

# 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](http://courts.arkansas.gov/opinions/sc_opinions_list.cfm) or Court of Appeals - [http://courts.arkansas.gov/opinions/coa\\_opinions\\_list.cfm](http://courts.arkansas.gov/opinions/coa_opinions_list.cfm)).

## ANNOUNCEMENTS

On January 10th, the supreme court published for comment the interim report and proposed rules changes that the Special Task Force on Practice and Procedure in Civil Cases has recommended to the court. The comment period expires on March 14, 2014, and a copy of the per curiam order was included in the weekly mailout.

On January 30th, the supreme court published for comment the final report and proposed change to Rule 702 of the Rules of Evidence that the Special Task Force on Practice and Procedure in Civil Cases has recommended to the court. The comment period expires on March 14, 2014, and a copy of the per curiam order was included in the weekly mailout.

## CRIMINAL

*Givan v. State*, 2013 Ark. App. 701 [**jurisdiction; revocation**] Because judges of different divisions within a judicial circuit have commutable authority, the fifth division judge had jurisdiction to revoke appellant's probation, which was from a sentence entered in the fourth division. (Wood, R.; CR-12-70; 12-4-13; Pittman, J.)

*Green v. State*, 2013 Ark. 497 [**sufficiency of the evidence; capital murder; kidnaping**] There was substantial evidence to support appellant's convictions. [**hearsay**] The trial court did not abuse its discretion when it permitted a sheriff to testify about statements made by appellant's son because the testimony was not offered for its truth but rather was offered to explain a series of actions taken by law enforcement officials while investigating the crimes for which appellant was convicted. [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motions for mistrial, which were based upon: (1) admission of testimony related to appellant's prior illegal conduct; (2) admission of testimony from appellant's wife regarding conversations that she had with law enforcement; and (3) an alleged reference by the State to appellant's invocation of his right to remain silent. [**cumulative error**] The Supreme Court does not recognize the cumulative-error doctrine when there is no error to accumulate. [**jury instructions; accomplice liability**] The circuit court did not abuse its discretion when it gave the accomplice liability instruction in appellant's case. [**juror**] In order to challenge a juror's presence on appeal, the appellant must have exhausted his peremptory challenges and must show that he was forced to accept a juror who should have been excused for cause. [**court reporter**] The trial court has an affirmative duty to see that the court reporter performs satisfactorily in order to provide an adequate record for appeal. [**amended order**] The circuit court did not abuse its discretion when it entered an amended order in appellant's case. (Erwin, H.; CR-12-721; 12-5-13; Baker, K.)

*Mason v. State*, 2013 Ark. 492 [**Rule 37; failure to request directed verdict**] Because a directed-verdict motion would not have been successful, appellant could not demonstrate that his trial counsel was ineffective for failing to make the motion. [**Rule 37; cross examination**] Trial counsel's tactical decision about how to cross-examine a witness was supported by reasonable professional judgment. Thus, appellant was not entitled to postconviction relief. [**Rule 37; failure to investigate or prepare**] To prevail on a postconviction petition based upon counsel's failure to investigate or prepare for trial the petitioner must establish what evidence or witnesses would have been discovered had counsel properly investigated the case and demonstrate that, but for counsel's lack of preparation, there is a reasonable probability that the outcome of his trial or sentence would have been different. (Sims, B.; CR-12-218; 12-5-13; Hannah, J.)

*Johnson v. State*, 2013 Ark. 494 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon a statement that was made by the prosecutor during closing arguments, which appellant alleged commented on his choice not to testify. (Glover, D.; CR-13-246; 12-5-13; Danielson, P.)

*Woods v. State*, 2013 Ark. App. 739 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**Ark. R. Evid. 404(b)**] The trial court did not abuse its discretion by admitting evidence of appellant's prior "child-molestation conviction" pursuant to the pedophile exception to Rule 404 (b). (Fogleman, J.; CR-13-562; 12-11-13; Vaught, L.)

*Fuentes v. State*, 2013 Ark. App. 736 [**motion to suppress**] Sufficient evidence was presented to support a finding of probable cause for issuance of a warrant in appellant's case. Thus, the trial court

did not err when it denied appellant's motion to suppress. (Johnson, L.; CR-13-351; 12-11-13; Whiteaker, P.)

*Stubblefield v. State*, 2013 Ark. App. 734 [**illegal sentence**] The Class B felony offense of felon-in-possession is not a sentencing enhancement. Because appellant's sentence for that offense was not enhanced by the statute defining the crime, the trial court did not err and appellant's sentence that was enhanced by Ark. Code Ann. § 16-90-120(a) was not illegal. (Wright, H.; CR-13-298; 12-11-13; Glover, D.)

*Atchley v. State*, 2013 Ark. App. 727 [**evidence**] Evidence that does no more than create an inference or conjecture as to another's guilt is inadmissible. (Honeycutt, P.; CR-12-485; 12-11-13; Harrison, B.)

*Hayes v. State*, 2013 Ark. App. 725 [**motion to suppress**] The photographs of young nude girls, which an informant obtained from appellant and turned over to law enforcement, provided probable cause for the search of appellant's home and sufficient evidence to support revocation of appellant's probation. (Webb, G.; CR-13-360; 12-11-13; Pittman, J.)

*Davenport v. State*, 2013 Ark. 508 [**Rule 37**] There is no reason for a court deciding an ineffective-assistance-of-counsel claim to address both components of the *Strickland* standard if the appellant makes an insufficient showing on one of the prongs. (Sims, B.; CR-13-18; 12-12-13; Goodson, C.)

*Fritts v. State*, 2013 Ark. 505 [**invocation of right to remain silent**] Appellant's statement that he had already told the officers all that he knew was not an unambiguous and unequivocal invocation of his right to remain silent. (Cox, J.; CR-12-933; 12-12-13; Corbin, D.)

*Turner v. State*, 2013 Ark. App. 754 [**mistrial; double jeopardy**] The trial court did not have an obligation to make specific inquiries of the jury before granting appellant's request for a mistrial. When a defendant elects to terminate the proceedings against him, the "manifest necessity" standard is inapplicable for purposes of considering application of the Double Jeopardy Clause. (Kemp, J.; CR-13-515; 12-18-13; Glover, D.)

*Copeland v. State*, 2013 Ark. App. 747 [**double jeopardy**] Multiple crimes committed in a single criminal episode can be charged and punished separately without violating double jeopardy principles. Thus, appellant's convictions for first-degree murder and first-degree battery, which resulted from appellant firing three separate shots at his victim, did not violate double jeopardy principles. (Keaton, E.; CR-12-404; 12-18-13; Pittman, J.)

*Reed v. State*, 2014 Ark. App. 10 [**sentencing**] Appellant's sentences, which exceeded the applicable sentencing ranges set out in Ark. Code Ann. § 5-4-401 (a), were illegal. (Fitzhugh, M.; CR-12-20; 1-8-14; Vaught, L.)

*Wade v. State*, 2014 Ark. App. 2 [**motion to suppress**] Seizure of appellant's hat and shoes, which were lawfully taken and inventoried while in police possession, did not offend the Fourth Amendment's proscription against unreasonable searches and seizures. (Kemp, J.; CR-12-463; 1-8-14; Pittman, J.)

*Lard v. State*, 2014 Ark. 1 [**evidence of bad acts and bad character**] The trial court did not abuse its discretion when it permitted testimony that disclosed appellant's previous bad acts and bad character because the evidence was independently relevant to establish appellant's intent, plan, and state of mind. [**admission of evidence**] Video evidence, such as that from the camera on a dashboard of a police car, is admissible if it is relevant, helpful to the jury, and not prejudicial. [**Rule 615**] If requested by a party, the exclusion of witnesses pursuant to Rule 615 of the Arkansas Rules of Evidence is mandatory. [**imposition of the death penalty; ex post facto**] Although the Method of Execution Act was found to be unconstitutional prior to appellant receiving a sentence of death, ex-post-facto principles would not prevent appellant's sentence from being carried out if the state adopted a new method of execution. (Davis, B.; CR-13-173; 1-9-14; Goodson, C.)

*Newman v. State*, 2014 Ark. 7 [**error coram nobis**] Because Newman was not competent at the time that he was forced to stand trial, the trial court abused its discretion when it thereafter denied Newman's *error coram nobis* petition. (Cottrell, G.; CR-12-118; 1-16-14; Goodson, C.)

*Wilson v. State*, 2014 Ark. 8 [**search and seizure**] Appellant lacked standing to challenge the search of a vehicle, which was rented by another person. However, he had standing to challenge his detention which resulted from the search of the rental car. (Thyer, C.; CR-13-488; 1-16-14; Hart, J.)

*Walden v. State*, 2014 Ark. 10 [**Rule 37**] Where no evidentiary hearing is held on a Rule 37.1 petition, the trial court has an obligation to provide written findings specifying any parts of the files or record that are relied on to sustain conclusively the trial court's decision that the petitioner is entitled to no relief. (Fitzhugh, M.; CR-12-669; 1-16-14; per curiam)

*Evans v. State*, 2014 Ark. 6 [**Rule 37**] The circuit court did not err when it denied appellant's request to either amend his petition or file a petition that exceeded the page limit set by Rule 37.1 (e). (Sims, B.; CR-12-338; 1-16-14; Danielson, P.)

*Sullivan v. State*, 2014 Ark. App. 54 [**revocation; suspended sentence**] Because the basis for revocation of appellant's suspended sentence was conduct that was not included as a term or condition in his suspended sentence, the trial court's finding that appellant violated the terms and conditions of his suspended sentence was clearly against the preponderance of the evidence. (Medlock, M.; CR-13-624; 1-22-14; Gruber, R.)

*Prillerman v. State*, 2014 Ark. App. 46 [**revocation; probation**] The State failed to present evidence that established the requirements of appellant's probation after he moved to another state and his supervision was transferred. Additionally, the State did not present evidence that established that appellant failed to comply with the terms of his probation in the new state. Thus, there was

insufficient evidence to support the circuit court's revocation order. (Huckabee, S.; CR-13-647; 1-22-14; Gladwin, R.)

*Henson v. State*, 2014 Ark. App. 49 [**Ark. R. Evid. 609**] The circuit court conducted the proper analysis pursuant to Rule 609 (a)(1) of the Rules of Evidence and did not abuse its discretion when it determined that evidence of appellant's prior convictions was more probative than prejudicial and therefore admissible. (McCallister, B.; CR-13-373; 1-22-14; Harrison, B.)

*Lewis v. State*, 2014 Ark. 23 [**admission of evidence**] The trial court did not abuse its discretion when it refused to allow appellant to cross-examine his co-defendant about her prior misdemeanor third-degree domestic-battery conviction for having stabbed appellant because the testimony was only marginally relevant, had very little probative value, and did not meet the requirements of Rule 404 (b) of the Rules of Evidence. (Johnson, L.; CR-13-444; 1-23-14; Hart, J.)

*Holt v. State*, 2014 Ark. App. 74 [**motion to suppress**] The trial court did not err when it applied the "public-safety" exception to the *Miranda* rule to appellant's case and denied appellant's motion to suppress. (Sims, B.; CR-13-258; 1-29-14; Glover, D.)

*Fountain v. State*, 2014 Ark. App. 71 [**revocation; confrontation clause**] In a revocation hearing, a defendant has the right to confront and cross-examine an adverse witness unless the court specifically finds good cause for not allowing confrontation. The court must balance the probationer's right to confront the witness against grounds asserted by the State for not requiring confrontation. When an error involving the constitutional right to confront adverse witnesses occurs at a revocation proceeding, the error is subject to harmless-error analysis. (Tabor, S.; CR-13-474; 1-29-14; Walmsley, B.)

*Harmon v. State*, 2014 Ark. App. 70 [**admission of evidence**] Appellant's proffered testimony, which created only an inference or conjecture as to another individual's guilt, was properly excluded. (Johnson, L.; CR-13-286; 1-29-14; Walmsley, B.)

*Farrow v. State*, 2014 Ark. App. 69 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motions for a new trial, which were based on statements made by the prosecutor during voir dire and opening statements. (Wilson, R.; CR-13-435; 1-29-14; Pittman, J.)

*Sanders v. State*, 2014 Ark. 40 [**admission of evidence; illegally obtained**] The appropriate remedy for a witness's potential bias resulting from an illegally obtained plea agreement is not suppression of the witness's testimony but rather to allow the defense to cross-examine the witness on the source of that bias and thereby impeach the witness's credibility. [**admission of evidence; transcripts from previous trials**] The trial court did not abuse its discretion when it admitted the testimony of several witnesses through transcripts from previous trials. [**law of the case doctrine**] The trial court did not err when it concluded that the law of the case doctrine prevented it from reconsidering an issue that was previously reviewed and decided by the appellate court. (Lineberger, J.; CR-13-390; 1-30-14; Hoofman, C.)

*Rackley v. State*, 2014 Ark. 39 [**Rule 37**] Appellant's trial counsel was ineffective because he was simultaneously representing appellant and appellant's wife at the time of appellant's trial, and the dual representation created an actual conflict of interest that adversely affected counsel's performance. Thus, the trial court erred by denying appellant's Rule 37 petition. (Reynolds, D.; CR-12-157; 1-30-14; Hoofman, C.)

*Hobbs v. Turner*, 2014 Ark. 19 [**habeas corpus - juvenile resentencing**]

Appellant sought resentencing under *Graham v. Florida*, 560 U.S. 48 (2010) because he was a juvenile when he was convicted and received life without parole for a kidnapping conviction along with other convictions and charges. The circuit court held a resentencing hearing and sentenced appellant to a term of 40 years for his kidnapping conviction with the other sentences to remain the same. The state appealed arguing that appellant should have been given life with the possibility of parole. Appellant cross appealed arguing that the court erred in not giving adequate consideration to his age and that the underlying maximum sentence today is considerably less under the Sentencing Guidelines and that 40 year sentence was disproportionate. The circuit court was affirmed on direct appeal and correctly ruled that it did not have the authority to create a sentence that was not authorized at the time appellant committed the offense, and the maximum sentence after invalidation of the life sentence was 40 years. The court further found that once the circuit court imposed a nonlife sentence its obligations under *Graham* were met. The individualized hearing considering a youth's characteristics under *Miller* applies to juvenile homicide offenders and is inapplicable. A writ of habeas corpus is designed to correct detention for an illegal period of time and does not provide a prisoner an opportunity to retry his case and is not a substitute for a direct appeal or postconviction relief. The court noted that under *Graham*, appellant was not entitled to additional consideration of his youth or the circumstances of his crime to reduce his sentence, particularly under a habeas corpus proceeding. The court did not address the argument of the disproportionate sentence. (Dennis, J.; CV12-407; 1-23-2014; Hannah, J.)

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

*Hooks v. State*, 2013 Ark. App. 728 (second-degree murder) CR-12-900; 12-11-13; Harrison, B.

*Fletcher v. State*, 2014 Ark. App. 50 (commercial burglary; theft of property; fraud) CR-13-415; 1-22-14; Harrison, B.

*Robinson v. State*, 2014 Ark. App. 64 (attempted murder; aggravated robbery; aggravated residential burglary; battery in the first degree; theft of property) CR-13-513; 1-22-14; Wood, R.

*Brown v. State*, 2014 Ark. App. 79 (first-degree battery) CR-13-548; 1-29-14; Wood, R.

*Tatum v. State*, 2014 Ark. App. 68 (promoting prostitution in the first degree) CR-13-602; 1-29-14; Gladwin, 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:

*Singletary v. State*, 2013 Ark. App. 699 (suspended sentence) CR-13-296; 12-4-13; Gladwin, R.

*Kendrick v. State*, 2013 Ark. App. 716 (probation) CR-13-463; 12-4-13; Wood, R.

*Wooten v. State*, 2013 Ark. App. 729 (suspended sentence) CR-13-595; 12-11-13; Harrison, B.

*Phengthavy v. State*, 2013 Ark. App. 732 (suspended sentence) CR-13-118; 12-11-13; Gruber, R.

*McGuire v. State*, 2014 Ark. App. 52 (probation) CR-13-837; 1-22-14; Wynne, R.

*Ellis v. State*, 2014 Ark. App. 56 (probation) CR-13-400; 1-22-14; Glover, D.

## CIVIL

*Lucci Corp. v. Beaux Manuf. Co*, 2013 Ark. App. 705 [**contract/ summary judgment**] Summary judgment was not in order. A material fact question exists on whether the parties' transactions embodied a sale-of-goods relationship versus an oral sale-of-services contract. (Scott, J.; CV-13-494; 12-4-13; Harrison, B.)

*Escapes, Inc. v. Palm Beach Vacation Owners Assoc.*, 2013 Ark. App. 704 [**dismissal order/forum**] Court's order does not state a sufficient legal reason to end the case. The circuit court stated in its order that "the fact that Alabama law governs the condominium development and the ownership and use of the condominium development" was a basis to end the case. But the court provided no reason why this point supported a dismissal, and we cannot supply one under the circumstances. The agreement expressly recites that it "shall be governed by, and shall be construed in accordance with the laws of the State of Arkansas." The parties themselves dispute whether the Alabama Uniform Condominium Act applies, and the circuit court did not rule on whether the Alabama Act applies or with regard to the Arkansas forum-selection clause contained in the parties' contract. (Duncan, X.; CV-13-348; 12-4-13; Harrison, B.)

*Parkerson v. Brown*, 2013 Ark. App. 718 [**easement**] Party abandoned her prescriptive easement. [**misc.**] Court did not err in its discovery or evidentiary rulings. (Lineberger, J.; CV-12-663; 12-4-13; Brown, W.)

*Diamante, LLC v. Dye*, 2013 Ark. 501 [**class certification**] Court's certification was proper. Class representatives met the adequacy requirement and that they do not have a conflict of interest in representing members of the class whose dues were deferred. All class members have a common claim even if the restrictive covenant filed in connection with the lot owned by the class representatives is different than the restrictive covenant of other class members. Class can include members whose dues are currently being deferred and members who signed documents agreeing to arbitrate controversies. Class counsel is adequate. (Arnold, G.; CV-13-467; 12-5-13; Hart, J.)

*Nowicki v. Pique*, 2013 Ark. 499 [**Firefighter's rule**] The Firefighter's Rule or the professional rescuer's doctrine provides that "a professional firefighter may not recover damages from a private party for injuries the fireman sustained during the course of putting out a fire even though the private party's negligence may have caused the fire and injury." In this case a roadside assistance worker's estate sought to recover from a trucker whose rig ran out of gas on the interstate and the decedent was rendering assistance at the time of his death. The doctrine applied to the roadside assistance worker and barred the claim. He died while undertaking a risk that as part of his employment was his duty to accept. (Hill, V.; CV-12-1048; 12-5-13; Hart, J.)

*Smith v. Conagra Foods, Inc.*, 2013 Ark. 502 [**certified question answered – Ark. Civil Rights Act**] Three-year limitations period in Ark. Code Ann. Section 16-56-105 applies to retaliation claims filed pursuant to section 16-123-108. (E.D. Ark.; CV-13-145; 12-5-13; Hoofman, C.)

*Rose v. Harbor East, Inc.*, 2013 Ark. 496 [**revivor**] A petition for writ of scire facias was filed but no writ was issued or served prior to entry of a court order of revivor. Because of the failure to comply with the statutory requirements the order of revivor was void. (Looney, J.; CV-13-327; 12-5-13; Danielson, P.)

*Graves v. Greene County*, 2013 Ark. 493 [**constable**] A constable is a "township officer" and not a "district official." Thus, Ark. Code Ann. Section 14-14-1207, which provides for reimbursement of expenses to "district officials" does not apply to constables. The salary set by the quorum court or constables was not arbitrary or capricious and was constitutional. (Laser, D.; CV-13-552; 12-5-13; Hannah, J.)

*Albarran v. Liberty Healthcare Mgt.*, 2013 Ark. App. 738 [**contempt**] The trial court noted that there had been no testimony or evidence at the hearing demonstrating Albarran's inability to comply with the court's order, and the court found him in contempt but gave him another thirty days to comply; failing that, Albarran was to be brought to court to explain his inability to pay before he would be jailed. Albarran has consistently refused to pay the attorney's fees that the court ordered him to pay. The circuit court properly utilized the process available to it to coerce Albarran's compliance. (Scott, J.; CV-13-561; 12-11-13; Whiteaker, P.)

*Heirs of M. Duncan v. Alfred Williams Living Trust*, 2013 Ark. App. 740 [**warning order**] The rule permits constructive service by warning order only if the whereabouts of the defendant is unknown after "diligent inquiry." There was not strict compliance with Rule 4(f)(1) because the warning order was not issued after diligent inquiry into the whereabouts of the defendants. Two separate deeds regarding the property in question contained evidence that the defendants resided in Smith County, Texas. A diligent inquiry should at a minimum begin in the location where a reasonable review of the case showed the parties to have last resided. It would have been reasonable to search the public records of Smith County, Texas. Had they done so, they would have discovered that the defendants were deceased and that they were looking for heirs. (Weaver, T.; CV-13-103; 12-11-13; Hixson, K.)

*Hardesty v. Baptist Health*, 2013 Ark. App. 731 [**requests for admissions**] Summary judgment was granted based on certain requests for admission that were deemed admitted after appellants



failed to respond to them or file their responses with the circuit court. Rule 36(b) states that a trial court can permit withdrawal or amendment of responses to answers to requests for admission. It is not mandatory that a trial court grant a request to withdraw and amend. The relevant question here is whether the circuit court in this case abused its discretion by denying appellants' motion to withdraw and amend. Appellants have not demonstrated an abuse of discretion by the circuit court, especially considering that the admissions are based on their failure to timely respond or file their responses. (Pierce, M.; CV-13-346; 12-11-13; Wynne, R.)

*Davis v. Schneider National, Inc.*, 2013 Ark. App. 737 [**negligence**] There is no material issue of fact that defendant was using a through highway and that plaintiff had the duty to yield at the intersection, which she failed to do. Defendant had already entered the intersection when he was struck broadside by Plaintiff, who was the proximate cause of this collision. Therefore, summary judgment was properly entered for defendant. (Scott, J.; CV-13-561; 12-11-13; Whiteaker, P.)

*Ford Motor Co. v. Washington*, 2013 Ark. 510 [**ACA 27-37-703/seat belts**] Trial court ruled that evidence of driver's nonuse of seatbelt was not admissible. However, Ford then argued that driver had opened the door to the admission of evidence of seat belt nonuse. Because there is a statute that expressly prohibits the admission of this evidence, this case can be distinguished from other cases in which we have held that otherwise inadmissible character evidence pursuant to our rules of evidence may be admitted to "fight fire with fire." Circuit court did not abuse its discretion and its ruling excluding evidence of nonuse of a seat belt is affirmed. [**preemption/type of glass in side windows**] Ford waived the preemption argument for purposes of appeal because the case was presented to the jury on a general-verdict form. On this point, the record reflects that the jury was instructed that it could find Ford liable based on either negligence or strict liability. In support of both claims, Washington asserted that the vehicle was defective (1) because it had an unreasonable propensity to roll over, or (2) because the side window was made of tempered glass. It is only the latter theory of recovery that Ford asserts should have been dismissed. Where the jury's verdict is rendered on a general-verdict form, it is an indivisible entity or, in other words, a finding upon the whole case. [**punitive damages**] Substantial evidence supported awarding of punitive damages. [**post judgment interest**] Prior appeals in case had been dismissed because of the lack of a final order. Post judgment interest should only run from the entry of the final order. (Jones, B.; CV-13-449; 12-12-13; Hoofman, C.)

*Worden v. Kirchner.*, 2013 Ark. 509 [**summary judgment**] No error in granting of summary judgment over following objections: granted prior to the completion of discovery; complaint alleged facts rather than conclusory; complaint was not barred by the statute of limitations. (Fox, T.; CV-13-261; 12-12-13; Goodson, C.)

*King v. Carter*, 2013 Ark. App. 749 [**venue**] Circuit court dismissed complaint due to improper venue based on a collision report that listed plaintiff's residence. Plaintiff never furnished evidence to the court to challenge this information, but relied on allegation in complaint setting forth his county of residence. Dismissal was affirmed. (Proctor, R.; CV-13-315; 12-18-13; Harrison, B.)

*Taylor v. Miles*, 2013 Ark. 762 [**service**] Pursuant to Ark. R. Civ. P. 12(h)(1), a party waives the defense of sufficiency of process under Ark. R. Civ. P. 12(b)(4) if he or she fails to raise the argument in either the answer or a motion filed simultaneously with or before the answer.” The answer contained no assertion that service of process was insufficient, nor did she object to, or reserve any issues concerning service of process, adequacy, or sufficiency of service of process. Defendant’s failure to assert the defense of insufficiency of service of process in her initial pleading resulted in a waiver of the defense. (Huckabee, S.; CV-13-108; 12-18-13; Brown, W.)

*Zulpo v. Blann*, 2013 Ark. App. 750 [**in loco parentis**] Stepsons were not entitled to a share of the proceeds from a wrongful-death action because they did not qualify as beneficiaries under the applicable statute. The decedent did not stand in loco parentis to them. At no time did the decedent assume the role or responsibilities of a parent with regard to them and, as such, the relationship never rose to the level of in loco parentis. They are not beneficiaries of the wrongful-death settlement as that term is defined in Ark. Code Ann. section 16-62-102. (Proctor, R.; CV-13-315; 12-18-13; Harrison, B.)

*Jenkins v. APS Ins, LLC*, 2013 Ark. App. 746 [**trade secrets act**] Because the jury’s finding was rendered on a general verdict form, appellate court has no way of knowing the particular theory on which the jury found liability. Consequently, even though claims that were preempted by the Act were submitted, claims that were not preempted were submitted also, and party has waived claim of error because there was a basis on which the recovery can stand. (Moody, J.; CV-13-426; 12-18-13; Gladwin, R.)

*Ark. Elder Outreach, Inc. v. Nicholson*, 2013 Ark. App. 758 [**charitable immunity**] The trial court ruled correctly in denying summary judgment on the issue of charitable immunity. The “pivotal issue,” whether the charitable-entity form has been abused, has not been resolved as a matter of law and remains for resolution by a fact-finder. (Huckabee, S.; CV-13-60; 12-18-13; Vaught, L.)

*In re Actos*, 2014 Ark. 3 [**certified question accepted**] Concerns claim for illegal exaction and precedential value of *Nelson v. Berry Petroleum Co.*, 242 Ark. 273 (1967) (CV-13-1051; 1-9-14; U.S. Dist. Ct. La.)

*C. Bean Transport, Inc. v. Kennedy*, 2014 Ark. App. 38 [**declaratory judgment**] Trial court did not abuse its discretion to decline to exercise subject-matter jurisdiction over declaratory judgment action because the same parties and issues were involved in other pending actions. (Tabor, S.; CV-13-522; 1-15-14; Whiteaker, P.)

*Tilley v. Sparrow*, 2014 Ark. App. 23 [**new trial**] Trial court properly granted a new trial because the jury found against the plaintiff who that had the right of way and the only evidence supporting the verdict is that the defendant did not see the plaintiff before the collision. (Sutterfield, D.; CV-13-470; 1-15-14; Pittman, J.)

*Terrell v. Hager*, 2014 Ark. App. 48 [**discovery**] Court did not abuse its discretion in striking answer because of discovery violations. (Smitherman, T.; CV-13-566; 1-22-14; Walmsley, B.)

*Erwin v. Frost*, 2014 Ark. App. 51 [**trust**] Court did not err in finding: trust was not irrevocable; evidence did not establish diminished capacity or undue influence and overreaching, scrivener's error. (McCormack, D.; CV-12-953; 1-22-14; Harrison, B.)

*Chesapeake Exploration, LLC v. Whillock*, 2014 Ark. App. 55 [**release**] Release was not a general release but was limited to the lease. But the release did bar a claim for breach of the warranty of title contained in the lease. (Maggio, M.; CV-12-1035; 1-22-14; Gruber, R.)

*Simpson v. Calvary SPV, LLC*, 2014 Ark. 33 [**certified questions accepted**] 1. Whether an entity that purchases delinquent accounts and then retains a licensed Arkansas lawyer to collect on the delinquent accounts and file lawsuits on its behalf in Arkansas is "attempt[ing] to collect," thus meeting the definition of "collection agency," pursuant to Arkansas Code Annotated section 17-24-1101? 2. Whether an entity that purchases delinquent accounts and then retains a licensed Arkansas lawyer to collect on the delinquent accounts and file lawsuits on its behalf in Arkansas is "attempt[ing] to collect" and, thus, is required to be licensed by the Arkansas State Board of Collection Agencies pursuant to Arkansas Code Annotated section 17-24-301(4)? (CV-14- 45; 1-23-14; U.S. Dist. Ct. Ed. Ark.)

*Nationwide Ins. Co. v. Citizens Bank*, 2014 Ark. 20 [**standard mortgage clause**] The policy at issue contained a standard mortgage clause, which operates as an independent contract between an insurance company and a named mortgagee. That independent contract with the mortgagee cannot be defeated by any act of the insured. Even though the insurance company was entitled to rescind its insured's policy based on the insured's fraud or misrepresentation, those fraudulent acts and the rescission of the policy have no effect on the independent contract with the mortgagee. (Cottrell, G.; CV-13-333; 1-23-14; Corbin, D.)

*Arloe Designs, LLC. v. Ark. Capital Corp.*, 2014 Ark. 21 [**contract**] Because an express condition was not met, no contract was formed. [**negligence**] Parties entered into arms-length negotiations for a commercial loan which did not come to fruition and there was no evidence to indicate that there was a relationship of special trust and confidence. Therefore, no duty was owed and party had no negligence claim. [**ADTPA**] Defendant was subject to the supervision, examination, and control of the Arkansas State Bank Commissioner and the Arkansas State Board of Finance and other defendant was a national bank and is regulated by the Office of the Comptroller of Currency and the Federal Deposit Insurance Commission. Because both are regulated by a regulatory body acting under statutory authority of Arkansas or of the United States, their actions and transactions are not subject to claims that can be brought under the deceptive practices act. [**lost profits**] Lost profit damages were too speculative and they were barred by the new-business rule. The new-business rule prohibits a new, never before operational business from recovering anticipated profits, as such damages are too remote, speculative, and uncertain to support a judgment for their loss. (Griffen, W.; CV-13-158; 1-23-14; Baker, K.)

*Hearst v. Baker*, 2014 Ark. App. 75 [**summary judgment/nonsuit**] Once summary judgment motion was filed and there was no timely response, the case has been submitted, and there was no absolute right to nonsuit the case. (Maggio, M.; CV-13-607; 1-29-14; Vaught, L.)

*Muccio v. Hunt*, 2014 Ark. 35 [**shareholder/direct derivative claim**] Direct suits brought by a shareholder are appropriate only when the shareholder asserts an injury that is distinct and separate from the harm caused to the corporation. In this case, summary judgment against the shareholder was error. His claims for fraud, breach of duty to disclose information, and conversion were direct claims. [**subject-matter jurisdiction**] A lack of standing or res judicata does not deprive a court of subject matter jurisdiction. [**Res judicata**] A bankruptcy court does not have constitutional authority to enter a final judgment on a state law that is not resolved in the process of ruling on a creditor's proof of claim. In this case, plaintiffs' causes of action are asserting state-law claims that were not claims against the bankruptcy estate; rather they were claims against the managers of the company, as well as attorneys who allegedly participated in fraud and conversion with these managers. These claims were not litigated in the bankruptcy. The bankruptcy proceeding did not have a res judicata or collateral estoppel effect on these state claims. (Lindsay, M.; CV-11-1273; 1-30-14; Hart, J.)

## DOMESTIC RELATIONS

*Elliott v. Skaggs*, 2013 Ark. App. 720 [**child custody–change in custody**] The trial court found a material change in circumstances and changed custody to the appellee father after the appellant mother admitted to unilaterally terminating visitation between the father and child, in violation of the court order, which alienated the child from the father. The mother also caused unsubstantiated reports of sexual abuse to be filed against the father and one of his family members over a few months' time, so that the child was subjected to a number of examinations and investigations. In affirming, the Court of Appeals found it was not clearly against the preponderance of the evidence for the circuit court to find a material change significant enough to warrant a change in custody. (Cottrell, G.; No. CV-13-543; 12-4-13; Brown, W.)

*Hart v. Hart*, 2013 Ark. App. 714 [**child custody–change in custody**] The Court of Appeals affirmed the trial court's findings that the appellant mother had failed to prove a material change in circumstances since the previous custody order, and found that, even if proved, it was not in the best interests of the child to change custody. The court held that the appellant failed to demonstrate clear error in those two conclusions of the trial court. (Pierce, M.; No. CV-13-542; 12-4-13; Hixson, K.)

*Keith v. Keith*, 2013 Ark. App. 700 [**child custody–change in custody**] The circuit court found that the appellant mother had pursued a continued course of conduct for the purpose of adversely affecting appellee father's ability to have a meaningful relationship with the children. In affirming, the Court of Appeals said that the circuit court had made a determination on a petition to change custody, which was premised on a change of circumstances that included the fact that the appellant had moved to Texas in the middle of the semester, without prior notification to appellee and without adjustments to the visitation schedule. Appellant called appellee names in the children's presence, and the children grew timid around the appellant. Pictures of the children's rooms in appellant's home reflected them in disarray with clothes thrown everywhere. The appellee took one child to the doctor because he had a severe headache on the first day of his visitation, and the child was treated for malnutrition and dehydration. The circuit court's decision was not clearly erroneous. (Landers, M.; No. CV-13-155; 12-4-13; Gladwin, R.)

*Young v. Young*, 2013 Ark. App. 707 [**child custody; relocation**] The appellant husband appealed from the circuit court's order denying his change of custody and granting the appellee mother's petition to permit relocation. The Court of Appeals affirmed, finding that the circuit court specifically considered all of the factors of *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), and found, based on all the evidence, that relocation with the mother was in the best interest of the child. Considering the deference accorded to the circuit court, based upon its superior position to judge the credibility of the witnesses, the court held that the circuit court did not clearly err in finding that the appellant failed to rebut the *Hollandsworth* presumption. (Bryan, B.; No. CV-13-366; 12-4-13; Wynne, R.)

*Overstreet v. Overstreet*, 2013 Ark. App. 710 [**child custody; child support; marital property; marital debt**] The Court of Appeals affirmed the award of custody of the parties' minor child to the appellee mother. Second, the Court of Appeals affirmed the award of child support and arrearage, with instructions to correct the amount of child support, reducing it from \$287 to \$277 every two weeks, in conformity with the child-support chart. Third, on the issue of marital property, the Court of Appeals reversed and remanded on the issue of marital debt, for the circuit court to address the allocation of marital debt that was omitted from the decree. The court said that might necessitate a reconsideration of the overall allocation of debt, including payment of the home mortgage. Finally, the Court of Appeals reversed and remanded on the issue of ownership of a boat and trailer. The court went beyond finding they were not marital property and awarded the property to a third party who was not a party to the action. The court reversed and remanded on the ownership issue, leaving it to the appellant and the third person to pursue any action between themselves to determine ownership of the boat and trailer. (Guthrie, D.; No. CV-13-352; 12-4-13; Glover, D.)

*Colquitt v. Colquitt*, 2013 Ark. App. 733 [**divorce; property division**] In affirming the circuit court, the Court of Appeals said there was evidence and argument before the court on all factors to be considered in an unequal division of property under Ark. Code Ann. 9-12-315, and the circuit court discussed most of those in its decree of divorce. The parties agreed that the parties' houses would not sell for the appellant's appraiser's valuation. The unequal division gave the appellee wife, who was within two years of retirement, a house in which to live and a means to generate future rental income. The court said it could not say that the circuit court clearly erred in its ten findings that support awarding the appellee three of the parties' four houses. (Singleton, H.; No. CV-13-609; 12-11-13; Gruber, R.)

*Abeyta v. Abeyta*, 2013 Ark. App. 726 [**child custody; joinder; UCCJEA**] The circuit court awarded custody of the parties' child and the appellant's daughter to the appellee wife, finding that she stood in loco parentis to the child and that it was in the child's best interest that custody be awarded to the appellee stepmother. The appellant's argument that the trial court failed to apply the preference for a natural parent was not raised below and thus was not preserved for appeal. However, the trial court's failure to join the child's biological mother, pursuant to Rule 19 of the Arkansas Rules of Civil Procedure, was error, because she had supervised visitation with the child under a court order from another court. Under Rule 19, when a plaintiff fails to join an indispensable party, the court should order that the indispensable party be joined. The Court of Appeals reversed and remanded the custody determination of the appellant's child for her

biological mother to be joined and for the trial court to determine if a change in custody to the appellee was warranted. Finally, the appellant had raised a UCCJEA issue, which the court did not consider, declining to depart from its previous determination that the UCCJEA has no application to intrastate custody disputes. (Singleton, H.; No. CV-13-492; 12-11-13; Walmsley, B.)

*Singletary v. Singletary*, 2013 Ark. 506 [**child custody; relocation**] The Supreme Court clarified that the *Hollandsworth* relocation presumption applies only in those cases in which a parent has been granted sole or primary custody of a child, not when the parents share joint custody of a child. The court said it was not retreating from the relocation presumption announced in *Hollandsworth*, but was clarifying that it is not applicable when divorcing parents have joint custody of their children. The proper analysis for a court facing a change-in-custody request due to relocation of one parent when the parents have joint custody was announced by the court in *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002). The analysis is essentially the same as a change-in-custody analysis when relocation is not involved: “when a change-of-custody was sought in a joint-custody arrangement, the trial court ‘must first determine that a material change in circumstances has transpired from the time of the divorce decree and, then, determine that a change of custody is in the best interest of the child.’” (citing *Lewellyn*). The decision of the circuit court awarding custody to the appellee father was affirmed; the Court of Appeals opinion reversing that was vacated. (Huckabee, S.; No. CV-13-587; 12-12-13; Corbin, D.)

*Cooper v. Cooper*, 2013 Ark. App. 748 [**divorce—retirement benefits—QDRO**] The Court of Appeals affirmed the circuit court’s entry of two qualified domestic relations orders (QDRO) dividing the appellant’s railroad-retirement benefits, all of which accrued during the parties’ marriage. The Court of Appeals considered the appellant’s arguments, but found them to be without merit or without supporting authority. (Smith, V.; No. CV-13-58; 12-18-13; Pittman, J.)

*Adams v. Adams*, 2014 Ark. App. 67 [**divorce; custody; visitation; marital property; marital debts; gender identity discrimination**] Because the appellee wife was domiciled in Arkansas, the Court of Appeals found that the circuit court had jurisdiction to hear and decide the parties’ divorce. The court also found that Arkansas was the home state of the children, so the court had jurisdiction under the UCCJEA to decide the issue of custody of their children. Although the appellant husband stated on appeal that the circuit court erred in its allocation of visitation, no argument was developed and no authority was cited, so the court did not consider the issue. The appellant also argued that the court awarded marital assets and debts inequitably, but provided no supporting arguments or authority on any except for two items, inheritance money and marital debt. The Court of Appeals found that, although property acquired by inheritance is not marital property when placed in the names of a husband and wife, as occurred in this case, a presumption arises that they own the property as tenants by the entirety. The appellant failed to overcome the presumption by clear and convincing evidence that a gift was intended, so the circuit court did not err in allocating the inheritance account as marital property and dividing it equally between the parties. With respect to the appellant’s argument that the circuit court erred in awarding marital debt without explanation, the Court of Appeals said the statutory presumption of equal division of marital property does not apply to the division of marital debts, and the court could not find that the trial court’s division was clearly erroneous. On the final issue of gender identity discrimination, the appellant asserted that no Arkansas law deals with “the civil liberty of gender

expression” or prohibiting discrimination against gender identity. However, Court of Appeals found that appellant submitted no permissive or persuasive authority from any other jurisdiction that addressed or distinguished the claim. The court said that appellant’s failure to develop an argument precluded its review of the issue on appeal. The decision was affirmed in its entirety. (Bryan, B.; No. CV-13-275; 1-22-14; Brown, W.)

*Preston v. Preston*, 2014 Ark. App. 58 [**change in custody**] Two years after the parties divorced and agreed to share joint custody of their children with each having equal time with them, the appellant wife filed for modification and sought primary custody. In his response, the appellee father agreed that there was a material change in circumstances, and also sought primary custody. The circuit court found it was in the best interest of the children to be placed in their father’s custody with liberal visitation granted to the appellant mother. The Court of Appeals affirmed, finding that the trial court did not, as the appellant suggested, base its decision on a preference for the parenting skills of the appellee father’s new wife over those of the appellant, whom the appellant alleged was the “de facto custodial parent” because of appellee’s absences from home in connection with his job. The court said the evidence was not undisputed and that the trial court was in the best position to resolve conflicts, to weigh the evidence, and to determine the best interests of the children. The decision was affirmed. (Landers, M.; No. CV-13-634; 1-22-14; Whiteaker, P.)

*Dozier v. Dozier*, 2014 Ark. App. 78 [**divorce–alimony; nonmarital property**] The appellant wife was granted a divorce and was awarded rehabilitative alimony of \$2,500 a month for seven years. The appellee husband was awarded certain real and personal property on the court’s finding that it was his separate nonmarital property. The parties’ marital property was equally divided between them. The appellant based her appeal upon the alimony award and the classification of the appellee’s separate, nonmarital property. The Court of Appeals said that the circuit court considered the proper factors in awarding alimony and did not abuse its discretion. Regarding the classification of certain property as the appellee’s separate, nonmarital property, the circuit court’s findings of fact were not clearly erroneous or against the preponderance of the evidence. The appellant argued two issues regarding the classification of the property, whether the 250 acres of real property was nonmarital property, and whether the Land Trust was an “illusory trust” so that its assets were marital property that should have been divided. The Court of Appeals found that the trial court’s findings were not clearly erroneous. The decision was affirmed. (Williams, L.; No. CV-13-66; 1-29-14; Hixson, K.)

*Lassiter v. Browning*, 2014 Ark. App. 72 [**change in custody**] The appellant mother appealed from the circuit court’s changing custody of the parties’ two children from joint custody to custody of the appellee father with visitation for the mother. In affirming, the Court of Appeals held that the circuit court’s finding that the appellee father proved a material change in circumstances is not clearly erroneous. The court also held that the circuit court’s finding that it was in the children’s best interest to award the appellee full custody is not clearly erroneous. (Philhours, R.; No. CV-13-393; 1-29-14; Wynne, R.)

*Hill v. Kelly*, 2014 Ark. 34 [**child support–deviation from chart–discovery**] The appellee father filed a motion for child support from the appellant mother. The appellant mother submitted to

appellee interrogatories and requests for production of documents, seeking financial information and documentation from 2007 through 2010. At the appellee's request, the circuit court granted a protective order, ordering that appellee did not have to respond to the discovery except for specific interrogatories not relevant to this appeal. The appellant argued that her discovery request regarding the appellee's financial condition, income, and assets were relevant because she sought a downward deviation from the child support chart. Under Administrative Order Number 10(V)(a)(12), when considering whether a deviation should be allowed, one factor is "[o]ther income or assets available to support the child from whatever source, including the income of the custodial parent." Appellant contended that she was prejudiced by the discovery ruling because she was prevented from presenting to the circuit court a full picture of appellee's income and wealth. The Supreme Court agreed, reversing and remanding on the discovery issue, with instructions for the circuit court to reconsider appellant's request in light of her downward-deviation argument, but expressing no opinion regarding which interrogatories and requests for production of documents are relevant to the appellant's downward-deviation argument. (Hewett, M.; No. CV-13-247; 1-30-14; Hannah, J.)

## **PROBATE**

*Whatley v. Estate of McDougal, et al.*, 2013 Ark. App. 709 [**wills and estates—revocation of will**] The Court of Appeals found that the testimony and attending circumstances were sufficient to overcome the presumption of revocation of decedent's will, the original of which was never found. It was up to the circuit court to determine the credibility of the witnesses and the weight to be accorded their testimony. The court said that ample testimony supported that decedent was determined that her son inherit nothing upon her death. She believed, and told many people, that her plans for distribution of her estate were taken care of. She and friends and relatives who were with her in her final days believed that all necessary papers were in her safe or in her attorney's office. The court said the evidence argues against revocation or destruction of her will and supports the conclusion that the will was in existence when she died. The trial court did not have to determine what happened to decedent's original will; it was enough that the court found that she did not revoke or cancel the will. The decision of the circuit court was affirmed. (Guthrie, D.; No. CV-13-347; 12-4-13; Gruber, R.)

*Wilson v. Wilson, et al.*, 2013 Ark. App. 759 [**guardianship**] The appellant mother of the child appealed the trial court's award of permanent guardianship to the appellees, the child's paternal grandfather and step-grandmother, alleging (1) that permanent guardianship should not have been ordered because the reasons supporting temporary guardianship were resolved; and (2) that it was not in the child's best interest to be placed with anyone other than her, the biological mother. The Court of Appeals set out the facts of the case and the law on guardianships, and determined that the decisions of the trial court were not clearly erroneous. In affirming, the court held that the trial court applied Arkansas case law and statutes correctly in this case. (Keaton, E.; No. CV-13-365; 12-18-13; Hixson, K.)

*Simpson v. Simpson, et al.*, 2014 Ark. App. 80 [**decedent's estate—will—undue influence**] The appeal by Timothy Roger Simpson, as personal representative of the estate of his deceased mother, is based upon the alleged error of the circuit court in setting aside the decedent's will based upon



undue influence of the appellant, who was the sole heir under the will. The Court of Appeals set out in detail the facts of the case and said that the circuit court's finding that appellant exerted undue influence over the decedent in the making of her will in 2006 was not clearly erroneous. It said the court had considered all of the testimony and evidence in concluding that the will was the result of undue influence. The trial court stated in its extensive findings that regardless of whether the appellant procured the will or was in a confidential relationship with the decedent the appellees met their burden and appellant did not overcome their proof. In addition, the court found that appellant was not credible. The decision was affirmed. (Honeycutt, P.; No. CV-13-75; 1-29-14; Brown, W.)

## JUVENILE

*Hill v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 760 [TPR – **motion for continuance**] The circuit court held a termination hearing where appellant was represented by appointed counsel. However, appellant moved for a continuance for a retained lawyer to represent her and on appeal argued that, in order to protect her parental rights, she should have been afforded a continuance to consult with another attorney. The court of appeals held that the circuit court did not abuse its discretion in denying appellant's motion for continuance because, during the approximate four-month period leading up to the termination hearing, another attorney did not enter an appearance, request a continuance, or appear before the circuit court. Appellant failed to demonstrate any prejudice and offered no explanation of how her case would have proceeded differently with a different attorney. (King, K.; CV-13-693; 12-18-13; Hixson, K.)

*Smith v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 753 [TPR – **sufficiency**] Appellants argued that the circuit court erred in terminating their rights because DHS made no effort to assist them in reunification, and there was reasonable expectation that, given additional time, they could have obtained stability and the ability to care adequately for their children. The appellate court held that DHS's efforts to provide meaningful efforts to rehabilitate the parents was not required and appellants' incarceration was clear and convincing evidence to support the alternative ground for termination. Additionally, appellants argued that the circuit court erred because DHS did not present testimony of the children's adoptability. While no one testified that the children were adoptable, the circuit court clearly considered the likelihood that the children would be adopted, as they lived with their maternal grandmother. Because the record demonstrated the circuit court considered the likelihood of adoption as part of its best-interest analysis, the circuit court was affirmed on this point. (Smith, T.; CV-13-685; 12-18-13; Gruber, R.)

*Mitchell v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 715 [TPR – **sufficiency and no-merit**] Appellants (mom and dad) appealed separately from the termination of their parental rights to their children. Appellant/mom's sole argument on appeal was that there was insufficient evidence to support the termination of her parental rights. The court of appeals held that, because of mom's long history with DHS and her failure to demonstrate that she could provide a suitable and safe home for her children, the circuit court did not clearly err in finding that termination of Amanda's parental rights was in the best interest of the children. Counsel for appellant/dad filed a no-merit

appeal and a motion to withdraw which was granted where there was evidence of severe domestic abuse toward the mom in front of the children that ultimately resulted in a felony conviction and prison sentence. (Coker, K.; CV-13-678; 12-4-13; Hixson, K.)

*McHenry v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 711 [**DN – custody termination**] Three children were originally removed from the custody of their parents and placed with their paternal grandparents, appellants. DHS later filed a motion to terminate custody with the appellants and dismiss the appellants as parties to the case or in the alternative to terminate reunification services to the appellants. On appeal, appellants argued that the circuit court terminated a custodianship, but continued to use guardianship and custodianship interchangeably. They further argued that documentation was never presented to the circuit court to prove that appellants had legal custody or legal guardianship of the children. These arguments were not preserved for appeal. The appellate court noted that even if the argument was preserved it would fail because although the parties and their counsel used custody and guardianship interchangeably, the court did not. The trial court found that the children's' dependency-neglect adjudication constituted a material change of circumstance and that it was not in their best interest to remain with appellants. (Wilson, R.; CV-13-644; 12-4-13; Glover, D.)

*Wear v. Ark. Dep't of Human Servs.*, 2013 Ark. App. 702 [**DN – sufficiency**]

The circuit court found appellant's children were dependent-neglected based on appellant's failure to protect them following the sexual abuse of appellant's child, M.V., by appellant's husband, an illegal immigrant who returned to his country following the sexual assault. Appellant argued that she was not a safety risk to her children and that the circuit court's order contained certain errors. The court of appeals affirmed where the evidence showed appellant knew of the sexual abuse and made attempts to reconcile with her husband. Appellant also encouraged M.V. to maintain a relationship with her husband. Appellant also argued that, although the adjudication order was modified to reflect that IFS services would be provided, the circuit court did not correct the other "errors" contained in the adjudication order. The court of appeals did not reach the merits of this issue finding it lacked jurisdiction because appellant failed to sign the amended notice of appeal as required by Arkansas Supreme Court Rule 6-9(b)(1)(B). (Smith, T.; CV-13-656; 12-4-13; Walmsley, B.)

*A.E.L. v. State*, 2013 Ark. App. 706 [**Juvenile transfer**]

Seventeen-year-old appellant was charged with aggravated assault, felony fleeing, and first-degree criminal and the circuit court denied his motion to transfer his criminal case to the juvenile division. Appellant argued that there was no evidence presented at the hearing regarding the juvenile-transfer statutory factors, listed in Arkansas Code Annotated section 9-37-318(g), and that the circuit court relied solely upon the criminal information, in violation of the supreme court's holding in *Thompson v. State*, 330 Ark. 746, 958 S.W.2d 1 (1997). The court of appeals held that there was evidence, separate from the criminal information, in the form of an officer's affidavit to support the circuit court's finding. Additionally, the court of appeals held that the circuit court

properly considered evidence that certain programs and facilities were not likely to provide rehabilitation to the juvenile. (Edwards, R.; CR-13-606; 12-4-13; Wynne, R.)

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

*Gossett v. Arkansas Dept. of Human Services*, 2014 Ark. App. 1 (Sullivan, T.; CV 13-584; 1-8-2014; Gladwin, R.)

*Porta v. Arkansas Dept. of Human Services*, 2014 Ark. App. 16 (Hewett, M.; CV 13-638; 1-8-2014; Brown, W.)

*Watson v. Arkansas Dept. of Human Services*, 2014 Ark. App. 28 (Halsey, B.; CV 13-780; 1-15-2014; Walmsley, B.)

*Castillo-Chavez v. Arkansas Dept. of Human Services*, 2014 Ark. App. 76 (Coker, K.; CV 13-886; 1-29-2014; Vaught, R.)

## **DISTRICT COURT**

*Taylor v. Biba*, 2014 Ark. 22 [**District Court Rule 9**][**strict compliance**]. The circuit court ruled that the certified docket sheet filed by appellant did not contain all docket entries and was not in substantial compliance with District Court Rule 9 so the circuit court did not have jurisdiction of the appeal. The supreme court reversed. The filing of a certified copy of the of the district court's docket sheet which contained all docket entries at that point did strictly comply with Rule 9(b) to commence an appeal. (Sutterfield, D.; CV 13-718; 1/23/2014; Baker, K.)

## **U. S. SUP. CT.**

*Kansas v. Cheever* [**5<sup>th</sup> Amendment**] At trial, Cheever raised a voluntary intoxication defense, offering expert testimony regarding his methamphetamine use. In rebuttal, the State sought to present testimony from the expert who had examined Cheever by the Federal District Court order. Defense counsel objected, arguing that since Cheever had not agreed to the examination, introduction of the testimony would violate the Fifth Amendment. The trial court allowed the testimony, and the jury found Cheever guilty and voted to impose a death sentence. The Kansas Supreme Court vacated the conviction and sentence, relying on *Estelle v. Smith*, in which U.S. Sup. Ct., held that a court-ordered psychiatric examination violated a defendant's Fifth Amendment rights when the defendant neither initiated the examination nor put his mental capacity in dispute. The court distinguished the holding of *Buchanan v. Kentucky*, that a State may introduce the results of such an examination for the limited purpose of rebutting a mental-status defense, on the basis that voluntary intoxication is not a mental disease or defect under Kansas law.

Held: The rule of *Buchanan*, reaffirmed here, applies in this case to permit the prosecution to offer the rebuttal evidence at issue.

In *Buchanan*, the prosecution presented evidence from a court-ordered evaluation to rebut the defendant's affirmative defense of extreme emotional disturbance. This Court concluded that this rebuttal testimony did not offend the Fifth Amendment, holding that when a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. *Buchanan*'s reasoning was not limited to the circumstance that the evaluation was requested jointly by the defense and the government. Nor did the case turn on whether state law referred to extreme emotional disturbance as an affirmative defense. The admission of rebuttal testimony under the rule of *Buchanan* harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination. Here, the prosecution elicited testimony from its expert only after Cheever offered expert testimony about his inability to form the requisite mens rea. Excluding this testimony would have undermined *Buchanan* and the core truth-seeking function of trial. (No. 12-609; December 11, 2013)