

SIGNIFICANT ARKANSAS DECISIONS

IN THE ARKANSAS SUPREME COURT

CIVIL PROCEDURE

CITY OF FORT SMITH V. CARTER, No. 05-198 (11-10-05):

In a case of first impression, the Supreme Court ruled that under Ark. R. Civ. Pro. 11, the trial court may not impose sanctions for verbal conduct, as opposed solely to signing a pleading. In this case, the City entered into a settlement agreement in open court on an eminent domain cause of action. In doing so, they represented to the trial court that they had authority to do so.

When the city refused to abide by the agreement entered into by its attorneys, a motion to enforce settlement was filed and denied, so the case went to a jury trial. After prevailing against the city, fees were awarded to the landowners pursuant to Rule 11. The trial court had refused to award fees based upon Ark. Code Ann. §18-15-605 (b), which provides for fees in a case of a corporation or water association.

The Supreme Court, in reversing the fee award under Rule 11, relied upon federal case law and held that the about-face by the City, a municipal corporation, was insufficient for a fee award under the sanction rule since no pleadings were signed. “We hold that oral representations cannot be the basis for Rule 11 sanctions.”

On cross-appeal, the Court addressed the lower court’s refusal to award fees under the above-mentioned statute, and while the Supreme Court acknowledged that the statute refers to corporations and not municipal corporations as such, the Opinion considered the purpose of the statute and reversed and remanded for a fee award. The General Assembly may wish to clarify the meaning of the statute, the Opinion noted.

TORTS

ENGLAND V. COSTA, No. 04-1192 (11-10-05):

Plaintiff, who was under the care and treatment of Defendant physician, suffered decelerations in labor in a co-defendant hospital and, her child was born with cerebral palsy. After settling with the hospital for \$2.5 million, she went to trial against the physician, disclosing the settlement. The jury found for the Defendant physician, and this appeal centered on an issue of first impression, namely whether AMI Civ. 4th 602, dealing with the right to assume others will use proper care, applies in a medical malpractice case. The trial court gave the instruction over objection, but the Supreme Court reversed, remanding for a new trial..

In the trial, testimony was presented that the Defendant went to and from the hospital while the Plaintiff was under his care and treatment, and he spoke with the nursing staff by telephone and in person. One nurse falsely told the physician defendant that nothing had occurred since he was last in the hospital, when in fact there had been fetal heartbeat deceleration. There was also a nursing delay in conducting a pelvic examination that Defendant ordered, and finally the nursing staff did not immediately notify Defendant of a dilation to nine centimeters, and instead waited eleven minutes before calling him. When he was told, the Defendant rushed to the hospital to perform a Caesarean section, only to find no operating room staff on hand. He performed the surgery with only one nurse assisting.

Significantly, there was no allegation of negligence on the part of the Plaintiff. Over objection, the Court allowed Defendant's proffered instruction, which was modified as follows: "Every physician using ordinary care has the right to assume, until the contrary is or reasonably should be apparent, that every other medical care provider will use ordinary care. To act on that assumption is not negligence. As I have used the term ordinary care here, I mean that degree of

care required of all physicians or medical care providers, as already explained in my definition of negligence.”

The Supreme Court, reviewed Arkansas automobile cases in which the standard instruction was given and cases in other jurisdictions, concluding that the instruction is inapplicable in a case where a plaintiff is not guilty of comparative fault.

“In sum, where there is no evidence of contributory negligence, AMI 602 should not be given. Generally speaking, when the instruction is utilized in a contributory negligence case, the phrase ‘every person’ in the instruction is intended to refer to the plaintiff. Here, however, the jury was instructed that ‘every physician’ is entitled to the assumption that other medical-care providers are not being negligent. In other words, the instruction informed the jury that a defendant is entitled to the presumption.”

The case was submitted on a general verdict, and the Supreme Court noted that it could not therefore determine if the jury found the physician non-negligent for performing his duties within the standard of care of other physicians or whether he was absolved since he had a right to rely upon others to act appropriately.

IN THE ARKANSAS COURT OF APPEALS

CRIMINAL LAW

TUMLISON V. STATE, No. CA CR 04-1367 (11-9-05):

The Defendant was found guilty of computer fraud, and while the prosecutor and defense agreed to a recommended sentence, the trial court ordered restitution in an amount that included the employer’s investigation expenses concerning the theft.

In reversing and remanding, the appeals court held that it is error to include such costs

since restitution is meant to replace the victim's losses, but they do not include the victim's investigation. The statute in issue provided that in sentencing, a restitution order may include the "actual economic loss caused to a victim by the crime." Ark. Code Ann. § 5-4-205.

The Opinion also noted that a Defendant does not have to agree with the amount of the restitution under the statute providing that if the trial court suspends a sentence or places a defendant on probation, conditioned upon making restitution.

"[T]he court, by concurrence of the victim, defendant, and the prosecuting attorney, shall determine to the amount to be paid as restitution." Ark. Code Ann. § 5-4-303. The parties must agree that the court will determine the amount to be paid by restitution, but the litigants may disagree as to its amount.

Finally, by agreeing to a sentence, after which the court dismissed the jury, the Defendant waived his right to a jury determination.

MERCHANT V. STATE, No. CA CR 05-38 (11-9-05) (Not Designated for
Publication):

The Defendant's motion to suppress murder confessions was properly denied by the trial court since the statements were voluntary and not protected under the circumstances.

The first was a voluntary and spontaneous admission that the Defendant made after he contacted the police while in a mental hospital in a sister state. He entered the facility voluntarily. He had ceased taking his prescribed medication, and admitted to hearing voices and having attempted suicide. Nevertheless, he was aware of what he was doing and initiated the statement, according to the officer's testimony. In this case, since it was a spontaneous confession, Miranda warnings were not in issue, the Court of Appeals ruled.

The second confession's admissibility hinged also on Defendant's action, and he was

said to have initiated the discussion. Defendant previously stated that he needed legal counsel, and questioning ceased. His request for counsel, however, did not prevent admission of the second statement since he initiated the statement, the Court ruled.

FAMILY LAW

COFFEE V. ZOLLIECOFFER, No. CA 05-148 (11-9-05):

In rejecting the argument that the natural parent was entitled to custody of her child unless the parent was shown to be 'unfit', the Court of Appeals removed custody from the natural parent and granted it to the grandparents with whom the child had been living with his mother's permission.

The mother had allowed her child to live with its grandparents for approximately eleven years and regularly visited, as well as supported, her offspring. She married and decided that she wanted to raise her teenager. The fifteen-year-old ward testified that she preferred to live where she was, keeping her friends and remaining in school. The trial court concluded that it was in the best interest of the child to change custody, and the appeals court agreed.

The dissent argued that this case turns the law giving the natural parent a preference upside down, and will serve as an impediment to those who want to allow a third party to raise their child, for financial or other reasons. The majority pointed to case law in Arkansas case law where a parent separated from their child for a period of years and ultimately lost a custody battle.

PRODUCTS LIABILITY

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY V. FLEETWOOD HOMES

OF TENNESSEE, INC., No. CA 05-404 (11-9-05) (Not Designated for Publication):

In a products liability claim, where there is no direct proof of a defect, the black letter

law in Arkansas is that the plaintiff must negate other possible causes. In this case, the insurer-plaintiff paid its insured damages due to a fire that gutted their mobile home. After an investigator opined that the electrical system was defective in manufacture from a staple piercing wiring, suit was filed against the manufacturer.

In granting summary judgment, the trial court concluded that there was insufficient proof of a defect from the factory, and the Court of Appeals agreed. “Here, Nationwide failed to eliminate other possible ignition sources. Particularly, West [their expert] was unable to eliminate improper installation of the mobile home’s electric set up in contravention of the manufacturer’s instructions as a cause of the fire.” While the expert was a certified fire investigator, his qualifications were insufficient to opine a cause of an electrical fire. He could only testify where the fire originated and that it was electrical.

Absent proof of a manufacturing defect, the opinion noted that a plaintiff must produce evidence to negate other causes for which the defendant would not be responsible. Without this proof, the plaintiff’s case failed to prove proximate causation, and since this was an essential element of the case, the summary judgment ruling was correct. Even if the lower court erred in limiting the expert’s testimony, the Plaintiff would therefore still lose.

The trial court’s dismissal was without prejudice, and on cross-appeal, the Defendant argued that it should have been with prejudice. The Court agreed and noted that in cases of failure to plead facts upon which relief can be granted, under 12 (b) (6), a dismissal is without prejudice. This was not the case here, however. In a case where the plaintiff cannot prove an essential element of their case, the summary judgment dismissal should be with prejudice.

WORKERS' COMPENSATION

WAL-MART STORES, INC. V. KING, No. CA 05-291 (11-9-05):

The claimant's injury which occurred as she was going to the break-room where it was strongly suggested that workers take respite, was compensable, as occurring while she was performing employment services, the Court of Appeals ruled, in affirming the Commission.

She was expected to answer any customer questions or provide assistance, if asked, while enroute to the lounge. In agreeing that this was a compensable workers' compensation claim, the appellate court rejected the argument that the trip was strictly personal, ruling that the injury occurred while she was carrying out the employer's interests.