

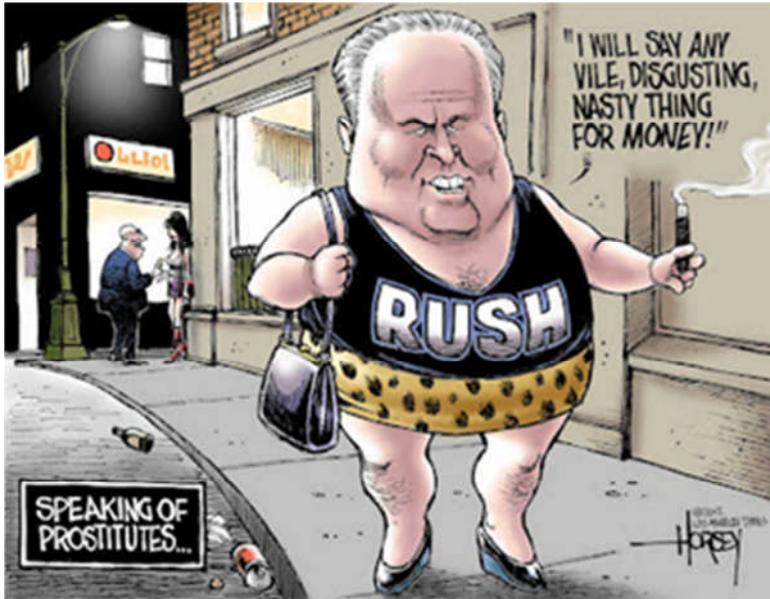
# Arkansas Supreme Court

## Medical Malpractice Disqualification of Counsel

*Bulsara v. Watkins*, 2012 Ark. 108. Defense counsel undertook to "represent" the partner of the defendant, who was not sued, and who was a treating physician. He then discussed the case with the treating non-defendant doctor without the permission of the plaintiff and to restrict plaintiff's counsel's access to the treating physician.

This violates Ark. R. Evid. 503(d)(3)(B) and Ark.R.Civ.P. 35(c)(2) (2011) and warrants disqualification of the attorney and a new trial.

This is an important case. First, it shows that there are consequences to violating the prohibition of *ex parte* contacts with treating physicians. It also puts an end to the practice of defendants' lawyers showing up to "represent" the witnesses in medical malpractice cases.



There was a strong dissent on whether disqualification was necessary. They pointed to other cases in which the dissent noted that relief short of disqualification might have been sufficient.

## Criminal Law Disqualification of Counsel

*Samontry and Pornpiemon Phouangmany v. State*, 2012 Ark. 105. Tschiemer handled this one on appeal,, so I think he should have to pronounce the names of the defendants three times fast. The intrepid Cabot Police thought "Cabot's got a whorehouse in it. Lord have mercy on our souls." They busted Samontry and Phouangmany

for prostitution, and Samontry's ex-husband for promoting prostitution or patronizing a prostitute or something. All of them were represented by Reggie Koch. In district court, the ex-husband was acquitted but the two women were convicted. The two women appealed to circuit court. Two weeks before trial, the State moved to disqualify Koch as the attorney for the defendants. The motion was only filed in the Phouangmany case, not the Samontry case, for some reason. The trial judge disqualified Koch.

The interlocutory appeal involving Samontry wasn't before the court because the motion and order were only filed in Phouangmany's case.

There was no evidence of an actual conflict of interest. The State surmised that there was a possibility that Richard could testify against Phouangmany's interest on some point, but there wasn't really any evidence to support that. Everyone's position all along was that they were all innocent.

The Supreme Court reversed the order disqualifying Koch.

## Good Faith Exception

*State v. Tyson*, 2012 Ark. 107. The cops went through three garbage bags they saw taken from Trailer 23 and thrown in the trash. There were some items used in preparing meth and some baby diapers. There was an absence of all the necessary items, making it reasonable to assume that the meth preparation was still underway.



The officers quickly sought a warrant. They wanted one that could be acted on at night, allegedly because of the concern for three small children, at least one still in diapers, living in trailer 23 where the meth was being cooked. The first issue was whether Ark. R. Crim. P. 13.2 authorized a nighttime raid. The trial court found it didn't, and suppressed the evidence gathered in the search.

The State appealed. The first question was whether this was a legitimate state appeal. The state doesn't get to appeal as a matter of right. The majority held it was. On the question whether the rule permitted a nighttime search under these circumstances, the Supreme Court agreed with the trial court. Rule 13.2 provides: in pertinent part

Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

- (i) the place to be searched is difficult of speedy access; or
- (ii) the objects to be seized are in danger of imminent removal; or
- (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy; the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

Ark. R. Crim. P. 13.2(c) (2011).

The next issue was whether the officers acted in good faith under *United States v. Leon*, 468 U.S. 897 (1984). The Supreme Court held that they did. It was a judicial mistake, not a police officer mistake.

There was a strong dissent. It was partially on whether the police officers could have really acted in good faith since the rule doesn't allow for nighttime searches for the safety of people in the house, even babies in diapers. It was partially on whether the good faith exception was a legitimate ground for interlocutory appeal.

## Child Support

*Arkansas Child Support Enforcement v. Perry*, 2012 Ark. 106. Perry was ordered to pay child support. He didn't. The child turned 18. Then, when they're chasing the back due child support, Perry decides he wants paternity testing. The Supreme Court decided he was not entitled to a paternity test. The statute at issue provides that an adjudicated father is entitled to one paternity test at any time "during the period of time that he is required to pay child support." The period of time in which a non-custodial parent is obligated to pay child support automatically terminates upon the child's eighteenth birthday. See Ark. Code Ann. § 9-14-237(a)(1)(A)(i). The period that appellee was "required to pay child support" ended when the child turned eighteen, and likewise, the period of time in which appellee could seek a paternity test also ended when the child turned eighteen.



A bunch of *per curiam* opinions.

*Dockery v. State*, 2012 Ark. 109. You can ask to withdraw a guilty plea until the order accepting it is reduced to writing and filed with the clerk. Trial court's decision that there was no jurisdiction to consider the motion was wrong. Reminder that defendant must establish manifest injustice by proving one of five things.

*Rueda v. State*, 2012 Ark. 104. Another list o things that have to be in the abstract and addendum. Court gave 7 days for a supplemental addendum.

## Arkansas Court of Appeals

### Only interesting case

#### Negligence/salacious details

*Pace v. Davis*, 2012 Ark. App. 193. Plaintiff has sex with Michael's fiancée. Michael predictably doesn't like it, and takes out his frustrations on Pace by shooting him. Michael had acquired the gun from his father six months before the shooting. So Pace sues Michael's father for negligence and negligent entrustment. There isn't any evidence that Michael is irresponsible with guns. He's an adult. There are generic arguments that Michael is "psychologically imbalanced" but there's scant real evidence of that. Michael is a college student and a year before the shooting he was treated for anxiety and depression, and that he used steroids, but none of that is sufficient to show he was incompetent to be custodian of a gun. Good comparisons to negligent entrustment of motor vehicle cases in Arkansas, negligent entrustment of firearms cases from other jurisdictions, and a couple of Arkansas cases in which there was evidence of actual negligence, such as the buyer telling the seller he wanted to blow a big hole in a man and a seller selling to a minor.



#### Administrative Law

*Sparkman Learning Center, v. Arkansas Department of Human Services*, 2012 Ark.App. 194. It would have been helpful if the court had mentioned what this case is actually about. It may be too convoluted to justify preserving for posterity, though. The department terminated the appellant's contract to provide services to a department program based on a finding that the appellant violated federal law by placing a disqualified individual in a position of authority whatever the hell that means. There was a hearing before an administrative law judge. At the hearing, the appellant objected to the presence of the administrative law judge's supervisors at the hearing. The administrative law judge upheld the department's decision to terminate the contract. The appellant then appealed to circuit court alleging that the presence of the supervisors constituted a due process violation. The department denied that there were any irregularities but caved anyway in circuit court and moved that the circuit court remand the case to the department to be heard by a person not employed by the Department so as to eliminate any question about the bias allegations. The independent third-party was appointed as a hearing officer. Appellant was satisfied with that person. That person also affirmed the department's termination of the contract.

Here's where it would've really been nice if the court had given us some information. Appellant claimed that there were some improper *ex parte* communications between the hearing officer and agency prior to the issuance of a final opinion. "There is no evidence of such irregularities, but appellant urges us to infer from differences in the wording of the specially appointed hearing officer's culinary opinion and final opinion that her final opinion was influenced by *ex parte* contact with the agency."

There were two problems with this argument. The first was that the appellant didn't really point to anything that constituted proof of bias. Second, there wasn't really any difference between the preliminary opinion and the final opinion and both reached the same result.

Whatever actually happened in this case, there was no evidence anything was improper and in any event there was no conceivable prejudice.

## Criminal law



### Revocation of probation

*Mewborn v. State*, 2012 Ark. App. 195. As we all know from many of these cases, revoking probation is fairly easy. This guy made it even easier than usual. There was one petition to revoke which was granted but all the judge did was tack another year of probation on to the sentence. Thereafter, the defendant moved to California and didn't do any of the many things he was supposed to. Proof of failure to comply with conditions of probation was easy. Nevertheless at the hearing, the judge did not even consider anything other than sentencing him to prison. Following the testimony at the revocation hearing, counsel for appellant asked the circuit court to "consider putting [appellant] back on probation." The circuit judge responded, "Yes, I'm not going to do that. That's not the way it goes."

But there wasn't any contemporaneous objection, so the Court said the argument wasn't preserved for review.

*Clayton v. State*, 2012 Ark.App. 199. 50 yrs for rape and 30 yrs for sexual assault consecutively affirmed. The testimony of the victim was sufficient.

*Hancock v. State*, 2012 Ark. App. 202. Redo brief. The video recording of the police stop isn't in the addendum. The brief's argument lacks development (fails to set out the standard of review and the elements of the offense charged).

## Worker's Compensation

*Walgreen Co. v. Goode*, 2012 Ark.App. 196. Award to claimant supported by substantial evidence. The only thing I found even slightly interesting in this case was that claimant was awarded TTD even though he continued to work in a family business as he had before the accident. "Any other employment" means any other employment in lieu of the one in which the employee was injured. When there is tandem employment, the other job is not "any other employment" undertaken in lieu of the employment in which the worker was injured. There were a bunch of other arguments, too, but most of them turned on things like credibility of witnesses and the ALJ (and commission) selecting which of several doctors to believe.



*Luster v. Ben E. Keith Co., Inc.*, 2012 Ark.App. 197. Claimant wins before ALJ but Commission reverses. Claimant appeals denial. Ct affirms. Three month gap between date of accident and report of injury was enough to justify the commission denying the claim.

*Flores v. WalMart Distribution*, 2012 Ark.App. 201. Sort of complicated procedural history, but the statute of limitations ran for claimant to assert permanent disability benefits even though the commission did entertain a request for additional medical treatment. Claimant contended that the statute could not expire as long as the medical treatment claim remained open since there was not yet a "last payment of compensation," but the Arkansas Supreme Court rejected a similar argument in *Stewart v. Arkansas Glass Container*, 2012 Ark. 198 (reversing court of appeals).

I'm not sure you can understand this without a timeline. (I'm not sure I understand it *with* one). So:

- 4/30/2005 Injury
- 6/29/2005 AR-C requesting additional treatment, additional TTD, and a fee
- 9/?/2005 Doctor assess 2% and says she reached maximum medical improvement
- 6/6/2006 Opinion of ALJ awarding TTD 6/17/2005 through 6/30/2005 and an TES unit. Nobody appealed
- 4/8/2009 Requested hearing on *medication and additional treatment*.
- 6/24/2009, parties canceled hearing, file to general files.
- 7/6/2009. Last authorized medical treatment
- 10/7/2009 claimant writes commission asking to reset hearing, because hearing had been set canceled on the understanding Walmart would pay for treatment, but it wasn't actually paid
- 10/11/2010 Prehearing questionnaire indicating *permanent impairment, wage loss, fee*.
- 1/24/2011 Hearing. Defense argues claims for permanent disability benefits were barred by statute.
- ALJ opinion finding permanent impairment and wage-loss disability were barred by statute of limitations, but the claim for additional medical treatment wasn't barred and she proved entitlement to those benefits.
- 7/5/2011. Commission affirms and adopts.

The Ark S. Ct. said in *Stewart, supra*, that a claim for medical benefits and nothing else tolls the statute of limitation only as to that specific claim and not as to other claims for benefits.

*Jaramillo v. Systems Contracting*, 2012 Ark. App. 200. Memorandum affirmance.

### *Termination of parental rights:*

*Camez v. Ark. Dept. Human Services*, 2012 Ark. App. 198. No merit brief. Only adverse ruling (terminating rights) adequately discussed. Pro se brief without merit. No real detail.