ADVANCE SHEET MEETING
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Review thrown together at the absolute last minute by . . . . .

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Arkansas Supreme Court

Edwards v. Edwards, 2009 Ark. 580. The Arkansas Supreme Court had decided in a series of cases that the trial judge in a divorce case did not have the authority to defer a decision on alimony. Here the trial judge did not address the issue of alimony in a divorce decree. The wife filed a motion for amendment of findings of fact and conclusions of law and among other things asked for alimony. The trial judge granted the motion in part and denied the request for new trial. At the end of the order the judge stated that a hearing would be scheduled as soon as the court and counsel could agree on a date and time. The wife appealed. The case went to the Court of Appeals which kicked it back a year later on the ground that the order was not a final one. After the appeal was dismissed the circuit judge held a hearing on the issues raised in the motion for reconsideration including the alimony. The judge entered a supplemental decree which included an alimony award. This time the husband appealed but before the circuit judge ruled or the motion was deemed denied the husband filed a notice of appeal

The Court of Appeals certified the case to the Supreme Court stating that there was a jurisdictional question. In the Grady case, the Arkansas Supreme Court had said the circuit judge had no authority to reserve the question of alimony for later consideration citing the language of Ark. Code Ann §9-12-312. Was the subject matter jurisdiction? If so, the trial court did not have jurisdiction to give the relief anyway. If it was not subject matter jurisdiction, since nobody thought of it until it got up to the Court of Appeals the

issue could not be raised at this late date in the Court of Appeals could go ahead and decide the issue (whatever it was) that the husband didn't think to raise on appeal.

The Supreme Court recognize that it had been rather sloppy with its language in the past but there is a big difference between jurisdiction -- which a circuit court certainly has in a divorce case to grant alimony and power which is the authority under a statute which may or may not implicate subject matter jurisdiction. Here all were talking about is power, so the trial judge did have the "jurisdiction" to award the alimony. He may not have had the power, that the husband's lawyer didn't think of that. The case was sent back to the Court of Appeals to decide the issue.

Pounders v. Rief, 2009 Ark. 581. Rief reviewed a prenup for Pounders. The marriage appears to last a just slightly over three years. Pounders sued Reif apparently for not explaining the prenup to her well enough and for pressuring her into signing the agreement. Reif argued that the statute of limitations precluded this claim. Pounders argued that this should be the five year statute on a written contract.

There wasn't actually a written contract for legal services, but there was a written contract for the prenup, which there has to be. Attached to the prenup was a certification that the lawyer had signed off on:

> I, William Michael Reif, Attorney At Law, have consulted with Lisa Nicole Kirk and advised her of her legal rights and the legal effect of this Agreement between she and David Pounders, dated on this 16th day of May, 2003; specifically, I have gone over the contractual agreement with her, clause by clause, explaining it to her and answering any question that she may have concerning it prior to her execution thereof; furthermore, I have explained to her what her legal rights and obligations would be absent this contractual agreement and under this contractual agreement.

Pounders asserted that the language in that certification constituted a contract. It was in writing. There is a five year statute of limitations for contracts in writing, Ark. code Ann §16-56-111.

Well, it wasn't a contract. First it had to do with something that had already happened rather than something that was getting ready to happen. Second, you have to have these certifications to make the prenup enforceable and let the husband keep all his money when he's tired of sleeping with the dumb young hot girl he's married and is ready for a new one.[1]

[1] This is a principle of general applicability. There was no evidence that the plaintiff in this particular case was dumb, young, or hot. In fact, the Court left any mention of those elements out of the opinion. It's just that that's frequently the case.

I know that the court does its very best to avoid telling anybody what the law is when it does not absolutely have to, but one cannot help but wonder what the law would've been in this case had there actually been a written contract for legal services. Frequently written contracts are used. In personal injury cases their mandatory if you're going to charge a contingent fee, and who doesn't? The court pointed out the two contradictory rules of construction for statutes of limitations. One is that you ordinarily choose the longer time. The other is that you look to the gist of the action. Clearly the gist of the action in this case was negligence. Clearly the longer statute of limitations was one on a written contract.

I don't think there is any serious question that the certification here was not a written contract. In the future, I would advise nubile young things to get a written agreement with the lawyer who is going to be reviewing their prenups. Frequently the guys will tire of them in less than five years, so they would be wise to keep their options open.

Williams v. State. 2009 Ark. 582. This is a per curiam remanded the case for rebriefing. The defendant is convicted of capital murder, having been charged with capital murder,, kidnapping felon in possession of a firearm first degree domestic battery first degree child endangerment, theft of cable services, illegal parking, and mopery. He alleges that the trial judge admitted hearsay evidence improperly which constituted the only evidence that the jury heard about his mental status just prior to the murder. The court orders a supplemental record to include the jury's verdict forms. Now come on! How in the bloody hell are verdict forms going to help you know whether or not the trial judge admitted hearsay evidence? Is the court just getting lazy or what?

On the retirement of Justice Annabelle Clinton Imber the court issues a per curiam about what a wonderful Justice she has been. It went through her many years of faithful service to the legal system in the state of Arkansas and praised her for the work she has done. Corbin dissenting.[2]

[2] Not really. Just wanted to see if you were paying attention.

Arkansas Court of Appeals

Seago v. Department of Human Services. Reid v. Department of Human Services, Broaderick v. Department of Human Services.

"It's a pity there's no hell for him to go to."
-Christopher Hitchens commenting on the death of Jerry Falwell

The quote, while arguably tasteless and inflammatory on the eve of Falwell's death, sums up how I feel about Tony Alamo. Not really, I guess. I guess there's really no way that finite evil can deserve infinite punishment, but Tony Alamo deserves a lot more punishment than he'll ever get in the life he's got left.

These cases really add nothing to the law. They're just a catalog of the unbelievably barbaric treatment to which the Alamo Christian Ministries subjected the unfortunate children of Alamo's deluded followers. Young girls were "married" off to old men in polygamous relationships. Children who rebelled in any way were subjected to brutal beatings or forced to "fast" for days on end. All this was justified in the name of Alamo's perverse religion which gives a bad name to the "religion" of the Taliban or the Spanish Inquisition. Parents allowed their children to be subjected to this. The state took the children. Good.

Nguyen v. FM Corporation, 2009 Ark.App. 775. Workers compensation commission decided that there was not enough evidence that the injured worker himself on the job. Arkansas Court of Appeals reverses. Arkansas Court of Appeals says that it is obvious that this man had a pre-existing condition that was unrelated to his work but that he undisputedly suffered a dramatic onset of symptoms after an incident at work that ended up resulting in surgery.

This is the kind of ridiculous decision that we get out of the Arkansas workers compensation commission from time to time. Usually however these are affirmed. The climate is the party with the burden of proof. The way the substantial evidence rule works, the party with the burden of proof can always lose. The finder of fact can simply disbelieve all the evidence. At some points, however, the Arkansas Supreme Court and Court of Appeals have said enough is enough. When it gets to be so blindingly ridiculous as here they will reverse and they did.

Sivixay v. Danaher Tool Group, 2009 Ark App 786. Sometimes the ridiculous nature of the Worker's Compensation Commission's rulings can be reduced to a sole issue. Here the worker was injured on the job. Everyone seems to admit that the injury was serious. But the employer denied wage loss disability was appropriate based on an offer to return the worker to his old job. The worker said he couldn't do his old job, and had to take a lower paying job. The ALJ didn't buy it, but the full commission did, finding that the

employee was ineligible for wage-loss benefits because he refused a bona fide and reasonably obtainable offer for the same wages he was earning at the time of the accident. An employee who is extended a bona fide and reasonably obtainable offer to be mployed at wages equal to or greater than his average weekly wage at the time of the accident is not entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment. Ark. Code Ann. § 11-9-522(b)(2) (Repl. 2002). The employer has the burden of proof on this issue.

The commission gave little weight to the worker's claim that he wasn't able to do his old job. The Court of Appeals found that hard to believe:

> From our review of the record, we cannot conclude that the Commission's decision displays a substantial basis for the denial of relief. The question before the Commission was whether the job in the forge department was a bona fide offer of employment that disqualified appellant from receiving wage-loss benefits. Obviously, an employee must be capable of performing the required job activities in order for the proposed position to be considered a bona fide offer of employment. According to the description of the job and appellee's own witness, the work in the forge department takes place in a hot environment, and the job is strenuous and physically demanding. Following the accident, appellant underwent multiple surgeries that involved the removal of eighty-percent of his stomach, multiple feet of the small intestine, a significant portion of the transverse colon, and half of his liver. As a result,
> appellant suffers from digestive maladies that have caused a significant loss in weight that he has not been able to regain in the six years following the accident. Dr. Moffitt opined, and appellee accepted, that appellant sustained a significant degree of physical impairment of thirty-five percent, noting that appellant's "physical activity is somewhat limited due to his weakness" associated with his chronic condition. Based on the objective evidence, the Commission's decision that the position in the forge department was a bona fide offer of employment defies common sense and logic. Reasonable persons with the same facts before them could not conclude that a 100-pound man, who has trouble eating and maintaining nutrition and whose weight fluctuates due to digestive problems caused by the resection of large portions of his internal organs, is physically capable of performing a labor-intensive job in a hot environment on a day-to-day basis. Accordingly, we reverse the Commission's decision and remand for proceedings consistent with this opinion.

pp. 7-8.

White v. Ark. State Hwy Transp.Dept. Substantial evidence to uphold commission decision that claimant wasn't permanently and totally disabled. The commission's decision was not sufficiently ridiculous to be reversed.

Griffith v. Medcath, Inc. Here the workers compensation commission's decision is barely ridiculous and must be affirmed.

Maulding v. Price's Utility Contractors, commission determination on the extent of permanent disability affirmed substantial evidence. I'm not sure that this was even ridiculous at all.

Potlatch Corp v. Word, This is almost another one of the routine affirmed for substantial evidence cases, but there is one difference here. Basically, claimant had an incident at work. At first she didn't report it as an on-the-job injury. In my experience, that's usually fatal to a workers compensation case. The administrative law judge felt the same way and denied the claim. For some reason, the workers compensation commission reversed. The comp commission's decision was upheld on appeal, as it is supposed to be under the rules.

The only interesting thing about this was that the respondent may be argument that since the claimant had made a claim for short-term disability benefits under the employer's short-term disability plan they should get credit for whatever the employee collected. There was not adequate evidence to resolve that dispute, so the Court of Appeals remanded it to the commission for further proceedings on the respondent's entitlement to an offset.

Look at the statute:

> **11-9-411. Effect of payment by other insurers.**
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> **(a) (1) Any benefits** payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services **or period of disability**, whether those benefits were paid under a group health care service plan **of whatever form or nature**, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, **a self-insured employee health or welfare benefit plan**, or a group hospital or medical service contract.
>
> **(2)** The reduction specified in subdivision (a)(1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy.
>
> **(b)** The claimant shall be required to disclose in a manner to be determined by the Workers' Compensation Commission the identity, address, or phone number of any person or entity which has paid benefits

described in this section in connection with any claim under this chapter.

(c) (1) Prior to any final award or approval of a joint petition, the claimant shall be required to furnish the respondent with releases of all subrogation claims for the benefits described in this section.

(2) (A) In the event that the claimant is unable to produce releases required by this section, then the commission shall determine the amount of such potential subrogation claims and shall direct the carrier or self-insured employer to hold in reserve only said sums for a period of five (5) years.

(B) If, after the expiration of five (5) years, no release or final court order is presented otherwise directing the payment of said sums, then the carrier or self-insured employer shall tender said sums to the Death and Permanent Total Disability Trust Fund.

This applies to any benefits, whether for an injury or not. It even applies to retirement benefits. *Henson v. GE*, 99 Ark. App. 129, 257 S.W.3d 908 (2007).

W.T. v. State. This case just goes to show that you do not have to prove absolutely anything at all to revoke probation. A minor was on probation. He had some pills at school. The pills were never identified as a controlled substance. Nevertheless, probation revocation was upheld on a preponderance of the evidence standard because there was some evidence that he told one student that the pills were Phenergan, his mother had had some Phenergan disappear, and he admitted that he understood that the pills did not belong to him. This is what really bugs me about it though:

> Appellant took pills to school that did not belong to him and attempted to distribute them to another student. By communicating to another student that he did not care if he got caught with the pills and that he was getting ready to take them, appellant demonstrated that he knew it was wrong to bring the pills to school and that he did not care about the consequences of his behavior.

One reason that the kids might not care if he got caught with pills is that he just holds the entire legal and school system in utmost contempt. Another might be that he thinks quite reasonably that there is no reason that he's not entitled to possess the pills. Apparently there was no blanket rule against having pills at school. Still this little nothing evidence was quite sufficient to revoke this kid's probation. The rule is they can revoke your probation if they want to.

Freyn v. Windsor Weeping Mary, LP, this case involves the interpretation of some contracts/leases. One provision said that the lessor would drill at least two wells deep enough to test the "Fayetteville Shale" during the first 18 months. Another provision said that the lessee could abandon the lease pretty much whenever the lessee decided to. The lessee decided to abandon the lease. The lessor sued, Alleging a measure of damages of the amount of money that the lessee would've blown drilling a couple of wells.

The trial court read the contracts as one contract, as he should have, and granted summary judgment for the defendant. This was correct. There was no inconsistency in the two provisions area nor was there any unjust enrichment here.

White v. State. Conviction for breaking and entering reversed and dismissed. Shackleford hired defendant to do yard work and gave them permission to enter his garage. One day the defendant entered the garage and noticed some fishing reels, an air compressor, and some other things and took them in on them. At some later point Shackleford entered his garage and noticed the absence of his fishing reels and as air compressor and the other things. White confessed and pleaded guilty to misdemeanor theft. That wasn't enough for the prosecutor who went forward on breaking and entering charges. The trial judge found him guilty on those charges.

To be guilty of breaking and entering, the defendant would've had to enter Shackleford's garage with the purpose of committing the offense. Obviously you have to rely on circumstantial evidence when the question is the intent of the defendant. Nevertheless, that doesn't mean that you get to ignore that element.

The court noted:

> Taken as a whole, this record supports two equally reasonable conclusions. First, White could have entered the garage and bathroom/storage room intending to steal from Shackleford. Or second, White could have entered the garage and bathroom/storage room intending to get or return yard tools or to use the bathroom, and once inside decided to steal from Shackleford. Faced with these two possibilities, the fact-finder had to speculate about White's entry purpose. A judgment, however, cannot rest on speculation.

p. 4

The Court of Appeals came to the quite logical conclusion that there is no way to tell which of these two scenarios actually happened. The prosecutor failed to prove the case beyond a reasonable doubt. The conviction is going to have to be for misdemeanor theft only.

There was a dissent.

Somehow, I don't think Tschiemer's going to be too worried about me trying to horn in on his gig of writing the official case reviews.