APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

OCTOBER 2015
VOLUME 23, NO. 2

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On October 22nd, the Supreme Court amended Administrative Order No. 10 (III) (g) regarding health insurance requirements in child support. A copy of the per curiam was included in the weekly mail out.

On October 22nd, the Supreme Court approved technical amendments to Administrative Order No. 9, which governs official court reporters time records. A copy of the per curiam was included in the weekly mail out.

CRIMINAL

Taylor v. State, 2015 Ark. 339 **[Rule 37]** In appellant's Rule 37 petition he asserted that his appellate counsel was deficient for failing to raise certain issues on appeal. However, because the issues were not presented to the trial court during appellant's trial, the appellate court would have been precluded from considering them on appeal. Thus, the circuit court did not error in denying appellant's petition for postconviction relief. (Sims, B.; CR-15-22; 10-1-15; Danielson, P.)

Griffin v. State, 2015 Ark. 340 **[motion to suppress]** Appellant's statements to law enforcement officials were spontaneous and were not the product of improper police questioning. Accordingly, the circuit court did not err when it denied appellant's motion to suppress his custodial statements. **[intoxication as a mitigating circumstance]** The trial court, acting as the finder of fact, considered the evidence of appellant's intoxication at the time of the offense but determined that it was not a mitigating circumstance for purposes of sentencing, which the court was free to do. (McCallum, R.; CR-14-818; 10-1-15; Baker, K.)

Holland v. State, 2015 Ark. 341 **[Ark. R. Evid. 404 (b); pedophile exception]** The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b) of the Arkansas Rules of Evidence, it admitted evidence of appellant's prior acts of sexual misconduct against other children, which were "strikingly similar" to the acts alleged in the current case, and which having occurred within seven and eleven years prior to the acts in the current case, were not too remote in time to be irrelevant. **[rape-shield statute]** Appellant sought to admit testimony regarding the victims' prior sexual activities as motive for accusing appellant of abuse. The trial court denied appellant's request. In affirming the circuit court's actions, the Supreme Court explained that "an alleged victim's motive or bias is admissible only when it is relevant and its probative value outweighs its prejudicial nature" and concluded that the probative value of the proffered evidence in appellant's case was slight compared to the prejudicial nature of the evidence. **[psychotherapist/patient privilege; review medical records]** Under some circumstances, a victim's psychotherapist/patient privilege must yield to the due process rights of the defendant. However, the defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the victim's medical files. Instead, the United States Supreme Court has determined that protecting the defendant's rights, as well as the State's interest of safeguarding the victim's privileged information, is best served by having the trial court conduct an *in camera* review of the files. In its review, the court would be looking for exculpatory evidence that is "material" to disclose to the defendant. (Sims, B.; CR-14-1019; 10-1-15; Goodson, C.)

Paulson v. State, 2015 Ark. 345 **[mistrial]** The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon a remark made by the prosecutor during voir dire of the jury. (Ramey, J.; CR-15-165; 10-1-15; Wynne, R.)

Mundell v. State, 2015 Ark. App. 554 **[revocation]** It was clearly against the preponderance of the evidence for the trial court to conclude that appellant's failure to comply with the conditions of his suspended sentence was inexcusable. (Cottrell, G.; CR-15-132; 10-7-15; Glover, D.)

Brasuell v. State, 2015 Ark. App. 559 **[sufficiency of the evidence; commercial burglary]** There was substantial evidence to support appellant's conviction. **[Ark. R. Evid. 404 (b)]** Because the evidence of appellant's subsequent bad acts was offered to establish his intent, motive, opportunity, knowledge, and plan to commit the crime, it was not an abuse of the trial court's discretion to admit the evidence pursuant to Ark. R. Evid. 404 (b). (Medlock, M.; CR-15-131; 10-7-15; Vaught, L.)

Green v. State, 2015 Ark. 359 **[admission of photographs]** Because the challenged photograph assisted the trier of fact by showing the condition of the victim's body, the location of the victim's injury, and the position in which the body of the victim was discovered, the trial court did not abuse its discretion in admitting a photograph of the crime scene. (Thyer, C.; CR-15-273; 10-8-15; Brill, H.)

Arms v. State, 2015 Ark. 364**[sufficiency of the evidence; introduction of a controlled substance into the body of another]** Arkansas Code Annotated § 5-13-210 does not include an unborn child or fetus as the possible victims of the criminal activity. Additionally, there was no evidence that appellant introduced methamphetamine into her baby's system by causing the child to ingest or inhale it. Finally, for the jury to conclude that the controlled substance was "otherwise introduced" into appellant's baby's system would have been speculation or conjecture or improper criminalization of a passive process. Thus, the trial court erred when it denied appellant's motion for a directed verdict. (Looney, J.; CR-15-124; 10-8-15; Hart, J.)

Sims v. State, 2015 Ark. 363 **[Rule 37]** The trial court did not err when it rejected appellant's Rule 37 petition in which appellant asserted that his trial counsel was ineffective for failing to offer various jury instructions and failing to address various evidentiary issues to appellant's liking. Additionally, because the files and records from appellant's case conclusively established that the allegations in appellant's petition were meritless, the trial court did not err when it denied appellant's petition without a hearing. (Wright, H.; CR-15-153; 10-8-15; Goodson, C.)

Wooten v. State, 2015 Ark. App. 568 **[witness competency]** The trial court did not abuse its discretion in finding the eighty-nine-year-old victim competent to testify because she displayed the ability to relay the events of her attack and describe what she saw, felt, and heard. (Yeargan, C.; CR-15-225; 10-21-15; Gladwin, R.)

Travis v. State, 2015 Ark. App. 572 **[witness competency]** The trial court did not abuse its discretion in finding the five-year-old victim competent to testify because she showed a moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts. (Johnson, L; CR-15-84; 10-21-15; Virden, B.)

Thacker v. State, 2015 Ark. App. 573 **[mistrial]** The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon her alibi witness being arrested in front of the jury. The appellate court reasoned that the arrest in front of the jury was proper because the witness disobeyed the court's order in front of the jury and the court was entitled to punish him summarily in front of the jury. (Wyatt, R.; CR-15-214; 10-21-15; Virden, B.)

Hardin v. State, 2015 Ark. App. 593 **[retroactive application of statute]** Arkansas Code Annotated § 16-85-714 applies only to no-contact orders issued after July 27, 2011, the effective date of the statute. (Erwin, H.; CR-15-421; 10-21-15; Hixson, K.)

Sylvester v. State, 2015 Ark. App. 589 **[motion to suppress]** Because appellant's statement "Yeah, yeah --- yeah, I will have to get a lawyer present," was ambiguous and equivocal, the investigators did not violate his right to counsel when they continued to question appellant after he made the statement. Therefore, the trial court's decision to deny appellant's motion to suppress the statements that he made during the interview was not clearly against the preponderance of the evidence. (Fitzhugh, M.; CR-15-427; 10-21-15; Vaught, L.)

Hill v. State, 2015 Ark. App. 587 **[continuance]** The trial court did not abuse its discretion when it denied appellant's request for a continuance, which was made after his original lawyer became ill and a new attorney had to be appointed to represent appellant a few days before his trial began. (Hearnsberger, M.; CR-14-824; 10-21-15; Whiteaker, P.)

Fowler v. State, 2015 Ark. App. 579 **[sufficiency of the evidence; first-degree murder]** There was substantial evidence to support appellant's conviction. **[admission of evidence]** Because appellant offered "general denial" as his defense, the circuit court was correct in finding that the victim's toxicology report was irrelevant inadmissible evidence. (Reynolds, D.; CR-13-316; 10-21-15; Harrison, B.)

Edison v. State, 2015 Ark. 376 **[cross examination]** The trial court did not abuse its discretion when it limited appellant's cross examination of a witness on the issue of whether the witness was bias because the limitation occurred only after it was clear that the issue had been sufficiently developed and clearly presented to the jury. **[hearsay testimony]** The appellate court will not reverse a conviction based upon erroneously admitted hearsay testimony if the admission of the evidence was cumulative to other evidence admitted without objection. (Johnson, L.; CR-15-189; 10-22-15; Danielson, P.)

Edwards v. State, 2015 Ark. 377 **[expert testimony; specific intent]** The circuit court correctly concluded that expert testimony on the issue of appellant's ability to form the required specific intent to commit murder was not admissible. (Wright, J.; CR-15-494; 10-22-15; Hart, J.)

Lee v. State, 2015 Ark. App. 616 **[mistrial]** The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon the prosecutor referring to the victim of a rape as a "virgin" in his opening statement. (Fogelman, J.; CR-15-311; 10-28-15; Brown, W.)

Scott v. State, 2015 Ark. App. 614 **[admission of evidence]** The trial court did not abuse its discretion when it permitted the State to elicit testimony about a certain statement that appellant made prior to the crime for which he was convicted because the statement was relevant to show appellant's state of mind shortly before the crime. (Griffen, W.; CR-15-253; 10-28-15; Hoofman, C.)

Ross v. State, 2015 Ark. App. 613 **[admission of evidence]** The trial court did not abuse its discretion when it excluded as hearsay a letter written by appellant's girlfriend in which she implicated herself and appellant in the crime for which appellant was convicted. Although appellant attempted to assert

that the letter was a "statement against interest," and thus admissible as an exception to the hearsay rule, the appellate court explained: "where accomplices are involved, a statement against interest that does not entirely exculpate the defendant cannot fall within" the 804(b)(3) exception to the hearsay rule. (Hearnsberger, M.; CR-15-241; 10-28-15; Hixson, K.)

Kourakis v. State, 2015 Ark. App. 612 **[sufficiency of the evidence; simultaneous possession of drugs and firearms]** There was substantial evidence to support appellant's conviction. **[motion to suppress]** Appellant had no reasonable expectation of privacy when he voluntarily allowed a private citizen to come into his home and view and record controlled substances located in his home. Therefore, the Fourth Amendment was not implicated and the trial court did not err in denying appellant's motion to suppress the video made during the private citizen's visit to appellant's home. (Erwin, H.; CR-15-307; 10-28-15; Vaught, L.)

Jackson v. State, 2015 Ark. App. 603 **[speedy trial]** Because the delay in appellant's trial was caused by appellant's request for a competency evaluation, the trial court did not err when it denied appellant's motion to dismiss the charges against him based upon an alleged speedy-trial violation. **[jury selection]** When the jury venire is drawn by random selection, the mere showing that it is not representative of the racial composition of the population will not make a prima facie showing of racial discrimination. **[Ark. R. Evid. 615]** Although the witness had been in the courtroom prior to his testimony in violation of Ark. R. Evid. 615, the trial court did not abuse its discretion in admitting the witness's testimony because it was rebuttal evidence admitted for the limited purpose of denying accusations appellant made during the presentation of his defense. (Henry, D.; CR-15-221; 10-28-15; Virden, B.)

Johnson v. State, 2015 Ark. 387 **[motion to suppress]** The facts asserted in the affidavit that accompanied the request for a search warrant were the basis for the magistrate's finding of probable cause that evidence related to the crime for which appellant was convicted would be located on appellant's cell phone. Thus, there was adequate probable cause to issue the search warrant and the resulting search was proper. Therefore, the circuit court's denial of appellant's motion to suppress was not erroneous. (Sims, B.; CR-15-174; 10-29-15; Baker, K.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Rose v. State, 2015 Ark. App. 563 (aggravated residential burglary) CR-15-112; 10-7-15; Hoofman, C.

Williams v. State, 2015 Ark. App. 553 (fraudulent use of a credit card) CR-15-130; 10-7-15; Gruber, R.

Burnside v. State, 2015 Ark. App. 550 (rape) CR-15-152; 10-7-15; Kinard, M.

Stone v. State, 2015 Ark. App. 543 (fraudulent use of a credit card) CR-15-102; 10-7-15; Abramson,

R.

Reardon v. State, 2015 Ark. App. 583 (DWI) CR-15-382; 10-21-15; Gruber, R.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Attaway v. State, 2015 Ark. App. 585 (probation) CR-15-456; 10-21-15; Glover, D.

Collins v. State, 2015 Ark. App. 600 (probation) CR-15-157; 10-28-15; Gladwin, R.

Harris v. State, 2015 Ark. App. 602 (suspended sentence) CR-15-284; 10-28-15; Abramson, R.

CIVIL

Town of Lead Hill v. Ozark Mtn. Regional Water Authority, 2015 Ark. 360 **[contract for water]** Based on the express terms of the contract, Lead Hill pledged payment under the contract solely from revenues generated by the sale of Lead Hill's water to its customers and that except for this pledge, Lead Hill does not otherwise further guarantee the obligations; therefore, there is no violation of Article 12, Section 4 of the Constitution. Amendment 78 is not violated because the contract in question is not for short-term financing. 7 U.S.C. § 1926(b) is not applicable. The parties are not competing for waterworks customers. The statute is designed to prevent competition. There is no competition or curtailment between Lead Hill and Ozark. Despite whether Ozark adhered to the proper corporate formalities, the record demonstrates that Ozark has received articles of incorporation and maintained the statutory authority to enter into the contract. Performance under the contract is not excused on the basis of impossibility of performance, impracticability of performance, supervening frustration, unconscionability, or lack of mutuality. (Womack, S.; CV-14-848; 10-8-15; Baker, K.)

Sawada v. Walmart Stores, Inc., 2015 Ark. App. 549 **[malicious prosecution]** Walmart is entitled to a summary judgment on the claim because employee had an honest and strong suspicion, based on a thorough investigation, that Sawada had committed theft. **[defamation]** A fact question on whether Walmart exceeded the qualified privilege of reporting criminal activity to law enforcement exists to defeat summary judgment. **[false light/outrage]** These claims are not supported by the evidence. (Coker, K.; CV-15-56; 10-7-15; Harrison, B.)

Ark. Fed. Credit Union v. Pigg, 2015 Ark. App. 549 **[attorney's fees]** AFCU argues that the circuit court entered an arbitrary amount of fees in the blank line of its order and that the amount was unreasonable. However, the amount was not arbitrary, but instead, the amount requested was based on the accounting of Pigg's attorney's time. In addition, both parties submitted detailed pleadings to the circuit court with respect to the attorney's fees. The circuit court was apprised of the fees by the arguments of both parties and chose to award the full amount requested by Pigg. (Griffen, W.;

CV-15-347; 10-7-15; Vaught, L.)

Platinum Peaks, Inc., v. Bradford, 2015 Ark. App. 548 **[statute of repose]** Arkansas's statute of repose (16-56-112) does not bar the negligence claim which is based solely on property damage. The circuit court did not err in allowing the negligence claim to go to the jury. The claim was not one for personal injury or wrongful death; it was solely based on property damage. (Gunter, J.; CV-14-976; 10-7-15; Harrison, B.)

Henderson v. Tyson Foods, Inc., 2015 Ark. App. 542 **[independent contractor / employee]** Tyson owed no duty to Henderson because Tyson did not maintain control over the training or supervision of PSSI's employees. No duty of care exists unless there is such a retention of a right of supervision by the prime contractor that the independent contractor is not entirely free to do the work his own way. **[negligence]** Tyson owed no duty to Henderson to warn of obvious hazards that are an integral part of the work that the independent contractor was hired to perform. There was no evidence presented of a hidden danger or an unusually dangerous condition. Henderson had been cleaning the equipment on which she was injured for a year. She had been trained by PSSI and knew the C.A.T. wheel was moving when she cleaned it. The dangers at issue were an integral part of her work; they were obvious, not hidden. (Dennis, J.; CV-15-170; 10-7-15; Gladwin, R.)

Seeco, Inc., v. Holden, 2015 Ark. App. 555 **[mineral interest]** At the time the tax sale took place, the severed mineral assessments in White County were located in a separate part of the county assessment book from surface interests. The mineral assessments therefore were not subjoined to the surface assessments as required by the law at that time. As a result, the power to sell for delinquent taxes was lacking. Thus, the 1958 tax sale of the one-half mineral interest and the accompanying tax deed to Holden's predecessor were void. On the adverse possession argument, Holden's mineral exploration nor his production was shown to be adverse to Wall's undivided one-half interest in the minerals. (Hughes, T.; CV-15-178; 10-7-15; Glover, D.)

Hollis v. Fayetteville School District, 2015 Ark. App. 544 **[teacher dismissal]** Summary judgment was proper on the Teacher Fair Dismissal Act claims. (Martin, D.; CV-14-463; 10-7-15; Abramson, R.)

Duell v. Bay, 2015 Ark. App. 577 **[immunity]** The circuit court found that "whether Defendant is entitled to statutory immunity under Arkansas Code Annotated section 19-10-305(a) is a question of fact for the jury." However, the issue of whether a party is entitled to statutory immunity is a question of law; therefore the circuit court was clearly in error when it characterized the issue as one of fact. (Martin, D.; CV-15-73; 10-21-15; Virden, B.)

Lowry v. McCorkle, 2015 Ark. App. 586 **[negligence/work place]** While an employee's knowledge of a defective condition eliminates an employer's duty to warn, it does not follow that the employer's overall duty to exercise reasonable care in providing a safe work place is also automatically eliminated under the circumstances presented in this case. The trial court's decision short-circuited the duty analysis and thereby eliminated the need to address the materiality and disputed nature of

the facts presented. The trial court erred in granting summary judgment on the basis that it did. (Hill, V.; CV-15-173; 10-21-15; Glover, D.)

Brown v. Wal-Mart, 2015 Ark. App. 569 **[pro se]** Pro se appellants are held to the same standards as attorneys in preparing their briefs. Appellant's failure to present any evidence of negligence on the part of appellee and to preserve the additional evidentiary arguments she now attempts to assert on appeal provides the appropriate basis for an affirmance. (Laser, D.; CV-15-5; 10-21-15; Gladwin, R.)

Horne v. Cuthbert, 2015 Ark. App. 592 **[judgment lien]** Horne argues that the orders reviving the judgment lien in 1985, 1998, and 2008 are void because Cuthbert failed to serve her petitions and the writs of scire facias on John Horne prior to obtaining orders extending the judgment lien. That is correct. Because there was no service of the writ of scire facias in accord with the statute's service requirements, the orders reviving the lien are void ab initio. As more than ten years have elapsed since Cuthbert obtained a valid reviver of her lien, her lien expired and there is no basis for her complaint for foreclosure. (Fitzhugh, M.; CV-15-44; 10-21-15; Vaught, L.)

King v. Jackson, 2015 Ark. App. 588 **[ejectment]** It is unclear on what basis the trial court premised its dismissal—want of prima facie evidence of title, want of prima facie evidence of possession, or proof by the Jacksons of a superior right of possession or title. The written order simply concludes that King and Caldwell failed to prove they were entitled to have the Jacksons ejected from the property without specification. When a written order does not specify the basis for the trial court's conclusion, the appellate court may utilize the oral pronouncement of the trial court to determine the intent behind its written orders. However, looking at the oral pronouncement of the trial court does not make the basis for the written order any clearer. King and Caldwell had the burden of proving, at a minimum, a prima facie entitlement to ejectment by either title or right of possession. They presented evidence of title by introduction of the correction deed. In its oral pronouncement, the court noted that the correction deed did not indicate an aggregate total acreage. However, it is not clear whether the court was actually making a ruling concerning prima facie proof of title. What the court did say was that King and Caldwell had failed to prove their right to possess the three acres that was the subject of the ejectment action, expressing doubts that the property was the subject of a lease agreement as opposed to having been sold. However, again, it is not clear if this was a ruling concerning the prima facie proof of title or an improper failure to shift the burden of proof to the Jacksons as King and Caldwell allege. Case is remanded for a determination of whether King and Caldwell presented a prima facie showing of entitlement to possession of the property and, if so, whether the Jacksons presented sufficient evidence to defeat legal title. (Griffen, W.; CV-15-129; 10-21-15; Whiteaker, P.)

Family Dollar Trucking, Inc. v. Huff, 2015 Ark. App. 574 **[malicious prosecution]** Viewing the testimony in the light most favorable to Huff and Ward, there is substantial evidence that Family Dollar did not make a full, fair, and truthful disclosure to the prosecuting attorney. A jury may reject the advice-of-counsel defense if there is substantial evidence that the defendants either did not

impartially state all the facts to counsel or did not honestly and in good faith act upon the advice given to them. Malice, the fourth element of a cause of action for malicious prosecution, can be inferred from the lack of probable case. The evidence, along with the allowable inference of malice, presented a question of fact, properly left for the jury. The evidence was sufficient to support the claims for malicious prosecution and the circuit court properly allowed the matter to go to the jury. **[outrage]** Evidence was not sufficient to support claim for outrage.
[damages] Family Dollar contends that the jury's damages award was made under the influence of passion or prejudice. In reviewing the proof most favorably to Huff and Ward, the verdict does not demonstrate passion or prejudice on the part of the jury or shock the conscience of this court. (Hill, V.; CV-14-603; 10-21-15; Virden, B)

Kelley v. Williams, 2015 Ark. App. 609 **[prescriptive easement]** The Kelleys were required to show that, for a period of at least seven years, the road had been used adversely to Mrs. Williams's right, that such use was not simply permissive, and that Mrs. Williams was on notice that such use was indeed adverse to her. It was not until 2010 that Mrs. Williams put up the pipe fence and a locked gate. This amount of time falls short of the seven-year period required to obtain an easement by prescription. (Landers, M.; CV-15-183; 10-28-15; Glover, D.)

First United Methodist Church v. Harness Roofing, Inc., 2015 Ark. App. 611 **[negligence/contractor/duty]** The three contractors owed a duty of care to both the standard of care of the contracting industry as well as to the standard of care of a reasonably prudent person. The standard of care for the industry is that degree of skill and care ordinarily possessed and used by contractors doing work similar to that shown by the evidence. Where a contractor is held to both custom-and-industry standards and to the standard that would be followed by a reasonably prudent man, the more exacting standard will control. There are genuine issues of material fact as to whether the contractors breached their duties to the church, and whether their negligence, if any, was a proximate cause of the fire, thus precluding summary judgment. (Sutterfield, D.; CV-15-106; 10-28-15; Whiteaker, P.)

Trujillo v. TK Martial Arts Academy, 2015 Ark. App. 606 **[affirmative defense]** Appellant argues that appellees' failure to plead the affirmative defense of release in their original answer should have precluded reliance on the exculpatory contract. Rule 8 does require that affirmative defenses be pled in responding to a complaint, but there is no requirement that the affirmative defense of release be pled in the original answer. With the exception of pleading the defenses mentioned in Rule 12(h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding. Release is not a defense mentioned in Rule 12(h)(1). Appellant moved to strike the amended answers, but the trial court found that no prejudice would result and allowed the amended answers. **[release]** Release was valid and enforceable. The release covered both the employer entity and the individual employees and agents. The appellant cannot take inconsistent positions in his pleadings. Appellant is bound by his complaint and cannot now maintain that appellees were not agents or employees. (Smith, T.; CV-

15-191; 10-28-15; Kinard, M.)

TFS of Gurdon v. Hook, 2015 Ark. App. 601 **[wrongful discharge]** An employee in a wrongful-discharge claim does not have to prove an actual violation of law in addition to proving that she was terminated for reporting suspected violations of law. An employee making such a claim must prove that she reported a violation of law. When viewed in the light most favorable to Hook, the evidence she presented was sufficient to allow the jury to determine that she was wrongfully discharged and that TFS's stated reasons for her termination were pretextual. The proper measure of damages in a public-policy wrongful-discharge action is the sum of lost wages from termination until day of trial, less the sum of any wages that an employee actually earned or could have earned with reasonable diligence. Additionally, an employee may recover for any other tangible benefit lost as a result of the termination. There was sufficient evidence for the jury to determine that Hook met her duty to mitigate her damages and to award her damages in the amount of $50,000 without resorting to speculation. (Easley, E.; CV-15-207; 10-28-15; Gladwin, R.)

Burleigh v. Center Point Contractors, Inc., 2015 Ark. App. 615 **[non-compete agreement]** The noncompete agreement violates the public policy of this state which prohibits unreasonable restraints of trade. Burleigh testified that Center Point did not provide him with any training, proprietary formulas, trade secrets, or a secret customer list. Rather, he maintained that he did not learn anything at Center Point that would give him an unfair advantage in the bidding process against it. As such, Center Point did not have a legitimate interest to be protected by the agreement, and the non-compete agreement only shielded Center Point from ordinary competition. (Scott, J.; CV-15-203; 10-28-15; Hoofman, C.)

Columbia Ins. Group v. Cenark Project, Inc., 2015 Ark. 396 **[certified question accepted]**
1. Whether faulty workmanship resulting in property damage to the work or work product of a third party (as opposed to the work or work product of the insured) constitutes an "occurrence"; and
2. If such faulty workmanship constitutes an "occurrence," and an action is brought in contract for property damage to the work or work product of a third person, does any exclusion in the policy bar coverage for this property damage? (E.D. Ark.; CV-15-804; 10-29-15)

Key v. Curry, 2015 Ark. 392 **[schools]** Trial court erred in rejecting sovereign immunity defense. No exceptions to sovereign immunity that were raised were applicable to stop the State Board of Education from removing the school district board and taking over the district. State Board did not act arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner in assuming control of the District. (Griffen, W.; CV-15-224; 10-29-15; Wynne, R.)

DOMESTIC RELATIONS

James v. Walchli, 2015 Ark. App. 562 **[attorney's fees]** The appellant appealed from an order that required her to pay $4,929.58 as a reasonable attorney's fee to her ex-husband, the appellee, because she contended the award was an abuse of the court's discretion. The Court of Appeals affirmed,

disagreeing that a clear abuse of discretion was demonstrated. The Court noted that there is no fixed formula for determining what constitutes a reasonable attorney's fee. Here, the court ordered one-half the fee the appellee requested. The Court said that a partial attorney's fee has been approved in the past, and that the Court gives deference to the superior position of the trial court in exercising discretion in the matter. The award was supported by the evidence. (Cox, J.; No. CV-15-51; 10-7-15; Hixson, K.)

Newby v. Newby, 2015 Ark. App. 540 **[visitation—material change in circumstances; best interest]** In this appeal modifying visitation, the appellant mother appealed on issues of material change in circumstances and contended that modifying visitation was not in the child's best interest. The Court of Appeals affirmed the court's increase in visitation with the father and the court's determination that it was in the child's best interest to modify visitation. (Duncan, X.; No. CV-15-48; 10-7-15; Gladwin, R.)

Olinghouse v. Olinghouse, 2015 Ark. App. 545 **[attorney's fees and costs]** The Court of Appeals affirmed the trial court's award of attorney fees and costs in this domestic relations case in which the appellant former wife twice filed petitions to increase child support and to modify visitation of an Arkansas decree after she and the child relocated to Texas, while the appellee father remained in Pulaski County. The attorney for the appellee made special appearances in the Texas court both times to ask the court to decline jurisdiction. He also filed motions to retain jurisdiction in the Pulaski County Circuit Court, which conducted hearings both times motions were heard. The circuit court found that it had continuing jurisdiction over the case and that nothing had changed between the filings of the first and second motions. The Court of Appeals noted that the award of attorney's fees in a domestic relations case is within the discretion of the circuit court and that no fixed formula exists for determining what constitutes a reasonable amount. The circuit court is in the best position to know the extent and quality of services rendered by the attorney and to assess other critical factors, and an award will not be set aside absent an abuse of discretion. Here, the appellant had to file a second motion in 2014 when nothing had changed since the motion in 2011. The court did not err in granting the attorney's fees. (Pierce, M.; No. CV-15-210; 10-7-15; Abramson, R.)

Coenen v. Coenen, 2015 Ark. App. 599 **[divorce]** The appellant initially filed a complaint for divorce based upon general indignities, but amended it to one for separate maintenance. The court granted an absolute divorce and awarded custody, reserving the issues of child support, alimony, property and debt division, contempt, and attorney's fees. A hearing was subsequently held on those remaining issues, they were decided, and an order was entered. The Court of Appeals held that the court erred in entering a divorce because, based upon the information before it, it had the authority only to grant the appellant a decree of separate maintenance. In addition, an absolute division of marital property cannot be made in a separate-maintenance action, so the court acted beyond its authority in dividing the parties' assets and liabilities in its final order. (Schrantz, D.; No. CV-14-745; 10-21-15; Brown, W.)

Edmondson v. Lockett, 2015 Ark. App. 571 **[divorce—payment of pension benefits; contempt]** The parties' 1988 divorce decree provides that at the time the appellant husband retires and begins

drawing a pension from his pension fund account, the appellee wife "will be paid a sum equal to thirty-two percent (32%) of the monthly pension amount paid to appellant]...at the time of his retirement." Ten years after the decree was filed, the appellee petitioned the circuit court to order the appellant to file a qualified domestic relations order ("QDRO") so that the company would set aside and pay benefits when appellant retired, and the court ordered that a QDRO be executed. In 2011, the appellee filed a petition asking the court, among other things, for the QDRO to be reinstated with AT&T, formerly Southwestern Bell, but the Court of Appeals noted that it is unclear whether a QDRO had ever been issued before a petition was filed for enforcement of orders and a citation for contempt in 2014. In that petition, the appellee alleged that the appellant had retired from AT&T but had failed to pay her thirty-two percent of the monthly payments. At a hearing on the motion in 2014, the court directed the appellant to pay her $3360, which represented thirty-two percent of his monthly benefit amount of $1500 for the seven months she had not been paid. It also held him in contempt for willful violation of its orders and ordered him to pay costs and her attorney's fees. He argued on appeal that the court misinterpreted the divorce decree and awarded the appellee more than she was entitled to. The circuit court found, and the Court of Appeals agreed, that the pertinent paragraph of the decree is unambiguous that he pay her thirty-two percent of the amount he testified he receives, which is $1500 a month. On the issue of contempt, the Court of Appeals found that the appellant had knowledge of the 1988 decree, but when he retired he did not inform her that he had retired and that he retained his benefits along with the appellee's share for seven months, so the circuit court was not clearly erroneous in finding him in contempt. The decision was affirmed. (Welch, M.; No. CV-14-741; 10-21-15; Abramson, R.)

Fell v. Fell, 2015 Ark. App. 590 **[divorce--marital property; marital debt]** The trial court found that the parties' marital home, which the appellant husband purchased just before the marriage, was marital property, that the appellant was entitled to his $11,000 down payment, and that each party was entitled to $12,000 of the remaining equity. The court also found that the parties' credit-card debt was marital debt and ordered that it be equally divided. The Court of Appeals found that the trial court erred in finding that the home was marital property, but said that the court did not divide the property under the marital property provision of the statute. Instead, the circuit court found that the parties had "added to" the home during the marriage. The Court of Appeals considered the evidence that marital funds were used to pay the mortgage and to make improvements on the appellant's house. It said the record supports that the appellee wife was entitled to "some benefit," and that the circuit court therefore did not clearly err in awarding her $12,000 of the equity in the house. On the issue of the credit card debt, the Court set out the evidence on the issue, testimony of the parties that clearly was disputed. The Court said the circuit court did not believe the appellant, but credited the appellee's testimony, and it deferred to that court on the issue of credibility. The decision was affirmed. (McCallister, B.; No. CV-15-176; 10-21-15; Vaught, L.)

Vongkhamchanh v. Vongkhamchanh, 2015 Ark. App. 584 **[child custody]** The appellee mother was awarded primary custody of the parties' two children, ages three and five, at the time of divorce. The appellant father was awarded standard visitation with one Skype or phone visitation per week. The parties could also adjust the visitation schedule by mutual agreement "to accommodate the [appellant's] service in the United States Air Force." The appellant contends, first, that the trial court

erred in using his military status as the basis for denying him custody. Second, the appellant contends "that the trial court erred in awarding him standard visitation in 'flagrant disregard' of its incompatibility with his active military status and against the best interest of the children." The Court of Appeals noted the trial court's reasoning for the award of custody to the mother. The testimony indicated that she had been the primary caretaker of the children and the court stated that it did not want to remove them from her because it found being with her to be the "most stable" environment. It based the custody award on the best interest of the children and noted the father's limited contact with them based in part upon his job, which meant they did not know him as well as they know the appellee mother. On the issue of visitation, the Court of Appeals did not have any details before it of the standard visitation order, nor did the appellant provide any alternative visitation schedule to the trial court. Neither he nor his attorney mentioned future visitation or any difficulty that the order of standard visitation would present. "Absent any evidence or argument to support a more workable visitation schedule...[the Court of Appeals held]...that the court did not abuse its discretion by failing to create such a schedule out of whole cloth." The decision was affirmed. (Beaumont, C.; No. CV-15-312; 10-21-15; Gruber, R.)

Montemayor v. Rosen, 2015 Ark. App. 597 **[child custody—joint custody]** The circuit court awarded joint physical custody of the parties' son, with the appellee father being considered the primary custodian and the final decision maker for educational, medical, and religious decisions. The appellant mother appealed, arguing that the court erred in not awarding her sole custody. The Court of Appeals said that, while neither party's conduct was perfect and the evidence was conflicting, the circuit court was in the best position to evaluate the credibility of the parties. The circuit court had specifically noted the appellant mother's anger toward the appellee and found that the appellee would better ensure frequent and continuing contact between the child and his mother. The decision was affirmed. (Hendricks, A.; No. CV-15-67; 10-21-15; Hoofman, C.)

McCoy v. Kincade, 2015 Ark. 389 **[child custody—modification]** When the parties divorced in 2004, the court awarded joint custody of the minor children who were three and five years old at the time. Their court-approved agreement provided that the appellee father would have the children Sunday evenings through Friday evenings. The appellant mother would have custody on Thursday evenings and the first three weekends of the month and the fifth weekend of a month with five weekends. The mother would have five non-consecutive weeks of summer visitation. At the time of the agreement, both parties lived in Mountain Home, but a month after the divorce, the mother moved to Fayetteville, 120 miles away. Both parents have remarried since the divorce. In 2013, the father filed a petition seeking primary custody based upon a material change in circumstances and the best interest of the children. The circuit court granted the change and slightly modified the visitation. The Court of Appeals affirmed the circuit court and the Supreme Court granted the appellant's petition for review. The appellant challenged only the circuit court's finding that a material change had transpired since the agreement. She did not challenge the court's finding that the change is in the best interest of the children. The Supreme Court found that the factors in this case have all been held appropriate when determining whether a material change in circumstances has occurred. These include one parent's relocation, the passage of time, the remarriage of one or both parents, a strained relationship between the parent and child, and the preference of the children,

all which were present in this case. The children are now teenagers, with friends and activities important to them, many on weekends. The mother was not fully cognizant of the importance of their activities to them and did not encourage their participation by allowing them to keep up with their social commitments in Mountain Home during her visitation. The children testified to the strain this put on their relationship with her. The Supreme Court found that the combined effects of the facts of the case support the circuit court's holding that a material change in circumstances existed. The decision was affirmed. (Webb, G.; No. CV-14-1059; 10-29-15; Wood, R.)

PROBATE

In the Matter of the Hamilton Living Trust; Bank of the Ozarks v. Cossey, 2015 Ark. 367 **[trust]** The Bank of the Ozarks was designated as the successor trustee of the Hamilton Family Living Trust. The Bank send a written notice declining the trusteeship to Larry Hamilton, a trust beneficiary, but the Bank reimbursed Hamilton for funeral expenses, auto expenses, and utility payments for a home. The Bank also liquidated some securities at his direction. A spokesman for the Bank testified that the reimbursements were made in a ministerial fashion in order to preserve the trust's assets, but he also admitted that he did not know whether Hamilton had actually been appointed personal representative (no decedent's estate had been opened at that time) or whether the car or home were trust assets. Another trust beneficiary brought a petition for accounting against the Bank. The circuit court granted the petition and the bank appealed, arguing that it had rejected the trusteeship and was not required to perform an accounting. The Supreme Court affirmed the circuit court's order because the Bank's actions exceeded the mere preservation of trust property and were instead consistent with exercising powers as trustee. (Welch, M.; No. CV-14-986; 10-8-15; Wood, R.)

JUVENILE

Merritt v. Ark. Dep't of Human Services, 2015 Ark. App. 552 **[DN Adjudication]** Appellant argued that there was no nexus of harm between the older siblings' prior adjudication and the current case. The abuse and neglect inflicted on the siblings is sufficient to show parental unfitness. There was also evidence concerning appellant' parenting, coping and co-dependency issues. (Naramore, W; CV-15-487; 10-7-2015; Kinard, M.)

Terrell v. Ark. Dep't of Human Services, 2015 Ark. App. 582 **[TPR Jurisdiction - UCCJEA]** Appellant argued that the trial court lacked subject matter jurisdiction to terminate his parental rights, and claimed that Arkansas was not the home state of the children under the UCCJEA. In November 2013, DHS took emergency custody and the trial court had jurisdiction to enter an order for emergency custody under A.C.A. §9-19-204. At that time there was no evidence of a child custody proceeding in Mississippi. In December 2014, DHS filed a petition to terminate parental rights. A guardianship petition was then filed in Mississippi in February 2015. However, the children had been in Arkansas for over a year and Arkansas had become the home state under A.C.A. §9-19-204(b) and had jurisdiction to terminate appellant's parental rights. (Branton, W.; CV-15-545; 10-21-2015; Kinard, M.)

Smith v. Ark. Dep't of Human Services, 2015 Ark. App. 564 **[TPR –continuance]** Appellants argued that the trial court abused its discretion in denying their request to continue the termination hearing until after the circuit court held a hearing to determine whether the court would place their children with the paternal grandmother. Continuances are within the sound discretion of the court and will not be reversed absent an abuse of discretion amounting to a denial of justice. An abuse of discretion occurs when the court acts improvidently and without due consideration, and the appellant must show prejudice from the denial. Appellants requested the continuance and announced that they were considering whether to consent to the termination on the condition that the court would allow the paternal grandmother to adopt their children. The court thoroughly discussed and considered the motion and did not abuse its discretion to go forward with the termination. (Smith. T.; CV-15-497; 10-7-2015; Hoofman, C.)

Brumley v. Ark. Dep't of Human Services, 2015 Ark. 356 **[TPR - imprisonment]** The DHS petition included the sentencing ground, but the trial court failed to rule on this ground in its order. The trial court relied on failure to remedy and subsequent factors grounds. The Supreme Court may affirm a trial court when it reached the right result although for a different reason. On de novo review the imprisonment ground is supported by the evidence. The court found that appellant's seven years of incarceration during the life of his nine-year old son was a substantial period of time. **[best interest – potential harm]** There was no error in the court's finding that it was in the children's best interest where appellant remained incarcerated at the time of the termination, resulting in no employment or stable housing. There was also evidence of a relative adoptive placement. Also see good discussion on subsequent factors ground in concurring opinion. (Zimmerman, S. CV-15-156; 10-8-2015; Brill, H.)

Contreas v. Ark. Dep't of Human Services, 2015 Ark. App. 604 **[TPR – reasonable efforts]** Appellant failed to preserve his argument that DHS made reasonable efforts to provide him services in prior orders. **[subsequent factors]** There was sufficient evidence of the subsequent factors ground where subsequent to the filing of the DHS petition and six months after appellant's child had been in DHS custody, appellant engaged in illegal activities during the time he attempted to get custody of his child, which questioned his judgement and priorities. During this time appellant plead guilty to possession of methamphetamine and was placed on three years' probation and within a few months he was charged with having sex with a minor. He rejected a plea deal of probation for this charge and risked receiving a prison sentence. Appellant also did not have a stable home during the sixteen months his child was in DHS custody. (Sullivan, T.; CV-15-467; 10-28-2015; Virden, B.)

Sanford v. Ark. Dep't of Human Services, 2015 Ark. App. 578 **[TPR – imprisonment]** At the time of the termination hearing appellant had been incarcerated for the entire nineteen months of the case, and still was incarcerated with four more months to complete his sentence. There was no error in finding this ground: that a parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial time of the juvenile's life. The time that appellant had already been incarcerated constituted nearly one-third of one of his child's life and half of his other child's life. **[best interest – potential harm]** There was no error in the court's finding of best interest where appellant admitted he left his children with their drug abusing mother, had a history

of putting his needs above his children, and his children would remain in care while he finished his criminal sentence and then found a suitable home and employment. (Haltom, B.; CV-15-275; 10-21-2015; Virden, B.)

McMahan v. Ark. Dep't of Human Services, 2015 Ark. App. 556 **[TPR – best interest]**
It was in the children's best interest to terminate where the evidence showed that appellant left his child and siblings in the mother's care during a trial home placement knowing she was still abusing drugs. Appellant lied to the court about the mother's well-being when the mother had attempted suicide, and when the children had been removed for a third time from the home when appellant was arrested for domestic battery against the mother and subsequently incarcerated for a year. Appellant also owed back child support, failed to take prescribed medications for PTSD and tested positive for oxycodone not prescribed to him. **[reunification services]** This case was reversed and dismissed based on noncompliance with service requirements and appellant argued that when his parental rights were reinstated he was entitled to services, even without a court order. The last standing order (PPH) remained in effect and it provided that appellant had not complied with any court order or case plan and no contact with his children. The appellate court noted that appellant did not get to wipe his slate clean based on noncompliance with service requirement, and that there was a long, troubled history in this case and it remained in place after the reversal. Further appellant does not appeal any ground for termination. (Zimmerman, S. CV-15-415; 10-7-2015; Glover, D.)

Cases in which the Court of Appeals affirmed No-Merit TPR and Motion to Withdraw Granted:

> *Billingsley v. Ark. Dep't of Human Services,* 2015 Ark. App. 608 **[Memorandum Opinion]** (Jamison, L,; CV-15-568; 10-28-2015; Gruber, R.)
>
> *Kelley. Ark. Dep't of Human Services,* 2015 Ark. App. 551 [five grounds not listed] (Sullivan, T.; CV-15-190; 10-7-2015; Kinard, M.)

C.M. v. State, 2015 Ark. App. 595 **[Delinquency Adjudication]**
Appellant attempted to appeal from a delinquency adjudication, but there was a disposition hearing scheduled. When an order provides for a subsequent hearing that prevents the order from being final and appealable. Appeal dismissed without prejudice (Williams Warren, J.; CV-15-195; 10-21-2015; Hixson, K.)

Cases remanded with instructions to enter written findings of transfer factors compliance with A.C.A. §9-27-318(g):

> *Harris v. State*, 2015 Ark. App. 565 **[Juvenile Transfer]** (Johnson, L.; CV-15-298; 10-7--2015; Brown, W.)
>
> *Brown v. State,* 2015 Ark. App. 570 [Juvenile Transfer] (Sims, B.; CV-14-369; 10-21--2015; Abramson, R.)