

Arkansas Case Reports

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SUPREME COURT OF ARKANSAS

(decisions and orders entered May 22, 2008)

CIVIL: Prospective and Retrospective Application, Charitable Immunity

Felton v. Rebsamen Med. Ctr., Inc., No. 07-724

Arkansas Supreme Court (Danielson, J.), May 22, 2008

From the Circuit Court of Pulaski County, Hon. Willard Proctor, Jr.

AFFIRMED grant of summary judgment to defendants.

CONCUR: Glaze, J.

DISSENT: Hannah, C.J., and Brown and Imber, JJ.

3 majority, 1 concur, 3 dissent

FACTS: Plaintiff-appellant Felton, as personal representative of the deceased, sued defendant-appellee Rebsamen and its insurer, defendant-appellee Medical Assurance. Rebsamen answered, stating that it was immune from suit because it was a charitable institution. Medical Assurance answered, claiming that the circuit court lacked jurisdiction based on *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 75 S.W.3d 174 (2002), which allowed direct suit against a charitable organization. Felton nonsuited as to Medical Assurance. Three months before the savings statute expired as to Medical Assurance, the court overturned *Clayborn* in *Low v. Ins. Co. of North America*, 364 Ark. 427, 220 S.W.3d 670 (2005), returning to the rule that charitable organizations are immune from suit, not just liability. Several months later, and about five months after the savings statute expired, Felton filed an amended complaint re-adding the claim against Medical Assurance. In its answer to the amended complaint, Medical Assurance asserted that the claim was barred by the statute of limitations. The circuit court granted the defendants' motions for summary judgment. Felton appeals.

LAW: 1. Summary judgment is to be granted only when it is clear that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Once the moving party establishes a prima facie entitlement to summary judgment, the opposing party must meet proof with proof to demonstrate the existence of a material issue of fact.

2. Ark. R. Civ. P. 8(c) requires affirmative defenses to be raised in a party's first responsive pleading.

3. The court holds that charitable immunity is an affirmative defense, falling into the catch-all provision of Rule 8(c), as 'any other matter constituting an avoidance or affirmative defense.'

4. Defenses under Rule 8(c) must be specifically pled to be considered by the circuit court, and failure to plead an affirmative defense can result in a waiver and exclusion of the defense from the case.

5. A charitable defendant is entitled to its charitable-immunity defense no matter how that defense is defined by law, so long as the charitable defendant affirmatively pled the defense of charitable immunity. Rebsamen was thus entitled to its defense both before and after the *Low* decision.

6. The elements of estoppel are: (1) the party to be estopped knew the facts; (2) the party to be estopped intended that the conduct be acted on; (3) the party asserting the estoppel was ignorant of the facts; and (4) the party asserting the estoppel relied on the other's conduct and was injured by that reliance.

7. Rebsamen pled the doctrine of charitable immunity, placing Felton on notice of its defense, and the elements of estoppel are not met here.

8. The Arkansas Supreme Court's decisions are applied retrospectively: a decision of the court, when overruled, stands as though it had never been.

9. The *Low* decision has previously been applied retroactively. Here, the retroactive application of *Low* is neither unfair nor prejudicial to Felton, because it was decided more than two months before the expiration of Felton's savings limitations period.

10. Felton fails to cite any authority that would permit the court to remand the matter for further discovery, therefore the court will not do so.

11. Medical Assurance specifically and timely asserted its statute-of-limitations defense, and the circuit court did not err in granting it summary judgment.

12. The laches defense is based on the equitable principle that an unreasonable delay by the party seeking relief precludes recovery when the circumstances are such as to make it inequitable or unjust for the party to seek relief. Laches is inapplicable here.

DISSENT (Hannah, C.J., joined by Brown, J.):

1. Felton is being punished for complying with the law; if he had not nonsuited against Medical Assurance, his action may have been saved by *Low*.

2. There are instances when retrospective application of an overruling opinion is inapplicable or unjust. Where a party justifiably relied on and assumed a now-compromised position based on the overruled case while it was law, and where fairness dictates, a decision overruling an earlier case will be prospectively applied.

DISSENT (Brown, J., joined by Imber, J.):

1. Under the circumstances of this case, I would apply our decision in *Low* prospectively because that is clearly the law in Arkansas, and also because it is manifestly the fair and just thing to do.

2. The rule of law concerning prospective application of new case law is plain. The new decision is applicable in all other cases arising after the decision becomes final.

3. Overruling a case will be applied retroactively only for the benefit of the appellant who worked to overturn the erroneous precedent.

4. The *Low* decision should be applied prospectively, and Felton was entitled to rely on our case law as it stood before the *Low* decision.

ATTORNEYS: Appellant - (Thomas K. Felton) John Byrd, Brian Brooks
Appellee - (Rebsamen Medical Center, Inc.) Mariam T. Hopkins

CIVIL: Writ of Certiorari, Discovery of Privileged Material*Baptist Health v. Circuit Court of Pulaski County*, No. 07-960

Arkansas Supreme Court (Glaze, J.), May 22, 2008

Petition for Writ of Certiorari

DENIED writ of certiorari.

FACTS: Plaintiff-respondent Reichen was injured while in defendant-petitioner Baptist Health's facility. Reichen and her family sued, and requested an order compelling discovery of performance enhancement forms. Baptist Health had objected to disclosing the forms on the ground that they were protected by peer review and quality assurance privileges. The circuit court ordered the forms disclosed. Baptist Health seeks a writ of certiorari.

LAW: 1. Various documents of committees of hospital medical staffs or medical societies responsible for reviewing and evaluating the quality of medical or hospital care are absolutely privileged. Ark. Code Ann. § 16-46-105.

2. A writ of certiorari is extraordinary relief. There must be no other adequate remedy but for the writ of certiorari, and a writ of certiorari lies only where (1) it is apparent on the face of the record that there has been a plain, manifest, and gross abuse of discretion, or (2) there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record.

3. The court will not look beyond the face of the record to ascertain the actual merits of a controversy, to control discretion, to review a finding of fact, or to reverse a trial court's discretionary authority.

4. A petition for a writ of certiorari is not an appropriate remedy when a party seeks to reverse a discovery order. A trial court's discovery ruling is a matter well within the court's jurisdiction and discretion. Even where a party objects to discovery on the grounds that the information sought is privileged, certiorari will not lie.

5. Here, it is clear that the circuit court had jurisdiction to enter a discovery order; what is at issue is whether the circuit court correctly interpreted a statute and applied its interpretation of that statute to the facts before it. Certiorari simply will not lie in these circumstances.

ATTORNEYS: Appellant - (Baptist Health)
Appellee - (Circuit Court of Pulaski County)

CIVIL: Dissolution, Due Process, Receivership, Prejudgment Interest*Sims v. Moser*, No. 07-1200

Arkansas Supreme Court (Danielson, J.), May 22, 2008

From the Circuit Court of Pulaski County, Hon. Timothy Fox

AFFIRMED in part; **REVERSED and REMANDED** in part; **AFFIRMED** on cross-appeal.

FACTS: Appellee Jewell sought the judicial dissolution of the law firm of Jewell, Moser, Fletcher & Holleman, P.A. (JMFH). Appellee Fletcher counterclaimed, asserting various causes of action. A receiver was appointed, and appellee Holleman was allowed to intervene. The appellants, various creditors, asserted claims against JMFH and also attempted to intervene. The circuit court eventually entered an order dissolving JMFH without giving the creditors a chance to present evidence. Appellant Sims had a judgment against JMFH from the Circuit Court of Lonoke County, but the circuit court declared that judgment void due to the appointment of the receiver. The circuit court allowed claims from the shareholders, but

denied most of the rest. It also entered judgment in Fletcher's favor on his counterclaim against Jewell. The creditors appeal, and Jewell and Fletcher cross-appeal.

LAW: 1. Due process with regard to property interests requires at a minimum that a person be given notice and a reasonable opportunity for a hearing before he is deprived of property by state action.

2. What process must be afforded is determined by context, and involves the consideration of three factors: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the burdens that additional or substitute procedural requirements would entail.

3. The opportunity to submit evidence to rebut charges or adverse claims and testimony is an essential requirement of a full and fair hearing to satisfy the Due Process Clause.

4. The creditors were not given an opportunity to support their claims before they were summarily denied. The circuit court failed to provide the appellants a hearing and such failure deprived them of their due-process rights. The case is reversed and remanded on this point.

5. The basic rule of statutory construction is to give effect to the intent of the legislature. In considering the meaning of a statute, the words are given their ordinary and usually accepted meaning. The statute is interpreted in such a way that no word is left void, superfluous or insignificant. There is no need to resort to rules of construction where the language is plain and unambiguous.

6. Ark. Code Ann. § 4-27-1432 does not give jurisdiction over claims to the receiver, and the receiver acts only with the authorization of the court. The circuit court has the option of appointing a receiver to aid in the process of winding up the affairs of a corporation, but the circuit court retains exclusive jurisdiction.

7. The circuit court did not err by making the final judgment on the claims.

8. Where a statute creates a right, remedy or proceeding that specifically provides a different procedure, the procedure so specified shall apply.

9. The process of dissolution is governed by statute, but nothing prohibits the application of civil procedure rules that do not govern the actual process by which the dissolution takes place.

10. Because the case is being remanded, there is no need to look at the circuit court's failure to issue findings of fact and conclusions of law.

11. To intervene as a matter of right under Ark. R. Civ. P. 24(a)(2), an intervenor must show that (1) he has a recognized interest in the subject matter, (2) that his interest might be impaired by the disposition of the suit, and (3) that his interest is not adequately represented by existing parties.

12. Because the case is being remanded, there is no need to address the circuit court's denial of the appellants' motions to intervene.

13. The court appointing a receiver has exclusive jurisdiction over the corporation and all its property. Ark. Code Ann. § 4-27-1432(a). However, dissolution of a corporation does not effect pending proceedings. Ark. Code Ann. § 4-27-1405(b). Also, a receiver may sue or defend in his own name as receiver of the corporation in all courts of this state. Ark. Code Ann. § 4-27-1432(c).

14. In construing statutes, the court seeks to reconcile statutory provisions to make them consistent, harmonious, and sensible.

legislature. In considering the meaning of a statute, the words are given their ordinary and usually accepted meaning. The statute is interpreted in such a way that no word is left void, superfluous or insignificant. There is no need to resort to rules of construction where the language is plain and unambiguous.

2. Statutory service requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact.

3. The bond forfeiture statute requires notice to the surety, and directs the circuit clerk to immediately issue a summons on each surety on the bail bond, requiring the surety to personally appear on the date and time stated in the summons. Ark. Code Ann. §16-84-207.

4. The order to show cause did not contain a date and time to appear, therefore it was not a summons under the statute.

5. Service of valid process is necessary to give a court jurisdiction over a defendant. Section 16-84-207 clearly requires that the issuance of a summons be immediate.

6. Because the summonses were not issued immediately, the forfeiture orders are reversed and remanded.

ATTORNEYS: Appellant - (First Arkansas Bail Bonds, Inc.) Jimmie Bush
Appellee - (State of Arkansas) Arkansas Attorney General

PER CURIAM: Ark. R. App. P.-Civil 5(b), Belated Appeal

Griddine v. State, No. CR 08-191

Arkansas Supreme Court (per curiam), May 22, 2008

Motion for Rule on Clerk

GRANTED motion for rule on clerk.

FACTS: The case was previously remanded for compliance with Ark. R. App. P.-Civil 5(b)(1). Defendant-appellant Griddine then moved for rule on the clerk.

LAW: 1. In a motion for belated appeal, there are only two reasons for an appeal not being timely perfected: either the party or the attorney is at fault, or there is good reason.

2. The court no longer requires an affidavit admitting fault before considering a motion, but an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect an appeal.

3. Ark. R. App. P.-Civ. 5(b)(1) applies to both civil and criminal cases for the determination of the timeliness of a record on appeal.

4. Strict compliance with Ark. R. App. P.-Civ 5(b) is required. The granting of an extension is not a mere formality.

5. The record does not show that Rule 5(b)(1) was complied with at the time the original motion for extension of time was filed and granted. It is clear from the record that Griddine's attorney is at fault. The motion is granted and a copy of this opinion will be forwarded to the Committee on Professional Conduct.

ATTORNEYS: Appellant - (Sedrick Griddine) Sara M. Sawyer-Hartness
Appellee - (State of Arkansas) Arkansas Attorney General

PER CURIAM: Belated Appeal*Sherman v. State*, No. CR 08-523

Arkansas Supreme Court (per curiam), May 22, 2008

Motion for Rule on Clerk

GRANTED motion for rule on clerk.**FACTS:** Defendant-appellant Sherman filed a motion for rule on clerk in which his attorney admits fault in tendering the record late.**LAW:** 1. In a motion for belated appeal, there are only two reasons for an appeal not being timely perfected: either the party or the attorney is at fault, or there is good reason.

2. The court no longer requires an affidavit admitting fault before considering a motion, but an attorney should candidly admit fault where he has erred and is responsible for the failure to perfect an appeal.

3. Sherman's attorney candidly admits fault, therefore the motion is granted and a copy of this opinion will be forwarded to the Committee on Professional Conduct.

ATTORNEYS: Appellant - (Joseph Sherman) Daniel Ritchey
Appellee - (State of Arkansas) Arkansas Attorney General**PER CURIAM: Ark. R. App. P.-Civil 5(b)***Winrock Grass Farm, Inc. v. Met. Nat'l Bank*, No. 08-529

Arkansas Supreme Court (per curiam), May 22, 2008

Motion for Rule on Clerk

REMANDED for compliance with rule.**FACTS:** The appellant moved for and was granted an extension of time, but the order does not contain a finding that all parties have had the opportunity to be heard.**LAW:** 1. Ark. R. App. P.-Civ. 5(b)(1) applies to both civil and criminal cases for the determination of the timeliness of a record on appeal.

2. Strict compliance with Ark. R. App. P.-Civ 5(b) is required. The granting of an extension is not a mere formality.

3. Because the order does not show that all parties had the opportunity to be heard on the motion, the matter is remanded to the circuit court to determine if the rule was complied with at the time the the original motion for extension of time was filed and granted.

ATTORNEYS: Appellant - (Winrock Grass Farm, Inc.) James Penick III
(Frank B. Whitbeck) Peter Kumpe
Appellee - (Metropolitan National Bank)

ARKANSAS COURT OF APPEALS(decisions and orders entered May 21, 2008)

CIVIL: Workers' Compensation*Owens Planting Co. v. Graham*, No. CA 07-793

Arkansas Court of Appeals (Bird, J.), Division IV, May 21, 2008

From the Arkansas Workers' Compensation Commission

AFFIRMED award of additional benefits.

FACTS: Appellee Graham was injured while working for appellant Owens Planting. The bucket of the front-end loader he was driving dropped, stopping the front-end loader suddenly and causing Graham's face to hit the steering wheel and dashboard. The parties stipulated that Graham sustained a compensable injury, and Owens Planting paid various medical expenses. Graham continued experiencing headaches, dizziness and vision and hearing problems, but an orthopedic surgeon and neurosurgeon could not find anything wrong with Graham and released him to work. Graham eventually saw another ear, nose and throat specialist, who found severe damage to Graham's nasal passages and eye sockets and performed surgery. The administrative law judge (ALJ) found this doctor to be a credible witness, and accepted his conclusion that the problems were a result of the compensable injury. The Commission affirmed the ALJ's findings. Owens Planting appeals.

LAW: 1. The evidence is viewed in the light most favorable to the findings of the Commission, and they will be affirmed if supported by substantial evidence. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

2. When the medical evidence is conflicting, it is a question of fact for the Commission to resolve.

3. Employers must provide medical services that are reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508.

4. The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary.

5. What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission.

6. Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages.

7. Whether or not an employee's healing period has ended is a question of fact for the Commission.

8. The findings of the Commission are supported by substantial evidence and are affirmed.

ATTORNEYS: Appellant - (Owens Planting Co.) Ronald Morgan

Appellee - (Arvel B. Graham) Kenneth A. Olsen, Charles P. Allen Jr.

CIVIL: Contractor Licensing, Attorney's Fees

Meyer v. CDI Contractors, LLC, No. CA 07-1307

Arkansas Court of Appeals (Gladwin, J.), Division I, May 21, 2008

From the Circuit Court of Pulaski County, Hon. James Moody.

AFFIRMED grant of summary judgment to defendant.

FACTS: Plaintiff-appellant Meyer, d/b/a plaintiff-appellant Meyer Excavators, entered into a subcontract with defendant-appellee CDI to perform earthwork on a project. CDI's contract was canceled, and it attempted to cancel its contract with Meyers. Meyer sued, alleging fraudulent inducement and breach of contract, and requested punitive damages. CDI moved for summary judgment, arguing the Meyers was barred from bringing the claim because he had entered the contract while holding a contractor's license that he had obtained by submitting false information. The circuit court granted CDI's motion, and awarded it attorney's fees. Meyer appeals.

LAW: 1. Summary judgment is to be granted only when it is clear that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Once the moving party establishes a prima facie entitlement to summary judgment, the opposing party must meet proof with proof to demonstrate the existence of a material issue of fact.

2. A contractor in violation of the licensing statutes may not sue in law or in equity for quantum meruit. Ark. Code Ann. § 17-25-103(d).

3. Regardless of how Meyer framed his pleadings, his claim for fraud is intrinsically founded on, and intertwined with, the facts surrounding the underlying contract, and the primary relief he sought was the benefit of his bargain. Therefore his fraudulent-inducement claim was barred by Ark. Code Ann. § 17-25-103(d).

4. The statute does not require that the applicant had the intent to give false information.

5. The general rule is that attorney's fees are not awarded unless expressly provided for by statute or rule.

6. A prevailing party in an action for breach of contract may be awarded a reasonable attorney's fee. Ark. Code Ann. § 16-22-308.

7. The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion.

8. There is no fixed formula in determining what is reasonable, but a trial court should consider several factors: (1) the experience and ability of counsel; (2) the time and labor required to perform the legal service properly; (3) the amount involved in the case and the results obtained; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged in the locality for similar services; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

9. The circuit court did not abuse its discretion in awarding attorney's fees to CDI.

ATTORNEYS: Appellant - (Robert Meyer) Nona Robinson
Appellee - (CDI Contractors, LLC) James Baker Jr., Kimberly Young

U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT(decisions and orders entered May 19-23, 2008)

CIVIL: Discrimination, Fed. R. Evid. 404(b), Harmless Error*Batiste-Davis v. Lincare, Inc.*, No. 06-4206

Eighth Circuit Court of Appeals (Benton, J.), May 19, 2008

From the U.S. District Court for the Eastern District of Arkansas

AFFIRMED verdict for defendant.

FACTS: Plaintiff-appellant Batiste-Davis, a respiratory therapist, was employed by defendant-appellee Lincare. She was promoted to center manager; one of her duties was assuring that filing was complete. Batiste-Davis and a patient that volunteered to help with filing both regularly took patient paperwork home. Batiste-Davis's supervisor suspended her without pay, then fired her. Batiste-Davis sued, alleging race discrimination. Before trial, the district court denied Batiste-Davis's motions to exclude evidence of a prior lawsuit she had filed alleging discrimination by another employer, and evidence of her past treatments for depression. The jury returned a verdict for Lincare. Batiste-Davis appeals.

LAW: 1. Evidentiary rulings of the trial court are reviewed for an abuse of discretion.

2. Evidence of prior acts is not admissible to prove the character of a person, but may be admissible to prove motive, intent, preparation or plan. Fed. R. Evid. 404(b).

3. Evidence of prior acts may be admitted if (1) relevant to a material issue; (2) proved by a preponderance of the evidence; (3) higher in probative value than in prejudicial effect; and (4) similar in kind and close in time to the event at issue.

4. Prior acts include prior lawsuits. Other courts generally do not admit evidence of prior suits unless they were fraudulently filed, but the Eighth Circuit allows evidence of prior lawsuits on a case-by-case basis if it meets the four requirements of the circuit's test.

5. The probative value of Batiste-Davis's prior suit was minimal, and was substantially outweighed by its unfair prejudice. The district court abused its discretion in admitting the evidence.

6. To be harmless error, the admitted evidence must not have had a substantial influence on the verdict. The error here was harmless.

7. Batiste-Davis put her mental condition at issue by alleging emotional suffering and mental anguish, therefore it was proper to admit evidence of her prior mental condition and treatment.

8. The denial of a new trial on the basis of the weight of the evidence is virtually unassailable. Reviewing the evidence most favorably to the verdict, the district court did not abuse its discretion by denying the motion for new trial.

ATTORNEYS: Appellant - (Berencer Batiste-Davis) Terrence Cain
Appellee - (Lincare, Inc.) Byron Freeland, Jeffrey L. Spillyards, Leigh Anne Shults

CIVIL: Securities Law, Preemption, Leave to Amend*Siepel v. Bank of America, N.A.*, No. 07-1899/07-1906

Eighth Circuit Court of Appeals (Shepherd, J.), May 19, 2008

From the U.S. District Court for the Eastern District of Missouri

AFFIRMED dismissal for failure to state a claim.

FACTS: The plaintiffs-appellants, beneficiaries of trust accounts maintained by defendant-appellee Bank of America, allege that the bank sent misleading letters to co-trustees and beneficiaries claiming benefits of moving to a mutual fund managed by an investment company owned by the bank. The letter did not disclose the conflict of interest or potential disadvantages of the move. The plaintiffs filed a class action alleging breach of fiduciary duty, unjust enrichment, and violations of the Investment Advisers Act of 1940, Securities Exchange Act of 1934 and Securities Act of 1933. The defendants asked the district court to decline jurisdiction based on forum shopping, and moved to dismiss the federal claims on the merits and the state-law claims as preempted. The district court dismissed the federal claims, denied leave to amend as futile, and found that the state-law claims were preempted. The plaintiffs appeal.

LAW: 1. It is unlawful for any person, in connection with the purchase or sale of any security, to (1) employ any device, scheme or artifice to defraud, (b) make an untrue statement of material fact or omit material facts from a statement, or (c) engage in a fraudulent or deceptive course of business. 17 C.F.R. § 240.10b-5; 15 U.S.C. § 78j.

2. A private right of action is recognized under § 10b, but claimants must be purchasers or sellers of securities.

3. The Securities Litigation Uniform Standards Act of 1998 (SLUSA) expressly preempts all covered state-law class actions that allege: (1) an untrue statement or omission of a material fact, or (2) use of a manipulative or deceptive device or contrivance, in connection with the purchase or sale of a covered security. 15 U.S.C. §§ 77p(b), 77bb(f)(1).

4. The 'in connection with' standard of § 10(b) is construed flexibly, not technically or restrictively. It is enough that the fraud alleged coincide with a securities transaction, whether by the plaintiff or by someone else.

5. The plaintiffs alleged non-disclosures that clearly coincide with the bank's purchase of shares of the mutual fund, and thus their state-law claims are preempted.

6. Although leave to amend should ordinarily be granted, a party should at least show how the complaint could be amended to save a meritless claim.

7. The legal conclusion underlying denial of leave to amend based on futility is reviewed de novo. The district court did not err in denying leave to amend.

ATTORNEYS: Appellant - (George Siepel, *et al.*) Steven M. Hamburg, Gregg Fishbein, Richard Lockridge, Richard Greenfield
Appellee - (Bank of America, *et al.*) Christopher Soller, Gregory B. Jordan, Mary J. Hackett, Darci F. Madden, Edward L. Dowd Jr., Jeffrey Russell, David J. Bird
(Columbia Funds Series Trust, *et al.*) Barry Short I, John Trocki III, Stephen Colangelo, Tim A. O'Brien, Jeffrey Russell, Laurie Hand

CIVIL: Social Security, Disability, Vocational Expert Testimony

Robson v. Astrue, No. 07-1863

Eighth Circuit Court of Appeals (Smith, J.), May 21, 2008

From the U.S. District Court for the Eastern District of Arkansas

AFFIRMED denial of benefits.

FACTS: Appellant Robson applied for disability insurance benefits, alleging disability due to post polio syndrome and back problems. At the hearing, the administrative law judge (ALJ) asked a hypothetical of the vocational expert (VE) which stated Robson's situation but did not mention Robson's obesity or post polio syndrome. The VE found that the individual in the hypothetical could perform secretarial work and that there were numerous positions in the economy. The ALJ determined that Robson was not disabled, and denied her claim. The Appeals Council denied her request for review, and Robson appealed to the district court, which affirmed the Commissioner. Robson appeals.

LAW: 1. The district court's affirmance of the Commissioner of Social Security's denial of benefits is reviewed de novo.

2. In reviewing the Commissioner's decision, the reviewing court determines whether there is substantial evidence on the record as a whole. The reviewing court may not reverse simply because there is substantial evidence to support a contrary decision.

3. A disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d).

4. To assess whether a claimant is disabled, the ALJ follows a 5-step evaluation process, considering: (1) the claimant's work activity, if any; (2) the medical severity of the impairment; (3) whether the medical severity of the impairment equals one of the enumerated listings; (4) the claimant's residual function capacity (RFC) and past relevant work; and (5) whether the claimant can perform other jobs in the economy given the claimant's RFC, age, education, and work experience. 20 C.F.R. § 404.1520(a)(4).

5. The Commissioner can ordinarily rely on the testimony of a VE to satisfy its burden of showing that the claimant can perform other work. However, such testimony is substantial evidence only when the testimony is based on a correctly phrased hypothetical question that captures the concrete consequences of a claimant's deficiencies.

6. The ALJ did not err in excluding Robson's obesity or post polio syndrome from the hypothetical, because Robson failed to identify any concrete consequences missing from the hypothetical.

7. A physician's conclusion that an applicant is disabled receives no deference because a finding of disability is one reserved for the Commissioner.

8. A treating physician's opinion is entitled to special weight, but it does not automatically control, particularly if the treating physician evidence is itself inconsistent.

9. Because the ALJ's hypothetical posed to the VE contained all of the concrete consequences of Robson's physical deficiencies, there was substantial evidence to support the finding the Robson could perform a sedentary job.

ATTORNEYS: Appellant - (Deborah Robson) Anthony W. Bartels, Eugene Wallace
Appellee - (Michael J. Astrue) Brian C. Linden, Stacey E. McCord, Tina M. Waddell

CIVIL (Bankruptcy): Appeal by Debtor from Confirmation of Own Plan

Zahn v. Fink (In re: Tenny Shikaro Zahn), No. 07-1974

Eighth Circuit Court of Appeals (Riley, J.), May 22, 2008

From the Eighth Circuit Bankruptcy Appellate Panel.

REVERSED dismissal of appeal.

FACTS: Appellant Zahn filed a bankruptcy petition under Chapter 13. Her petition did not include the distributions her non-filing husband received from an IRA account. The trustee, appellee Fink, objected to the confirmation of the plan, and Zahn was required to include the IRA income. She then objected to her own plan, which was eventually confirmed. She appealed confirmation of the plan to the Bankruptcy Appellate Panel (BAP), which dismissed the appeal for lack of standing. Zahn appeals.

LAW: 1. The bankruptcy court's interpretation of the law is reviewed de novo and its findings of fact for clear error.

2. In order to have standing to appeal the decision of the bankruptcy court, an appellant must be a person aggrieved.

3. Generally, a party may appeal from a judgment in his favor when there has been some error prejudicial to him, or he has not received all he is entitled to.

4. The extended length of Zahn's plan, caused by including the disputed income, is material and prejudicial to her, and she is therefore an aggrieved party.

5. Confirmation of a plan generally acts as a final order and the appellate court has jurisdiction over final orders. An order denying confirmation of a plan, which does not dismiss the case, is not a final order and cannot be appealed.

6. Confirmation of Zhan's plan is a final order and is appealable.

7. Not allowing a debtor to appeal confirmation of her own plan would require a debtor to comply with a plan that contains provisions the debtor does not believe are required by the Bankruptcy Code, while losing her right to appeal those provisions.

8. The court holds that a debtor who objects to her own plan may be an aggrieved party and have standing to appeal confirmation of such plan.

ATTORNEYS: Appellant - (Tenny Zahn) Tracy L. Robinson, Gregory Roach
Appellee - (Richard Fink) Richard Fink V, Karie Fahrenholz

CIVIL: Choice of Laws

St. Paul Fire & Marine Ins. Co. v. Building Constr. Enter., Inc., No. 07-2246

Eighth Circuit Court of Appeals (Melloy, J.), May 23, 2008

From the U.S. District Court for the Western District of Missouri

This action was brought in diversity and the court applies Missouri substantive law.

AFFIRMED choice of law decision.

FACTS: Defendant-appellant Building Constructions Enterprises (BCE) sought coverage under two insurance policies for expenses associated with a project in Kansas. The plaintiffs-appellees insurers sought a declaratory judgment to determine whether they owed coverage. The district court, sitting in diversity, applied Missouri law to determine whether Kansas or Missouri substantive law should govern the insurance policies. The district court found that a multi-factored test controlled, and that Missouri had more substantial contacts than did Kansas. BCE was a Kansas corporation, but only performed about 10% of its activities in Kansas. Its headquarters were located in Missouri, and the insurance contracts were entered into in Missouri. The district court held that Missouri law governed the policies, and that it did not require the insurers to provide coverage for BCE's claim. BCE appeals.

- LAW: 1. The district court's choice-of-law determination is reviewed de novo.
2. Missouri has adopted the Restatement (Second) of Conflict of Laws §§ 188 and 193.
3. Section 188 is a general, multi-factored test for use when a contract contains no choice-of-law provision, and assesses the contacts a state has with the parties and the underlying events in the case.
4. Section 193 is a more specific choice-of-law provision that addresses certain insurance contracts, and treats the principle location of the insured risk as the most important factor in the choice-of-law determination.
5. With multiple-risk insurance policies, like the ones at issue in this case, there is often no principle location for the insured risk. In such circumstances, the general, multi-factored test of Section 188 typically controls.
6. There is no indication that the parties intended a different state's law to control interpretation of the insurance policies for each written construction contract. Nothing indicated that it was possible to predict with fair accuracy where the risk would be located, or at least principally located, during the life of the policy, as required by Section 193.
7. The district court properly applied Section 188, and determined that Missouri law controlled.

ATTORNEYS: Appellant - (Building Constructions Enterprises) Scott C. Long, John Weist, April L. Martin
Appellee - (St. Paul Fire & Marine Ins. Co.) Lee M. Baty, Lee Ogburn, Steven Klepper, Theresa Otto
(North River Ins. Co.) Brian D. Jenkins, Rodrigo Garcia II, Michael G. Norris

CIVIL: Standing, Injury-in-Fact

Pucket v. Hot Springs Sch. Dist. No. 23-2, No. 07-2651

Eighth Circuit Court of Appeals (Gruender, J.), May 23, 2008

From the U.S. District Court for the District of South Dakota

AFFIRMED dismissal for lack of standing.

FACTS: Defendant-appellee Hot Springs School District bused students of a private religious school. The district's insurer informed the district that busing those students was not covered by its liability insurance, and the South Dakota Attorney General determined that a public school district lacked statutory authority to provide busing for children attending a religious school. The district discontinued busing the students. The South Dakota legislature subsequently passed a law which gave school districts authority to provide transportation to private-school students. The plaintiffs-appellants, students and parents of students of the religious school, sued the district, arguing that terminating the busing service violated the First and Fourteenth Amendments. The district later reinstated busing of the students. The state intervened, and the district court granted it and the school district summary judgment, finding that the plaintiffs lacked standing. The plaintiffs appeal.

LAW: 1. The district court's grant of summary judgment is reviewed de novo, and may be affirmed on any basis supported by the record.

2. Standing is a jurisdictional requirement and can be raised by the court sua sponte at any time during the litigation.

3. Under Article III of the U.S. Constitution, federal courts may only adjudicate actual cases and controversies. To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an injury-in-fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision.

4. To have standing, a plaintiff must demonstrate more than a generalized grievance. The injury must be concrete, not conjectural or hypothetical.

5. Under South Dakota law, school boards are creatures of statute with limited powers; a school board cannot exercise power unless it is expressly granted or necessarily implied by statute. When powers are necessarily implied from a statute, the implication should be clear and undoubted, and the party claiming through it should be able to point it out with certainty and precision.

6. The plain language of the relevant statutes did not authorize the the district to bus the private-school students.

7. The plaintiffs cannot show that the district's alleged discrimination caused their injury, because the district did not have the statutory authority to bus the students before the new law was enacted. The plaintiffs therefore lack standing to challenge the district's decision to discontinue busing the students prior to that time.

8. The new law specifically authorized the district to bus the students, but it did not require the district to do so.

9. There is no evidence that the plaintiffs actually requested the district to reinstate busing after the law became effective. By proffering a nebulous claim that the district should have understood that they wanted busing resumed without actually asking for it, the plaintiffs failed to show the existence of any injury to warrant judicial intervention.

10. The court will not sanction an attempt to manufacture a lawsuit designed to challenge South Dakota constitution provisions without having met the essential elements of standing. The district court's dismissal of the suit is affirmed.

ATTORNEYS: Appellant - (Daniel Pucket, *et al.*) Anthony R. Picarello Jr., Daniel Duffy, Derek L. Gaubatz, Jeffrey G. Hurd, Eric C. Rassbach, Kevin J. Hasson, Roger T. Severino
Appellee - (Hot Springs School District No. 23-2) Judith K. Grunewaldt, Naomi R. Cromwell (Hot Springs School Board) Jessica L. Filler, Richard P. Tieszen, Judith K. Grunewaldt, Naomi R. Cromwell (Mark Barnett) Diane Best, Jeffrey Hallem, Roxanne Giedd

CIVIL: Retaliatory Discharge, Causal Connection

Van Horn v. Best Buy Stores, L.P., No. 07-2677

Eighth Circuit Court of Appeals (Arnold, J.), May 23, 2008

From the U.S. District Court for the Southern District of Iowa

AFFIRMED grant of summary judgment to defendants.

FACTS: Plaintiff-appellant Van Horn began working for defendant-appellee Best Buy as a sales manager-in-training, then was hired by defendant-appellee Clark as inventory manager of new a Best Buy store. Van Horn reported two sales managers for sexual harassment, one during her training due to comments made directly to her, and the other at the new store based

on complaints from employees. There was evidence that Clark and Van Horn did not get along well. About two months after the last complaint, Best Buy reorganized and her position was combined with another. Best Buy alleged that she was not qualified for the new position, and fired her. Van Horn sued Best Buy and Clark for retaliatory discharge under Title VII and the Iowa Civil Rights Act (ICRA, Iowa Code § 216.11.2). The district court granted the defendants summary judgment. Van Horn appeals.

LAW: 1. Title VII prohibits an employer from discriminating against an employee because he or she has opposed any practice made unlawful by Title VII. 42 U.S.C. § 2000e-3(a).

2. The district court properly granted summary judgment to Clark on the Title VII claim because Title VII does not provide for an action against an individual supervisor.

3. Iowa courts generally use the analytical framework used for Title VII claims, and look to federal law for guidance in deciding cases under ICRA.

4. Van Horn was required to first make out a prima facie case by showing that she engaged in protected conduct, that the employer treated her in a manner that a reasonable employee would have found materially adverse, and that the protected conduct was causally related to the adverse action. If she did so, the burden would shift to the defendants to show a legitimate non-retaliatory reason for the adverse action, and then Van Horn would have an opportunity to show that the given reason was pretext for retaliation.

5. To make out a retaliation claim, the plaintiff must show that the protected conduct was a determinative -- not merely motivating -- factor in the employer's adverse employment decision

6. Although not dispositive, the time lapse between an employee's protected activity and the employer's adverse action is an important factor when evaluating whether a causal connection has been established. An interval of two months is too long to support an inference of causal connection.

7. The evidence cannot support a reasonable inference, as opposed to a speculative guess, that Van Horn's two acts of protected conduct were a determinative factor, not merely a motivating factor, in the decision to discharge her when her position was terminated.

ATTORNEYS: Appellant - (Ashlie Van Horn) Robert Wright Jr.
Appellee - (Best Buy Stores, *et al.*) Frank Harty, Debra Hulett

CIVIL: Federal Arbitration Act, Diversity Jurisdiction, Amount in Controversy

Advance America Servicing of Ark, Inc. v. McGinnis, No. 07-2770

Eighth Circuit Court of Appeals (Murphy, J.), May 23, 2008

From the U.S. District Court for the Western District of Arkansas

AFFIRMED dismissal for lack of subject matter jurisdiction.

FACTS: Defendant-appellee McGinnis sued plaintiff-appellant Advance America in state court under the Arkansas Deceptive Trade Practices Act. Advance America filed an answer and motion to compel arbitration, then brought this action in federal court to compel arbitration and to stay the state-court action. Advance America alleged diversity jurisdiction. The district court determined that the amount in controversy had not been met, and granted McGinnis's motion to dismiss. Advance America appeals.

LAW: 1. The Federal Arbitration Act does not create independent federal-question jurisdiction.

2. The district court's ruling that it had no subject-matter jurisdiction is reviewed de novo.

3. The party invoking federal jurisdiction has the burden to prove the requisite amount by a preponderance of the evidence. A complaint will be dismissed for lack of subject-matter jurisdiction if it appears to a legal certainty that the value of the claim is less than the required amount of \$75,000.

4. The amount in controversy is determined by the value to the plaintiff of the right sought to be enforced.

5. The object of this litigation is the value at stake in the arbitration dealing with the loan transactions between these two parties. The value of the underlying controversy must be viewed from the perspective of the federal plaintiff.

6. The district court did not err in finding Advance America's conclusory declaration insufficient to establish that the amount of the possible award in the arbitration would exceed \$75,000.

7. There is nothing in the record to support Advance America's speculation that attorney fees awarded by the arbitrator could possibly exceed \$75,000 when the value of the disputed loan transactions was found by the district court to be below \$1,000. The district court's judgment is affirmed.

ATTORNEYS: Appellant - (Advance America Servicing of Arkansas) Claire Hancock,
Lewis Wiener, Phillip Stano, Gary D. Marts Jr.
Appellee - (Brenda McGinnis) Daniel Turner, Todd M. Turner,
Christopher A. Averitt

CRIMINAL: Probable Cause, Leon Good-Faith Exception, Conspiracy, Acquittal

U.S. v. Hudspeth, No. 07-1632

Eighth Circuit Court of Appeals (Benton, J.), May 19, 2008

From the U.S. District Court for the Western District of Missouri

AFFIRMED conviction.

FACTS: Defendant-appellant Hudspeth was convicted of conspiracy to distribute pseudoephedrine, conspiracy to launder money, and money laundering. Hudspeth served as vice-president and chief managing officer of a wholesale supply company. He applied for a List I chemical license with the Drug Enforcement Agency (DEA), and was informed of the

importance of recordkeeping and the dangers of pseudoephedrine and ephedrine products. These products became a large part of his sales, and he encouraged salesmen to work around the limitations on selling customers large amounts and to continue to sell to outlets that did not have a reasonable, legal need for large quantities of the products. Search warrants uncovered irregular sales procedures, but Hudspeth continued to sell the pseudoephedrine and ephedrine products until he was arrested. Hudspeth moved to suppress the search warrants, but the district court denied the motion. Hudspeth was sentenced to concurrent terms of 240 months' imprisonment. He appeals.

LAW: 1. With regard to a district court's denial of a motion to suppress, its findings of fact are reviewed for clear error and legal conclusions de novo.

2. Probable cause to issue a warrant is established if an affidavit in support of the search warrant sets forth sufficient facts to lead a prudent person to believe that there is a fair probability that contraband or evidence of a crime will be found in a particular place.

3. Whether probable cause to issue a search warrant has been established is determined by considering the totality of the circumstances. The affidavit for a search warrant should be examined using a common-sense approach, not a hypertechnical one.

4. Probable cause requires only a showing of a fair probability, not hard certainties.

5. There was probable cause for the warrants, and they were therefore valid.

6. Under the *Leon* good-faith exception, disputed evidence will be admitted if it was objectively reasonable for the officer executing a search warrant to have relied in good faith on the judge's determination that there was probable cause.

7. In assessing whether an officer relied in good faith on the validity of a warrant, the totality of the circumstances are considered, including any information known to the officer but not included in the affidavit. The question is whether a reasonably well trained officer would have known that the search was illegal despite the issuing judge's authorization.

8. The *Leon* good-faith exception applies here, and the district court did not err in denying the motions to suppress.

9. The denial of a motion for judgment of acquittal is reviewed de novo, viewing the evidence most favorably to the verdict. A conviction will be reversed only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt.

10. To convict for conspiracy, the government had to prove (1) an agreement among two or more people to achieve an illegal purpose; (2) knowledge of the agreement; and (3) that the defendant knowingly joined and participated in the agreement. The agreement may be a tacit understanding rather than a formal, explicit agreement.

11. To convict for distribution, the government had to prove Hudspeth possessed or distributed pseudoephedrine knowing, or having reasonable cause to believe, that it would be used to manufacture a controlled substance. 21 U.S.C. § 841(c). It is insufficient to show an inadvertent sale of pseudoephedrine to an illegal drug manufacturer.

12. To convict for money laundering, the government had to prove Hudspeth engaged in financial transactions with the knowing use of the proceeds of illegal activities and with the intent to promote the carrying on of unlawful activity. 18 U.S.C. § 1956(a)(1)(A)(i).

13. There was sufficient evidence to support Hudspeth's convictions.

14. A trial court's response to a jury's request for supplemental instruction is a matter within the sound discretion of the trial court, and is reviewed for abuse of discretion.

15. The trial court must take great care to insure that any supplemental instructions are accurate, clear, neutral, and non-prejudicial, answering with concrete accuracy and within the specific limits of the question presented.

16. It may be proper at times to simply refer the jury back to the original instructions. The district court did not abuse its discretion in doing so here in response to the jury's question regarding money laundering.

17. Plain error exists if (1) there was an error (2) that was plain, (3) the error affected the defendant's substantial rights, and (4) a failure to grant relief would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

18. There was no plain error in the money laundering jury instruction.

ATTORNEYS: Appellant - (Roy Hudspeth) Donald Cooley
Appellee - (United States) Randall D. Eggert

CRIMINAL: AEDPA, Statute of Limitations, Equitable Tolling

Bishop v. Dormire, No. 07-2341

Eighth Circuit Court of Appeals (Gruender, J.), May 19, 2008

From the U.S. District Court for the Western District of Missouri

VACATE and REMAND dismissal of petition for writ of habeas corpus.

FACTS: Petitioner-appellant Bishop was convicted of rape, sodomy and child molestation. After the Missouri Court of Appeals affirmed his conviction, he filed for state post-conviction relief, which was denied and the denial was upheld on appeal. Bishop then filed a federal petition for writ of habeas corpus. The district court dismissed the petition as untimely. Bishop appeals.

LAW: 1. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), an inmate must file for federal habeas relief within one year of the date when a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A).

2. The one-year limitations period is tolled for the time during which a properly filed application for state post-conviction or other collateral review is pending.

3. A properly filed motion to recall the mandate tolls the AEDPA statute of limitations.

4. To toll the statute of limitations, the pending state post-conviction or other collateral review need not raise a federally cognizable claim.

5. The limitations period should have been tolled during the pendency of Bishop's motion to recall the mandate.

6. Bishop's sentence became final the day the Missouri Court of Appeals issued its mandate, based on a recent abrogation of en banc precedent. This recent change may justify the possibility of equitable tolling.

7. The case is remanded to allow the district court to determine whether Bishop can establish that he pursued his rights diligently but nonetheless was lulled into inaction, which might justify equitable tolling of the AEDPA statute of limitations.

ATTORNEYS: Appellant - (Terry Bishop) Susan M. Hunt
Appellee - (David Dormire) Andrew W. Hassell

CRIMINAL: Sentencing, Stipulation

U.S. v. Lopez, No. 07-2283

Eighth Circuit Court of Appeals (Riley, J.), May 20, 2008

From the U.S. District Court for the Northern District of Iowa

AFFIRMED sentence.

FACTS: Defendant-appellant Lopez pleaded guilty to conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine. Lopez and the government negotiated an agreement in which Lopez stipulated that a sentence within the guidelines range of 360 months to life was reasonable and the government agreed not to pursue a sentencing enhancement. The district court sentenced Lopez to 600 months. Lopez appeals.

LAW: 1. A defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal.

2. Lopez does not raise any legal or equitable challenges to his negotiated stipulation, and therefore may not now contest his sentence since it falls within the agreed sentencing range.

ATTORNEYS: Appellant - (Hector Lopez) Rees Douglas
Appellee - (United States) John H. Lammers

CRIMINAL: Return of Seized Property

Jackson v. U.S., No. 07-1454

Eighth Circuit Court of Appeals (Benton, J.), May 21, 2008

From the U.S. District Court for the Eastern District of Missouri

AFFIRMED in part; **REVERSED** and **REMANDED** in part.

FACTS: Defendant-appellant Jackson was arrested while driving a Ford Expedition leased in his girlfriend's name which was equipped with an after-market stereo and wheel rims. The officers seized various personal effects including a gold bracelet and \$1,510 in cash. Other personal property and \$7,000 were discovered inside the Expedition. Some of the stereo equipment was later stolen out of the vehicle, and Jackson's girlfriend received insurance proceeds for the loss. Upon default of the lease, Ford repossessed the Expedition. After Jackson was tried and convicted of drug-related offenses, he moved for the return of property seized at the time of arrest. The district court found that the currency was lawfully forfeited, that the claims to the stereo equipment and rims were abandoned, and that Jackson was entitled to the other personal effects, but that they were either lost or unlawfully appropriated. The district court found that it had no jurisdiction to award money damages, and severed the meritorious claims. Jackson appeals.

LAW: 1. The district court's legal conclusions are reviewed de novo, and its findings of fact for clear error.

2. A person whose property is seized by the government may petition the district court for its return. Fed. R. Crim. P. 41(g).

3. The movant must establish lawful entitlement to the property, and the court should afford the movant an opportunity to meet this burden.

4. A person from whom property is seized is presumed to have a right to its return.

5. The government must then establish a legitimate reason to retain the property, which may be satisfied by showing a cognizable claim of ownership or right to possession adverse to the movant's.

6. A Rule 41(g) motion is properly denied if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture or the government's need for the property as evidence continues.

7. Because the property was seized from Jackson's possession, he satisfied his initial burden.

8. The government met its burden as to the stereo equipment, because evidence showed that Jackson's girlfriend had an adverse claim of ownership.

9. Under Missouri law, abandonment is the voluntary relinquishment of ownership so that the property ceases to be the property of any person and becomes the subject of appropriation by the first taker. Abandonment of property requires intent plus act.

10. Jackson did not abandon his claim to the wheel rims, and under Missouri law an accessory to an automobile does not become an integral permanent part of the automobile by being attached thereto.

11. Rule 41(g) does not allow monetary damages, but another statute might. The matter is remanded for the district court to grant the movant an opportunity to assert an alternative claim for monetary damages.

ATTORNEYS: Appellant - (Rickey Jackson) Eric Bohnet
Appellee - (United States) Larry H. Ferrell, Michael A. Price

CRIMINAL: Probable Cause, Sentencing

U.S. v. Allebach, No. 07-2916

Eighth Circuit Court of Appeals (Melloy, J.), May 21, 2008

From the U.S. District Court for the Northern District of Iowa

AFFIRMED conviction and sentence.

FACTS: Defendant-appellant Allebach entered a conditional guilty plea to possession of powder cocaine with intent to manufacture five grams or more of crack cocaine. Acting on a tip from neighbors, police picked up trash bags from the curb in front of Allebach's residence. Containers and other items contained white residue that tested positive for cocaine. Officers applied for a search warrant, and during the search officers found over 30 grams of powder cocaine and 3 grams of crack. Allebach was sentenced to 136 months' imprisonment. He appeals.

LAW: 1. A reasonable magistrate could conclude that the materials found in the trash were sufficient to establish probable cause that cocaine was being possessed and consumed in Allebach's residence.

2. Even if the warrant were not supported by probable cause, the *Leon* good-faith exception would allow admission of the evidence.

3. The district court's interpretation of the sentencing guidelines is reviewed de novo, and its relevant conduct determination for clear error.

4. In determining whether conduct is relevant, the district court should consider the similarity, regularity, and temporal proximity of the conduct.

5. The district court did not clearly err in determining Allebach's possession of crack cocaine was part of the same course of conduct as his possession with intent to manufacture crack cocaine.

6. When a judge decides to simply apply the guidelines to a particular case, doing so will not necessarily require lengthy explanation.

7. Allebach's sentence was reasonable.

ATTORNEYS: Appellant - (Michael Allebach) Mark C. Meyer
Appellee - (United States) Martin McLaughlin, Patrick J. Reinert

CRIMINAL: Sentencing, Alternative Sentences

U.S. v. Desantiago-Esquivel, No. 07-1170

Eighth Circuit Court of Appeals (Melloy, J.), May 22, 2008

From the U.S. District Court for the Eastern District of Missouri

REVERSED and REMANDED for resentencing.

FACTS: Defendant-appellee Desantiago-Esquivel is an illegal alien from Mexico, and pleaded guilty to conspiring to distribute 50 grams or more of methamphetamine. The district court found that she qualified for safety-valve relief, and imposed a sentence of 36 months if she voluntarily stipulated to removal after serving her sentence. The district court also imposed an alternative sentence of 99 months in the event she did not stipulate to removal. The government appeals.

LAW: 1. The reasonableness of a sentence is reviewed under a deferential abuse-of-discretion standard. As to sentences outside the guidelines range, the reviewing court may take the degree of the variance into account and consider the extent of a deviation from the guidelines. The district court must ensure that the justification is sufficiently compelling to support the degree of the variance.

2. Reasonableness review also requires the reviewing court to ensure the district court committed no significant procedural error, such as failing to calculate or improperly calculating the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence, including an explanation for any deviation from the Guidelines range.

3. If the decision was procedurally sound, the substantive reasonableness of the sentence is reviewed under the abuse-of-discretion standard considering the totality of the circumstances.

4. The procedure used in this case, imposing alternative sentences, constitutes significant error and requires reversal. The case is reversed and remanded for resentencing.

ATTORNEYS: Appellant - (United States) Abbie Crites-Leoni
Appellee - (Viridiana Desantiago-Esquivel) Carter Law

CRIMINAL: Sentencing, Substantial Assistance*U.S. v. Perez*, No. 07-2452

Eighth Circuit Court of Appeals (Benton, J.), May 22, 2008

From the U.S. District Court for the District of Minnesota

AFFIRMED sentence.

FACTS: Defendant-appellant Perez pleaded guilty to possession with intent to distribute methamphetamine and possession of a firearm during a drug trafficking crime. As part of the plea agreement, Perez agreed to cooperate with law enforcement; if the government concluded that he provided substantial assistance, it agreed to move for a downward departure. Perez participated in an investigation, but no charges were pursued because Perez had not followed instructions and had entrapped the suspect. While in jail, Perez made a comment construed to be a threat to the life of the prosecutor assigned to his case. The government requested that Perez's sentence be increased for obstruction of justice, and did not make a motion for downward departure. The district court sentenced him to 157 months' imprisonment. Perez appeals.

LAW: 1. Upon motion of the government, the district court has authority to impose a sentence below a statutory minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person. 18 U.S.C. § 3553(e).

2. The government has no duty to make a substantial assistance motion unless it entered into a plea agreement with the defendant that creates such a duty.

3. A district court may review the government's refusal to make a substantial assistance motion if such refusal (1) was prompted by an unconstitutional motive, such as the defendant's race or religion; or (2) was not rationally related to a legitimate government interest.

4. The denial of a motion to compel is reviewed for abuse of discretion.

5. To obtain an evidentiary hearing, a defendant must make a substantial threshold showing that the government's refusal to make substantial assistance motion was premised on an improper motive. This threshold showing requires more than the presentation of evidence of substantial assistance and general allegations of improper motive.

6. Perez failed to satisfy his substantial threshold burden.

ATTORNEYS: Appellant - (Alexander Perez) William M. Orth
Appellee - (United States) James Lackner

CRIMINAL: Probable Cause, Continuance*U.S. v. Nguyen*, No. 07-2555

Eighth Circuit Court of Appeals (Shepherd, J.), May 22, 2008

From the U.S. District Court for the District of Minnesota

AFFIRMED conviction.

FACTS: Defendant-appellant Nguyen was convicted of mail fraud and wire fraud. He engaged in a 'bust-out' scheme whereby he charged the maximum on several credit cards, paid the balances with forged checks, then charged the maximum again. A postal investigator began investigating due to checks mailed as payments, and based on his information a search warrant was issued and credit cards and other evidence was seized. Nguyen moved to suppress evidence obtained through the search warrant, but his motion was denied. The government moved to exclude evidence of other bust-out schemes involving individuals

associated with Nguyen. The district court granted the government's motion. The morning of trial, Nguyen moved for a continuance because he wanted to replace his court-appointed attorney with a private attorney. The district court denied the motion. Nguyen appeals.

LAW: 1. In regard to the denial of a motion to suppress, the district court's legal determination of probable cause is reviewed de novo and its underlying factual conclusions for clear error.

2. For probable cause to be shown, the warrant application and affidavit must describe the circumstances showing that, based on practical experience and common sense, there is a fair probability that contraband or similar evidence will be found in the targeted place.

3. An informant's reliability, veracity, and basis of knowledge are relevant to a finding of probable cause.

4. Police officers are entitled to a presumption of credibility when they are informants mentioned in a search warrant, and there was no reason to treat the postal inspector any differently.

5. There was a pattern of fraudulent behavior which suggested a continuing criminal activity, so the information in the warrant affidavit was not stale.

6. A district court has broad discretion to decide a request for a continuance. Its decision will be reversed only if it abused its discretion and the moving party was prejudiced as a result.

7. Continuances are disfavored and should only be granted if the moving party has shown a compelling reason. Last minute requests to change counsel are also disfavored.

8. When there is not a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the defendant and his counsel of record, denial of a last-minute request for substitution is appropriate.

9. The denial of a new trial is reviewed for abuse of discretion.

10. A defendant is entitled to an interpreter if the court determines he speaks only or primarily a language other than English, so as to inhibit his comprehension of the proceedings or communication with counsel or the courts, or so as to inhibit his comprehension of questions and the presentation of testimony. 28. U.S.C. § 1827(d)(1).

11. The evidence showed the Nguyen did not need an interpreter.

12. Due process is violated if the prosecution suppresses evidence that is material to the defendant's guilt. *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a *Brady* violation, a defendant must show that the government suppressed evidence, the evidence was favorable to him, and the evidence was material to the issue of guilt.

13. The challenged evidences was irrelevant and immaterial to Nguyen's guilt. The government is not expected to imagine ways that the evidence could somehow be relevant to the defendant's defense.

ATTORNEYS: Appellant - (Dan Nguyen) John S. Hughes
Appellee - (United States) Joseph T. Dixon III

PER CURIAM: Motion to Reopen, Changed Country Conditions*Lin v. Mukasey*, No. 07-2627

Eighth Circuit Court of Appeals (per curiam), May 22, 2008

From the Board of Immigration Appeals

DENIED petition for review.

FACTS: Petitioner Lin is a native and citizen of China. She entered the U.S. with fraudulent documents, conceded removability, and applied for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). She claimed to have been forced to have an abortion and that she would be forcibly sterilized if she returned to China. The immigration judge (IJ) denied her claims, finding her not credible. The Board of Immigration Appeals (BIA) affirmed. Several years later, Lin filed an untimely motion to reopen the proceedings based on changed country conditions. The BIA denied the motion. Lin petitions for review.

LAW: 1. An untimely motion to reopen is time-barred unless the movant makes a sufficient showing of changed country conditions with evidence that is material and was not available and could not have been discovered or presented at the previous hearing. 8 C.F.R. § 1003.2(c)(3)(ii).

2. Motions to reopen are disfavored, and the BIA's decision regarding changed country conditions is reviewed under a highly deferential abuse of discretion standard.

3. Lin did not demonstrate changed country conditions, and most of the evidence she submitted was available at the time of the first hearing.

4. The BIA abuses its discretion if its decision is without rational explanation, departs from established policies, invidiously discriminates against a particular race or group, or where the agency fails to consider all factors presented by the alien or distorts important aspects of the claim.

5. The BIA did not abuse its discretion, and the petition for review is denied.

SUPREME COURT OF THE UNITED STATES(decisions and orders entered May 19-23, 2008)

CIVIL: Dormant Commerce Clause, Differential Taxes on Municipal Bonds*Department of Revenue of Kentucky v. Davis*, No. 06-666, 553 U.S. ____

United States Supreme Court (Souter, J.), May 19, 2008

On Writ of Certiorari to the Court of Appeals of Kentucky

REVERSED and REMANDED judgment that tax was unconstitutional.

PARTICIPATING IN FULL OPINION: Souter and Breyer, JJ.

JOINED IN ALL BUT PART III-B: Ginsburg, J.

CONCUR TO FULL OPINION: Stevens, J.

CONCURRING IN PART: Roberts, C.J., and Scalia, J.

CONCURRING IN JUDGMENT: Thomas, J.

DISSENT: Kennedy and Alito, JJ.

FACTS: The Commonwealth of Kentucky taxes its residents' income. It excludes from taxable income the interest on any state or local bond, but only those from Kentucky. Similar tax schemes are employed by most states and have existed from the time states first began taxing income in the early 20th century. Respondents, the Davises, are Kentucky residents who paid state income tax on interest from out-of-state municipal bonds, then sued the tax collectors in

state court. The trial court granted judgment to the commonwealth, but the Kentucky Court of Appeals reversed, finding that the differential taxing ran afoul of the Commerce Clause. The Court granted certiorari to Kentucky.

LAW: 1. The dormant Commerce Clause restricts economic protectionism, such as regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

2. Dormant Commerce Clause analysis asks whether a challenged law discriminates against interstate commerce. A discriminatory law is virtually per se invalid, and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. If so, the law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

3. An exemption covers states that go beyond regulation and themselves participate in the market so as to exercise the right to favor their own citizens over others. The 'market participant' exception reflects a basic distinction between states as market participants and states as market regulators.

4. State and local governments that provide public goods and services on their own, unlike private businesses, are vested with the responsibility of protecting the health, safety, and welfare of their citizens, and laws favoring such states and their subdivisions may be directed toward any number of legitimate goals unrelated to protectionism.

5. A government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors.

6. The issuance of debt securities to pay for public projects is a quintessentially public function.

7. There is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being substantially similar to the other bond issuers on the market.

8. Part III-B of the opinion discusses the dual role of regulating and participating in the market, which gives the regulation a civic objective different from the discrimination traditionally held to be unlawful.

9. The current tax schemes are important to states, and financing for long-term municipal improvements would change radically if the differential tax feature disappeared.

10. The fact that the system has been in force for a very long time is of itself a strong reason for leaving any improvement that may be desired to the legislature.

CONCUR (Stevens,J.):

1. If a state merely borrows money to pay for spending on transportation, public safety, education, utilities, and environmental protection, it does not operate a commercial enterprise for purposes of the dormant Commerce Clause.

2. A state's reliance on general taxes or municipal bonds to finance public projects does not merit the same Commerce Clause scrutiny as operation a fee-for-service business enterprise in an area in which there is an established interstate market.

3. In my judgment, state action that motivates the state's taxpayers to lend money to the state is simply not the sort of burden on interstate commerce that is implicated by our dormant Commerce Clause jurisprudence.

CONCURRING IN PART (Roberts, C.J.):

1. I join all but Part III-B of the opinion of the court; I see no need to proceed to the alternative analysis in Part III-B.

CONCURRING IN PART (Scalia, J.):

1. I join all but Part III-B and the discussion of whether the balancing of the burden on interstate commerce and the state interests is appropriate here. I apply our negative Commerce Clause doctrine only when stare decisis compels me to do so. In my view, it is an unjustified invention, not to be expanded beyond its existing domain.

2. A court cannot decide which interest outweighs the other without deciding which interest is more important. I would abandon the balancing and leave these legislative judgments to the legislative branch.

CONCURRING IN THE JUDGMENT (Thomas, J.):

1. I agree with the Court that Kentucky's differential tax scheme is constitutional, but rather than apply a body of doctrine that has no basis in the Constitution and has proved unworkable in practice, I would entirely discard the Court's negative Commerce Clause jurisprudence.

2. The legislature, not the judiciary, bears the responsibility of curbing what it perceives as state regulatory burdens on interstate commerce. In the face of congressional silence, we have no authority to invalidate Kentucky's differential tax scheme.

DISSENT (Kennedy, J., joined by Alito, J.):

1. The Commerce Clause doctrine that emerged from the decisions of this Court has been appropriate and necessary to implement the Constitution's purpose and design.

2. Today the Court weakens the preventative force of the Commerce Clause and invites other protectionist laws.

DISSENT (Alito, J.):

1. I proceed in this case on the assumption that the Court's established dormant Commerce Clause precedents should be followed.

ATTORNEYS: Appellant - (Dept. of Revenue of Kentucky, *et al.*) C. Christopher Trower, Douglas M. Dowell Sr.
Appellee - (George W. Davis, *et ux.*) G. Eric Brunstad Jr., David J. Guin, Matthew Heffner, Matthew Hurst, Arthur T. Susman, Charles Watkins

CRIMINAL: Child Pornography, First Amendment, Overbreadth

U.S. v. Williams, No. 06-694, 553 U.S. ____

United States Supreme Court (Scalia, J.), May 19, 2008

On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

REVERSED and REMANDED judgment that statute was unconstitutional.

CONCUR: Stevens and Breyer, JJ.

DISSENT: Souter and Ginsberg, JJ.

5 majority, 2 concur, 2 dissent

FACTS: Defendant-respondent Williams was convicted under 18 U.S.C. § 2252(a)(3)(B) for pandering or soliciting child pornography. He appealed, arguing that the statute was unconstitutionally overbroad. The Eleventh Circuit reversed his pandering conviction, holding that the statute was both overbroad and impermissibly vague. The Court granted certiorari to the government.

LAW: 1. Obscene speech -- sexually explicit material that violates fundamental notions of decency -- is not protected by the First Amendment.

2. Child pornography, which consists of sexually explicit visual portrayals that feature children, is not protected by the First Amendment. The government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.

3. Two provisions of the Child Pornography Prevention Act of 1996 were previously held facially overbroad, because the child-protection rationale for speech restriction does not apply to materials produced without children and because it criminalized the possession of material that had been pandered as child pornography regardless of whether it actually was that.

4. A statute is facially invalid if it prohibits a substantial amount of protected speech.

5. The first step in overbreadth analysis is to construe the challenged statute.

6. Rather than target the underlying material, section 2252(a)(3)(B) bans the collateral speech that introduces such material into the child-pornography distribution network.

7. The important features of the statute are: (1) it includes a scienter requirement, 'knowingly,' which applies to every element of the two provisions; (2) the statute's string of operative verbs -- advertises, promotes, presents, distributes, or solicits -- is reasonably read to have a transactional connotation; (3) the defendant must actually have the subjective belief that the material was child pornography, and his actions must objectively manifest such a belief; (4) the defendant must intend that the listener believe the material to be child pornography; and (5) the use of the term 'sexually explicit conduct' connotes actual depiction of the sex act rather than merely suggesting that it is occurring -- the portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera.

8. Offers to engage in illegal transactions are categorically excluded from First Amendment protection. The exclusion is not based on the less privileged First Amendment status of commercial speech, but on the principle that offer to give or receive what is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection.

9. Offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection just because the offeror is mistaken about the the factual predicate of his offer.

10. The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.

11. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

12. Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. The mere fact that close cases can be envisioned does not render a statute vague. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.

13. The statute at issue is not facially invalid.

CONCUR (Stevens, J., joined by Breyer, J.):

1. First, I believe the result to be compelled by the principle that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.

2. Second, to the extent the statutory text alone is unclear, it is appropriate to look beyond the text in order to ascertain the intent of the drafters. Congress's aim was to target materials advertised, promoted, presented, distributed, or solicited with the intention of inciting sexual arousal.

DISSENT (Souter, J., joined by Ginsburg, J.):

1. The exception for child pornography to the general rule that pornography is not prohibited rests not on the content of the picture but on the need to foil exploitation of child subjects. The justification limits the exception: only pornographic photographs of actual children may be prohibited.

2. In failing to confront the tension between ostensibly protecting the material pandered while approving prosecution of the pandering of that same material, and in allowing the new pandering prohibition to suppress otherwise protected speech, the Court undermines our precedent in both reasoning and result. I would hold the statute to be unconstitutional.

ATTORNEYS: Appellant - (United States) Paul D. Clement
Appellee - (Michael Williams) Richard J. Diaz

CRIMINAL: Armed Career Criminal Act, Maximum Term of Imprisonment

U.S. v. Rodriguez, No. 06-1646, 553 U.S. ____

United States Supreme Court (Alito, J.), May 19, 2008

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

REVERSED and REMANDED holding that recidivist enhancements are ignored under ACCA.

DISSENT: Souter, Stevens and Ginsberg, JJ.

6 majority, 3 dissent

FACTS: Defendant-respondent Rodriguez was convicted of being a felon in possession of a firearm. He had two prior state convictions in California for residential burglary and three state convictions in Washington for delivery of a controlled substance. The Washington statute that Rodriguez was convicted of violating stated that a defendant could be imprisoned for a maximum of five years, but on a second or subsequent offense the maximum was ten years. In the federal case, the government moved for Rodriguez to be sentenced under the Armed Career Criminal Act (ACCA). The district court declined to do so, and the Ninth Circuit affirmed, holding that the maximum term of imprisonment for determining if the ACCA applied must be determined without taking recidivist enhancements into account. The Court granted certiorari to the government.

LAW: 1. The ACCA sets a 15-year minimum sentence in the case of a person who has three previous convictions for a violent felony or a serious drug offense, or both. 18 U.S.C. § 924(e)(1). A 'serious drug offense' is one for which a maximum term of imprisonment of ten years or more is prescribed by law.

2. A straightforward application of the language of the ACCA leads to the conclusion that the 'maximum term of imprisonment prescribed by law' in this case was 10 years.

DISSENT (Souter, J., joined by Stevens and Ginsburg, JJ.):

1. The Court chooses a reading of the ACCA over another that would make at least as much sense of the statute's ambiguous text and would follow the counsel of a tradition of lenity in constructing perplexing criminal laws.

2. There is only one reading of the statute with any realistic chance of giving fair notice of how the ACCA will apply, and that is the reading the district court and Court of Appeals each chose.

ATTORNEYS: Appellant - (United States) Paul D. Clement, Kannon K. Shanmugam
Appellee - (Gino Rodriguez) Andrew J. Pincus, Charles A. Rothfeld

CRIMINAL: Carrying Explosives During Felony

U.S. v. Ressam, No. 07-455, 553 U.S. ____

United States Supreme Court (Stevens, J.), May 19, 2008

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

REVERSED and REMANDED reversal of conviction.

CONCUR: Scalia and Thomas, JJ.

DISSENT: Breyer, J.

6 majority, 2 concur, 1 dissent

FACTS: Defendant-respondent Ressam attempted to enter the U.S. by car ferry. He falsely identified himself on a customs declaration form, and, when his car was searched, explosives and related items were found in the trunk. Ressam was convicted of making false statement to a U.S. customs official, and of carrying an explosive during the commission of that felony. The Ninth Circuit set aside the explosives conviction because the explosives were not related to the underlying felony of making a false statement. The Court granted certiorari to the government.

LAW: 1. The relevant portion of the statute makes it a crime to carry an explosive during the commission of any felony which may be prosecuted in a court of the U.S. 18 U.S.C. § 844(h).

2. It is undisputed that the items hidden in Ressam's care were explosives, and that respondent was 'carrying' those explosives when he knowingly made false statements to a customs official, and that those statements violated § 1001.

3. The term 'during' in section 844(h) denotes a temporal link. Because Ressam's carrying of the explosives was contemporaneous with his violation of section 1001, he carried them 'during' that violation. The judgment of the Court of Appeals is reversed.

CONCUR (Thomas, J., joined by Scalia, J.):

1. Because the plain language of the statute squarely answers the question presented in this case, I join only the part of the Court's opinion discussing the plain language.

DISSENT (Breyer, J.):

1. My problem with the Court's interpretation is that it would permit conviction of any individual who legally carried explosives at the time that he engages in a totally unrelated felony.

2. The Court's interpretation, coupled with the broad definition of explosives, would encompass a farmer hauling fertilizer that commits an unrelated mail fraud or a hunter who buys snacks with a counterfeit bill.

3. The statute's context makes clear that it does not cover carrying of explosives totally unrelated to the felony. There must be an intentional misuse of explosives.

4. I believe the statute applies if the felony facilitated or aided the carrying of explosives, or vice versa. I would remand for a determination of the presence or absence of that relevant relation.

ATTORNEYS: Appellant - (United States) Paul D. Clement, Michael B. Mukasey

Appellee - (Ahmed Ressam) Thomas W. Hillier II

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P: 479.409.6464 F:479.521.4064
olw@ozarklegalwriting.com

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