

APPELLATE UPDATE

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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 December 15th, the supreme court amended Administrative Order Number 8 to provide for the new Sentencing Order to be effective January 1, 2012. A copy of the per curiam was included in the weekly mailout.

On December 15th, the supreme court created the Arkansas Supreme Court Commission on Children, Youth, and Families.

CRIMINAL

Roberts v. State, 2011 Ark. 502 [**Rule 37**] Where the ninety-day filing period under Rule 37.5(e) has expired and a waiver of postconviction relief has been affirmed by the supreme court, a petitioner must file the appropriate motion to reopen postconviction proceedings before a Rule 37 petition can be brought in circuit court. (Looney, J.; CR 10-1068; 12-1-11; Brown, R.)

Kelley v. State, 2011 Ark. 504 [**Rule 37**] Appellant did not demonstrate that there was a reasonable probability that but for his attorney's failure to obtain a ruling on an objection the outcome of the proceedings would have been different. Thus, the circuit court's denial of appellant's petition for postconviction relief was not clearly erroneous. (Sanders, E.; CR 11-11; 12-1-11; Baker, K.)

Fredrickson v. State, 2011 Ark. App. 749 [**exclusion of testimony**] Because appellant was able to present his theory of mitigation to the jury through other testimony and counsel's arguments, and because appellant did not receive the maximum sentence, the Court of Appeals concluded that appellant was not prejudiced by the trial court's exclusion of certain testimony regarding how appellant's disease or disorder might have affected his behavior. (Hearnsberger, M.; CACR 11-295; 12-7-11; Hart, J.)

Owens v. State, 2011 Ark. App. 763 [**sufficiency of the evidence; possession with intent to deliver**] There was substantial evidence to support appellant's conviction. [**identity of confidential informant**] Appellant failed to meet his burden of establishing that the identity of the confidential informant was necessary to his defense. Thus, the trial court did not err by denying appellant's motion to disclose the identity of the confidential informant. [**motion to suppress**] Reasonable suspicion existed to stop appellant's vehicle. Therefore, the trial court did not err by denying appellant's motion to suppress the evidence that was obtained during the lawful traffic stop. [**chain of custody**] Because there was no showing of evidence tampering, the trial court did not abuse its discretion by admitting certain exhibits, which appellant challenged. (Griffin, J.; CACR 10-1110; 12-7-11; Brown, W.)

Halpaine v. State, 2011 Ark. 517 [**double jeopardy**] Where a parent fails to provide support following an earlier finding of criminal contempt for failure to support, the parent commits another offense and double jeopardy does not bar prosecution even when nonsupport is considered a continuing offense for other purposes. (McCallister, B.; CR 11-476; 12-8-11; Gunter, J.)

Dimas-Martinez v. State, 2011 Ark. 515 [**juror misconduct**] The trial court abused its discretion by failing to remove a juror who slept during the trial and a juror who tweeted about the case during the trial. [**aggravating circumstances**] The appropriate standard that a circuit court should apply in determining whether to submit an aggravating circumstance to the jury is that of substantial evidence, the same standard employed by an appellate court on review. (Clinger, D.; CR 11-5; 12-8-11; Corbin, D.)

Villagran v. State, 2011 Ark. App. 769 [**impeachment**] Appellant's custodial statements, even if obtained in violation of appellant's right to counsel, could be used to impeach his contradictory testimony at trial. (Humphrey, M.; CACR 11-261; 12-14-11; Vaught, L.)

Smoak v. State, 2011 Ark. 529 [**sufficiency of the evidence; internet stalking of a child**] There was substantial evidence to support appellant's conviction. [**entrapment**] The rule that a defendant cannot deny commission of an offense and simultaneously assert the defense of entrapment is abolished. Thus, a defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment, even if the defendant denies one or more elements of the crime. (Cottrell, G.; CR 11-71; 12-15-11; Hannah, J.)

Mendez v. State, 2011 Ark. 536 [**Ark. R. Evid. 1009**] The trial court abused its discretion when it permitted a translation of appellant's statement that was prepared by an unqualified interpreter to be admitted into evidence at appellant's trial. (Storey, W.; CR 10-1241; 12-15-11; Baker, K.)

Daniels v. State, 2012 Ark. App. 9 [**sufficiency of the evidence; possession of methamphetamine with intent to deliver**] There was substantial evidence to support appellant's conviction. [**continuance**] The trial court did not abuse its discretion when it denied appellant's request for a continuance. (Gibson, B.; CACR 11-575; 1-4-12; Robbins, J.)

Warren v. State, 2012 Ark. App. 23 [**judgment**] A circuit court has the power to make "the record speak the truth" and can enter an order *nunc pro tunc* at any time to correct clerical errors in a judgment or order. (Fogleman, J.; CACR 11-329; 1-4-12; Hoofman, C.)

Lynn v. State, 2012 Ark. 6 [**Act 346**] A plea of guilty or *nolo contendere* tendered pursuant to Act 346 is not a conviction. Thus, there is no right to appeal in such situations. (Storey, W.; CR 11-161; 1-12-12; Gunter, J.)

Cooper v. State, 2012 Ark. App. 59 [**mistrial**] The record does not demonstrate that the trial court erred when it denied appellant's request for a mistrial. (Storey, W.; CACR 11-592; 1-18-12; Hart, J.)

Walker v. State, 2012 Ark. App. 61 [**double jeopardy**] Because both first-degree terroristic threatening and second-degree battery require proof of additional facts that are not required by aggravated robbery, those offenses are not lesser-included offenses. Thus, it did not violate principles of double jeopardy to charge appellant with each offense or to sentence appellant separately for convictions of each offense. [**amendment to criminal information**] Because the amendment to the criminal information in appellant's case did not: (1) change the nature or degree of the crime charged; (2) comprise appellant's ability to make a defense; or (3) cause appellant prejudice, the trial court did err by allowing the State to orally amend the information to include the *contra pacem* clauses. (Chandler, L.; CACR 11-647; 1-18-12; Robbins, J.)

Plessy v. State, 2012 Ark. App. 74 [**amendment to criminal information**] Because appellant was not unfairly surprised or otherwise prejudiced by the amended criminal information that was filed in his case, the circuit court did not err by allowing the State to amend the information the week before trial. [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon the prosecutor eliciting certain testimony from appellant. [**admission of testimony**] The trial court properly allowed rescue workers to testify that the victim identified appellant as his attacker pursuant to the dying declaration exception to the hearsay rule. Where the number of photographs admitted was not excessive and the photographs were used to enable the witnesses to testify more effectively, it was not an abuse of discretion for the trial court to admit certain photographs of the victim's body. (Cox, J.; CACR 11-814; 1-18-12; Brown, W.)

Magness v. State, 2012 Ark. 16 [**second-degree escape**] A convicted felon, who is released on a bed-space bond, is not in custody so as to make him criminally liable for second-degree escape when he violates a condition of release. (Pope, S.; CR 11-445; 1-19-12; Baker, K.)

Jordan v. State, 2012 Ark. App. 79 [**jury instruction**] Because there was no rational basis for giving the reckless manslaughter jury instruction, the trial court did not abuse its discretion in denying appellant's request for the instruction. (Johnson, K.; CACR 11-298; 1-25-12; Pittman, J.)

Newton v. State, 2012 Ark. App. 91 [**sufficiency of the evidence; sexual indecency with a child; sexual assault in the second degree**] There was substantial evidence to support appellant's convictions. [**witness testimony**] The trial court did not abuse its discretion when it overruled appellant's objection to a question that he alleged the prosecutor had already asked the minor victim witness and she had already answered. (Pope, S.; CACR 11-848; 1-25-12; Brown, W.)

Graham v. State, 2012 Ark. App. 90 [**sufficiency of the evidence; driving while intoxicated**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court did not abuse its discretion when it admitted appellant's breath-alcohol test results into evidence during appellant's trial. [**jury instructions**] The trial court did not err when it gave a model jury instruction rather than appellant's proffered jury instruction because the model instruction represented a more accurate reflection of the law. (Glover, D.; CACR 11-712; 1-25-12; Matin, D.)

Scroggins v. State, 2012 Ark. App. 87 [**revocation hearing**] As long as it is clear from the record that the trial court knew the terms and conditions of a defendant's probation, the fact that the terms and conditions are not formally introduced into evidence at a revocation hearing does not constitute a failure of proof in and of itself. (Ramey, J.; CACR 11-768; 1-25-12; Glover, D.)

Green v. State, 2012 Ark. 19 [**continuance**] The trial court did not abuse its discretion when it denied appellant's request for a continuance. [**jury instructions**] When a defendant's defense is that he or she is entirely innocent of the crime, no rational basis exists to instruct the jury on a lesser-included offense because the only issue for the jury is whether the defendant is guilty as charged. [**evidence**] The circuit court did not err when it refused to require a counselor to disclose what, if any, diagnosis or conclusions she had made as to the mental health of appellant's victim. (Erwin, H. CR 10-369; 1-26-12; Hannah, J.)

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

Gowen v. State, 2011 Ark. App. 761 (possession of drug paraphernalia with intent to manufacture methamphetamine) CACR 11-635; 12-7-11; Martin, D.

Ali v. State, 2011 Ark. App. 758 (aggravated robbery; attempted capital murder; theft of property while employing a firearm) CACR 11-603; 12-7-11; Abramson, R.

Pruitt v. State, 2011 Ark. App. 754 (breaking or entering) CACR 11-521; 12-7-11; Glover, D.

Muncy v. State, 2011 Ark. App. 790 (aggravated robbery) CACR 11-600; 12-14-11; Hoofman, C.

Benton v. State, 2012 Ark. App. 71 (second-degree forgery; theft-by-receiving) CACR 11-404; 1-18-12; Martin, D.

Devor v. State, 2012 Ark. App. 82 (hindering apprehension or prosecution) CACR 11-856; 1-25-12; Robbins, J.

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:

Newsom v. State, 2011 Ark. App. 760 (probation) CACR 11-558; 12-7-11; Martin, D.

Johnson v. State, 2011 Ark. App. 777 (suspended imposition of sentence) CACR 11-332; 12-14-11; Gladwin, R.

CIVIL

Jonesboro Healthcare Center v. Eaton-Moery Envir. Services, 2011 Ark. 501 [**dismissal**] Contract action was mistakenly filed in district court but it exceeded the jurisdictional amount and was dismissed for lack of subject matter jurisdiction. Suit was subsequently filed in circuit court but was later dismissed for improper service because of defect in summons. Defendant argued that the dismissal should be with prejudice under Rule 41 because of prior dismissal. Dismissal for lack of subject matter jurisdiction is not a voluntary dismissal under R. 41 (a) nor an involuntary dismissal under R. 41 (b). Consequently, the dismissal in district court did not trigger the two dismissal rule. (Laser, D.; SC 11-294; 12-1-11; Corbin, D.)

BancorpSouth Bank v. Shields, 2011 Ark. 503 [**arbitration**] Bank signed various agreements over the years regarding an account beginning in 1982. A 2005 agreement had an arbitration clause which bank tried to enforce and compel arbitration of a dispute. However, there was no agreement by the parties to the 1982 contract to modify the account contract in 2005 because the parties had changed over time, and the owner of the account and signatory to the 1982 agreement did not execute the 2005 modification. (Guthrie, D.; SC 11-500; 12-1-11; Brown, R.)

Bakalekos v. Furlow, 2011 Ark. 505 [**pension**] This appeal involved a dispute over an increase in benefits approved by the Policemen's Pension and Relief Fund. Court approved the action of the pension board in increasing the benefits and overruled challenges based on statutory interpretation, improper delegation of powers, and equal protection. (Kilgore, C.; SC 11-526; 12-1-11; Goodson, C.)

Bloodman, Admnx. v. Jefferson Hosp. Assn., 2011 Ark. App. 747 [**charitable immunity**] Trial court erred in granting hospital's motion to dismiss medical malpractice suit against it on the basis of charitable immunity in the absence of evidence that the hospital currently qualified for such status. (Wyatt, R.; CA 11-76; 12-7-11; Pittman, J.)

Padilla v. Archer, Admnr. 2011 Ark.App. 746 [**medical/expert testimony**] Doctor met legal requirements of an expert with respect to standard of care under the locality rule. [**deposition**] Party waived objections to testimony presented via deposition when objections were not made during the actual deposition. The objection with respect to whether the witness had been qualified as an expert was of the type that could have been obviated, removed, or remedied had it been made at the time of the deposition; thus, it was waived when no objection was made. Trial court did not err when it allowed doctor's deposition to be replayed during deliberations at the request of the jury. (Webb, G.; CA 10-1307; 12-7-11; Pittman, J.)

Davis v. Gillam, 2011 Ark. App. 744 [**oral contract**] Evidence supported trial court's finding of an oral contract; performance of the contract gave parties title to the property; therefore, action to eject them from the property was without merit. (Edwards, R.; CA 11-285; 12-7-11; Vaught, L.)

Talley v. Asset Acceptance, LLC, 2011 Ark. App. 757 [**summons**] Summons served on the defendant was not fatally defective because it contained an incorrect zip code in the circuit court's address. (McCormack, D.; CA 11-676; 12-7-11; Glover, D.)

Lewis v. AT&T Mobility, 2011 Ark. App. 756 [**negligence**] Suit against AT&T alleged that it allowed a third party to use plaintiff's debit card number to purchase items without presentment of the card, PIN number, or his signature. Plaintiff failed to establish that AT&T owed him a duty. Debit card was issued by VISA – not AT&T. (Moody, J.; CA 11-473; 12-7-11; Glover, D.)

Bayer Cropscience LP v. Schafer, 2011 Ark. 518 [**punitive damages**] Ark. Code Ann. § 16-55-208, which limits the amount of recovery of punitive damages, violates article 5, § 32 of the Arkansas constitution because it limits the amount of recovery outside the employment relationship. [**economic-loss doctrine**] Since there was damage to lands, crops, and equipment, the economic-loss doctrine does not preclude recovery in this case. [**expert witness**] Court did not abuse its discretion in permitting expert testimony; objections go to the weight but not to admissibility of opinions. (Whiteaker, P.; SC 10-1246; 12-8-11; Goodson, C.)

Chandler v. Ark. Appraiser Licensing Bd., 2011 Ark. 519 [**admin. appeal**] Neither appraiser nor her attorney appeared at board's hearing; therefore, when she appealed to circuit court, issues were not preserved for judicial review because they were not raised nor ruled on by the board. (Fox, T.; SC 11-401; 12-8-11; Goodson, C.)

Davis v. Pines Mall Partners: 2011 Ark. App. 783 [**continuance**] Trial court did not abuse its discretion in denying request for continuance in order to obtain an attorney by pro se litigant when request was made after hearing had begun and litigant had notice of hearing for over three

months. (Wyatt, R.; CA 11-636; 12-14-11; Gruber)

Berry v. Moon: 2011 Ark. App. 781 [**easement**] Evidence did not support an easement by prescription because the use was permissive. An easement by implication was not established because it was not proved that the easement was permanent, obvious, or necessary. An easement by necessity requires that there be no other route, and in this case it cannot be said that the route in question is the only means to access the property. (Cottrell, G.; CA 11-637; 12-14-11; Wynne)

Hooten v. Mobley Law Firm: 2011 Ark. App. 778 [**contract/attorney fees/res judicata**] Attorney's claim in probate case for fees was not approved. He then filed suit to recover fees. Defendants claimed that action should be barred by res judicata, but trial court rejected this argument. On appeal, court held that it was error to not apply res judicata. Attorneys should have appealed from action in the probate case. Post-amendment 80, the case filed in the probate division of circuit court had jurisdiction to address all of the claims asserted related to the fee dispute, including contract and unjust enrichment. (McCain, M.; CA 11-616; 12-14-11; Gladwin)

Machen v. Machen, 2011 Ark. 531 [**family settlement agreements**] The family settlement agreement was valid and enforceable. The testator is not a party to a family settlement agreement. The testator's recourse if he wishes to change or revoke his will is to do so in accordance with the probate code. (Chandler, L.; SC 11-128; 12-15-11; Brown, R.)

Butler v. Williams, 2012 Ark. App. 5 [**contract**] Parties entered into contract for sale of time-share interest, and oral contract was taken out of the statute of frauds by part performance. (Dennis, J.; CA 11-469; 1-4-12; Pittman, J.)

Walls v. Humphries, 2012 Ark. App. 4 [**lease**] If an instrument affecting real estate is not recorded, then it is not valid against a subsequent purchaser of the property unless the purchaser had actual notice of the prior interest. Neither of the forgoing is present in this case. Court erred in awarding attorney's fees based on breach of contract because in this case the fees were awarded to a party that was a stranger to the contract. (Wood, R.; CA 11-242; 1-4-12; Pittman, J.)

Blake v. Shellstrom, 2012 Ark. App. 28 [**jury misconduct**] Ark.R. Evid. 606 applies to situations where the jury is exposed to extraneous prejudicial information, but it does not apply when a juror tells other jurors during deliberations that he was a former federal employee and knew that the plaintiff would have had health insurance. Knowledge obtained by a juror from his ordinary life experiences is not contemplated by Rule 606. (Harkey, A.; CA 11-541; 1-4-12; Brown, W.)

Anaya v. Ford, 2012 Ark. App. 8 [**release**] Summary judgment was not in order when factual questions existed as to whether there was a meeting of the minds with respect to a release and settlement between party and insurance company representative during telephone conversation between them. (Hearnsberger, M.; CA 11-757; 1-4-12; Gladwin, R.)

Conrad v. City of Beebe, 2012 Ark. App.15 [**annexation**] Published notice of annexation is not required to include the property description; statute requires only that city give notice of the election. Court's refusal to grant nonconforming-use status was not clearly erroneous. *City of Fayetteville v. S & H, Inc.*, was distinguished as purpose of ordinance in prohibiting nondomestic animals and nonoperating vehicle on property was to protect an imminent threat to public health, safety, and welfare. (Hannah, C.; CA 11-540; 1-4-12; Gruber, R.)

Grayson v. Couch, 2012 Ark. App. 20 [**summary judgment**] Claims between attorneys arising out of their practice and its termination involving contract and agency, could not be settled via summary judgment because of factual disputes. (Moody, J.; CA 11-189; 1-4-12; Martin, D.)

Green v. City of North Little Rock, 2012 Ark. App. 21 [**employment/drug test**] City did not violate police officer's constitutional rights in requiring that he take a drug test. Under facts of case, test met the reasonableness requirement under the Fourth Amendment. Officer demonstrated no FMLA violations. (Moody, J.; CA 11-189; 1-4-12; Martin, D.)

Berry v. Walker, 2012 Ark. App.6 [**constructive trust**] Court properly found that property was held in a constructive trust. (McCormick, D.; CA 11-626; 1-4-12; Glover, D.)

Coombs v. J.B. Hunt, 2012 Ark. App. 24 [**invasion of privacy**] Court erred in denying invasion of privacy claim via summary judgment because of factual issues related to expectation of privacy in context of a shared hotel room and the nature of the alleged acts of invasion. [**vicarious liability**] There are fact questions related to whether employee's actions alleged to be invasive were committed while on the job. [**summary judgment**] Summary judgment was proper on claims of outrage, wrongful discharge, and negligent retention. (Duncan, X.; CA 11-517; 1-1-12; Hoofman, C.)

BDO Seidman, LLP v. SSW Holding Co., 2012 Ark. 1 [**arbitration**] Contract language mandated that the FAA rather than New York law governed interpretation of arbitration provision. As a result, the arbitrator – not the court– must decide claims as to whether fraud or unconscionability invalidated the arbitration provision. (Fitzhugh, M.; SC 11-165; 1-5-12; Baker, K.)

May v. Tax Assessor: 2012 Ark.7 [**illegal exaction**] Claim was not an illegal exaction claim; plaintiffs' dispute was not with the validity of an ad valorem tax on natural gas but on how the tax was assessed and collected. Plaintiffs' recourse was with the county's equalization board. (Hughes, T.; SC11-652; 1-12-12; Danielson, P.)

Faigin v. Diamante Golf Club, LLC: 2012 Ark. 8 [**class certification**] Class action arising over dispute in assessment of monthly fees. Commonality factor was not satisfied as the defense asserted by the purported class representative is not common to the overwhelming majority of the proposed class. (Herzfeld, R.; SC11-691; 1-12-12; Baker, K.)

Brodie v. City of Jonesboro: 2012 Ark. 5 [**Ark. Civil Rights Act**] Court did not properly apply *McDonnell Douglas* framework to employment-discrimination suit. That is, plaintiff making a prima facie case; defendant rebutting with a legitimate, nondiscriminatory reason, and the plaintiff's countering by showing the employer's reason was in fact a pretext. (Laser, D.; SC11-563; 1-12-12; Hannah, J.)

Downey Moving Co. v. Wiseman, 2012 Ark. App. 57 [**default judgment**] Because there is no evidence that the summons and complaint were served on the defendant, and because compliance with Rule 4 cannot be determined given the absence of these documents in the record, the motion to set aside the default judgment should have been granted. (Maggio, M.; CA 11-755; 1-18-12; Pittman, J.)

Stadler v. Warren, 2012 Ark. App. 65 [**boundary**] Boundary by acquiescence was supported by evidence that the boundary was a fence line. Adverse usage up to a fence is not required to establish a boundary by acquiescence. (Pearson, B.; CA 11-353; 1-18-12; Gruber, R.)

Broussard v. St. Edward Mercy Health System, 2012 Ark.14 [**medical malpractice**] Provision in Ark. Code Ann. § 16-114-206(a), requiring that expert testimony may only be given by medical care providers of the same speciality as the defendant doctor, is unconstitutional. It violates the separation of powers doctrine, as it is procedural not substantive. (Tabor, S.; SC 11-561; 1-19-12; Hannah, J.)

Independence County v. City of Clarksville, 2012 Ark. 17 [**arbitration**] Arbitration agreement was unenforceable due to the absence of mutuality. (Pearson, W.; SC 11-268; 1-19-12; Goodson, C.)

Twin Rivers Health, LLC v. Ark. Health Services Permit Commission, 2012 Ark. 15 [**administrative appeal**] Commission did not set forth any findings of fact or conclusions of law to support its decision to grant the transfer of the permit of approval; therefore, appeal must be reversed and remanded to Commission for findings to be made. (Rogers, R.; SC 11-740; 1-19-12; Danielson, P.)

Russenberger v. Thomas Pest Control, 2012 Ark. App. 86 [**fraudulent concealment/pleading**] Plaintiff alleged sufficient facts to support application of fraudulent concealment in dispute between homeowner and termite company. (Fox, T.; CA 11-808; 1-25-12; Gruber, R.)

Servicemaster v. Vickers, 2012 Ark. App. 84 [**pleadings**] Trial court did not err in refusing to amend the pleadings to conform to the evidence at trial, or in finding the complaint failed to allege various causes of action. (Pierce, M.; CA 11-706; 1-25-12; Wynne, R.)

Go v. Crossett Health Foundation, 2012 Ark. App. 83 [**modification / contract**] Court properly entered summary judgment as facts were undisputed that modification agreement was a valid contract. It conferred additional consideration to plaintiff beyond that which was

contemplated by the original agreement. (Gibson, B.; CA 11-697; 1-25-12; Robbins, J.)

Gibbs v. Bumgarner, 2012 Ark. App. 81 [**attorney's fees**] When both contract and tort claims are advanced, statute does not permit an award of attorney's fees unless the action is primarily in contract. (Smith, K.; CA 11-303; 1-25-12; Hart, J.)

Brasfield v. Johnson, 2012 Ark. App. 88 [**law of the case**] In first appeal, appellate court found that the trial court had subject matter jurisdiction, and the law of the case doctrine controls. No material change of facts have been presented to cause the court to abandon application of the doctrine. (Dennis, J.; CA 11-402; 1-25-12; Glover, D.)

Unimeks, LLC v. Purolite, 2012 Ark. 20 [**summons**] Evidence did not refute that summons bore a valid signature and seal of the clerk. (Piazza, C.; SC 11-371; 1-26-12; Corbin, D.)

Bohot v. State Farm, 2012 Ark. 22 [**insurance/exclusion**] Exclusion from receiving medical-payment coverage under policy because injured party was paid for such under workers' comp. was valid and applicable to facts of case. (Taylor, J.; SC 11-881; 1-26-12; Danielson, P.)

DOMESTIC RELATIONS

Bass v. Bass, 2011 Ark. App. 753 [**child support; contempt**] Administrative Order No. 10 and the family support chart must be consulted and referenced in any child support order. That the chart amount of support is the appropriate amount is a rebuttable presumption. Any deviation requires the court to make specific written findings stating why, after considering all relevant factors, including the best interest of the child, the chart amount is unjust or inappropriate. Here, the court order neither stated the chart amount nor gave written findings why, after the court considered all factors including best interests, the chart amount was unjust or inappropriate. The court said it appears that two items were factored—a state adoption subsidy for the two special-needs children, and a monthly death benefit one child received for his biological father. Although these amounts may be considered on remand, neither was earned by the appellee father so neither can be considered a substitute for his support obligation. If considered as “income or assets available to support the child” under Administrative Order No. 10, the court should consider the source and reasons for the money and, most importantly, the best interests of the children, both with serious special needs. On the issue of contempt, the Court of Appeals found that the evidence supported the court's determination that the appellant was in contempt for violating the visitation order, but modified the sentence to time already served. (Shirron, P.; No. CA 11-243; 12-7-11; Gruber, R.)

Coker v. Coker, 2011 Ark. App. 752 [**divorce—general indignities**] Insufficient evidence was presented to support award of a divorce based upon general indignities. The appellee wife relied upon the appellant's long-term affair with another woman for his actions that rendered her condition in life intolerable. The Court of Appeals said that she failed either to prove or to corroborate the ground of general indignities, because adultery is a separate ground for divorce,

which she did not plead. Assuming the affair fit into the category of “general indignities,” there was no corroboration of it. The court reversed and dismissed, including the award of attorney’s fees since there was no longer a basis for that award. (Williams, L.; No. CA 11-471; 12-7-11; Wynne, R.)

Hill v. Hill, 2012 Ark. App. 11 [**divorce**] The Court of Appeals called the history of the litigation in this case “a procedural morass.” It began with the appellee’s complaint for separate maintenance filed in Saline County and appellant’s cross-complaint for divorce. The case was later transferred to Washington County. After a series of proceedings, the former judge in the case announced that the appellee would be granted a divorce and that, pursuant to the parties agreement, the court would enter a *nunc pro tunc* order reinstating the appellee’s previously dismissed divorce complaint. However, the *nunc pro tunc* order was never entered. Despite that and after a hearing, the former judge denied various motions the appellee had filed and entered the divorce decree. Appellee filed a notice of appeal, but never filed an appeal. She subsequently filed a petition on various post-judgment matters, including relocation, modification of visitation, and contempt. The previous judge recused and the case was assigned to the current judge, who, after a hearing, vacated the divorce decree. In reversing, the Court of Appeals said that the court erred based upon the particular circumstances of this case. Both parties fully participated in consolidated cases, including a three-day trial in which all issues were litigated and a divorce decree was entered. The appellee participated in all of the divorce proceedings—and even filed a notice of appeal. Over a year after the divorce hearing and more than ten months after the divorce decree was entered, she moved to vacate under Rule 60(c)(4), but that rule provides no basis for setting aside the decree. (Storey, W.; No. CA 11-710; 1-4-12; Robbins, J.)

Watkins v. Watkins, 2012 Ark. App. 27 [**divorce; property division—marital property**] The parties were married, divorced, subsequently remarried, then divorced again. In this appeal, the appellant wife disputed the division of funds deposited in joint accounts, the status of funds from appellee’s sale of farm equipment, and the status of appellee’s shop building on real property the appellant owned before their first marriage, out of which the appellee operated his business. The Court of Appeals noted that, while not specifically stated in the trial court’s letter opinion, the division of property appeared to be unequal, but the order failed to include specific findings to explain. The court noted specific items it found to be marital property, and remanded for entry of an order demonstrating consideration of the statutory factors. (Bell, K.; No. CA 10-940; 1-4-12; Brown, W.)

Smith, et al. v. Smith, 2012 Ark. App. 6 [**step-parent-adoption**] The trial court set aside an interlocutory order of adoption of two children by the stepmother based upon “fraud, duress, and intimidation.” The appellee biological mother consented to the adoption after receiving assurances from the appellant father that she would have regular visitation with the children. Four months after the interlocutory decree was entered, the father filed a petition to modify the visitation agreement, and the trial court found that it had lost jurisdiction to hear visitation issues after the adoption. After a hearing, the trial court set aside the adoption. In affirming, the Court of Appeals found that the trial court had jurisdiction to set aside the adoption. The 90-day limitation of Rule 60 does not apply if there was a showing of “fraud, duress, or intimidation.” Second, the one-year statute of limitation did not apply because it is settled law that, unless a statute expressly

provides otherwise, its operation is ordinarily tolled by the commencement of an action, not by the date of the judgment. Finally, appellant's contention, that the court erred in finding fraud, was raised for the first time on appeal. If the issue was based upon the court's factual basis for the ruling, testimony was presented to support the court's conclusion. (Singleton, H.; No. CA 11-73; 1-4-12; Hart, J.)

Chastain v. Chastain, 2012 Ark. App. 73 [**change of custody; relocation**] In this change of custody and relocation case, the parties agreed that the trial court's primary decision was whether the parties had true joint physical custody under the terms of their settlement agreement or whether the appellee mother had primary physical custody so that she was entitled to a presumption in favor of relocation with the children. The parties' pro se agreement called the custody "joint and equal with the mother having the primary residence." One provision was "Secondary Residential Responsibility, Visitation, or Time," which established visitation to the appellant father based upon his work schedule. The parties were to divide the children's expenses evenly with neither paying child support. The parent with "primary residential responsibility of the children" got the tax deductions for the children. The appellee mother used an online service in drafting the settlement agreement and neither party consulted a lawyer. Some of the language and terms in the agreement were not terms used in Arkansas, such as "primary residential parent." The court noted that several other states use that term as Arkansas uses "custodial parent." That plus the section on "Secondary Residential Responsibility" that covered appellant's visitation, the fact that appellee got the tax deduction, and other testimony of the parties, resulted in the court's conclusion that appellee was the custodial parent and therefore entitled to the presumption in favor of relocation. The court discussed the relevant factors for relocation, found that the appellant failed to rebut the presumption, and allowed her to relocate with the children to South Carolina. It also set out a visitation schedule for the appellant. The Court of Appeals said that the evidence clearly supported the decision allowing relocation and affirmed the case. (Smith, V.; No. CA 10-1175; 1-18-12; Hoofman, C.)

PROBATE

Munn v. Hudson, 2011 Ark. App. 734 [**temporary guardianship; custody**] The trial court dissolved the maternal grandmother's temporary guardianship of the child and awarded custody to the natural father. The temporary, emergency guardianship was granted, with the father's consent, when the child's mother died in an auto accident. By its terms, the guardianship was to be in place for the rest of the school year and summer vacation because the father, who was in the military, was not in a position to take custody of the child at the time. He subsequently petitioned to terminate the temporary guardianship because he was in a position to assume custody of the child. He testified about his care of the child when he and her mother were married and about his ability to care for her now. The Court of Appeals affirmed the trial court's finding that the guardianship was no longer necessary and should be terminated. (Smith, P.; No. CA 11-506; 12-14-11; Hart, J.)

Gammill, et al. v. Hoover, 2011 Ark. App. 788 [**guardianship; custody**] The appellee's former boyfriend (now her husband) was charged with and pled guilty to first-degree battery for inflicting

burns on her 23-month-old daughter when appellee left the child with him. Appellee pled guilty of child endangerment. Appellee's parents obtained temporary guardianship of the abused child and her 3-year-old brother after the charges were filed. The appellee filed a petition to regain custody of her children and the appellants, the children's maternal aunt and uncle, intervened and sought guardianship, which the court denied. He found that the mother had done everything DHS told her to do while her parents had temporary guardianship of the children. The court ordered that the appellee's husband, who had pled guilty to abusing the child, was not to be left alone with the child. In reversing, the Court of Appeals said that, under best interest of the children standard, the circuit court's finding was against the preponderance of the evidence. The court said the mother, although otherwise qualified, was not a suitable guardian for the children. (Weaver, T.; No. CA 11-785; 12-14-12; Abramson, R.)

In Re Adoption of J.P., et al. v. Benson, et al., 2011 Ark. 535 [**adoption; grandparent and great-grandparent visitation**] This case involves both a step-parent adoption and grandparent and great-grandparent visitation. The trial court denied the step-mother's petition for adoption and granted the maternal grandmother and great-grandmother visitation. The natural father and the step-mother appealed to the Court of Appeals, which affirmed. The Arkansas Supreme Court granted review. The court affirmed the trial court's denial of the step-mother's petition for adoption. The court reversed and remanded the grandmother and great-grandmother's petition for grandparent and step-grandparent visitation, finding it premature. Visitation had not been denied and their relationship with the child had not been lost. They did not prove by a preponderance of the evidence that the loss of a relationship between them and the child likely would harm the child, so they failed to establish that visitation with them was in his self-interest. The circuit court erred in finding that the grandmother and great-grandmother rebutted the statutory presumption under the grandparent visitation statute. The Court of Appeals opinion was vacated. (Boling, L.; No. SC 11-675; 12-15-11; Danielson, P.)

Moreland, Personal Representative of Dodds, Deceased v. Dodds, Executor, et al., 2012 Ark. App. 10 [**decedent's estate; rescission of deed**] The trial court's decision to reopen the case for the limited purpose of allowing one of decedent's children (on behalf of herself and other beneficiaries), to collect \$20,090.38 from her brother, the difference in the purchase price he paid and the purchase price the will directed he would pay, for the decedent's real property, was not clearly erroneous. She was seeking equitable rescission, for which she had to show a lack of an adequate remedy at law. She had an adequate remedy at law. The court agreed with the trial court that the appellee owed the beneficiaries that amount and that the appellant has been given the authority to sue him for that amount to make the beneficiaries whole. (Benton, W.; No. CA 11-452; 1-4-12; Robbins, J.)

JUVENILE

Arkansas Dept. of Human Services v. Mitchell, 2012 Ark. App. 72 [**FINS**] The court ordered DHS to provide family services to prevent removal, including assistance with school uniforms,

maternity clothing, and baby cloths. DHS filed a motion to intervene for the limited purpose of contesting the court's order and filed a motion for reconsideration. At a hearing, DHS argued that the court failed to make specific findings as required by law and that the agency would not remove on the basis that the family could not afford clothing. Following the hearing, the trial court agreed with DHS that it's order for baby clothes for an unborn baby was premature but ordered the other items to prevent educational neglect.

Appeal dismissed without prejudiced due to insufficiency of the Rule 54(b) Certification.

Tacking the language in the rule is insufficient and must be supported by specific factual findings that there is not just reason for delay. The order must contain specific facts that explains why a hardship or injustice would be alleviated by an immediate appeal. (Brown, E.; CA11-739; 1-18-2012; Martin, D.).

Weatherspoon v. Arkansas Dept. of Human Services, 2012 Ark. App. 34 [**D-N Adjudication**] The trial court was affirmed in finding appellant's child dependent- neglected as a result of appellant's neglect and general unfitness. Neglect does not require actual harm, but substantial risk in terms of future harm. The trial court noted that an incident did occur in part due to lack of protection by the appellant, appellant's prior history, and the court's concern with appellant's lack of stability. Appellant failure to challenge the court's judicial notice of two prior dependency-neglect cases prevents review on appeal. (Branton, W.; CA11-850; 1-11-2012; Hart, J).

Bayron v. Arkansas Dept. of Human Services, 2012 Ark. App. 5 [**TPR – sufficiency of the evidence**] When an appellant fails to attack the trial court's independent, alternative basis for a ruling, it is not subject to reversal. Appellant argued that the court's finding concerning the children's adoptability was insufficient. However, there was evidence by the adoption specialist that the children were adoptable and that she had been able to find adoptive parents for sibling groups. The court had evidence to make its finding. (Cooper, T.; CA11-895; 1-18-2012; Brown, W.).

Brabon v. Arkansas Dept. of Human Services, 2012 Ark. App. 2 [**TPR - Best Interest/Adoption**] The court found a high likelihood that the children would be adopted. Appellant challenged the court's finding, specifically as to the testimony concerning their adoptability and that her children did not consent to be adopted. Failure to object to the admission of the testimony or raise the consent issue with the trial court prevents review upon appeal. (Harrod, L.; CA11-832; 1-4-2012; Vaught, L.).

Andrews v. Arkansas Dept. of Human Services, 2012 Ark. App. 2 [**TPR – Relative Placement**] Appellant argued that the trial court erred in declining to hear testimony concerning placement of her children with their maternal grandmother because it was relevant to the court's consideration of best interest. However, during the TPR hearing, appellant only asked the court to consider the grandmother's home study that the court had previously ordered. Appellant is bound by the scope of her argument to the trial court on appeal. The appellate court stated that even if appellant's argument had been preserved, the trial court would be upheld. The trial court's ruling was an evidentiary ruling on whether to consider the maternal grandmother's home study. Trial courts

have broad discretion in evidentiary rulings and will not be overturned unless there is a manifest abuse of discretion. (Coker, K.; CA11-758; 1-4-2012; Martin, D.).

Rossie-Fonner v. Arkansas Dept. of Human Services, 2012 Ark. App. 29 [**TPR**] Compliance with the case plan and court orders is not determinative. What matters is the intended result. The trial court was affirmed finding that the child had been out of the home for 12 months and despite meaningful efforts by DHS, appellant failed to correct and remedy the conditions that caused removal. The court also found a history of actual violence, threatening behavior, anger and hostility to the court that continued to create a clear and continuing risk to her child. The appellate court also noted that the risk posed to the child in this case was not just injury, but death if appellant's mental illnesses manifested. The evidence also included appellant's lifelong history of mental illness and that the nature of this illness was permanent and unpredictable and would present a continued risk to her child. (Branton, W.; CA11-888; 1-4-2012; Brown, W.).

Reichard v. Arkansas Dept. of Human Services, 2011 Ark. App. 762 [**TPR – sufficiency of the evidence**] There was sufficient evidence to terminate where appellant did make progress with drug treatment through drug court, but still seven months prior to the termination hearing had not been able to maintain a home, job, or adequately provide for her children. (Branton, W.; CA11-805; 12-7-2011; Hoffman, C.).

Nespor v. Arkansas Dept. of Human Services, 2011 Ark. App. 745 [**TPR – failure to state grounds**] Appellant argued that the trial court's TPR order was defective for failure to state the grounds or statutory basis upon which the decision was based. The judgment referenced the subsequent issues ground in the petition and there were multiple findings that supported the termination based on that ground. The Court of Appeals stated the court's intent was clear, but noted that it is better practice to include such information in the order. The appellate court held that the trial court intended in its written judgment to rely on the subsequent issue ground. (Isbell, G.; CA11-749; 12-7-2011; Vaught, L.).

Cases in which the Court of Appeals Affirmed No-Merit TPR and Motion to Withdraw Granted:
Bajoie v. Arkansas Dept. of Human Services, 2012 Ark. App. 62 (Morley, R.; CA 11-911; 1-18-2012; Robbins, J.).

Thouvenell v. Arkansas Dept. of Human Services, 2012 Ark. App. 56 (Hewett, M.; CA11-907; 1-18-2012; Vaught, L.).

Anderson v. Arkansas Dept. of Human Services, 2011 Ark. App. 791 (Branton, W.; CA11-804; 12-14-2011; Hoffman, C.).

Bell v. Arkansas Dept. of Human Services, 2011 Ark. App. 772 (Yeargan, C.; CA11-786; 12-14-2011; Vaught, L.).

Glover v. Arkansas Dept. of Human Services, 2011 Ark. App. 748 (Morley, R.; CA11-508; 12-7-2011; Pittman, J.).

DISTRICT COURT

Garcia v. State, 2012 Ark. App. 80 [**constitutionality of city ordinance**]. A district court conviction of violating a city noise ordinance was appealed to circuit court. The only issue was whether the noise ordinance was constitutional. Where the constitutionality of an ordinance is challenged on appeal, review is limited to the subsections which are violated. On the record, the court of appeals could not determine which subsection of the ordinance was violated. The burden of providing a record sufficient to show that reversible error occurred was on the appellant; he failed to do so. (Green, R.; CACR11-696; 1/25/12; Pittman, J.)

EIGHTH CIRCUIT

Smith v. David H. Arrington Oil & Gas: [**oil and gas**] Grant of summary judgment to landowners in suit against Arrington Oil & Gas, Inc. for failure to pay cash bonuses under oil and gas leases is affirmed. Lease agreements, together with bank draft, constituted enforceable contract. Bank draft's no-liability clause does not negate the mutuality of the obligation in the underlying lease agreement. The acceptance of the executed lease agreements constituted an approval and satisfied the lease approval language of the drafts. Renunciation of lease agreement for reasons unrelated to title precludes defense to the enforceability. Only good faith disapproval of title would justify invocation of condition precedent. (E.D. Ark.; # 10-3423; 1-5-12)

Hayden v. Nevada County: [**civil rights**] The alleged coercion the defendant sheriff used to persuade plaintiff to plead guilty - representations regarding his sentence - did not render plaintiff's guilty plea involuntary, and the coercion did not violate any constitutional right. An official holding a criminal defendant in pretrial custody may reasonably assume that the trial court will properly determine whether a defendant is competent to stand trial or make a plea. (W.D. Ark.; # 10-3838; 1-10-12)