Advance Sheets Meeting January 20, 2012

Constitutional Law

Broussard v. St. Edward Mercy Health System, et al, 2012 Ark. 14. The provision of the Civil Justice Reform Act that purports to require standard of care testimony in medical malpractice cases be provided by "medical care providers of the same specialty as the defendant" violates Section 3 of Amendment 80. Patient turns up with unexplained burn. Surgeon and nephrologist see it, but do little. Plaintiff's expert, not a surgeon or nephrologist, says any doctor should have known to get a specialist who knows what s/he's doing. Trial court excludes this testimony since plaintiff's expert isn't a nephrologist or a surgeon. Reversed.

Administrative Procedure

Twin Rivers Health and Rehab LLC v. Arkansas Health Services Permit Commission, 2012 Ark. 15. The Commission failed to make any findings of fact as to one of the determinations it made. They're not going to consider the argument piecemeal, either. Reversed and remanded for findings of fact and conclusions of law in accord with 25-25-210(b)(2)

Arbitration.

Independence County v. Clarksville, 2012 Ark. 17. Independence County appeals a trial judge's order denying a motion to compel arbitration. Such an order is immediately appealable. The trial court denied arbitration on the basis of lack of mutuality and on the basis that where a party had a right to terminate the entire contract, the contract containing the arbitration agreement was properly terminated. The Supreme Court found the trial judge was right on lack of mutuality. The arbitration provision had a limitation of powers clause which prevented the panel from awarding any monetary damages. Mutuality within the arbitration agreement is required. There's no mutuality where one party is shielded from litigation while reserving to itself the right to sue. Mutuality requires that the terms of the agreement impose real liability on both parties. The damages provision would preclude the panel from enforcing the appellee's primary obligation, which was to purchase electrical power supplied by appellant. The court distinguished *Hamilton v. Ford Motor Credit Co.*, 99 Ark.App. 124 (2007). The court also said that opinions of the Court of Appeals do not have any binding effect on the Supreme Court.

Workers' Compensation

Cedarville Public School v Marshall, 2012 Ark. App. 55. Court of Appeals affirms by memorandum opinion as the commission's finding was supported by substantial evidence.

Tucker v. Bank of America Indemnity Ins. Co. Of North America, 2012 Ark. App 66. Tucker

worked for the bank. Slipped and fell on stairwell going into bank. Commission failed to make findings of fact on which their decision could be examined.

DHS Cases

Bajoie v. DHS, 2012 Ark. App. 62, *Thouvenell v. DHS*. 2012 Ark. App. 56. Termination of parental rights. No merit brief. All hoops jumped through.

Bayron v. DHS, 2012 Ark. App. 75. Fairly detailed history of failure to comply with reunification plans and stay off dope, but all became moot because one of the grounds the court relied on was her "subjecting the children to aggravated circumstances" and she failed to challenge that ground on appeal. Also argues adoptability of children not proven. But here there was at least someone who testified that the children were adoptable. *Cf. Haynes v. Ark. Dept. Of Human Services*, 2010 Ark. 28, where they had no evidence at all on the point.

Domestic Relations

Chastain v. Chastain, 2012 Ark. App. 73. Couple divorced. Didn't hire lawyer, but prepared a decree based on something they found on the Internet. The decree declared that the parties would have joint and equal custody, but that the mother would be the "primary residential parent" and that the father would get very liberal "visitation." Mother then was deployed to Haïti where she met a boyfriend from North Carolina. Upon returning, she resumed taking care of the children. She found a job in North Carolina with a contractor, which would allow her to not have to worry about being deployed overseas and would pay her about twice as much. Father objected to her moving to North Carolina with the children. First question was whether there was true joint custody or whether this order really made her the custodial parent. If she was the custodial parent there is a presumption in favor of relocation that the father would have to rebut.

Civil procedure

Downey Moving & Storage v. Wiseman. 2012 Ark. App. 57. No affidavit of service showing what was served, only a green card. Therefore, there was no valid evidence of service. Not enough that it was alleged in the motion that the summons and complaint were served. Default judgment reversed and dismissed.

It's not clear what the arguments were, but conceivably this could make it necessary to include the affidavit for return of service in every appeal because courts can check for jurisdiction *sua sponte*. That's probably not what was intended here, but the court was insufficiently clear for my comfort.

Appellate Procedure.

Jewell v. Duree- Jewell. 2012 Ark.App. 64. Third time is the charm. Abstract insufficient. Twice before abstract or addendum was faulty.

Lack of final, appealable order.

DHS v. AM et al. 2012 Ark. App. 72. Trial judge ordered DHS to provide school uniforms and maternity clothing to pregnant teenager, as well as "items for AM's baby." DHS appeals, arguing that the court lacked jurisdiction to enter orders regarding a baby not yet born. The purpose of orders like this is to prevent unnecessary removal of the child from the family home. There was no allegation of immediate danger to the health or well-being of the child so they weren't even thinking in terms of removal yet. The trial judge said there was a danger of educational neglect to AM. At a hearing, the judge agreed that the order to purchase items for the baby was premature.

Trial judge entered a 54 (b) certification but didn't set forth any reasons for the 54(b) in the final judgment. Court dismisses without prejudice for lack of final, appealable, order.

Eaton and Moery Farms v. Estate of Lescher, 2012 Ark. App. 67. Trial judge found that a party was entitled to a judgment against another conditioned on a farm being sold to satisfy the debt due the estate. Trial judge also had not yet determined the amount of the judgment. Judgment or order not final or appealable if the issue of damages remains to be decided.

Arlands, LLC v. MPC Color, Inc., et al. 2012 Ark.App. 77. There were two cases pending, *Liberty Bank v. Pinpoint Printing* and *Arlands LLC v. MPC Color, Inc.* An order consolidated both cases and their cross-claims and they were all tried together. On August 29, 2011 a joint final order was entered on all cases and all issues.

In the final order of the trial court entered on August 29, 2011, the court stated:

> This court has determined this to be a final and appealable order on all issues and parties presented to this court in case No. CV 2007-175. If any party wishes to appeal from case No. CV 2010-548, that shall be done by separate appeal as that case was consolidated for hearing purposes in this matter and presents distinct issues from the underlying cause. Accordingly, it is not consolidated for purposes of appeal. Further, this court retains jurisdiction over this matter for the sol [sic] purpose of making determinations with regard to any proposed distribution from the escrow account which may be in dispute.

Arlands filed a notice of appeal in the *Arlands* case on September 15, 2011; Liberty Bank filed in the *Liberty Bank* case on September 16, 2011.

On November 23, the attorney for Arlands filed the record and paid the filing fee. No separate record was filed in the *Liberty Bank* case.

Liberty Bank moved for a separate briefing schedule.

The motion was denied on the ground that no appeal was perfected in the *Liberty Bank* case and it is not a party to the *Arlands* case, so the motion is denied

What were they supposed to do? There's only one record. This is a giant trap in cases involving multiple parties.

Raulston v. Waste Management, Inc. 2012 Ark.App. 68. Pages 13 through 19 are not included in brief. File substituted brief.

Stadler v. Warren, 2012 Ark. App. 65. Real estate boundary goes with fence that had been up for 50 years and that seven witnesses testified it had been their understanding that the fence was the boundary line. Appellant argues that no *owner* of the tracts of land indicated that they thought the fence was the boundary, citing a case *Rebom v. Buffalo* 260 Ark. 531 (19 76). But the court of appeals thought they were expanding *Rebom* beyond its holding and there were no cases applying the holding to any facts other than those in *Rebom*. Affirmed.

Criminal Law

Crouse v. State. Unsuccessful *Anders* brief. Sentence of 60 months probation for Y felony. You can't do that. Then the defendant promptly violated probation. Sent to prison. Underlying sentence was illegal, so no probation, so remand for proceedings consistent with opinion. Reversed.

Magness v. State, 2012 Ark. 16. Conviction for escape reversed and dismissed since the State failed to prove he was in custody which is a required element of escape. Released on bond pending bed space subject to conditions. Left state without written permission and failed to contact the sheriff's department and his bondsman in violation of provisions of the release. Defendant moved for directed verdict on the ground the State failed to prove he was in custody. It's a question of first impression whether a convicted felon released on bed-space bond is in constructive custody to make him liable for escape when he violates a condition of release. Escape is the unauthorized departure of a person from custody. There are various meanings of custody in various circumstances, but the temporary release program allows the judge to impose terms and conditions "to ensure the offender's return to custody," which must mean he's not in custody during the release. Bond is not a form of custody, according to the testimony of the bond company representative (why her testimony on a legal issue makes any difference is not explained). While he violated the conditions of the order allowing his release, he did not escape from custody. The circuit court erred in denying his motion for directed verdict. Reversed and dismissed.

Jones v. State, 2012 Ark. App. 69. No merit brief and *pro se* brief. No merit. Admitted to

violating some terms of probation, and sentences after probation can be higher.

Kimmel v. State, 2012 Ark.App. 70. No merit brief, but there was no transcript of the hearing. Need supplemental brief with transcript of hearing in record and abstract of hearing in brief.

Clark v. State, 2012 Ark. App. 60. Argument that the arrest warrant wasn't in compliance with Ark. R. Crim. P. 7.1(c) because there was no independent judicial determination of probable cause. But the addendum was not sufficient so ordered rebriefed.

Benton v. State, 2012 Ark. App. 71. Second degree forgery with respect to a check and theft by receiving in connection with a gold ring. Someone broke into the victim's house and stole a ring and her checks. The ring was purchased in 1993 for $800 or $900. Stigger, a felon on parole and admitted crack-cocaine addict cashed the $150 check at A-Z Mart in Stuttgart. She said Benton gave her the check. Benton supposedly owed Stigger $50 for turning a trick and gave her the check saying the check belonged to his girlfriend[i] and that she should cash it and take her $50 from the check. She said she gave the rest to Benton. He also tried to get her to cash a second check, but it had the same name and stuff, so she refused to cash it. The police investigated. After Stigger told them she got the check from Benton, they arrested him. He had the ring on his person. He said he found it on the ground immediately upon the police removing the ring from his pocket. He blurted that out before they even asked him what he was doing with the ring. Jury convicted Benton of second-degree forgery and theft by receiving. Thirty years on each count, running consecutively.

The whole court agreed on the theft by receiving charge. Unexplained possession or control of stolen property gives rise to a presumption that the person in whose possession the property is found knew the property was stolen. The presumption is not overcome by a plausible explanation for possession. That's all for the jury to determine. The ring was recently stolen at the time it was found in his possession.

There was a dissent as to the forgery conviction. The problem is that a person can't be convicted of a felony based on accomplice testimony unless that testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. The victim's testimony was enough t show that the check was forged. The dissent said that if you take Stigger's testimony out of the case, the rest of the evidence is not enough to connect Benton with the forgery. But the ring and the checkbook were taken at the same time and the fact that Benton had the victim's ring tends to connect Benton to the forgery. This circumstantial evidence was substantial. The dissent noted that the conviction regarding the ring was good because the defendant blurted out that he had found the ring on the ground before they even confronted him about ownership. But without Stigger's testimony, there's nothing showing Benton even had the check. It is still only speculation that the check was taken at the same time as the ring. When the victim reported it, she did not notice that the checks were taken. Benton could have gotten the ring in other ways than carrying out the burglary of the house by

himself. The state didn't even try to charge him with burglary. There was no other evidence that Benton was at the A-Z Mart when the check was cashed. No handwriting analysis even though Stigger had said she received the check from Benton "all made out."

This is just another case illustrating that the accomplice corroboration provision should not be taken seriously.

Plessy v. State, 2012 Ark. App. 74. *Pro forma* motion for directed verdict with no details prevents review on appeal. It was okay for the state to amend the information to include a firearm enhancement and to amend to allege first-degree murder, even though the prosecutor only gave notice that the information would be amended to include the firearm charge. There was no argument at trial as to what in the amendment was challenged or how it unfairly prejudiced defendant. The amendment was given to the trial court and the defendant's lawyer at the beginning of the trial as the court prepared to read the information to the jury. The state is entitled to amend the information at any time prior to the case being submitted to the jury as long as the amendment does not change the nature or degree of the offense charged.

There was some question whether Plessy was known as "Q," The prosecutor took a letter from his school file, signed "Q," and cross examined Plessy about it. Plessy didn't recognize the letter or the addressee. The prosecutor asked how the letter was signed. Defense asked for a bench conference. The trial judge told the prosecutor not to ask any more questions about it unless Plessy admitted he wrote it. But back in open court, the prosecutor again asked Plessy how the letter was signed. Before defense lawyer could object, Plessy answered "Q." Trial court denied motion for mistrial on the ground that Plessy had already testified that he never saw the letter and Defendant could reemphasize that. Supreme Court said that the prosecutor's asking the question again didn't result in a level of prejudice that would make denial of a mistrial an abuse of discretion. There was other evidence that people called Plessy "Q."

It was okay to allow the dying declaration into evidence even though the victim gave alleged conflicting statements to witnesses. The statements weren't necessarily inconsistent.

Admission of certain photographs wasn't an abuse of discretion.

Double Jeopardy.

Walker v. State. 2012 Ark. App. 61. Defendant and accomplice robbed a couple at their home. The prosecutor charged the defendant with two counts of aggravated robbery, two counts of first-degree terroristic threatening, and one count of first-degree battery. At a pretrial hearing the defendant moved to dismiss the information because the prosecutor forgot the *contra pacem* clause ("Against the peace and dignity of the State of Arkansas") as required by the Arkansas Constitution. Defendant also complained that the first degree battery charge was overcharging

because the defendant used his gun as a club to hit the victim rather than as a gun.

The prosecutor then moved to amend to meet the objections of the defense. The amendment was allowed. Standards are pretty lenient on amending informations, so long as the defendant can't show prejudice.[ii]

Defendant was convicted on all charges (as amended). He contended that convicting him of all the charges arising out of the incident violated double jeopardy.

Criminal Procedure

Duncan v. State 2012 Ark. App. 63. Defendant was convicted of possession of a controlled substance–cocaine, simultaneous possession of drugs and firearms, possession of a prohibited weapon, possession of a controlled substance–marijuana (third offense), and felon in possession of a firearm. He challenges the controlled substance and simultaneous possession of drugs and firearms on the basis of double jeopardy. But it wasn't made in the trial court below.

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[i] We're supposed to believe that his girlfriend gave him a check so he could pay off his outstanding hooker account.

[ii] Although I usually take the criminal defendant's side in on questions of law, I have to agree that the standard ought to be fairly lenient.