed November 3, 1999.

Ray, Maurice *v.* State, CA CR 99-520 (Bird, J.), affirmed December 1, 1999.

Ray, Robert John *v.* State, CA CR 99-566 (Neal, J.), affirmed December 22, 1999. Petition for rehearing denied January 19, 2000.

Redwine *v.* Jones, CA 99-91 (Hays, S.J.), affirmed on appeal and cross-appeal November 10, 1999.

Reed *v.* State, CA CR 99-448 (Stroud, J.), affirmed December 15, 1999.

Reed *v.* Watkins, CA 99-116 (Hays, S.J.), affirmed December 8, 1999. Petition for rehearing denied January 12, 2000.

Reynolds *v.* Baumgarner, CA 99-16 (Roaf, J.), affirmed December 15, 1999.

Richmond *v.* PMT, L.L.C., CA 99-282 (Hart, J.), affirmed November 3, 1999.

Ricketts *v.* Ricketts, CA 99-877 (Pittman, J.), affirmed November 17, 1999.

Riddle *v.* State, CA CR 99-350 (Robbins, C.J.), affirmed November 17, 1999.

Rivera *v.* Shelby Group, Inc., CA 99-479 (Pittman, J.), reversed and remanded December 8, 1999.

Roberson *v.* State, CA CR 99-95 (Hays, S.J.), affirmed December 1, 1999.

Robinson *v.* State, CA CR 99-446 (Hart, J.), affirmed December 1, 1999.

Rodgers *v.* Mid-State Trust IV, CA 98-1248 (Roaf, J.), appeal dismissed December 8, 1999.

Ross *v.* Newman, CA 99-310 (Pittman, J.), affirmed November 17, 1999.

Sanders *v.* State, CA CR 99-367 (Neal, J.), affirmed December 1, 1999.

Scott *v.* Scott, CA 99-3 (Stroud, J.), affirmed November 17, 1999.

Seay *v.* Wildlife Farms, Inc., CA 99-122 (Hart, J.), appeal dismissed October 27, 1999.

Six *v.* State, CA CR 99-153 (Stroud, J.), reversed and dismissed October 27, 1999.

Smith *v.* Smith, CA 99-279 (Crabtree, J.), affirmed December 1, 1999.

Smith *v.* State, CA 99-651 (Crabtree, J.), affirmed December 22, 1999.

Sowell *v.* Arkansas Dep't of Human Servs., CA 99-198 (Neal, J.), affirmed October 27, 1999.

Starks *v.* State, CA CR 99-137 (Rogers, J.), affirmed November 10, 1999.

Stewart, Gary Lee *v.* State, CA CR 99-132 (Bird, J.), affirmed October 20, 1999.

Stewart, Louis Eddie *v.* State, CA CR 99-188 (Rogers, J.), affirmed November 10, 1999.

Stockberger *v.* State, CA CR 99-338 (Bird, J.), affirmed December 15, 1999.

Strom *v.* State, CA CR 99-200 (Griffen, J.), affirmed as modified December 1, 1999. Petition for rehearing granted and supplemental opinion issued January 19, 2000.

Thomas *v.* Arbor Interiors, Inc., CA 99-548 (Stroud, J.), affirmed December 15, 1999.

Tindall *v.* Feazell, CA 99-602 (Jennings, J.), affirmed December 22, 1999.

Tindall *v.* Hargis, CA 99-585 (Stroud, J.), affirmed December 22, 1999.

Trader *v.* Single Source Transp., CA 99-579 (Meads, J.), affirmed December 15, 1999.

United States Fidelity & Guar. Co. *v.* Triple H Elec. Co., CA 99-245 (Roaf, J.), affirmed November 10, 1999. Petition for rehearing denied January 12, 2000.

Wal-Mart Stores, Inc. *v.* Godfrey, CA 99-510 (Neal, J.), affirmed November 3, 1999.

Ward *v.* Ward, CA 99-424 (Crabtree, J.), affirmed December 22, 1999.

Watson *v.* State, CA CR 99-252 (Crabtree, J.), affirmed November 3, 1999.

Weems *v.* State, CA CR 99-439 (Hart, J.), affirmed November 3, 1999.

Wheeler *v.* State, CA CR 99-596 (Crabtree, J.), affirmed November 17, 1999.

Whitaker *v.* State, CA CR 99-309 (Hays, S.J.), reversed and remanded December 15, 1999.

White *v.* Stout, CA 98-1053 (Neal, J.), affirmed December 15, 1999.

Williams *v.* State, CA CR 99-399 (Hays, S.J.), affirmed November 17, 1999.

Willis *v.* City of Little Rock, CA 99-218 (Neal, J.), affirmed November 17, 1999.

Wonderland Cave & Club, Inc. *v.* Hughes, CA 99-251 (Crabtree, J.), affirmed December 8, 1999.

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Allen *v.* Director of Labor, E 99-192, December 15, 1999.
Angus *v.* Director of Labor, E 99-124, October 20, 1999.
Barnes *v.* Director of Labor, E 99-188, December 15, 1999.
Bell *v.* Director of Labor, E 99-186, December 1, 1999.
Boatright *v.* Director of Labor, E 99-175, December 1, 1999.
Bradley *v.* Director of Labor, E 99-199, December 15, 1999.
Brailsford *v.* Director of Labor, E 99-127, October 20, 1999.
Brown, Howard D. *v.* Director of Labor, E 99-123, October 20, 1999.
Brown, O'Melvin *v.* Director of Labor, E 99-196, December 15, 1999.
Catron *v.* Director of Labor, E 99-136, October 20, 1999.
Century Flooring *v.* Director of Labor, E 99-150, November 10, 1999.
Council *v.* Director of Labor, E 99-189, December 15, 1999.
Craig *v.* Director of Labor, E 99-197, December 15, 1999.
Crossett C-Store, Inc. *v.* Director of Labor, E 99-139, October 20, 1999.
Daniels *v.* Director of Labor, E 99-187, December 15, 1999.
Davenport *v.* Director of Labor, E 99-141, November 10, 1999.
Garrison *v.* Director of Labor, E 99-169, November 17, 1999.
Green *v.* Director of Labor, E 99-145, November 10, 1999.
Grimes *v.* Director of Labor, E 99-149, November 10, 1999.
Guthrie *v.* Director of Labor, E 99-172, December 1, 1999.
Haynes *v.* Director of Labor, E 99-180, December 1, 1999.
Heggins *v.* Director of Labor, E 99-191, December 15, 1999.
Herring *v.* Director of Labor, E 99-138, November 10, 1999.
Holder *v.* Director of Labor, E 99-171, December 1, 1999.
House *v.* Director of Labor, E 99-174, December 1, 1999.
Houston *v.* Director of Labor, E 99-168, November 17, 1999.
Jackson *v.* Director of Labor, E 99-194, December 15, 1999.
Knox *v.* Director of Labor, E 99-183, December 1, 1999.
Krutz *v.* Director of Labor, E 99-151, November 10, 1999.
Martin *v.* Director of Labor, E 99-185, December 1, 1999.
McClorn *v.* Director of Labor, E 99-165, November 17, 1999.
McKee *v.* Director of Labor, E 99-176, December 1, 1999.

Moore *v.* Director of Labor, E 99-153, November 10, 1999.
Murphy *v.* Director of Labor, E 99-137, November 10, 1999.
Myrick *v.* Director of Labor, E 99-126, October 20, 1999.
Phillips *v.* Director of Labor, E 99-158, November 17, 1999.
Quality Mfg'd Homes *v.* Director of Labor, E 99-131, October 20, 1999.
Prince *v.* Director of Labor, E 99-148, November 10, 1999.
Reaves *v.* Director of Labor, E 99-144, November 10, 1999.
Robinson, Lekisha *v.* Director of Labor, E 99-122, October 20, 1999.
Robinson, Morris *v.* Director of Labor, E 99-184, December 1, 1999.
Russell *v.* Director of Labor, E 99-195, December 15, 1999.
Sanchez *v.* Director of Labor, E 99-154, November 17, 1999.
Scott *v.* Director of Labor, E 99-128, October 20, 1999.
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Smith *v.* Director of Labor, E 99-125, October 20, 1999.
Smallwood *v.* Director of Labor, E 99-162, November 17, 1999.
Tucker *v.* Director of Labor, E 99-198, December 15, 1999.
USA Truck, Inc. *v.* Director of Labor, E 99-202, December 15, 1999.
Vondran *v.* Director of Labor, E 99-142, October 20, 1999.
Walters *v.* Director of Labor, E 99-164, November 17, 1999.
Ward *v.* Director of Labor, E 99-155, November 17, 1999.
Washington *v.* Director of Labor, E 99-140, November 10, 1999.
Wiggins *v.* Director of Labor, E 99-179, December 1, 1999.
Williams *v.* Director of Labor, E 99-135, October 20, 1999.
Witherspoon *v.* Director of Labor, E 99-159, November 17, 1999.
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