Advance sheet notes: Court of Appeals

Workers compensation

St. Edward Mercy Medical Center v. Phipps. CA 11-43, 2011 Ark. App. 497.

Claimant hurt her left shoulder. The employer sent her to doctors. The doctors released her. The employer/insurance company sent her a letter saying that they would not authorize additional medical treatment for her. She sought treatment on her own from another doctor and got well. She tried to get the employer to pay for her treatment but the employer refused. Apparently at the hearing the respondent failed to prove that the treatment was unauthorized because they failed to prove that she had received notice of her duties regarding changing doctors. Based on that, the administrative law judge held that the treatment was authorized the employer appealed contending that even though nobody bothered to prove it at the hearing there was actually a change of physician form signed by the claimant in the commission's file. The commission found that there was no evidence of record demonstrating that claimant was provided the notice regarding her rights and responsibilities regarding change of physicians. The burden is on the employer to show that the form was provided to the employee and they failed to do that. The commission's decision was affirmed. The record on appeal does not contain any evidence that the employer ever delivered or that the employee ever received a change of physicians form. The plaintiff was the only person who testified, and she did not testify on the issue. There's a footnote that says that the respondent brought the form to the attention of the commission during the briefing process the briefs, however, were not part of the record.

Midsouth Mixers, Inc. v. Stevens CA 10 -- 1140, 2011 Ark. App 501.

The Court of Appeals reversed this case for specific findings of fact and conclusions of law. On remand the commission found that the original administrative law judge's decision, which the commission's original decision reversed, was supported by a preponderance of the evidence and correctly applied the law. The commission then affirmed and adopted the ALJ's decision which it had previously reversed. Now the respondent appeals. "On remand, Commission conducted a de novo review of the record and adopted the administrative law judge's decision the commission is permitted to adopt the administrative law judge's decision and in so doing, the commission makes the administrative law judge's findings and conclusions the findings and conclusions of the Commission." Since the administrative law judge's original decision did in fact consider all the evidence of may call the findings and conclusions of law required the commission could execute the appellate court's mandate by simply adopting it. Affirmed.

Crawford v. Superior Industries. CA 11-57, 2011 Ark. App. 504.

Claimant contended he was permanently and totally disabled. Respondent denied it. The commission gave him an 18% impairment of the body as a whole. Affirmed. It's true that the claimant was on Social Security disability. Social Security's standards are different.

Guillermina Padilla Briseno v. George's, Inc., CA 11-124, 2011 Ark. App. 513

For some reason I suspect this lady's name is actually Ms. Padilla, or in Spanish Padilla Briseño, but she's called Briseno throughout the opinion. And that's the most interesting thing about it. She fell and hurt her shoulder. Three different doctors were suspicious that she was exaggerating her symptoms, and there was evidence that she had a much greater range of motion on surveillance videos than on medical examination, confirmed by one of the doctors who actually watched the surveillance videos on behalf of the respondent. The respondent decided it wasn't going to pay any more. Hell, people with no objective evidence lose even when their doctors are cheerleading for them, so this shouldn't be much of a surprise.

Clark v. El Nopal, Inc, CA 10-1279, 2011 Ark.App. 514

Claimant dropped a pot on his foot. A couple of months later back problems surfaced. No big surprise that the Commission found that the causal connection between the foot and the back injury was deemed speculative.

Civil procedure (avoiding the merits)

Stokes v. Mangum Construction Co. CA 11-65, 2011 Ark.App. 498.

Plaintiff sued defendant for breach of contract defendant filed a document *pro se* entitled "Petition Requesting Abatement Pending Completion of Administrative Process for Set-Off, Settlement and Closure." This document apparently failed to respond to the allegations of the complaint. As it was not an "answer" the plaintiff moved for default judgment. Defendant unsuccessfully tried to get a continuance. Defendant did not attend the hearing. The trial court awarded a default judgment

Then the defendant filed a petition to vacate the default judgment. He claimed that he did appear by filing the document mentioned. He also filed an amended motion alleging that service was defective. If the document the plaintiff filed had been an answer, it would have been a responsive pleading. And issues of service are waived if not pleaded in the first responsive pleading. The service was defective because the green card attached to the affidavit of service affirmatively shows the delivery was not restricted to the defendant or his agent. The box requesting restricted delivery was not checked at all. This violated rule four for service by mail and invalidated the service. The requirement that the "restricted delivery" box be checked must be strictly construed and compliance must be exact. The plaintiff took the position that the defendant had not filed an answer. An answer is "defendant's first pleading that addresses the merits of the case usually by denying plaintiff's allegations." Since the plaintiff concedes that the defendant failed to answer the complaint plaintiff could not rely on the argument that service of process arguments were way therefore the default judgment was void.

Wilson v. Union Pacific, 2011 Ark. App 508.

Service was obtained 181 days after the complaint was filed. The summons erroneously stated that the appellee had 20 days to answer the complaint (should have been 30) [you all see where this is going]. The defense agreed to waive the 20 days argument, but there was still the fact that the complaint should have been served in 120 days and was instead served in 181 days. There was no real motion for extension of time to serve the defendant, although there was a letter asking for reassurance of summons and the summons was reissued. That doesn't count. The trial judge dismissed this case with prejudice. I would think that was an error, but the appellant failed to get a ruling on the equitable tolling argument from the trial judge which prevented the Court of Appeals from reviewing that argument. There is apparently some United States Supreme Court law that limits the application of state procedural rules in FELA cases. The United States Supreme Court refused to allow "over exacting local requirements for meticulous pleadings" to result in the dismissal of the case under FELA. *Brown v. Western Railway of Alabama*, 338 U S. 294 (1949) the Court of Appeals did not think that applied here.

Sewage law.

Wright v. Briant CA 10-1261, 2011 Ark.App. 510

Johnston owned property he had a septic tank servicing both a home and a mobile home on the property. He sold the mobile home and about 2 acres to the Briants. This occurred in August of 1999. In 2004 Johnston sold the rest of his property to Wright. Wright contended that he was not aware that the septic tank on his property was servicing the mobile home. He did, however, now there was no sewer system in the area and the two pieces of property had once been one. Wright figured out that Briant's mobile home was using the septic tank on what was now his property. He told Briant that he needed to install his own

septic system. Briant tried to do so but was told that the land would not perk (whatever the hell that means) and that it was too small for its own independent system. Wright claimed that the property was large enough to support a separate system and capped off the lines to the septic tank one day. This resulted in sewage backing up into Briant's home. The Briants sued.

The trial court found an easement by necessity although as the Court of Appeals points out the real name for this easement is an easement by implication. Wright should have known of the shared septic tank and the Briants had no reasonable alternative. The trial court awarded damages to the Briants for the damage they suffered as a result of the septic system being disconnected.

On appeal right contended that there was not adequate evidence that the easement was necessary. That first failed because the argument was not made to the trial court however they mentioned in passing that they would also affirm on the merits. "An easement by implication arises where, during unity of title, a landowner imposes an apparently permanent and obvious servitude on part of his property in favor of another part and where, at the time of the later severance of ownership, the servitude is in use and is reasonably necessary for the enjoyment of that part of the property favored by the servitude." That's pretty much what was shown here. Apparently this does not mean "actual visibility" but "susceptible of being ascertained upon reasonable expectation by persons ordinarily conversant with the subject." Wright knew that the property he purchased was not serviced by a sewer system; that there was a mobile home on the Briants property; that both pieces of property had at one time been part of a larger parcel from which the Briants property had been severed." That at least gave him notice of facts that put him on inquiry of the relevant facts. "Where a man has sufficient information to lead into a fact, he shall be deemed cognizant of it."

Burden of Proof, Affirmative Defense

Smith v. Sims CA 10-979 2011 Ark. 499.

Plaintiff sued on the promissory note. There was some uncertainty as to how many payments had been made, so the trial judge directed verdict for the defendants. Payment is an affirmative defense in the burden of proving it lies on the party asserting it. The jury could have found the amount owing on the note based on the evidence. Reversed and remanded for trial.

Riceland Seed v. Wingmead. CA 11 -- 089, 2011 Ark. App. 502.

I don't think this case is very important. It is a squabble between two companies the buyer had a contract to buy some rice and he was supposed to pick it up on June 3. He didn't. There was some dispute as to whether the parties agree to an extension for the time to pick up the rice but that was a fact question. About the only thing that is of much interest is that the Supreme Court's *Caplener* decision, which held that a party could not change his deposition testimony by affidavit for the purpose of avoiding summary judgment doesn't really apply to a full bench trial in which a judge can make his own credibility determinations. Besides, the testimony wasn't really inconsistent anyway. I don't see any new law made here.

Dye v. Anderson Tully Co. CA 11-33, 2011 Ark. App. 503.

Quiet title. Plaintiff submits affidavit. It is undisputed. Trial court granted summary judgment for plaintiff. Defendant appeals on the ground that there was not sufficient legal description. In fact the evidence was unclear as to what County the property was actually in. Plaintiff had paid taxes as required for quiet title case in Arkansas County. The defendant said that the property was in Desha County. The defendant tried to get the judge to join the two counties as necessary parties to the lawsuit. The Arkansas River was the county boundary between Arkansas County and Desha County. The boundary of the counties moved with the movement of the navigable river. The trial court found that the property had moved to Arkansas County that wasn't clearly erroneous.

Criminal law

Garr v. State, CACR 10-1301, 2011 Ark. App. 509

The defendant robbed a cab driver and shot him in the process. He forced the cab driver to turn his wallet over to him at gunpoint, and he rifled through it. But it could not be proved what the defendant actually took from the cab driver's wallet. That was because he shot the cab driver. The driver was hospitalized for 10 days after the incident. For some reason, he wasn't able to remember exactly how much money had been in his wallet. Garr was convicted of criminal attempt to commit first-degree murder and aggravated robbery. You can have an aggravated robbery conviction without proof that the theft was successful only that you were trying to steal. The fact that he demanded the drivers money at gunpoint, threatened to blow his head off if he did not comply, and followed through on his threat by shooting him (I'm not really sure he followed through on the threat but I don't think that's particularly relevant clip) rifled through the victim's wallet looking for money was enough. Whether he actually found any money or took it was not material.

Criminal law: revocation of probation

Solomon v. State. CA CR 10-1332, 2011 Ark. App. 505

Defendant failed to report for probation or pay probation fees for about a year. There was an event at which he was given the opportunity to sign up at a drug rehabilitation facility but apparently he did not do that either. It was enough that the state put on testimony that the appellant failed to report as required for 11 months September 2008 through July 2009. Affirmed.

Colbert v. State, CA CR 10 -- 38, 2011 Ark. App. 507

This guy (Robert Colbert, or maybe we should say Ro-BEAR Col-BEAR and this could be the Col-BEAR re-POUR-ted decision) violated the terms of his probation several times and his probation had been extended. The state then filed another petition to revoke based on possession of a firearm, delinquency and making court-ordered payments, failure to perform community service, and failure to obtain a GED. There was also evidence that he possessed counterfeit money. There was a gun under the mattress where he was sleeping. He said he did not know about either one of them. He was behind on payments because he was unemployed. Trial judge did not believe defendant and sentenced him to three years only one violation is necessary so failure to pay alone was enough.

Riley v. State, CA CR 10-1334, 2011 Ark. App 511

Defendant tried to commit a robbery and got caught. That's enough to revoke probation. There was a clerical error though. It wasn't *felony* fleeing, only *misdemeanor* fleeing. But it was felony aggravated robbery and aggravated burglary, so that was enough to revoke. He did get the record corrected, though, so people won't think of him as a FELONY fleer.

Domestic Relations

Aliluyeva v. Dzhugashvili, CA 10-7734, 2011 Ark App. 525

Penelope Aliluyeva and George Dzhugashvili lived together in North Dakota. Aliluyeva got transferred to her employer's Texarkana, Arkansas office. They got an apartment together in Texarkana, Texas under Aliluyeva's name, as Dzhugashvili did not have a job. Dzhugashvili got a job for about 6 months, but lost it. Aliluyeva, on the other hand, was doing quite well and received a promotion and stock options.. Since Dzhugashvili didn't have a job, Aliluyeva called the human resources department, in North Dakota, and asked if Dzhugashvili could be added to her health insurance. Aliluyeva denies saying that she and Dzhugashvili were married, but according to the health insurance plan, Dzhugashvili wouldn't be entitled to health insurance if they weren't. Several months after that, the couple attended another couple's wedding together. The wedding was in Eureka Springs, Arkansas. Aliluyeva signed the guest book

"Penelope and George Dzhugashvii." The happy couple became less happy as Dzhugashvili couldn't get a job and became increasingly hard to deal with. Dzhugashvilli moved out, and moved into an inexpensive apartment in Arkansas. Three months later, he filed for divorce in Miller County. He contended that they had entered into a common law marriage in Texas. He asked for half of the increase in her net worth during the time they were married. The three elements of a common-law marriage are (1) agreement to be married; (2) after the agreement, living together in Texas as husband and wife; and (3) representing to others in Texas that they are married. TEX.FAM.CODE ANN. § 2.401(a) (Vernon Supp.2001); In re Estate of Giessel, 734 S.W.2d 27, 30 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.). A common-law marriage does not exist until the concurrence of all three elements. Winfield v. Renfro, 821 S.W.2d 640, 645 (Tex.App.-Houston [1st Dist.] 1991, writ denied). Aliluyeva denied evernr agreeing to be married, conceded that they had lived together in Texas, but denied ever having held herself out as Dzhugashvili's wife, but in the alternative, never having done so *in Texas*. There was contradictory testimony about her calling Aliluyeva calling herself Dzhugashvili's wife, but all the testimony that she ever did was from Dzhugashvili and the photocopy from the wedding register. There was no question that if they entered into a common law marriage in Texas, the Arkansas courts would have to give full faith and credit thereto.

In the alternative, the institution known as common law marriage is actually "informal marriage" under a Texas statute. Aliluyeva argued that in 2005 Texas outlawed marriage, or at least any form of marriage created by the Texas legislature. Texas Constitution: Article 1 Section 32:

> Sec. 32. MARRIAGE.
>
> (a) Marriage in this state shall consist only of the union of one man and one woman.
>
> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

Texas has rules of construction that are similar to ours:

> When a statute is clear and unambiguous, courts need not resort to rules of construction or extrinsic aids to construe it, but should give the statute its common meaning. *Bridgestone/ Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex.1994); One 1985 *Chevrolet v. State*, 852 S.W.2d 932, 935 (Tex.1993). The Legislature' s intent is determined from the plain and common meaning of the words used. *Monsanto Co. v. Cornerstones Mun. Util. Dist*., 865 S.W.2d 937, 939 (Tex.1993*); Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 352 (Tex.1990). This Court has reiterated these principles many times. In *RepublicBank Dallas, N.A. v. Interkal, Inc*., 691 S.W.2d 605, 607 (Tex. 1985), we stated:
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> > Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language and not elsewhere... . They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.
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> Id. (quoting *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (1920)).

St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 505 (Tex.1997)

the primary goal in the interpretation of a constitutional provision is to ascertain and give effect to the apparent intent of the voters who adopted it*. See, e.g., Edgewood I.S.D. v. Kirby*, 111 S.W.2d 391, 394

(Tex.1989); *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263, 265 (1922); see C. Antieau, Constitutional Construction § 3.01 (1982). "[T]he intention of the framers of a constitution is of but little importance-the real question being, what did the people intend by adopting [the constitutional] language submitted to them?" *Smissen v. State*, 71 Tex. 222, 9 S.W. 112, 116 (1888).

The Trial Court found that there was insufficient evidence that Aliluyeva ever held herself out as Dzhugashvili's wife in *Texas*. The trial judge reasoned that if she had held herself out as a wife in Texas as much as Dzhugashvili said she had, he should have been able to produce at least one witness who confirmed it. The Court of Appeals affirmed.

The concurring opinion took the position that her act of signing Dzhugashvili up for insurance benefits constituted holding herself out as his wife. Although the actual communication was a telephone communication between an office in Arkansas and a hearer in North Dakota, they continued to hold themselves out as husband and wife every time the insurance was withheld from her check, and she was resident in Texas at the time. The concurring opinion would affirm, however, in that the 2005 amendment prevents the legislature from creating or recognizing any legal status identical to or similar to marriage. That definition encompasses marriage. As the voters of the state of Texas, in a moment of homophobic insanity, outlawed marriage, the courts of Arkansas are required to give full faith and credit to their decision.

Medical malpractice

Villines v. North Arkansas Regional Medical Center CA 10-1196, 2011 Ark. 506.

Plaintiff was admitted to the hospital for kidney stones. His doctor obtained consent for surgery. The hospital contacted Melton to provide anesthesia services. The hospital's policy was to get informed content sent prior to surgery and administration of anesthesia. They had an informed consent form. Hospital personnel were to verify that consent had been given looking to:

- Information has been provided to the patient before the surgery or procedure;
- has been explained to the patient or surrogate by the anesthesia provider and/or physician
- the patient or surrogate gave consent to treatment after the discussion
- the patient or surrogate was given the opportunity to ask questions about proposed treatment and all of these questions were answered fully
- the blanks were filled in with the necessary information
- all signatures required had been obtained

Instead, a nurse is stuck a blank form under the groggy plaintiff's nose shortly before surgery and asked him to sign it. This occurred before anyone had explained anesthesia to him at all. He signed it and the nurse witnessed it.

Melton arrived at the hospital and prepared to use a spinal block because the plaintiff's recent throat surgery would preclude the use of general anesthesia. Melton says that he discussed the issue with both Mr. and Mrs. Villines before surgery. The patient had no recollection of any discussion (which probably should not surprise anybody). The wife of the patient also recalled not meeting the anesthesiology provider until after the procedure. During the surgery Melton experience difficulty administering the spinal block and made a bunch of punctures in the plaintiff's back. This resulted in arachnoiditis.

Plaintiff's expert testified that if the provider deviated from its informed consent policy it would fall below the standard of care. The expert described the consent obtained from the patient as uninformed consent. Melton never signed the form. Instead, the form is signed by a completely different anesthesiology provider who never actually saw plaintiff. The hospital also tried to raise intervening proximate cause. But it is well settled that intervening proximate cause requires the defendant to show that the event intervened that in itself cause damage completely independent of the defendant's conduct. This wasn't completely independent of the defendant's conduct.

The trial judge granted summary judgment to the hospital. The Court of Appeals found that material questions of fact remain and they reversed and remanded.

Somehow also there were arguments about the uniform contribution among joint tortfeasors act after the plaintiffs settled with Melton. The Court of Appeals refused to give an advisory opinion on that issue is the case had not even been submitted to a jury yet the jury had not decided the issue, and the remedy that the hospital was asking for is little different than what the parties had already agreed to do (inform the jury about Melton's settlement.

Orders of Protection.

Paschall v, Paschal, 2011 Ark.App. 515.

Divorce. Wife files for order of protection. Preliminarily granted then denied. Files for another one. Her evidence is the same as was at the first hearing plus that he called her and annoyed her a lot. Judge granted it. Husband appeals.

She did allege domestic abuse, and there's nothing wrong with using evidence that was ruled insufficient before for certain purposes such as pattern and practice, but she does have to allege and prove new acts that rise to the standard of domestic violence under the language of the statute. The standard is pretty low, but nothing she testified to occurring after the first hearing rose to that low standard.

Public Service Commission

Pressler v. Entergy, CA 10-996, 2011 Ark. App. 512.

This case was a good opportunity to illustrate how a customer goes about challenging a bill before the P.S.C. Unfortunately, the Court of Appeals doesn't tell us why the appellangs thought they had been overcharged. Plaintiffs were building a new home (4500-5000 ft^2, for what that may be worth—sounds big to me). A temporary electric meter wsas installed outside the perimeter of the house. Aug, 2006. Then the electric company installed a permanent meter and turned it on. Nov. 2007. When the customers learned the permanent service meter was activated, they asked that it be turned off, which was done on or about 1/10/2008. The customers moved in in February 2009. Then they got the bill for service while the new meter was on in the amount of $1704.66. They complained that the power had been turned on to the permanent switch without their permission, but they don't seem to doubt that they used at least some energy. They say they were overcharged, but there's no reason shown in the record that they thought that. They had a hearing. They were not represented. They failed to subpoena a bunch of Entergy employees, but there's no real clue as to what they expected the Entergy employees to say. Then one of their witnesses that they had identified came down with swine flu. There were some requests for continuance back and forth, which were solved by saying they could reopen the hearing to produce the sick guy's testimony. There was a disagreement about whether the Entergy employees would be allowed to testify, and the judge appears to have indicated at one point that they could testify at the supplemental hearing, but the post-hearing written order was to the contrary. Then, after protest, the ALJ changed the ruling to allow the customers to call whomever they wanted to. But they apparently didn't subpoena the witnesses. A PSC employee testified that there wasn't anything out of line with the bill. The electricity seems to have been charged at the same rate on both meters, and there was evidence that there were plenty of items in the house to eat up $1700 bucks worth of electricity. This included a heat pump that the customers intentionally turned on to prevent pipes from freezing. The customers must have intended to use these items, including the heat pump, believing that they were running the electricity through the temporary meter.

It really didn't make any difference that they were billing through the wrong meter, or at least none was proved. It came as an unpleasant surprise, to be sure, but that doesn't mean they didn't use seventeen hundred bucks worth of electricity.

I suspect something else was going on. There is not a clue as to why the customers thought they were

overbilled.

The ALJ appears to have believed the PSC witness. I don't' know how the PSC works, and whether there's any problem implicated by the fact that the star witness may well work down the hall from the ALJ, but this case doesn't shed any light on the problem.