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CRIMINAL

Morales v. State, 2013 Ark. App. 555 [**affirmative defense; sexual indecency with a child**]
Based upon a review of the evidence, it was reasonable for the fact-finder to conclude that appellant did not prove his affirmative defense by a preponderance of the evidence. Thus, the trial court did not err when it denied appellant's motion to dismiss. (Davis, B.; CR-13-295; 10-2-13; Wood, R.)

Fleming v. State, 2013 Ark. App. 551 [**revocation of suspended sentence**] Appellant's behavior established that he was aware that the terms of his suspended sentence had been amended. Additionally, appellant's attorney, as appellant's agent, signed the order that amended the terms of appellant's suspended sentence. Thus, appellant's argument that the trial court erred by revoking his suspended sentence based upon a violation of the terms in the amended order, which he alleges to have had no knowledge, is without merit. (Cottrell, G.; CR-13-215; 10-2-13; Vaught, L.)

Cassinelli v. State, 2013 Ark. App. 553 [**motion to suppress**] Law enforcement officials had probable cause to believe that appellant committed a moving violation. Additionally, law enforcement officials had a reasonable suspicion that appellant was driving while impaired. Thus, the traffic stop, which led to appellant's arrest for DWI, was lawful and the trial court

correctly denied appellant's motion to suppress the evidence obtained during the stop. (Wright, J. CR-13-285; 10-2-13; Hixson, K.)

Russell v. State, 2013 Ark. 369 [**mental disease or defect**] Because there were conflicting forensic evaluations, the trial court did not abuse its discretion when it refused to find appellant not guilty by reason of mental disease or defect before the trial. (Griffen, W.; CR-12-475; 10-3-13; Hart, J.)

Smith v. State, 2013 Ark. 364 [**speedy trial**] Speedy trial begins to run on the date that the defendant is arrested not on the date that the arrest warrant is issued. [**sentencing**] Appellant's sentence which contained a firearm enhancement pursuant to Ark. Code Ann. § 16-90-120, was not illegal. (Johnson, L.; CR-13-20; 10-3-13; Baker, K.)

Houston v. State, 2013 Ark. 374 [**Rule 37**] The trial court was clearly erroneous in finding that trial counsel's decision not to have certain evidence tested was reasonable. The results from the testing could have bolstered appellant's defense and may have changed the outcome of the trial. Thus, appellant was able to satisfy both prongs of the *Strickland* test and to establish that trial counsel was ineffective. Thus, the trial court erred when it denied appellant's Rule 37 petition. (Wright, H.; CR-09-315; 10-3-13; per curiam)

Shatwell v. State, 2013 Ark. App. 568 [**sufficiency of the evidence; first-degree murder; tampering with evidence**] There was substantial evidence to support appellant's convictions. [**admission of evidence**] The trial court did not abuse its discretion when it permitted the State to introduce evidence of prior bad acts because the evidence was independently relevant and was offered to establish appellant's criminal intent. (Webb, G.; CR-13-144; 10-9-13; Harrison, B.)

Chatfield v. State, 2013 Ark. App. 565 [**hearsay**] The trial court abused its discretion when it admitted hearsay testimony. However, because appellant failed to request a limiting instruction, and because the hearsay testimony was cumulative to other properly admitted evidence, the error was harmless. (Sims, B.; CR-13-139; 10-9-13; Walmsley, B.)

Wells v. State, 2013 Ark. 389 [**sufficiency of the evidence; felony murder; aggravated robbery**] There was substantial evidence to establish that appellant caused the death of another person under circumstances manifesting an extreme indifference to the value of human life during the course and furtherance of committing an aggravated robbery. [**accomplice liability**] Any error by the trial court in refusing to give the accomplice-liability jury instruction was harmless because if the alleged accomplice testimony would have been eliminated from the case, there would have been other evidence that would have independently established the crimes and appellant's role therein. (Wright, J.; CR-13-122; 10-10-13; Hannah, J.)

Allen v. State, 2013 Ark. 396 [**404 (b)**] Because appellant failed to establish that testimony regarding the alleged bad acts of a witness for the State was relevant to any material issue in

appellant's case, it was not an abuse of discretion for the trial court to exclude the evidence. (Wright, H.; CR-13-106; 10-10-13; Hoofman, C.)

Sandoval v. State, 2013 Ark. App. 586 [**sentencing**] Appellant's sentences, which were within the statutory ranges, were valid. (Hill, V.; CR-13-430; 10-23-13; Walmsley, B.)

Andrade-Martinez v. State, 2013 Ark. App. 604 [**sufficiency of the evidence; attempted capital murder, aggravated assault, felon in possession of a firearm during the commission of a felony, felon in possession of a firearm, possession of cocaine, simultaneous possession of drugs and a firearm**] There was substantial evidence to support appellant's convictions. [**motion to suppress**] Law enforcement officials acted in good faith when they obtained a warrant to search appellant's home and the affidavit used to support the request for the search warrant contained sufficient lawfully obtained information to establish probable cause. Thus, the trial court did not err when it denied appellant's motion to suppress. (Storey, W.; CR-13-272; 10-23-13; Wood, R.)

Fields v. Hobbs, 2013 Ark. 416 [**writ of habeas corpus**] The circuit court did not err in finding that appellant failed to establish that the circuit court that accepted his guilty plea and sentenced him lacked territorial jurisdiction to do so. Appellant failed to establish that the judgment and commitment order entered in his case was invalid on its face or that he was being detained based upon an illegal sentence. Thus, the circuit court did not err when it denied appellant's writ of habeas corpus petition. (Williams, C.; CV-12-625; 10-24-13; Hoofman, C.)

Haskins v. State, 2013 Ark. App. 613 [**revocation**] The circuit court's finding that appellant violated the terms of his suspended sentence was not clearly against the preponderance of the evidence. [**continuance**] The trial court did not abuse its discretion when it denied appellant's last minute request for a continuance, which appeared to be an attempt to manipulate the court proceedings. (Fitzhugh, M.; CR-13-318; 10-30-13; Wynne, R.)

Engram v. State, 2013 Ark. 424 [**Rule 37**] The circuit court erred in summarily dismissing appellant's Rule 37 petition in the absence of a hearing and specific written findings on the issue of whether good cause existed for the belated filing of the petition. (Sims, B.; CR-12-694; 10-31-13; Corbin, D.)

State v. Robinson, 2013 Ark. 425 [**motion to suppress**] There is no rule of criminal procedure, statute, or case law that establishes a bright-line rule that provides that in order for a police officer to execute a search warrant outside of his jurisdiction there must be an interagency agreement or interagency cooperation to validate the search. Thus, the circuit court erred in finding that it was per se unreasonable for officers to execute an extraterritorial search warrant without the cooperation of local law enforcement. (Griffen, W.; CR-12-1128; 10-31-13; Corbin, D.)

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

Dotson v. State, 2013 Ark. App. 550 (possession of a controlled substance with the purpose to deliver; simultaneous possession of drugs and firearm) CR-13-97; 10-2-13; Whiteaker, P.

Moore v. State, 2013 Ark. App. 582 (possession of a firearm by certain persons) CR-13-292; 10-23-13; Gladwin, R.

Medlock v. State, 2013 Ark. App. 609 (second-degree battery) CR-13-203; 10-30-13; Walmsley, B.

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:

Williams v. State, 2013 Ark. App. 592 (probation) CR-12-839; 10-23-13; Gruber, R.

Brooks v. State, 2013 Ark. App. 590 (suspended sentence) CR-13-471; 10-23-13; Wynne, R.

CIVIL

Discover Bank v. Danner, 2013 Ark. App. 540 [**debtor/creditor**] It is clear here that the credit card was in fact issued to defendant and that the debt sought to be collected is based on charges alleged to have been made to her credit card. There is significant and persuasive evidence to show that defendant did in fact authorize at least some of the charges made in this case. But for its error of law requiring a signed sales receipt in every case, the trial court could have found differently. (McCallum, R.; CV-12-816; 10-2-13; Pittman, J.)

Gulfc0 v. Brantley, 2013 Ark. 347 [**debtor/creditor**] The circuit court's findings of unconscionability and predatory lending practices are not clearly erroneous. The court did not err in refusing to enforce the mortgage, as to do so would contravene the public policy of this State. Despite the debtors' demonstrated inability to pay, the lender continued to loan them money. Each loan, that included built-in fees and high interest rates, placed the debtors in a position of ever-increasing debt, such that it was all but inevitable that they would end up in default. Considering the totality of the circumstances, the circuit court found that the evidence revealed an intolerable pattern of reprehensible and unconscionable conduct that offended its sense of decency and justice. (Guthrie, D.; CV-13-135; 10-3-13; Goodson, C.)

Cooper v. Circuit Court of Faulkner County, 2013 Ark. 365 [**certiorari**] The circuit court order prohibited petitioners from filing any additional pleadings in land condemnation action until the fees and costs were paid in full. The petitioners have no other remedy. The order prohibiting the

filing of additional pleadings is not a final, appealable order. The circuit court exceeded its jurisdiction and committed gross abuse by denying them access to the courts. Relief in the form of a writ of certiorari is appropriate. (CV-13-202; 10-3-13; Baker, K.)

Legalzoom.Com, Inc. v. McIlwain, 2013 Ark. 370 [**arbitration**] The circuit court erred in denying the motion to compel arbitration based upon the allegations concerning the unauthorized practice of law and its belief that the contract was unconscionable. There was a valid agreement to arbitrate and the issues must first be addressed in the arbitration proceeding rather than the court. (Sutterfield, D.; CV-12-1043; 10-3-13; Hart, J.)

Brown v. Freddie Mac, 2013 Ark. App. 574 [**foreclosure**] The foreclosure sale took place; the property was conveyed by deed to Freddie Mac; but when Freddie Mac demanded possession of the property; the property owners asked the trial court to set aside the foreclosure sale because they were not in default at the time of foreclosure, alleging that the mortgage agreement had been previously modified. The problem with this argument is that they did not make it *before* the foreclosure sale. The statutory framework makes clear that legal or equitable rights must be asserted *before* a foreclosure sale is held or the claim will be “forever barred or terminated,” *except* in cases where fraud or the failure to strictly comply with the applicable statutory provisions. (Moody, J.; CV 12-1028; 10-9-13; Glover, D.)

Ford Motor Co. v. Keatts, 2013 Ark. App. 575 [**Lemon Law**] Ford claims that the consumer did not satisfy a condition precedent prior to bringing a civil action. The Lemon Law requires consumers to participate in informal dispute settlement (IDSP) prior to bringing legal action to enforce consumer rights, so long as the manufacturer made the required disclosures. However, because all remedies under Arkansas state law were not available to the consumer, his failure to participate in the arbitration did not preclude his state-law action and he could proceed to court without exhausting the IDSP options. Under the Lemon Law, if the manufacturer fails to repair the vehicle after a final attempt, the consumer has an unconditional right to choose a refund rather than a replacement. Because Ford’s IDSP does not require consumer approval of a replacement as Arkansas law requires, it fails as a matter of law. Ford does not require that the consumer be “made whole,” but instead places him in a “take-it-or-leave-it position.” Although the IDSP does allow for a replacement vehicle, there is no language requiring that the replacement be acceptable to the consumer or granting the consumer the unconditional right to choose a refund rather than a replacement. (Fox, T.; CV 12-988; 10-9-13;Vaught, L.)

Farmer v. Moon, 2013 Ark. App. 564 [**Decl. Judgment**] Appeal is dismissed because circuit court lacked jurisdiction to enter a declaratory judgment. Ark. Code Ann. 14-51-308(e) provides that an appeal of a municipal civil service commission’s decision to the circuit court to be taken by filing a notice of appeal with the commission within thirty days of the decision. Appellee filed no such notice of appeal, however; instead, he filed this declaratory-judgment action almost four months after the commission’s decision. An action for declaratory judgment may not be utilized as a substitute for an appeal. (Griffen, W.; CV 13-4; 10-9-13; Pittman, J.)

Trammell v. Hooks, 2013 Ark. App. 576 [**accord/satisfaction**] There was evidence of a dispute over what was owed and a manifestation of consent to accept less than what was owed; therefore, there was no error in giving an accord and satisfaction jury instruction. (Laser, D.; CV 12-685; 10-9-13; Hixson, K.)

Hardin v. Bishop, 2013 Ark. [**agency**] Court erred in granting summary judgment as there were outstanding factual issues. (Dennis, J.; CV 12-1037; 10-10-13; Goodson, C.)

Carter v. Cline, 2013 Ark. 398 [**attorney's fees**] Attorneys fees are not recoverable if there is no valid contract and they are not recoverable under Ark. Code Ann. § 16-22-308 if the claim is based in tort. However, fees may be awarded under the statute to a prevailing party. (Moody, J.; CV 12-875; 10-10-13; Hoofman, C.)

Hotel.com, LP v. Pine Bluff Advertising Comm., 2013 Ark. 392 [**class action**] The predominance requirement was satisfied as there are overarching issues that can be addressed before resolving individual issues. Contention that administrative remedies had not been exhausted was without merit. (Wyatt, R.; CV 13-342; 10-10-13; Danielson, P.)

Deer Sch. Dist. v. Kimbrell, 2013 Ark. 393 [**schools**] School district's claims relating to the adequacy reports and evaluations, COLAs, transportation funding, and facilities funding were not barred by res judicata because they arose after release of the mandate in *Lake View* and could not have been litigated in that case. However, res judicata barred claims relating to education funding, which were or could have been litigated in the previous school-funding cases. (Piazza, C.; CV 13-182; 10-10-13; Baker, K.)

Bashiri v. Frankian, 2013 Ark. App. 591 [**motions**] The motion filed, while titled a summary-judgment motion, was clearly a motion for default judgment, as the motion was based entirely on the failure to answer the complaint. The circuit court, however, treated the motion as one for summary judgment and entered an order that makes no mention of defendant's failure to file an answer. In considering the motion to set aside, the circuit court refused to look at Rule 55, which should be used in determining whether to grant the motion because the order requested to be set aside was filed as a result of a motion for default. The case is remanded to determine whether the judgment should be set aside using the proper standard. (Maggio, M.; CV-13-191; 10-23-13; Wynne, R.)

Lindberg v. Mehlburger Brawley, PLLC, 2013 Ark. App. 606 [**appeal**] When a trial court bases its decision on two independent grounds and appellant challenges only one on appeal, the appellate court will affirm without addressing either. (Fox, T.; CV-13-276; 10-23-13; Brown, W.)

Powell v. Fernandez, 2013 Ark. App. 595 [**service**] In 2004, Rule 6(b) was amended to specifically include Rule 4(i) as one of the rules under which the trial court could not extend the

time for taking an action except to the extent and under the conditions stated in that rule. Strictly applying the service requirements of Rule 4(i), a plaintiff has 120 days to serve a defendant after suit is filed; however, if a motion to extend the period of time for service is made within 120 days after the filing of suit, the period of time may be extended if good cause is shown. A second motion for extension of time, although filed within the time constraints of the first extension, was filed more than 120 days after the filing of suit. There is nothing in Rule 4 that addresses allowing multiple extensions to be obtained within the time of prior extensions—the only time limit in the rule is within 120 days of the filing of suit. Powell's second extension was not filed within 120 days of the filing of suit; therefore, service was defective, and the default judgment was void. . (Schrantz, D.; CV-13-220; 10-23-13; Glover, D.)

Royal Overhead Door v. Jernigan, 2013 Ark. App. 588 [**exoneration rule**] The exoneration rule provides that when an employee has been released or dismissed and the employer has been sued solely on a theory of vicarious liability, any liability of the employer is likewise eliminated. A “nondelegable duty” may encompass either a direct or a vicarious theory of liability depending on the case; the term is not necessarily limited to one theory or the other. Here, the negligence was direct in nature. Defendant had to install the fireplace in a professional, workmanlike manner but did not do so. (Phillips, G.; CV-12-966; 10-23-13; Harrison, B.)

Harris v. Temple, 2013 Ark. App. 605 [**foreign judgment**] The foreign judgment became final and enforceable when the order registering the judgment was file marked. The judgment's enforceability does not depend upon resolution of motions to set aside filed after the fact. A judgment debtor cannot avoid the judgment's enforcement by filing a motion to set it aside. (Johnson, K.; CV-13-146; 10-23-13; Wood, R.)

Skalla v. Canepari, 2013 Ark. [**fiduciary duty**] Tenant in common did not breach fiduciary duty to other cotenant – a cotenant has absolute dominion over his property and may dispose of it as he sees fit so long as he does not interfere with the rights of others. [**tortious interference**] Plaintiff produced no proof of interference. [**deceptive trade practices**] Claim failed to assert any type of consumer-oriented act that caused damages. The business practices involved farming. (Laser, D.; CV 12-1065; 10-24-13; Goodson, C.)

Ark. Board of Chiropractic Examiners v. Currie, 2013 Ark. App. 612 [**administrative appeal**] Board's findings and conclusions were not specific enough but remand to the Board is the proper disposition rather than dismissal. (Wood, R.; CV-13-232; 10-30-13; Harrison, B.)

Taylor v. MCSA, LLC, 2013, Ark. 430 [*See Estate of Taylor under the Probate cases*] (Landers, M.; CV-13-12; 10-31-13; Goodson, C.)

DOMESTIC RELATIONS

Baker v. Baker, 2013 Ark. App. 543 [**divorce—division of property; allocation of debt; child custody**] In this divorce case, the circuit court awarded five acres on which the marital home was

located to the appellee husband because it was given to him as a gift before his marriage. He was ordered to pay the appellant wife \$2,042.22, half of the principal of the mortgage, because marital funds were used to pay that. The court divided items of personal property, including a gold coin that once belonged to the appellant's great-grandmother, which the court determined was marital property. The trial court equally divided marital debt of \$22,672.37, ordering the appellant to reimburse the appellee for payments he had made on the parties' credit cards, offsetting an overpayment of child support he made, and offsetting his obligation to pay her one-half of the mortgage principal. After computations, appellant was ordered to pay the appellee \$7,819.24 at 6% interest. The court also awarded custody of the child to the appellee husband, determining that the appellant and her witnesses were less credible, and that appellee would provide more stability for the child. The Court of Appeals discussed each issue and affirmed the decision in all respects. (Hannah, C.; No. CV-12-1112;10-2-13; Walmsley, B.)

Dodd (Raff) v. Gore, 2013 Ark. App. 547 [**child custody–modification; change of circumstances**] In 2009, paternity was established in the appellee and primary custody was awarded to the appellant mother. Three years later, the court modified its original order, changing primary custody to the appellee father and granting visitation to the mother. She argued on appeal that there was not a material change of circumstances and that modification was not in the child's best interests. The Court of Appeals reviewed the extensive testimony and found that the facts did not amount to a material change in circumstances warranting a change in custody. The court reversed the order changing custody to the father, and did not reach the issue of best interests. (Scott, J.; No. CV-13-56; 10-2-13; Gruber, R.)

Brave v. Brave, 2013 Ark. App. 542 [**divorce–marital property–corporate goodwill versus personal goodwill**] The trial court erred in failing to find that the restaurant's goodwill was personal goodwill and thus non-marital property. The Court of Appeals extended the concept of personal goodwill in a non-professional business to Brave New Restaurant under "the unique facts of this particular case...because Peter's presence is essential to the success of the restaurant." The court noted that "[o]ther jurisdictions have recognized personal goodwill in connection with commercial or non-professional business enterprises," citing cases from Oklahoma, Indiana, and Florida. (Brantley, E.; No. CV-12-479; 10-2-13; Walmsley, B.)

Russell v. Russell, 2013 Ark. 372 [**divorce–property, temporary alimony**] At the time of the divorce, the parties stipulated that appellant owed a 99/300th interest in NRS, a company that he and his two step-brothers bought from appellant's step-father, Glynn Colquitt, four months after the parties married. The appellant and appellee entered into a property-division agreement regarding all property except the appellant's interest in NRS, which was a part of the circuit court's decision. NRS has only one client, the Hong Kong Shanghai Banking Corporation (HSBC). Even though Glynn Colquitt sold his shares in NRS to his sons, "he remained the face of the business and continued to draw a salary." The appellant and his two step-brothers regularly took cash from the business over and above their salaries to support their lifestyles. During the divorce, both parties presented the court with their own experts' testimony about the value of appellant's shares in NRS. Both agreed that the full value of NRS was \$3.028 million,

but their opinions varied greatly regarding what the appellee could realize from a sale of NRS stock. Part of the disparity involved consideration of the “personal goodwill” of Glynn Colquitt. The appellee had been employed at NRS, and she testified that the company’s viability was based not on its personal relationships but on its ability to comply quickly with HSBC’s changing requirements, which, in her opinion, outweighed the personal relationships. In the divorce decree, the circuit court placed a value of \$272,875 on appellee’s interest in the business. It awarded the appellant his entire 33% interest in NRS and offset the “unequal division of property” by awarding the appellee alimony of \$11,370 a month for twenty-four months, which approximately equaled the value of her interest in NRS that was set by the court. In affirming the circuit court, the Supreme Court said that in traditional equity cases, the circuit courts have broad powers to distribute the property to achieve an equitable division. To that end, the court may order credits and setoffs to achieve a just result. In addition, the division of marital property and the award of alimony are complementary devices that a court may employ to make the dissolution of a marriage as equitable as possible. An award of alimony will not be reversed absent an abuse of the court’s discretion in a traditional equity case to award it. Here, the circuit court did not err in ordering the appellant to pay alimony as a complementary device to offset the unequal distribution of marital property. In addition, the Court held that the valuation of the NRS shares was not clearly contrary to the preponderance of the evidence. The decision of the circuit court was affirmed. (Spears, J.; No. CV-13-244; 10-3-13; Hart, J.)

Chester v. Pilcher, 2013 Ark. App. 571 [**visitation**] The appellant mother argued on appeal that the appellee father failed to show a material change in circumstances to be granted increased visitation with their two children, that she did show a material change in circumstances for a decrease, and that, even if there had been a material change in the appellee’s favor, increased visitation was not in the children’s best interests. In affirming the order of the circuit court, the Court of Appeals said that there was no modification increasing what was set out in the initial visitation order, so the appellant’s argument that the father failed to show a material change in circumstances has no merit. Also, the court found no clear error in the court’s not decreasing his visitation. The trial court weighed the evidence and assessed the credibility of the witnesses, deferring to the court on those matters. Finally, on the issue that the circuit court failed to consider the best interest of the children in modifying the visitation schedule, the court pointed out again that the schedule was not modified. (Koon, E.; No. CV-13-224; 10-9-13; Wynne, R.)

Unruh v. Grist, 2013 Ark. App. 584 [**change in custody**] The evidence support the trial court’s finding of a material change in circumstances and that a change in custody was in the child’s best interests. The decision was affirmed. (Williams, C.; No. CV-13-171; 10-23-13; Pittman, J.)

Midyett v. Midyett, 2013 Ark. App. 597 [**contempt; alimony**] The parties divorced in Nevada in 2008. The decree incorporated an alimony agreement. They reconciled, living together in Fayetteville until the appellant obtained an order of protection against the appellee, which excluded her from the residence and required the appellant to pay her moving expenses. Subsequently, she filed a petition for contempt, alleging that appellant failed to pay her moving expenses. In response, he registered the Nevada decree in Arkansas and asked the court here to

modify or set aside the alimony agreement. The appellee filed a motion for contempt for his nonpayment of alimony. The court denied the appellant's request to modify the alimony agreement, held him in contempt for nonpayment of \$30,030 in back alimony, and denied holding him in contempt for not paying her moving expenses. In affirming the decision, the Court of Appeals found that the issue of contempt on the alimony payments involved a discovery matter under Ark. R. Civ. P. 36, requests for admission. The court said a circuit court has broad discretion in discovery matters, which will not be reversed absent an abuse of discretion. On the trial court's refusal to modify or set aside the parties' alimony agreement, the court affirmed the finding that Nevada retained exclusive jurisdiction under the Uniform Interstate Family Support Act (UIFSA). Under UIFSA, the tribunal in the state that issues a spousal-support order has continuing exclusive jurisdiction to modify the order throughout the existence of the support obligation. Finally, the appellant asserted that the circuit court neglected to rule on a claim he filed against the appellee for the tort of outrage. The trial court had ruled that he had not asserted a specific cause of action that would allow him to recover damages and, that if there were a separate civil action to be filed, the divorce case would not be the place to do it. In addition, the court ruled that, under his pleadings, no cause of action would allow him to recover for the conduct he alleged. The court made independent alternative rulings, each dispositive of appellant's claim. He attacked only one on appeal, so the court said the case could be affirmed without addressing either ruling. (Bryan, B.; No. CV-12-701; 10-23-13; Whiteaker, P.)

Brice v. Brice, 2013 Ark. App. 620 [**child custody**] The appellant father contended on appeal that the trial court erred in failing to grant custody of the parties' three children to him, alleging that the trial court erred in making several factual findings. The trial court found that both parents were suitable to care for the children, but concluded that it was in the children's best interests to award custody to their mother. The court supported its decision with findings of fact based on the evidence, and the Court of Appeals was not left with a definite and firm conviction that any of the trial court's findings of fact were a mistake. On the appellee's motion to strike a portion of appellant's brief, the Court of Appeals did strike a footnote that contained information not in the record, and the court noted that the information was not considered by the court in making its decision in the case. (Smith, V.; No. CV-12-974; 10-30-13; Glover, D.)

Wagster v. Wagster, 2013 Ark. App. 616 [**divorce—military retirement; setting aside decree—fraud**] When the parties divorced in 2006, they entered into a property-settlement agreement that made no distribution of the appellee husband's military retirement. In 2011, the appellant former wife filed a motion to set aside the decree based upon the appellee's alleged fraudulent representation to her that she was not entitled to any of his military retirement. The circuit court denied the motion. The Court of Appeals affirmed the trial court's finding that the appellee's statement to her was his opinion, not fact, and was not clearly erroneous. In addition, the court's finding that appellant's reliance on his legal opinion regarding his military retirement was neither reasonable nor justifiable was also not clearly erroneous. Evidence was presented that the appellant was intelligent and she admitted that she knew and understood that she could hire a lawyer to advise her. Likewise, she testified that she signed the agreement without reading it. The decision was affirmed. (Harkey, A.; No. CV-13-181; 10-30-13; Gruber, R.)

Goodloe v. Goodloe, 2013 Ark. App. 624 [**child custody—change of custody**] Appellant father’s motion to change custody of the parties’ two children from the appellee mother to himself was denied. On appeal, he alleged that the trial court erred in not granting him physical custody of the children despite the fact that the court found a material change in circumstances sufficient to change the legal custody, taking the educational decision-making for both children and the medical decision-making for one child from the mother and giving it to him. The court said that if the circuit court found a material change in circumstances to change legal custody on such major issues, it follows that a change in physical custody is warranted and that the court’s decision not to do was clearly erroneous. The decision was reversed. (Smith, V.; No. CV-13-187; 10-30-13; Brown, W.)

Bradford v. Bradford, 2013 Ark. App. 615 [**divorce—division of property**] The parties’ divorce decree included the trial court’s division of real and personal property. The court found that \$93,207.09 of funds in an account held as tenants by the entirety was the separate property of the appellee husband. The Court of Appeals said it recognized that the appellee requested the court to make an unequal distribution in this case, and that a circuit court may order an unequal distribution of marital property based on the equities, citing the basis and reasons for not dividing the marital property equally. The court reversed the finding that the funds were the separate property of the appellee and remanded for the court to consider whether an equal distribution of the marital funds would be inequitable. If so, the court shall consider the statutory factors and shall set out the basis and reasons for the unequal division in its written order. (Clawson, C.; No. CV-12-1015; 10-30-13; Gruber, R.)

McNutt v. Yates, 2013 Ark. 427 [**child custody—change in custody**] The circuit court ordered that custody be changed from the appellant mother to the appellee father. The Court of Appeals affirmed in part and reversed in part. The Supreme Court granted a petition for review, so it treated the appeal as if originally filed in the Supreme Court. The Supreme Court found (1) that the circuit court did not abuse its discretion in denying the appellant’s motion for a continuance after granting her attorney’s motion to withdraw; (2) that the court did not err in finding that appellee father proved a material change in circumstances and in awarding him custody; and (3) that the court did not have the power to modify child support retroactively to April, 2011, a point which the appellant conceded in her briefs on appeal. The court reversed on the retroactive modification of child support and affirmed on the other two points. (Huckabee, S.; No. CV-13-454; 10-31-13; Danielson, P.)

PROBATE

In the Matter of the Estate of L.C. Taylor, Deceased v. MCSA, LLC, et al., 2013 Ark. App. 429 [**appointment of special personal representative**] The decedent’s son, Bobby Taylor, was appointed special personal representative of the estate for the limited purpose of investigating and prosecuting all claims for nursing-home abuse. On behalf of the estate, he filed a wrongful-death action against the defendants. He was subsequently deposed in the wrongful-death action and revealed, for the first time, that he was a convicted felon. The parties agreed that under Ark.

Code Ann. 28-48-101(b)(3), a convicted felon is not qualified to serve as a special personal representative, so he moved to substitute another of decedent's sons, Ronnie Taylor, as special personal representative, which the court did. That substitution was challenged by one of the appellees, who intervened in the case, asserting that the appointment issue was determinative of the timeliness of filing the wrongful-death claim. They asserted that the original appointment of Bobby was invalid, thereby invalidating the substitution of Ronnie. The trial court vacated the order and found that it was void ab initio. On appeal, Ronnie contends that decision was erroneous, and that the order was voidable, not void. The issue is the effect of the vacation of the order. The appellant asserts that Bobby's acts prior to his removal remain valid, and the appellee contends that all of his acts from his appointment forward are void. The Supreme Court set out the pertinent statutes and held that Bobby's acts as a special personal representative were valid until the date of his removal as special personal representative, and that the circuit court erred by finding that the order of appointment was void ab initio. (Landers, M.; No. CV-12-925; 10-31-13; Baker, K.)

JUVENILE

Williams v. Arkansas Dept. of Human Services, 2013 Ark. App. 622 [TPR - sufficiency]
Appellant argued there was insufficient evidence to support the ground of failure to remedy the conditions that caused removal because his conduct did not cause the removal. The Appellate Court reversed and remanded and declined to accept DHS's argument that appellant had been the cause of removal in a prior dependency-neglect case that had been closed. While a trial court may use a parent's actions from previous closed proceedings, it cannot be used as the sole ground when the previous proceedings were closed and ended in reunification. (Branton, W.; CV13-520; 10-30-2013; Whiteaker, P.).

McBride v. Arkansas Dept. of Human Services, 2013 Ark. App. 566 [TPR - sufficiency]
Appellant did not specifically challenge any of the three grounds for termination, but argued that the court erred in finding that she failed to remedy the conditions that caused removal which concerned the safety of her infant due to her drug usage. Even with three drug treatment referrals, appellant delayed drug treatment until the eleventh hour and was arrested for drugs being sold out of her apartment two months prior to the termination hearing. The trial court is in the best position to weigh the evidence and determine the credibility of the witnesses. (Brown, E.; CV13-136; 10-9-2013; Walmsley, B.).

Emmons v. Arkansas Dept. of Human Services, 2013 Ark. App. 541 [TPR - sufficiency]
Appellant (mom) argued that she was making progress despite her relapses. However, evidence that a parent makes progress as a termination is imminent will not outweigh other evidence demonstrating a failure to comply and remedy the situation that caused the children to be removed. Appellant (dad) is precluded from arguing that he should have been given transportation to a drug assessment that he failed to attend because previous orders finding reasonable efforts were not appealed. There was also evidence that he had transportation, he

never requested transportation and he continued to use illegal drugs throughout the case. (Thyer, C.; CV13-414; 10-2-2013; Pittman, J.).

Anthony v. Arkansas Dept. of Human Services, 2013 Ark. App. 556 [**TPR - sufficiency**] The “other factors ground” upheld where appellant concealed child from DHS and law enforcement following the probable cause hearing for five months and evidence showed that appellant did not have a job or stable residence, continued to use drugs, demonstrated an inability to stay out of jail, and had sporadic visitation with her children. Appellant argued that she lacked notice of the issues she had to defend against at the termination hearing because that the TPR petition was filed in June 2012 and most of the issues discussed occurred after August 2012. Failure to raise this issue below precludes appellate review. Permitting the introduction of proof on an issue not raised in the pleading constitutes an implied consent to trial on that issue. (Halsey, B.; CV13-354; 10-2-2013; Wood, R.).

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

Gaskill v. Arkansas Dept. of Human Services, 2013 Ark. App. 610 (James, P.; CV 13-604; 10-30-2013; Walmsley, B.).

Painter v. Arkansas Dept. of Human Services, 2013 Ark. App. 602 (Thyer, C.; CV13-586; 10-23-2013; Hixson, K.)

DISTRICT

Carrick v. State, 2013 Ark. App. 587 [**pro se appeal**] [**filing fees**] Appellant received no punishment but was found to have committed two violations in district court. The two violations were appealed to circuit court and a \$165.00 filing fee was paid. There was one mistrial and the State dismissed the charges prior to a second trial occurring. Appellant moved to recover his filing fee saying that the fee violated Arkansas Constitution article 2, section 13, which states that citizens are allowed “to obtain justice freely, and without purchase.” The circuit court denied a refund of the filing fee. The Court of Appeals held that our supreme court has said that it is not unconstitutional to require a party to pay a filing fee. It was also noted that the two Arkansas code sections concerning the filing fees state that no portion of the fee could be refunded. (Sims, J.; CR 13-442; 10/23/13; Harrison, B.)

Jones v. State, 2013 Ark. App. 611 [**conditional plea**] [**remand to settle record**]. This is an appeal from a conditional plea of guilty to DWI. Appellant argues that the circuit court erred in denying his motion to suppress which stated that the officer lacked reasonable suspicion to “stop and detain” him under Ark. R. Crim. P. 3.1. Appellant was observed turning into a driveway 500 yards before a sobriety checkpoint. Appellant asserts that according to an incident report, the officers had no facts other than his lawful conduct in turning off the highway to support reasonable suspicion to pursue and detain him. In lieu of a hearing, the court reviewed the motion to suppress and the parties’ briefs and issued a letter opinion denying the motion to suppress. That no hearing was held on the motion

to suppress means that no testimony was received. The incident report appears to be the primary source of facts on which the court based its finding that reasonable suspicion existed. The case was remanded to the circuit court to determine whether this incident report was actually placed in the record. If it was not, the circuit court must enter an order so stating for transmittal to the Court of Appeals; if it was, the circuit court must submit a certified supplemental record to include the omitted incident report. (Kemp, J.; CR 13-485; 10/30/13; Harrison, B.)

EIGHTH CIRCUIT

L. Simes, II v. Arkansas Judicial D. & D. Comm. [**Civil rights**] In a Section 1983 action challenging disciplinary proceedings brought before the Arkansas Judicial Discipline and Disability Commission, a member of the Commission, who essentially acted as the Commission's prosecutor by selecting which complaints against Simes should be pursued, was entitled to absolute immunity for his actions. While prosecutorial immunity does not absolutely shield statements to the press, the Commission member's statements did not implicate constitutional rights and the district court did not err in declining to exercise jurisdiction over what it concluded were nothing more than state law defamation claims. Ddistrict court did not err in concluding Simes's claims for declaratory and injunctive relief were moot. (E.D. Ark.; # 12-3564; 10-31-13)

Patel v. Trivedi [**insur/contract**] The district court did not err in finding the plaintiffs' tort claims were time-barred; however, the district court erred in dismissing their breach-of-contract claim against their insurer as their allegation that the insurer breached two of their life insurance policies by refusing to honor disability-based waiver-of-premium provisions in those policies was sufficient to state a claim for breach of contract. (W.D. Ark.; # 13-1043; 10-31-13)