

# **SIGNIFICANT ARKANSAS DECISIONS**

## **IN THE ARKANSAS SUPREME COURT**

### **APPELLATE PRACTICE**

#### **COLEMAN V. REGIONS BANK, No. 04-750 (11-3-05):**

An order awarding attorney's fees that were contingent on the resolution of other matters was conditional and not a final order, resulting in dismissal.

### **CONTRACTS**

#### **COLEMAN V. REGIONS BANK, No. 05-307 (11-3-05):**

The lessors sued the bank-lessee after the termination of its lease, contending that the bank's construction, including a 'bridge' between buildings, had to be removed to comply with the lease agreement's "good condition" clause. In granting the Petition for Review, which alleged the interpretation of the clause was one of first impression, the Supreme Court considered the entire contract and concluded that the lessee did not have to remove the improvements.

The trial court had granted summary judgment for the bank, rejecting the lessor claim that the buildings had to be returned in the identical condition architecturally. This was affirmed by the Court of Appeals, and the Supreme Court also affirmed. Another issue raised was that of the statute of limitations, and the trial court found for the defendant. On appeal, the statute of limitations was not mentioned by the Plaintiffs until their reply brief, at which point the appellate court would not consider it.

The agreement provided that the bank would keep the building in "good order and repair the inside and outside of the building on the leased premises and the sidewalks and passageways

adjacent thereto. Upon the termination of this lease the building shall be delivered to the Lessor in good condition, reasonable wear and tear during the term of this lease excepted. The building and permanent improvements built upon the leased premises by the Lessee, other than bank fixtures, equipment and bank vaults, shall become the property of the Lessor and shall remain the property of said Lessor at the termination of this lease . . . “

## **FAMILY LAW**

### **WEST V. WEST, No. 04-393 (11-3-05):**

In affirming the trial court’s jurisdiction in a joint custody challenge, it mattered not that the child had moved to Oregon where Arkansas visitation continued. The divorce was here, and the child spent about twenty five percent of the time in Arkansas, with the father and family remaining here. The trial court properly retained jurisdiction, despite the mother’s arguments to the contrary.

## **TORTS**

### **TEMPLETON V. UNITED PARCEL SERVICE, INC., No. 04-659 (11-3-05):**

Plaintiff sued his employer for torts of outrage and fraud after he resigned under suspicion of theft of drugs. Two co-employees accused the Plaintiff after they were suspects of the same thing by the employer’s security personnel, and after implicating the Plaintiff, he was given the same choice: resign or be fired. Plaintiff acknowledged taking some prescription drugs when offered them in a parking lot for a physical ailment but denied stealing.

In the following lawsuit, the Plaintiff alleged that Defendant was guilty of the tort of outrage. He claimed that Defendant told him that if he was fired with a bad reference, he would not find work again in the community. These facts were insufficient to constitute the tort of

outrage, resulting in summary judgment for UPS.

The Opinion noted that in only one reported case of an employer sued for outrage did it find the facts sufficient, noting that since Arkansas is an employment at will state, the discharge would have to be in such a manner to constitute extreme and outrageous conduct, beyond all possible bounds of decency, which resulted in severe emotional distress, and in that decision, the employer denied the employee medication and knew of his medical condition. Tandy Corp. v. Bone.

Finally, outrageous conduct toward a third party, as one of the others fired, could not be claimed by Plaintiff, especially since Plaintiff admitted accepting drugs in the parking lot from another employee, the decision noted.

The elements of fraud are a false representation of a defendant, with knowledge or belief by the defendant of its falsity or making the statement without sufficient evidence, that the statement was made with intent to induce reliance by a plaintiff, that the plaintiff justifiably relied upon the fraudulent statement, and that damages were suffered due to the reliance.

The Plaintiff did not specifically state what false statements were made by his employer, as the theft allegations came from the employees who were fired, and there was no proof that the claim that the Plaintiff would not find work if he did not resign caused him damage. Any damages resulting from unemployment would occur if he was fired, even if he did not resign. Summary judgment was also proper on this count.

## IN THE ARKANSAS COURT OF APPEALS

### CIVIL PROCEDURE

**RIVERSIDE MARINE REMANUFACTURERS, INC. V. BOOTH**, No. CA 05-367 (11-2-05):

When the trial court pronounced mid-way in the Plaintiff's case that "unless something happens," the Defendant is going to lose, the court should have recused when the Plaintiff made their motion. The apparent reason for the judge's statement, in the bench trial, was that he wanted to encourage settlement.

The litigation arose after the Defendant terminated health insurance coverage for the company founder and former majority shareholder, under a consulting agreement, substituting a lower quality plan.

Another reason that the judge should have withdrawn from hearing the case was that there was an inexplicable failure to record a motion hearing in which one of the judge's statements were made. The Opinion noted that by an Administrative Order, it is the duty of the circuit court to require a verbatim record unless waived by the litigants.

**MARTIN V. KNOLLMAYER**, No. CA 03-967 (11-2-05) (Not Designated for Publication):

The plaintiff's lawsuits (first in federal court and now in state court) failed on her contentions of legal negligence. The reason that this case is of interest is that it broaches some salient points of procedure as it concerns the trial court's consideration of a motion for summary judgment, which are worth noting:

- A judge may not rely upon factual allegations in briefs.

- Allegations in the complaint are not proof.
- Self-serving litigant statements of their subjective beliefs are not proof.
- Arguments of counsel are not proof.
- An affidavit stating only conclusions is not proof.
- A party responding to a motion for summary judgment must meet proof with proof and show that there are genuine issues of material fact.
- And, in a claim for legal malpractice, the plaintiff must show that
  - (1) the attorney's conduct fell below the generally accepted standard of practice, and
  - (2) that the conduct was a proximate cause of damages (that, "but for the alleged negligence of the attorney, the result in the underlying action would have been different.")

## **CRIMINAL LAW**

**JUCKETT V. STATE**, No. CA CR 05-238 (11-2-05) (Not Designated for Publication):

Defendant, convicted of first degree sexual assault, argued that the trial court erred in admitting sexual assault testimony of another child, for which he was not charged, since the nature of his fondling was different in that case compared to that in the instant case under the 'pedophile exception'.

This exception to the rule against admission of previous bad acts allows proof of similar actions with the child victim or other children, showing a tendency of a defendant to commit such acts -- with what the Court noted was an individual or a class of individuals -- with whom the defendant had an intimate relationship. The evidence also shows the depraved sexual instinct

of a defendant.

**VENN V. STATE**, No. CA CR 04-1315 (11-2-05) (Not Designated for Publication):

A juror's statement that her daughter worked in the same office with a witness was insufficient to grant a defendant's request to disqualify the witness and panel. The revelation came about in the sentencing phase when a witness was called. The juror notified the bailiff that their daughter worked in the same building with the witness. The trial court questioned the juror who promised fairness, so the judge refused to remove them. The opinion noted that since the sentence was less than allowed for the crime, the Defendant could not prove prejudice.

## **FAMILY LAW**

**HURTT V. HURTT**, No. CA 04-1298 (11-2-05):

The decree provided that the husband's mother would be a babysitter for the minor child, but this did not entitle her to intervene when there was a petition to modify custody, the Court of Appeals ruled, in rejecting the lower court's decision that the paternal grandmother was a third party beneficiary. The chancellor specifically noted that he was not basing his ruling in allowing her intervention based upon visitation issues but based upon what he deemed a contractual entitlement.

The appellate court also rejected the portion of the order that if the Appellant were to move to Texas to remarry, as she said she planned, child custody would revert to the husband. The Court of Appeals noted that it is improper to enter a prospective change of custody, based upon events that may occur. If relocation occurred, it would be examined, with the party challenging the relocation having to show that it was not in the best interest of the child. Factors for examination in a case of relocation are discussed in other case law, referenced in this opinion,

which was apparently not considered by the court below.

**MCNEIL V. MCNEIL**, No. CA 04-1138 (10-26-05) (Not Designated for Publication):

The trial court's award to one party of the marital home in a divorce was improper, where there were insufficient findings to justify a non-equal division of marital property. There is a presumption that property acquired during the marriage is marital property.

The parties built the house themselves. The husband was awarded the home as well as child custody. While the husband built it in the marriage, the wife worked to contribute income so that he would not have to work outside the construction.

**ROBSON V. ROBSON**, No. CA 05-182 (11-2-05) (Not Designated for Publication):

The trial court's alimony award of \$1,650 per month was affirmed since the husband worked and the wife of a longstanding marriage was incapable of working. The purpose of alimony is to deal with economic imbalances between the parties in earning ability.

. As to the requirement that the husband continue paying the life insurance premiums, however, the appeals court reversed and remanded. The chancellor below noted that the life insurance policy was property. The Court of Appeals therefore concluded that it would be error to order an unequal division in the absence of specific factual findings.