

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

JUNE, 2013
VOLUME 20, NO. 10

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 June 20th, the Supreme Court announced amendments to Administrative Order Number 19.

The court also published for comment proposed rules changes recommended by the Criminal Practice Committee and the Civil Practice Committee. The comment period on both of them expire on July 31, 2013.

On June 27th, the Supreme Court published for comment proposed rules changes recommended by the Judicial Discipline and Disability Commission. The comment period expires on July 31, 2013.

CRIMINAL

Baker v. State, 2013 Ark. App. 281 [**Ark. R. Evid. 404 (b)**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b) of the Arkansas Rules of Evidence, it allowed appellant's daughter to testify that appellant sexually abused her when she was fourteen years old. (Henry, D.; CACR 12-754; 5-1-13; Harrison, B.)

Nunn v. State, 2013 Ark. App. 282 [**admission of photographs**] The trial court did not abuse its discretion when it admitted into evidence three autopsy photographs, which aided the State's

theory of the case and enabled the jury to better understand forensic testimony. (Erwin, H.; CACR 12-804; 5-1-13; Harrison, B.)

Decay v. State, 2013 Ark. 185 [**Rule 37**] The circuit court failed to make specific findings of fact and conclusions of law as required by Rule 37.5 (i). (Storey, W.; CR 10-1309; 5-2-13; Hannah, J.)

Fisher v. State, 2013 Ark. App. 301 [**motion to suppress**] Because there was reasonable cause to believe that appellant was driving while intoxicated, collection of his breath by means of a PBT device was not an unlawful seizure. (Wright, J.; CACR 12-465; 5-8-13; Gladwin, R.)

Winters v. State, 2013 Ark. 193 [**motion to suppress**] The circuit court's conclusions that appellant was not vulnerable and that he gave his statement voluntarily and free of coercion were supported by the totality of the circumstances in the case. Thus, the circuit court's ruling to deny appellant's motion to suppress was not clearly against the preponderance of the evidence. [**statement against interest**] The circuit court did not abuse its discretion by excluding testimony regarding a statement against interest, which was made by appellant's accomplice, because the statement did not entirely exculpate appellant. (Green, R.; CR 12-537; 5-9-13; Corbin, D.)

Spearman v. State, 2013 Ark. 196 [**sufficiency of the evidence; aggravated robbery; theft of property**] There was substantial evidence to support appellant's convictions. (Glover, D.; CR 12-803; 5-9-13; Hart, J.)

Powell v. State, 2013 Ark. App. 322 [**sufficiency of the evidence; possession of cocaine with intent to deliver; possession of drug paraphernalia**] There was substantial evidence to support appellant's convictions. [**motion to suppress**] The law enforcement official witnessed appellant commit two traffic violations, which provided probable cause to stop appellant's vehicle. Appellant, who was detained for approximately twelve-and-a-half minutes, was not detained for a prolonged period of time during the traffic stop. During the stop, the law enforcement official developed a reasonable articulable suspicion that criminal activity was underway. Because the stop of appellant's vehicle and the continued detention of appellant after the stop were lawful, the trial court did not err in denying appellant's motion to suppress the evidence obtained during the stop. (Green, R.; CACR 12-743; 5-15-13; Gruber, R.)

Fincham v. State, 2013 Ark. 204 [**jury instructions**] AMCI 301 does not accurately state the law with respect to the lesser-included offense of extreme-emotional-disturbance manslaughter because the instruction directs the jury to consider manslaughter only if it has reasonable doubt as to the greater offense. Instead, the jury should be instructed to consider extreme-emotional-disturbance manslaughter after it finds a defendant guilty of murder. (Johnson, L.; CR 12-638; 5-16-13; Hoofman, C.)

State v. Colvin, 2013 Ark. 203 [**sentencing**] The circuit court lacked authority to suspend the portion of appellant's sentence that she received as an enhancement pursuant to Ark. Code Ann. § 5-4-702. (Wright, H.; CR 12-739; 5-16-13; Goodson, C.)

Jackson v. State, 2013 Ark. 201 [**motion to suppress; drug-dog search**] Because the initial purpose of the traffic stop was ongoing at the time that law enforcement officials deployed their drug-dog, additional reasonable suspicion was not required before running the dog around appellant's vehicle. [**motion to suppress; custodial statement**] Appellant's statement at the police station was spontaneous and was not the product of an interrogation. Appellant failed to establish that the circumstances surrounding the traffic stop or the giving of his custodial statement were unlawful. Therefore, the trial court did not err when it denied appellant's motion to suppress the statement or the evidence obtained during the stop. (Elmore, B.; CR 12-859; 5-16-13; Corbin, D.)

Wilson v. State, 2013 Ark. App. 337 [**motion to suppress**] Appellant lacked standing to challenge the search of a vehicle, which was owned by another person. Appellant also lacked standing to challenge law enforcement's placement of a GPS device on another person's vehicle, which occurred while the vehicle was on property not owned by appellant. (Thyer, C.; CR-12-820; 5-22-13; Wynne, R.)

State v. Tejeda-Acosta, 2013 Ark. 217 [**error coram nobis**] The circuit court erred as a matter of law by expanding the grounds for a writ of *error coram nobis* to include claims of ineffective assistance of counsel. (Comstock, J.; CR 12-903; 5-23-13; Corbin, D.)

Sales v. State, 2013 Ark. 218 [**Rule 37**] The circuit court failed to make specific written findings of fact and conclusions of law as required by Rule 37.5 (i). (Gibson, R.; CR 10-53; 5-23-13; Danielson, P.)

State v. O'Quinn, 2013 Ark. 219 [**sentencing**] Appellant was convicted as a habitual offender. His sentence, which was less than the statutory-minimum for a habitual offender, was illegal. (Reynolds, D.; CR 12-1063; 5-23-13; Danielson, P.)

Gold v. State, 2013 Ark. 220 [**motion to dismiss**] The circuit court did not abuse its discretion when it declared a mistrial after determining that the jury was deadlocked. Thus, retrial of appellant does not violate double jeopardy principles and the trial court did not err in denying appellant's motion to dismiss the charges against him. [**jury deliberations**] The circuit judge erred when he sent his bailiff into the jury room to determine the progress of the jury's deliberations. (Storey, W.; CR 12-1104; 5-23-13; Baker, K.)

Martin v State, 2013 Ark. App. 371 [**admission of evidence**] The circuit court did not abuse its discretion when it allowed a firearm-and-tool examiner to testify about the results from the testing of a gun and gun cartridges which he did not perform. The appellate court noted that the lack of personal knowledge on the part of the expert does not mandate the exclusion of the

testimony but rather presents a jury question as to the weight of the testimony. (Wyatt, R.; CR-12-936; 6-5-13; Harrison, B.)

Hoodenpyle v. State, 2013 Ark. App. 375 [**sufficiency of the evidence; first-degree battery**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The circuit court did not abuse its discretion when it permitted the State to introduce the victim as a demonstrative exhibit. [**lesser-included jury instruction**] Because the victim's injuries were serious and life-threatening, there was no basis for giving the lesser-included jury instruction of third-degree battery. [**alternative sentence**] The decision to allow alternative sentencing is reviewed for an abuse of discretion. The standard of review is a high threshold, and it requires that a trial court act improvidently, thoughtlessly, or without due consideration before the court's actions will be reversed on appeal. (Medlock, M.; CR-12-469; 6-5-13; Glover, D.)

Arroyo v. State, 2013 Ark. 244 [**Rule 37; continuance; right to counsel of choice**] Appellant was wrongly denied his right to counsel of his choice. (Whiteaker, P.; CR-12-834; 6-6-13; Hannah, J.)

Brawner v. State, 2013 Ark. App. 413 [**sufficiency of the evidence; stalking; violation of an order of protection**] There was substantial evidence to support appellant's convictions. [**registration as a sex offender**] The sex offender registration statute permits a court to require a defendant convicted of stalking to register as a sex offender. [**sentencing**] A sentence of imprisonment for a misdemeanor and a sentence of imprisonment for a felony shall run concurrently, and both sentences are satisfied by service of the sentence for the felony. [**Evid. R. 404(b)**] The trial court did not abuse its discretion when it admitted testimony concerning appellant's prior bad acts because the evidence was not used to prove appellant's character but rather was offered to show appellant's motive, intent, and plan to carry out threats that he made against his victim. (Reynolds, D.; CR-12-917; 6-19-13; Hixson, K.)

Castrellon v. State, 2013 Ark. App. 408 [**sufficiency of the evidence; second-degree sexual assault**] There was substantial evidence to support appellant's conviction. [**access to victim's medical records**] The trial court, who conducted an *in camera* review of the requested information and determined that it was not exculpatory, did not abuse its discretion when it denied appellant's request to view the victim's medical, psychological, and counseling records. [**Evid. R. 503**] The exception to the patient-physician privilege in Rule 503(d)(3)(A) of the Arkansas Rules of Evidence does not apply to the victim of a crime in a case being prosecuted by the State. (Wright, H.; CR-12-975; 6-19-13; Whiteaker, P.)

Porta v. State, 2013 Ark. App. 402 [**admission of evidence; psychological evaluation**] The trial court abused its discretion when it permitted a forensic psychologist to testify during the State's case-in-chief about incriminating statements appellant made during his mental-health examination. (Cottrell, G.; CR-12-399; 6-19-13; Glover, D.)

Kirby v. State, 2013 Ark. App. 393 [**motion to suppress**] The trial court did not err by concluding that the stop of appellant's vehicle for having excessive window tint and the consented to search of appellant's person and truck were valid. [**search warrant**] The trial court did not err by determining that the affidavit submitted in support of the request for a search warrant sufficiently established the reliability of the informant. (Storey, W.; CR-12-866; 6-19-13; Wynne, R.)

State v. Kindall, 2013 Ark. 262 [**rape-shield statute**] The trial court abused its discretion when it permitted the defendant to employ the rape-shield statute to introduce evidence that the victim had previously made allegations of a sexual offense against another individual and then recanted the allegations. (Johnson, J.; CR-12-792; 6-20-13; Hart, J.)

Livingston v. State, 2013 Ark. 264 [**motion for mistrial**] The trial court did not err by denying appellant's request for a mistrial, which was based on the fact that defense counsel's father died during the trial. (Pope, S.; CR-12-945; 6-20-13; Hoofman, C.)

Nelson v. State, 2013 Ark. App. 421 [**motion to suppress**] Appellant was not illegally detained or arrested. Thus, the trial court did not err in denying appellant's motion to suppress on those grounds. [**custodial statement**] Based upon the totality of the circumstances, the appellate court determined that appellant's confession was voluntarily given. [**admission of evidence**] Results from psychological stress evaluations are inadmissible unless both parties stipulate to their admissibility in writing. (Tabor, S.; CR-11-788; 6-26-13; Pittman, J.)

Turley v. State, 2013 Ark. App. 427 [**expungement**] Once a trial court places a defendant under first-offender status, it is bound by the requirements set forth in the statute, which provides that if the defendant is released from probation early by the trial court, the trial court shall expunge the defendant's record. Whether to expunge the matter is not left to the discretion of the judge. (Karren, B.; CR-13-161; 6-26-13; Glover, D.)

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

Flemons v. State, 2013 Ark. App. 280 (leaving the scene of a personal-injury accident) CACR 12-736; 5-1-13; Walmsley, B.

Richey v. State, 2013 Ark. App. 382 (rape) CR-12-972; 6-19-13; 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:

Seals v. State, 2013 Ark. App. 326 (suspended sentence) CACR 12-934; 5-15-13; Vaught, L.

Piggee v. State, 2013 Ark. App. 357 (probation) CR 12-1091; 5-29-13; Harrison, B.

CIVIL

Thomas v. Sharon, 2013 Ark. App. 305 [**med-mal**] Plaintiff was not awarded any damages in suit over a surgical clamp that was left in her abdomen. Although negligence was stipulated, a new trial was not required because the evidence supported the jury's apparent decision that no damages were suffered. (Crow, G.; CA 12-231; 5-8-13; Walmsley, B.)

Morris v. Christopher, 2013 Ark. App. 312 [**personal jurisdiction**] The exchange of an email between a resident of Hawaii and a resident of Mississippi about a resident of Arkansas does not establish the minimum contacts for personal jurisdiction in Arkansas to sustain a defamation action in this state. (Wright, J.; CA 12-1046; 5-8-13; Hixson, K.)

Rouse v. Myers, 2013 Ark. App. 313 [**accord and satisfaction**] After trial, losing party sent check to satisfy the judgment, which was cashed before the court entered the order awarding attorney's fees to the prevailing party. Trial court concluded that the check constituted an accord and satisfaction of the entire claim and set aside the award. The check was not an accord and satisfaction because there was nothing on the check to indicate that it was intended to cover attorney's fees. Moreover, there was no compromise because the dispute had been litigated to a judgment. (Williams, C.; CA 12-864; 5-8-13; Wood, R.)

Muldrew v. Duckett, 2013 Ark. App. 304 [**adverse possession**] Statute of non-claim does not apply to adverse possession claims. Adverse possession was established before the payment of ad valorem taxes became an element in 1995. (Johnson, K.; CA 12-230; 5-8-13; Pittman, J.)

Southern Bldg. Serv., Inc. v. City of Fort Smith, 2013 Ark. App. 306 [**construction contract**] Liquidated damages award in favor of the owner was in error because it included too many days of interest and contractor was owed money and was entitled to a set-off against the liquidated damages amount. It was error to award the owner additional damages to complete the contract because the owner cannot recover both liquidated damages and actual damages. (Fitzhugh, M.; CA 12-503; 5-8-13; Walmsley, B.)

Plymate v. Martinelli, 2013 Ark. 194 [**med-mal**] Directed verdict was proper as plaintiff's proof failed to satisfy the locality requirement. There was no testimony as to the standard in the community but only the state as a whole. (Fryauf, M.; SC 12-998; 5-9-13; Baker, K.)

Pollard v. Seeco, Inc., 2013 Ark. App. 331 [**mineral lease**] The oil and gas lease gave the lessee the right to use the property for its gas exploration and production operations and to select the construction site for the drill pad. Generally, as against the surface owner, the owner of mineral rights has a right to go upon the surface to drill wells to the underlying estate and to occupy so much of the surface beyond the limits of its well that may be necessary to operate its estate and

remove the product. Recovery for an injury to the surface of the land is available when the use of the surface is unreasonable. (Williams, L.; CA 12-1026; 5-15-13; Brown, W.)

Carter v. Waymack, 2013 Ark. App. 317 [**lease**] The lease expired. Rather than renewing the lease per its terms, the tenant conditioned its tender of the rental payment on execution of a W-9. Interjecting this condition, and failing to unconditionally make payment, in effect, terminated the lease. (Huckabee, S.; CA 12-1032; 5-15-13; Gladwin, R.)

Temco Const. Co v. Gann, 2013 Ark. 202 [**materialman's lien**] Trial court's order granting motion to dismiss provided, "Upon consideration of all arguments, pleadings, briefs, and exhibits." However, ruling only addressed expressly one issue that had been raised – that notice of lien did not strictly conform to statutory language. On appeal, supreme court refused to review other issues that were raised in the trial court and on appeal, including application of direct-sale exemption and constitutionality of materialman's lien statute, on the basis that the trial court had not ruled on the issues. Language in order does not operate as a ruling on all issues if ruling addresses only one of them. Appellate court does not presume a ruling from trial court's silence.

Thus, the other issues were not preserved for appellate review. (Maggio, M.; SC 12-874; 5-16-13; Corbin, D.)

Banks v. Riddle, 2013 Ark. App. 334 [**sanctions**] Court did not abuse its discretion in awarding sanctions. Other issues raised were not preserved because of untimely notice of appeal. (Yeargan, C.; CA 12-815; 5-22-13; Gladwin, R.)

Asbury Automotive, Inc. v. McCain, 2013 Ark. App. 338 [**arbitration**] The arbitration clause was subject to FAA, and it covered the issues in dispute. Fact that arbitration agreement was not signed by a party does not defeat the contract if assent is indicated by acceptance of benefits of the contract, part performance, or otherwise. (Gibson, R.; CA 12-994; 5-22-13; Wynne, R.)

Loca Luna, LLC v. Bd. of Adjustment, 2013 Ark. App. 336 [**zoning variance**] Variance granted by board for restaurant to operate despite having inadequate parking facilities was affirmed by circuit court. Showing of undue hardship can include self-inflicted hardship. Although court used wrong standard of review, no prejudice has been shown. (Griffen, W.; CA 12-110; 5-22-13; Pittman, J.)

Black v. Rowen, 2013 Ark. App. 349 [**med-mal/summary judgment**] Plaintiff failed to show causation – failed to show how defendant breached the standard of care or how the aorta was damaged. (Moody, J.; CA 12-890; 5-22-13; Brown, W.)

State v. Cassell, 2013 Ark. 221 [**infamous crime**] Misdemeanor - theft conviction prohibits person from holding public office. Under the constitution, a crime involving dishonesty or deceit constitutes an "infamous crime," which bars the offender from holding public office. (Clinger, D.; SC 12-852; 5-23-13; Hoofman, C.)

Sullivan v. Coney, 2013 Ark. 222 [**employment termination**] Police Chief was terminated by mayor. Under the law, police chief was an at -will employee and could be terminated without cause and there was no due process violation. On whistle-blower claim, mayor was entitled to qualified immunity. It was not shown that the mayor would have known that his conduct violated a clearly established right. [**summary judgment**] There is no requirement in Rule 56 that parties orally argue a claim raised in a motion. When parties have fully briefed the issue, it is before the court. (Hughes, T.; SC 12-1094; 5-23-13; Hoofman, C.)

Lee v. Jones, 2013 Ark. App. 358 [**post-trial motion**] Trial court did not have jurisdiction to set aside a settlement agreement more than 90 days after entry of the original order. (Moore, R.; CA 12-594; 5-29-13; Wynne, R.)

Jones v. Runsick, 2013 Ark. App. 356 [**quiet title**] To assert boundary by acquiescence to a quiet title action to determine the boundary line of adjoining properties, it must be plead as an affirmative defense under Rule 8, Ark. R. Civ. P. (Harkey, A.; CA 12-1082; 5-29-13; Harrison, B.)

Williams Tractor, Inc. v. ANB Venture, LLC, 2013 Ark. App. 354 [**repossession of collateral**] Trial court did not err when it awarded detention damages for the debtor's refusal to turn over the collateral to the secured party. Debtor was not entitled to any set off for alleged cost of repairs and storage fees because it was holding the collateral hostage. (Schwartz, D.; CA 12-586; 5-29-13; Walmsley, B.)

Gore Engineering, Inc. v. Contractor's Licensing Bd. 2013 Ark. App. 353 [**licensing**] Appeal from board which found that engineer had acted as contractor without obtaining a license was affirmed. Board found that work performed exceeded that within the engineer's exception. (Duncan, X.; CA 1339; 5-29-13; Pittman, J.)

Tadlock v. Moncus, 2013 Ark. App. 363 [**oral contract**] Evidence supported court's finding of an oral contract. Contract did not violate statute of frauds because of part performance. Furthermore, an oral agreement for the repayment of money is not within the statute of frauds even if the money was used to purchase real property. The agreement was not intended to be a mortgage. (Cooper, T.; CA 12-888; 5-29-13; Hixson, K.)

Proctor v. Cabot School Dist., 2013 Ark. App. 366 [**teacher fair dismissal act**] Teacher's dismissal for not obtaining prior approval before taking leave was not arbitrary and capricious. Teacher knew there would be no administrator in the building on two of the three days she would be absent due to her having previously granted permission to the assistant principal to be absent on those days. She had formerly complied with the prior-approval requirement, and knew the policy existed. (Elmore, B.; CA 13-34; 5-29-13; Brown, W.)

Courtyard Gardens, LLC v. Quarles, 2013 Ark. 228 [**arbitration/agency**] There was not an enforceable agreement to arbitrate because the mother did not authorize her son to execute the agreement on her behalf. (McCallum, R.; SC 12-873; 5-30-13; Hannah, J.)

Barton Land Services, Inc. v Seeco, Inc. 2013 Ark. 231 [**mineral deed**] 1929 deed conveyed 100% of mineral rights. Text of deed contained a blank (“an undivided ___ interest in and to all of the oil, gas and other minerals”) Ark. Code Ann. §18-12-105 provides “all deeds shall be construed to convey a complete estate of inheritance in fee simple unless expressly limited by appropriate words in the deed.” Furthermore, Ark. Code Ann. §18-12-102 provides the words, “grant, bargain and sell” shall be an express covenant to the grantee ... that the grantor is seized of an indefeasible estate in fee simple . . . unless limited by express words in the deed. (Wood, R.; SC 12-742; 5-30-13; Goodson, C.)

Ark. Lottery Comm. v. Alpha Marketing, 2013 Ark. 232 [**sovereign immunity**] Alpha sued Lottery Commission for alleged trademark infringement related to use of “Arkansas Lottery.” Commission is an entity of the State entitled to the defense of sovereign immunity. Further, Alpha’s claims for injunctive, monetary, and declaratory relief would operate to control the actions of the State and are therefore barred by the defense of sovereign immunity. Commission did not waive the defense in its pleadings or by seeking affirmative relief. (Griffen, W.; SC 12-510; 5-30-13; Hart, J.)

Quattlebaum v. McCarver, 2013 Ark. App. 376. No issues were preserved for appeal in this appeal from entry of summary judgment. (Moody, J.; CV 12-693; 6-5-13; Whiteaker, P.)

Murphy v. Bunge N. America, Inc., 2013 Ark. App. 372 [**attorney disqualification**] Court did not abuse its discretion in disqualifying counsel, and attorney did not get a timely waiver from his client pursuant to Rule 1.7 (b) of the Rules of Professional Conduct. (Dennis, J.; CV 12-772; 6-5-13; Wynne, R.)

Fuller v. City of Kensett, 2013 Ark. App. 370 [**annexation**] Appeal from city’s annexation order was not timely. (Hannah, C.; CV 12-814; 6-5-13; Walmsley, B.)

Midkiff v. Crain Ford, 2013 Ark. App. 373 [**summary judgment**] Fact questions remain as to whether the financing condition was met and whether the parties intended a final agreement had been agree made. (Henry, D.; CV 13-88; 6-5-13; Wynne, R.)

Gawenis v. Alta Resources, LLC, 2013 Ark. App. 379 [**oil/gas lease**] Parol evidence was properly excluded because contract addressed the points; however, parol evidence is admissible in reformation cases based on mutual mistake. Mutuality of obligation is not at issue if there was performance under the lease. Assignment of lease without consent was not a material breach. (Clawson, C.; CV 12-489; 6-5-13; Wood, R.)

Knesek v. Cameron Hubbs Constr. Co., 2013 Ark. App. 380 [**prejudgment interest**] Prejudgment interest was not in order because the damages were not definitely ascertainable before trial. [**attorney's fees**] Trial court should have conducted a *Chrisco* analysis in considering attorney's fees. (Cottrell, G.; CV 12-942; 6-5-13; Wood, R.)

Smith v. State, 2013 Ark. 248 [**sovereign immunity**] Inmate's suit was properly dismissed for failure to state a claim, and it was barred by sovereign immunity. (Dennis, J.; CV 11-1124; 6-6-13; per curiam)

Lott v. Langley, 2013 Ark. 247 [**elections**] Suit over signatures on a petition to get on ballot for city director was moot. Election is over and expedited relief was not sought. (Moody, J.; CV 12-1076; 6-6-13; Hoofman, C.)

Henry v. Mitchell, 2013 Ark. 246 [**misrepresentation**] Seller of property committed constructive fraud by mistakenly misrepresenting the boundaries of the property, which had the effect of vitiating any waiver or release that the buyer had executed. Damages were measured by the cost to restore the property to the condition represented by the seller, and it was not error to include the sum expended to acquire access and water to the property. Plaintiff's proof in the case met a clear and convincing standard. (Putnam, J.; CV 13-48; 6-6-13; Corbin, D.)

Higginbotham v. Graham., 2013 Ark. App. 397 [**contract**] There was no meeting of the minds to form an enforceable contract. The parties knew that appellee did not own all of the property she and her husband purported to be selling—at most, they owned two-thirds. The parties chose not to include any provision for the very real possibility that appellee and her husband would not be able to obtain their son's interest in the property. (Fergus, L.; CV 12-956; 6-19-13; Wynne, R.)

Swindle v. Rogers Board of Education, 2013 Ark. App. 416 [**school discipline**] Father sued school district over discipline imposed on his five year old child for using profanity. The facts were not in dispute. The circuit dismissed the case. The case was affirmed as the facts did not justify judicial interference in the Board's actions. (Duncan, X.; CV 12-1081; 6-19-13; Wood, R.)

Essential Accounting Systems, Inc. v. Dewberry, 2013 Ark. App. 388 [**contract**] Issuance of stock to party supplied the necessary consideration to form a valid contract. Thus, the corporation promised Dewberry an ownership interest in consideration of the assignment of computer software program. Dewberry promised to transfer software, and the corporation performed by issuing its stock to Dewberry. Trial court erred in holding that the contract was unenforceable. (Wright, J.; CV 12-915; 6-19-13; Walmsley, B.)

Warren School Dist. v. Avery, 2013 Ark. App. 414 [**teacher fair dismissal act**] On appeal from school board's action to terminate teacher, the circuit court reversed and court of appeals affirmed the circuit court. The teacher did not receive a fair and impartial hearing -- not based on

any perceived lack of honesty or integrity of the school board members; rather, because the school board heard evidence regarding the alleged incident through statements made by the superintendent outside of the termination hearing. Furthermore, the board considered evidence regarding allegations not included in the notice of termination. The notice of termination stated that the only reason his termination was being recommended was because he was charged with first degree sexual assault of a minor. Avery was not put on notice that he would have to defend against any other allegations. (Pope, S.; CV 12-648; 6-19-13; Hixson, K.)

Avery v. Warren School Dist., 2013 Ark. App. 392 [**attorney's fees**] Teacher who prevailed in suit against school district over termination appealed the amount of attorney's fees awarded. Circuit court's properly limited attorneys' fees to the work done on the employment-termination case and did not take into account work done in a related criminal proceeding (Pope, S.; CV 12-707; 6-19-13; Harrison, B.)

Collins v. City of Bryant, 2013 Ark. App. 409 [**attorney's fees**] Trial court lost jurisdiction to vacate the order awarding fees because it was more than 90 days after entry. (Arnold, G; CV 12-1053; 6-19-13; Whiteaker, P.)

Primus Automotive Financial Services, Inc. v. Wilburn, 2013 Ark. 258 [**garnishment**] The petition for a writ of garnishment and the order of garnishment was issued well within the ten-year limitations period on the judgment entered January 9, 2002. Process was issued, and execution was had on the judgment within the limitations period. The limitations period on the underlying judgment was tolled as of January 21, 2011, when the garnishee was warned that some of the wages would be subject to future orders of the court. A new ten-year period of limitations then commenced on January 21, 2011. There is no basis in the law to quash the garnishment or to set it aside as the circuit court did in this case because the judgment became stale and expired. (Tabor, S.; CV 12-761; 6-20-13; Corbin, D.)

DHS v. Pope, 2013 Ark. App. 429 [**adult abuse registry appeal**] Trial court properly overruled department's placement of person on adult abuse registry and had the name removed. There was not substantial evidence that person negligently supervised the adult put in her care. That adult was not harmed but a child was harmed by the supervised adult. The application of the negligent supervision statute was arbitrary, capricious, and an abuse of discretion. (Moody, J.; CV 12-1125; 6-16-13; Glover, D.)

Reynolds v. Circuit Court Clark County, 2013 Ark. 287 [**workers' comp**] Workers' Comp Commission has exclusive jurisdiction to decide in the first instance claim for an occupational disease resulting from exposure to coal tar pitch. (Lineberger, J.; CV 12-922; 6-27-13; Goodson, C.)

Roller v. TV Guide Online Holdings, LLC, 2013 Ark. 285 [**jurisdiction/venue**] Subject matter jurisdiction may not be created by agreement of the parties. Party objecting to venue has the burden to show that venue is improper. It was error for trial court to shift burden to plaintiff and

require them to plead to avoid jurisdiction in California. The defendant has not shown that an enforceable agreement existed relating to consent to venue. (Lindsay, M.; CV 12-306; 6-27-13; Baker, K.)

Walls v. Humphries, 2013 Ark. 286 [**oil/gas rights**] A subsequent purchaser is charged with notice when the land is in possession of someone other than the record owner even though the subsequent owner may not be aware of the third person's possession. Attorney's fees are not allowed because litigation does not concern a breach of contract, but rather, whether party was a innocent purchaser of the property. (Wood, R.; CV 12-37; 6-27-13; Goodson, C.)

Certified Question Accepted: *Adams v. Cameron Ins. Co.*, 2013 Ark. 292, CV 13-456; 6-27-13. Whether an insurer in determining the "actual cash value" of a covered loss under an indemnity insurance policy may depreciate the costs of labor when the term "actual cash value" is not defined in the policy.

DOMESTIC RELATIONS

Wells v. Wells, 2013 Ark. App. 298 [**alimony**] The trial court denied the appellant's motion to modify alimony that he had agreed to pay the appellee. The trial court found that the parties' agreement for alimony was a separate contract, not subject to modification by the court. Alternatively, the court found that modification was not proper because appellant failed to demonstrate a change in income substantial enough to justify modification of the alimony agreement. On appeal, the appellant challenged the first finding but not the second. The Court of Appeals said that when a court bases its decision on two independent grounds and appellant challenges only one on appeal, the appellate court will affirm without addressing either. (Spears, J.; No. CA 12-1030; 5-1-13; Brown, W.)

Yates v. Yates, 2013 Ark. App. 307 [**modification of child custody; modification of child support**] The circuit court (1) awarded custody to the appellee father based upon changed circumstances and (2) retroactively reduced the appellee's child support obligation. The Court of Appeals affirmed the change in custody, stating that the court will affirm a correct decision if the record supports it, even though the reason was not stated by the trial court as a basis for its decision. The record supported a finding of a material change in circumstances, and that an award of custody to the father was in the best interest of the children. For appellant's second allegation of error, the court said that child-support orders cannot be retroactively modified for the time period before the filing of the petition for modification, and that it is an abuse of discretion for the court to do so. On this point, the court's order was reversed and the case was remanded for entry of an order consistent with the law. (Huckabee, S.; No. CA 12-667; 5-8-13; Wynne, R.)

Cowell v. Long, 2013 Ark. App. 311 [**modification of child support**] On the appellant's motion to modify child support, the trial court increased appellee's payments \$60 per month, effective

prospectively. On appeal, appellant contended that the trial court erred in relying on appellee's tax return to determine his income and abused its discretion in failing to award the child-support increase retroactively. The Court of Appeals found that the trial court first considered the appellee's monthly income, found that the corresponding amount on the child-support chart was \$360, an increase of \$60 over what he was paying, and found that constituted a material change in circumstances sufficient to support the modification. The court found no clear error in the trial court's method of determining his income, even though that was not the appellant's preferred method of determining his income. On the issue of when the increase would take effect, the court said the trial court "otherwise ordered" the child support to be paid prospectively, as permitted by statute. The court held that the court did not abuse its discretion on this point. (Goodson, D.; No. CA12-977; 5-8-13; Vaught, L.)

Hawkins v. Hawkins, 2013 Ark. App. 330 [**retroactive child support; valuation of real property**] After the appellee filed for divorce, the parties entered into an agreed temporary order providing for appellant to pay a certain amount of child support to the appellee. Almost two years later, the final divorce hearing was held, after which the court entered a decree. The appellant appeals two findings. On the issue of child support, the amount ordered in the final decree was higher than in the temporary order, and it was ordered to be retroactive to the date the complaint was filed. The Court of Appeals cited *Rudder v. Hurst*, 2009 Ark. App. 577, 337 S.W.3d 565, in which a retroactive award was affirmed. In affirming that case, the court had noted that no error is committed when a trial court reserves judgment until a later determination and makes contemplated adjustments at that time. The court contrasted that case from the one before it. Here, the parties had entered into an agreed order, the court signed off on it, and no language in the agreement reserved the right for retroactive modification. Neither party had requested reconsideration of support retroactively at any time during the two years following the temporary order. Under these fact, the court's sua sponte retroactive modification of the temporary support order was clearly erroneous. The second allegation was that the circuit court's valuation of the parties' real property was not supported by the evidence. The parties had an ownership interest in ICON Communications and also a 50% interest in the real property where the business was located. The circuit court made two separate property divisions, one for the value of the real property and one for the business itself. Appellee submitted an appraisal of the real property without objection, and an expert witness's report that valued ICON was challenged only by the appellant's testimony. The court relied upon both. The Court of Appeals found that the circuit court did not clearly err in its award of \$142,000 to appellee for her share in the real property or in its refusal to discount the real property value by the debt of the business. The case was affirmed in part and reversed in part. (McCain, G.; No. CA12-952; 5-15-13; Wood, R.)

Harral v. McGaha, 2013 Ark. App. 320 [**contempt; visitation; attorney fees**] The parties divorced over twelve years ago. This case arose from a finding of contempt against the appellant, modification of the order of visitation giving the appellee mother additional time with the child, the court's failure to hold the appellee in contempt, and the order for appellant to pay appellee's attorney fees. The order of contempt against the appellant father for omitting the appellee mother's name from a HIPAA form and excluding her from the pre-op area when their child had

surgery was affirmed. The court determined that the father violated the original divorce decree based upon his intent to diminish the mother's involvement and to enhance his own relationship with the child. The modification of the visitation order was also affirmed based upon changed circumstances. The court's refusal to find the appellee mother in contempt was also affirmed. Finally, the order for attorney fees was affirmed, as well. (Davis, B.; No. CA12-284; 5-15-13; Harrison, B.)

Herring v. Herring (now Beck), 2013 Ark. App. 348 [**modification of child custody**] The trial court denied a change in custody from the mother to the father finding that the appellant father's evidence was controverted to such a degree that he failed to prove his allegations of a change in circumstances by a preponderance of the evidence. The Court of Appeals summarized the "considerable conflicting and controverted evidence" and found that the circuit court's decision was not clearly erroneous or against the preponderance of the evidence. The decision was affirmed. (Guthrie, D.; No. CV-12-769; 5-22-13; Whiteaker, P.)

Davenport v. Uselton, 2013 Ark. App. 344 [**modification of visitation; contempt**] The trial court denied the appellant custodial father's motion to modify the mother's visitation with their three children, finding no material change in circumstances sufficient for modification. The court also denied the appellant's motion for contempt. The court found specifically that the appellee was living with someone with whom she was romantically involved and that she was willfully exercising visitation while her partner was present overnight, but the court did not hold her in contempt. The Court of Appeals noted a provision in the decree that prohibited that behavior, which provision the appellee did not challenge. The court said that because the trial court found her conduct fell within the provision and that her violation of the provision was willful, the conduct was, by definition, contemptuous behavior. The court said it could not reconcile the two findings, so it reversed and remanded on this point, directing the trial court to resolve the apparent inconsistencies in the findings. (Spears, J.; No. CV-12-769; 5-22-13; Whiteaker, P.)

Parker v. Parker, 2013 Ark. 236 [**divorce—venue**] The appellant filed a divorce complaint at 9:05 a.m. in Benton County, where he lived. His estranged wife, the appellee, filed a divorce complaint on the same day at 9:43 a.m. in Washington County, where she lived. She moved to dismiss his complaint asserting that Washington County was the "proper" venue." The Supreme Court held that because the plain language of § 9-12-303(a) places venue for a divorce action in the county where the complainant resides and § 9-12-303(c) grants the venue determination to the first Arkansas resident who files, the trial court erred in dismissing the appellant's complaint. (Fryauf, M.; No. CV-12-886; 5-30-13; Hart, J.)

Dugas v. Kells, 2013 Ark. App. 384 [**order of protection**] The Court of Appeals affirmed the circuit court's granting an order of protection for ten years to the appellee. The court found that appellee's petition for the order of protection met the requirements of Ark. Code Ann. Section 9-15-201, and declined to consider other arguments because they address issues raised in appellant's pending Rule 60 motion. (Reynolds, D.; No. CV-12-460; 6-19-13; Gladwin, R.)

Cooper v. Cooper, 2013 Ark. App. 386 [**retirement benefits; qualified domestic relations order**] The Court of Appeals ordered the appellant to file a supplemental addendum within seven days that will comply with Arkansas Supreme Court Rule 4-2(a)(8). Appellant's failure to file a compliant supplemental addendum within the prescribed time subjects him to possible affirmance for noncompliance with the rules. (Smith, V.; No. CV-13-58; 6-19-13; Pittman, J.)

Jones v. Jones, 2013 Ark. App. 391 [**divorce–property**] The appellant husband contested the trial court's division of property in their divorce case, specifically, the parties' marital home titled in the appellee-wife's name only, the parties' vehicles, the appellant's life insurance policies, and a tract of property owned by the parties as tenants by the entirety. In affirming on all points, the court found that the home in which the parties lived fell squarely within statutory provisions that property acquired by one spouse before marriage remains his or her separate property, and it found that the trial court had not clearly erred in that finding. On the issue of the three vehicles, all found by the trial court to be marital property, the court said the division was equitable, which does not equate to mathematical precision. The appellant was given sole ownership of the two trucks he used while the appellee was given sole ownership of the auto she drove. The court did not commit reversible error in dividing the vehicles. On the life insurance policies, the court ordered that the appellee receive one-half of the cash value of the policies on the appellant's life. The appellant had failed to bring up a record sufficient to demonstrate that the circuit court had erred on that issue. Finally, the trial court found no error in the division of the 35-acre tract which it ruled was marital property owned as tenants by the entirety. The court did not err in rejecting the appellant's constructive-trust theory. (Harkey, A.; No. CV-12-691; 6-19-13; Harrison, B.)

Bishop (Singletary) v. Singletary, 2013 Ark. App. 304 [**child custody; relocation**] The Court of Appeals reversed and remanded the case for the circuit court to consider it in light of *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). The trial court had considered it a joint custody case, finding that the appellant's relocation was a material change in circumstances and failing to apply the presumption that relocation by the custodial parent is in a child's best interest. (Huckabee, S.; No. CV-12-751; 6-19-13; Wynne, R.)

Carroll v. Carroll, 2013 Ark. App. 401 [**divorce--property settlement agreement**] The parties were divorced by a consent decree that incorporated the parties' property settlement agreement. Proceeds from a severe injury the appellee suffered in an automobile accident during the marriage had been deposited in an account with Morgan Stanley, \$100,000 in a CD, \$100,000 in an annuity held by MetLife, and \$400,000 in bonds. Before and in anticipation of their divorce, the parties told their broker to move the assets into the appellee husband's name except for \$60,000, which appellant wife was to receive by check. They signed a document to move the bonds from the joint account into appellee's name. The broker did not realize they still held the annuity with MetLife, so she failed to prepare paperwork to make that transfer. She told them she would have documents prepared for their signatures, which she mailed to them. They never returned them. The broker faxed the form to appellee in Oklahoma City, where he had just moved, and he faxed it back within a few minutes with both signatures on it. The broker was

unable to reach appellant to verify her signature for some time, but when she did, the appellant said she had never been to Oklahoma City and had not signed the form. After a hearing, the trial court denied both appellee's motion for contempt and appellant's motion to set aside the property settlement agreement. The court made findings from the bench. On appeal, appellant claimed the court's written order did not match its oral orders from the bench. Administrative Order No. 2(b)(2) provides that an oral order from the bench is not effective until reduced to writing and filed. If a court's findings from the bench conflict with its written order, which the Court of Appeals said it was not certain that they did in this case, the written order controls. Second, the court found that the trial court did not err in applying the law of fraud to its factual findings. Finally, the court said the circuit court did not clearly err in finding that the parties intended for the annuity to be included in "the Morgan Stanley account." The decision was affirmed. (Brantley, E.; No. CV-12-1042; 6-19-13; Gruber, R.)

Thompson v. McCain, 2013 Ark. 261 [**writ of prohibition; writ of certiorari**] Petitioner filed a petition for writ of prohibition or, in the alternative, a writ of certiorari. A writ of prohibition is appropriate only when a circuit court is wholly without jurisdiction and only when no other remedy, such as an appeal, is available. Further, a writ of prohibition cannot be invoked to correct an order already entered. Here, each of the allegations in the petition concerns orders already entered by the circuit court. Therefore, the court said, a writ of prohibition will not lie. The court said that a writ of certiorari lies only when two requirements are met: First, (1) the circuit court commits a plain, manifest, clear, and gross abuse of discretion, apparent on the face of the record, or (2) the court lacks jurisdiction, or acts in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record. Second, there can be no other adequate remedy but the writ of certiorari. Here, the petitioner had an adequate remedy: he could have appealed the circuit court's orders, which he did not do. Certiorari may not be used as a substitute for appeal, or for the correction of mere error when the right of appeal has been lost because of the fault of the petitioner. The petition was denied. (No. CV-13-85; 6-20-13; Danielson, P.)

PROBATE

In the Matter of the Estate of Lewis Weldon Adair, Deceased v. Adair, 2013 Ark. App. 290 [**decedent's estate**] The estate and the widow of the deceased had a dispute over who owned certain farm equipment. The trial court ordered that certain items of farm equipment passed to the widow because they were purchased during the marriage with marital assets, making them personal property subject to tenancy by the entirety. After reviewing the evidence presented, the Court of Appeals could not find that the trial court's finding that the farm equipment belonged to the widow by virtue of tenancy by the entirety was clearly erroneous. (Culpepper, D.; No. CA 12-983; 5-1-13; Glover, D.)

Gordon v. Draper, et al., 2013 Ark. App. 352 [**adoption**] The appellant natural father appealed a decree granting an adoption to the appellee, the child's stepfather. He alleged several grounds for

reversal, mostly arguing, according to the Court of Appeals, what an exemplary father he is and that the result in the case is patently unfair. In affirming the adoption, the Court of Appeals relied upon Code provisions providing that parental consent to an adoption is not required in cases of abuse if the cause is irremediable or will not be remedied by the parent. The failure of a parent to make reasonable efforts to remedy the cause for twelve months creates a presumption that the cause will not be remedied. In addition, the appellant had failed significantly and without justifiable cause to communicate with his child or to contribute to her support for nineteen months. He made no attempt to contact her at any time, and his being in prison is no excuse for his failure to communicate or to support. (Williams, C.; No. CV-12-1086; 5-29-13; Gladwin, R.)

Witham v. Beck, 2013 Ark. App. 351 [**guardianship–termination**] When a natural parent, who has not been deemed unfit and who has consented to a guardianship, files a petition to terminate a guardianship, that parent must put forth evidence that the guardianship is no longer necessary. Here, the appellee natural mother of the child, who had not been deemed unfit and who had consented to the guardianship, filed a petition to terminate and presented evidence that the guardianship was no longer necessary as she had been discharged from the military (which requires a single parent to have a guardianship for his/her child). Once the court is satisfied that the conditions necessitating the guardianship have been removed, the guardian has the burden to rebut the presumption that termination is in the child’s best interest. Once it was shown in this case that the guardianship was no longer necessary, the appellant tried to show that it was in the best interest of the child that she remain with her, and she argued that she overcame the presumption of termination of the guardianship by making that showing. The Court of Appeals said that the circuit court’s determination that appellant did not overcome the presumption that the appellee mother was acting in the child’s best interest was not clearly erroneous. The decision was affirmed. (Hughes, T.; No. CV-12-1052; 5-29-13; Gladwin, R.)

Wilson, et al. v. Lindvall, et al., 2013 Ark. App. 364 [**wills**] After the decedent’s wife died in 1991, he married a woman in 1994 with two children, the decedent’s stepdaughters. The decedent’s son died in 2004, survived by his wife and son. This will contest involves the decedent’s grandson and the grandson’s mother, the appellants, who contend that the 2004 will resulted from undue influence and fraud on the part of the appellee stepdaughters, all beneficiaries under the decedent’s will. The Court of Appeals held that the trial court did not clearly err in finding that the appellants failed to prove undue influence in the making of the will. Testimony supported that the decedent was competent, independent, and not subject to being influenced against his will. Testimony also supported that he had a loving relationship with his stepdaughters and that he appreciated Martha for the help she gave him and that he trusted her, as he showed many times in the years following the execution of the will. The appellants’ contentions about burdens the appellees had as a result of having procured the will were raised for the first time on appeal and were not considered. The decision was affirmed. (Koon, E.; CV-12-1036; 5-29-13; Hixson, K.)

JUVENILE

Payne v. Arkansas Dept. of Human Services, 2013 Ark. 284 **[DN Appeals]** The appellate court must consider everything the trial court considered in making its determination that it was in the child's best interest not to be in the care of the mother. The circuit court considered evidence in its final order, including the previous testimony of appellant that was not made part of the record. The appellate court noted that the trial court and attorneys failed to formally enter it into evidence. Case remanded and supplemental record ordered to be filed with appellant's testimony and anything else that was relevant to termination hearing and the final order of the circuit court. Rebriefing in the Court of Appeals. (Keaton, E.; CV-13-269; 6-27-2013; Danielson, P.).

Hernandez v. Arkansas Dept. of Human Services, 2013 Ark. App. 424 **[DN Adjudication]**. Appellants seven other children were placed in DHS custody as a result of neglect prior to the birth of S.D. Abuse or neglect of one sibling can establish that another sibling is at serious risk of serious harm even when that other sibling has not actually been abused or neglected. Adjudication upheld based on conclusive finding that S.D's older siblings were dependent-neglected and additional evidence of the S.D's current medical needs, including particular feeding and medication requirements. (Burgess, E.; CV-13-169; 6-26-2013; Harrison, B.).

Bowie v. Arkansas Dept. of Human Services, 2013 Ark. App. 279 **[DN Adjudication]** Appellant's five year son reported that his mother hit him on top of his head with a belt which resulted in her being arrested and charged with second-degree battery. Appellant was called as a witness, but her attorney explained that he had advised her not to testify due to her pending felony charges. Appellant argued that the evidence was insufficient to support a finding of dependency-neglect and that the trial court erred in inferring abuse in part on appellant's refusal to testify based on Fifth Amendment grounds. The DHS attorney argued that appellant's invocation of her Fifth Amendment right justified an inference that she was guilty of the alleged abuse and appellant's attorney failed to object. The trial court adjudicated based on the medical photographs, the fact that appellant changed her story regarding the injury, and that appellant refused to testify. Appellant's attorney made no objection that the court drew an inference of guilt based on invoking her Fifth Amendment right. As such, this issue is not preserved for appeal. (French, T.; CA-12-1005; 5-1-2013; Pittman, J.).

Ingle v. Arkansas Dept. of Human Services, 2013 Ark. App. 418 **[DN Review – Permanent Placement]** Permanent custody with father and case ordered closed was affirmed where the child had been placed with his father since the probable cause hearing and the court found that permanent custody was in the child's best interest. Appellant argued that it was an error to place her son with his father because permanent custody consideration at a review hearing is not authorized under the juvenile code and that 9-27-365 (no reunification hearing) was not complied with. Appellant is incorrect. A court has the authority to place permanent custody with a relative as disposition option at 9-2-334(a)(2)(A). Disposition options are always available to the court when the court determines a disposition is in the child's best interest. (Zimmerman, S.; CV-13-147; 5-19-2013; Wood, R.).

Scarborough v. Arkansas Dept. of Human Services, 2013 Ark. App. 296 [**DN Review – Permanent Placement**] Permanent custody with aunt at review hearing upheld where four-year old child had been subject to two d-n adjudications and two removals. The first was from his mother as a result of her drug use and then from his maternal grandparents (appellants) following a report that his mother was manufacturing methamphetamine in appellant's home and that they were unwilling to have the child drug tested. When he tested, he tested positive for methamphetamine. Appellant's argued that the court erred in granting permanent custody at the review hearing because they did not have notice that the court was terminating reunification services, that the court made a permanency decision at the review hearing (not the permanency planning hearing), and it did not follow the permanency preferences. Appellant's argument is not preserved for appeal because the objection to permanent custody with the aunt was not specific enough to put the circuit court on notice of the error alleged. (Burgess, E.; CA12-970; 5-1-2013; Wood, R.).

Penn v. Arkansas Dept. of Human Services, 2013 Ark. App. 327 [**DN Fifteen Month Review – Permanent Placement**] Permanent custody to maternal grandfather and his wife affirmed. Appellant argued insufficient evidence to support that custody was in child's best interest. Evidence supported that maternal grandfather had provided appellant's son stability and he had been in his home since the review hearing. Appellant continued to exhibit poor judgment in her relationship with her boyfriend. She failed to complete domestic violence classes as directed and lacked the stability her son needed. (Elmore, B.; CA13-52; 5-15-2013; Hixson, K.).

Porter v. Arkansas Dept. of Human Services, 2013 Ark. App. 299 [**TPR - Best Interest**] There was sufficient evidence to support trial court's finding that the termination was in their children's best interest after an 11 year history with DHS. The court properly considered potential harm to J.S where evidence showed that five of appellant's children had been terminated due to appellant's methamphetamine use that she continued to use methamphetamine while she was pregnant with J.S. and after he was placed in DHS custody. Although appellant had remained sober for five months prior to the termination hearing her rehabilitation was still a work in progress as noted by her past periods of sobriety only to return to using meth. (Zimmerman, S.; CA13-23; 5-1-2013; Brown, W.).

Sellers v. Arkansas Dept. of Human Services, 2013 Ark. App. 417 [**TPR – Best Interest**] There was clear evidence as to potential harm where appellant mom did not have any contact with DHS for five months and failed to comply with the court's orders. Appellant dad also continued to have unstable relationships, continued drug use nine months into the case, and associated with drug users. (Zimmerman, S.; CV-13-101; 6-19-2013; Wood, R.)

Jackson v. Arkansas Dept. of Human Services, 2013 Ark. App. 411 [**TPR – sufficiency**] Appellant argued that the trial court erred in relying on a ground (support and contact) to terminate not pled in the petition violating his due process rights. Appellant is correct on this point. There was no notice and DHS never amended its petition or moved to conform the pleading to proof. The first time appellant was placed on notice of the ground was in the order

terminating his rights. Appellant was denied the opportunity to develop a defense against the ground or to address this ground in closing arguments. Due process requires that appellant be afforded an opportunity to properly defend the allegations against him prior to terminating his parental rights and as such the court's reliance on this ground was clearly erroneous.

Appellant also argued the 12 month remedy ground did not apply to him because his conduct did not cause the removal. DHS argued that the children were removed due to the mother's drug use and there was no appropriate caregiver. His absence also caused the removal. The court found that the removal was a result of the mother's drug use and appellant's absence was not the cause of removal; that the statute was not applicable to him to support termination.

Finally, appellant argued that the subsequent factors ground did not apply because DHS failed to offer services to him and there was no evidence that he failed to remedy the subsequent factor. Appellant made his first appearance before the court at the termination hearing. DHS failed to show that it took any steps to contact appellant after his appearance in the case to determine his suitability as a caregiver or to provide him services. Termination reversed and remanded. (Zimmerman, S.; CV-13-152; 6-19-2013; Whiteaker, P.).

Austin v. Arkansas Dept. of Human Services, 2013 Ark. App. 406 [**TPR – sufficiency**] In this second TPR hearing regarding appellant, he argued that the trial court erred in finding that it was in his child's best interest to terminate parental rights because DHS failed to show that returning S.A. to his care would be potentially harmful. Evidence supported the trial court's decision including, that appellant did not have stable housing; he lived with his sister and her husband who had drug issues; he had outstanding felony warrants in Arizona that he had not dealt with; and he did not have transportation since his driver's license had been suspended as a result of a DUI.

Appellant also argued that there was insufficient evidence as to the two grounds for termination, 12 month remedy and subsequent factors. There was sufficient evidence as to the 12 month remedy where evidence demonstrated that his child was removed as a result of his drug use and that he continued to have drug issues, and failed to have stable housing or employment. As to the subsequent factors, appellant demonstrated continued instability and had anger issues; he did not have a valid driver's license; he was not managing his medication; and he failed to resolve outstanding felony warrants in Arizona. (Coker, K.; CV13-165; 6-19-2013; Glover, D.).

Strong v. Arkansas Dept. of Human Services, 2013 Ark. App. 278 [**TPR – Best Interest**] There was sufficient evidence as to potential harm where appellant did not have a home, still used drugs, failed to complete parenting or drug treatment, maintain contact with her children, and did not have stable employment. (Brown, E.; CA13-71; 5-1-2013; Gladwin, R.).

Madison v. Arkansas Dept. of Human Services, 2013 Ark. App. 368 [**TPR – Best Interest**] There was sufficient evidence as to potential harm where appellant mom after 24 months, including a trial placement, failed to comply with court orders, maintain contact with DHS and get counseling for her children. Appellant dad also had a sex abuse finding against his minor daughter, was a convicted felon for trading pseudoephedrine and methamphetamine, and tested positive for drugs during the case. The trial court made specific findings that the children would

suffer potential harm if returned and neither parent was ready to take custody of the five children after two years of services. (Halsey, B.; CV13-53; 6-5-2013; Gladwin, R.).

A.H. v. State, 2013 Ark. App. 419 [**Transfer**] Appellant, at age 16, was charged with aggravated robbery, theft of property, and two counts of criminal mischief in the second degree as a result of a carjacking. The trial court entered the statutory findings required in 9-27-318. Appellant argued that the court erred in finding that there was little testimony or evidence that he could be rehabilitated. The trial court found that there were rehabilitative services available and two witnesses, including his current juvenile probation officer testified that he was salvageable. The evidence demonstrated that appellant had been offered services in the juvenile system and persisted in delinquent behavior involving serious aggressive conduct relating to the protection of society. Rehabilitation is one factor for the court to consider and the moving party has the burden by clear and convincing evidence that the case should be transferred to the juvenile division. (Wright, H.; CV12-1075; 6-19-2013; Brown, W.)

R.B. v. State, 2013 Ark. App. 377 [**Delinquency-sufficiency**] Appellant's argument that there was not substantial evidence to support his adjudication of obstruction of governmental operations failed. There was evidence of his disorderly conduct at a juvenile detention facility where he refused to return to his room and a struggle ensued which resulted in the assault of officers while appellant tried to resist their control. [**EJJ**] Appellant also argued that the court erred in allowing the state to orally petition to revoke a suspended imposition of a sentence because he had not been transported to DYS at the time the new offense occurred. The appellate court found that although the jurisdiction and the resulting sentence were not appealed, questions of jurisdiction may be reviewed. The circuit court in its order stated it had jurisdiction based on 9-27-318(I), which refers to the criminal division transferring cases to juvenile division and did not include any crime for which appellant was charged with. The appellate court then reasoned that the extended jurisdiction was in error as was the resulting sentence to ADC. Case remanded for disposition consistent with opinion.

Note: A.C.A. 9-27-501 is the EJJ jurisdiction statute. A.C.A. 9-27-318 is the transfer statute. The court is also required to complete an EJJ Designation Hearing pursuant to 9-27-503, if the case is not transferred from the criminal division as an EJJ case. Also note that 9-27-306 provides for the EJJ disposition hearing and for the court to suspend imposition of an adult sentence pending review, not suspend an adult sentence. The state may file a petition to impose an adult sentence pursuant to 9-27-507.

(Cook, V.; CV-12-785; 6-5-13; Vaught, L.)

E.S. v. State, 2013 Ark. App. 370 [**Delinquency-sufficiency**] Appellant challenged that there was sufficient evidence that she was an accomplice to the crime of disorderly conduct. Appellant argued that there was no evidence that she engaged in any behavior that would make her an accomplice, but she was just present at the crime scene. The trial court affirmed where it found that appellant was an encouragement to one of the girls in the altercation and there was

conflicting testimony about whether appellant actually sprayed mace. (Fergus, L.; CV13-99; 6-5-2013; Hixson, K.)

E.N. v. State, 2013 Ark. App. 365 [**Delinquency-sufficiency**] Appellant argued that there was insufficient evidence that he committed aggravated assault and terroristic threatening when he pointed a gun at a schoolmate because his actions did not create a substantial danger of death or injury. The victim testified that he pointed the gun at him and cocked the hammer and said he would shoot him if he walked closer. Another witness driving by stopped and called 911. Even appellant testified that he pointed a gun and that it was not a toy gun. The court could reasonably conclude that the loaded gun found inside appellant's house was the gun he used. (Fryauf, M.; CV12-818; 6-5-2013; Wood, R.)

E.S. v. State, 2013 Ark. App. 370 [**Delinquency-Mental Capacity**] Appellant was not denied a fair and full defense to meaningfully challenge the state's mental evaluation where he stipulated that he was fit to proceed and was given the opportunity to present his own expert witnesses as to why his Asperger's diagnosis affected his mental capacity. (Wood, R.; CA12-711; 5-1-2013; Harrison, B.)

Cases in which Court of Appeals denied motion to withdraw and remanded to supplement the record:

McBride v. Arkansas Dept. of Human Services, 2013 Ark. App. 389 [(Brown, E.; CV-13-136; 6-19-2013; Walmsley, B.).

Martin v. Arkansas Dept. of Human Services, 2013 Ark. App. 293 (Isbell, G.; CA 13-53; 5-1-2013; Whiteaker, P.).

Cases in which the Court of Appeals affirmed No-Merit TPR and motion to withdraw granted:

Bates-Zingleman v. Arkansas Dept. of Human Services, 2013 Ark. App. 433 (King, K., R.; CV 11-1146; 6-26-2013; Vaught, L.).

Murry v. Arkansas Dept. of Human Services, 2013 Ark. App. 431 (Hewett, M.; CV 13-278; 6-26-2013; Glover, D.).

Gregory v. Arkansas Dept. of Human Services, 2013 Ark. App. 420 (Cook, V.; CV 13-178; 6-19-2013; Brown, W.).

Patton v. Arkansas Dept. of Human Services, 2013 Ark. App. 412 (Hewett, M.; CV 13-209; 6-19-2013; Whiteaker, P.).

Jimmerson v. Arkansas Dept. of Human Services, 2013 Ark. App. 341 (Zimmerman, S.; CV 13-120; 5-22-2013; Glover, P.).

Pfeifer v. Arkansas Dept. of Human Services, 2013 Ark. App. 319 (Keaton, E.; CA 13-86; 5-2013; Walmsley, B.).

Armstrong v. Arkansas Dept. of Human Services, 2013 Ark. App. 295 (Hewett, M.; CA 13-45; 5-1-2013; Hixson, K.)

Hayes v. Arkansas Dept. of Human Services, 2013 Ark. App. 294 (Finch, J.; CA 12-1120; 5-1-2013; Vaught, L.).

EIGHTH CIRCUIT

Buddy Bean Lumber Co. v. Axis Surplus Insurance Co., **[insurance]** The proper interpretation of the coinsurance provision in the policy in question depends on whether the insured has filed an actual cash value claim or a replacement cost claim. Here, where the insured filed a claim for the actual cash value of stolen electrical wire, the term "value" in the coinsurance policy should be read to mean the actual cash value of the insured's mills. Based on this interpretation, the insured was not subject to a coinsurance penalty on its claim and was entitled to receive the value of the wire minus its deductibles and any interim payment it had received. (No: 12-3232; W. D. Ark.; 5-23-13)

Bell v. Pfizer: **[products liability]** The district court did not err in determining product liability claims against brand defendants failed as a matter of law because Bell stipulated she had not ingested a product manufactured by the brand defendants. As for claims against the generic manufacturer, the district court erred in dismissing all the claims as failure to warn claims and thus preempted. Dismissal of non-warning design defect and breach of implied warranty claims are remanded to the district court for further proceedings. The district court did not err in concluding Bell could not state a viable claim based on Pliva's failure to incorporate the 2004 change into its label under the learned intermediary doctrine. (No: 12-1674; E. D. Ark.; 6-14-13)

Swift Transportation Company v. Angulo: **[legal malpractice]** District court's grant of summary judgment in favor of attorneys who failed to file a timely notice of appeal, is affirmed. There was sufficient evidence to support underlying jury verdict, so state appellate court would not have reversed the judgment on insufficient evidence grounds. The trial court did not abuse its discretion in admitting evidence of discovery disputes or in instructing the jury on spoliation of evidence. (No: 12-1069; E. D. Ark.; 6-17-13)

Evance v. Trumann Health Services: **[employment discrimination]** District court correctly granted summary judgment on discrimination claims, as there was no direct evidence of discrimination and employer articulated legitimate, nondiscriminatory reason for termination and Evance did not show other similarly situated employees were treated more favorably. District court properly granted summary judgment on defamation claims, as there was no evidence to support she was defamed by falsely stating she initiated improper conduct with resident. (No: 12-2654; E. D. Ark.; 6-18-13)

Indigo LR LLC v. Advanced Ins. Brokerage: **[insurance]** Where the insurer's receiver had reimbursed plaintiff's claim in full, plaintiff lacked standing to bring this action since the reimbursement fully redressed any injury plaintiff suffered. (No: 12-3119; E. D. Ark.; 6-21-13)

U.S. SUPREME COURT

Maryland v. King **[4th Amendment]** After his 2009 arrest on assault charges, respondent King was processed, where booking personnel used a cheek swab to take a DNA sample pursuant to the Maryland DNA Collection Act (Act). The swab was matched to an unsolved 2003 rape, and King was charged with that crime. He moved to suppress the DNA match, arguing that the Act violated the Fourth Amendment, but the trial court found the law constitutional. King was convicted of rape. The Maryland Court of Appeals set aside the conviction, finding unconstitutional the portions of the Act authorizing DNA collection from felony arrestees.

Held: When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

(No. 12-207; June 3, 2013)

Adoptive Couple v. Baby Girl, 570 U.S. ____ (2013). **[ICWA]** This case involved an infant who is 1.2% Cherokee. The South Carolina Supreme Court ruled that ICWA applied and required her to be taken at 27 months from her adoptive parents and returned to her biological father who had previously signed a relinquishment of parental rights, that he later retracted and had never had contact with the child. The U.S. Supreme Court reversed and held that 25 U.S.C. §1912(f), which bars involuntary termination of a parent's rights without finding serious harm to the Indian child is likely to result from the parent's continued custody of the child, does not apply when the parent never had custody of the child. Continued custody refers to custody that the parent has or at least had at some time in the past.

Further, 25 U.S.C. §1912(d) conditions an involuntary termination of parental rights as to an Indian child on a showing that active efforts have been made to provide remedial services...designed to prevent the breakup of an Indian family and that these efforts have been unsuccessful. The court reasoned that this statute contemplates a family breakup prior to termination. The Supreme Court held when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no relationship. The breakup of the family occurred prior to the termination and this section is not applicable.

Finally, Section 1915(a)'s adoption placement preferences are inapplicable in cases where no alternative party has formally sought to adopt this child. The adoptive couple was the only party that sought adoption of baby girl. This section is not applicable to father since he argued his rights should not have been terminated and no other Indian families sought custody.