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CRIMINAL

Jackson v. State, 2018 Ark. App. 222 [**cross examination**] The circuit court did not abuse its discretion in denying appellant the opportunity to cross examine a law enforcement officer about arrest warrants issued in other cases for other individuals who were wholly unrelated to appellant's trial. Specifically, the properly excluded testimony would have: (1) been confusing for the jury; (2) called for the jury to speculate on various issues; (3) was not relevant to the charges pending against appellant; and (4) did not establish the witness's bias against appellant. (Hearnsberger, M.; CR-17-755; 4-4-18; Abramson, R.)

Finch v. State, 2018 Ark. 111 [**juror misconduct**] During the jury's deliberations in the guilt/innocence phase of appellant's trial, a juror used his cell phone to look up the definition of "hung jury" and shared the information with the other jurors. The trial court learned that the juror had looked up information on his phone and removed him from the jury. Based upon its interpretation of Rule 606(b) of the Rules of Evidence, the court did not ask the juror what he had looked up and did not allow appellant to question the juror about the nature of the researched information. On appeal from the denial of appellant's motion for a mistrial based upon the juror's misconduct, the Supreme Court explained: "a juror may testify on the question of whether

extraneous prejudicial information was improperly brought to the jury's attention and what that information consisted of is an integral part of the testimony and is necessary for deciding whether a reasonable possibility of prejudice exists. . . [T]here is nothing in either Rule 606(b) or any precedent of which we are aware that would have prevented the circuit court from undertaking a reasonable inquiry into the nature of the extraneous information when it was brought to the court's attention during deliberations." (Johnson, L.; CR-17-360; 4-5-18; Wynne, R.)

Vasquez v. State, 2018 Ark. App. 241 [**speedy trial**] The trial court correctly determined that pursuant to Ark. R. Crim. P. 28.3(h) "good cause" existed to exclude a one-month period from the speedy trial calculations in appellant's case. The appellate court concluded that the excluded period, which was to the next available court date, was not unnecessarily lengthy in light of the fact that jurors had to be notified, witnesses subpoenaed, and translators scheduled. (Cottrell, G.: CR-17-875; 4-11-18; Virden, B.)

Mitchell v. State, 2018 Ark. App. 253 [**Ark. R. Evid. 405**] Although evidence of specific violent acts by the victim was inadmissible at appellant's trial because appellant had no knowledge of them, appellant was entitled to introduce testimony about the victim's reputation for violence in his community because that evidence was probative on the issue of who was the aggressor in the dispute that led to the victim's death and appellant's justification defense. [**Ark. R. Evid. 803(1)**] At trial, appellant attempted to introduce a statement that was made by a third party during a police interview. The third party told police that appellant made certain statements regarding why he committed the crime to him as they were leaving the scene of the crime. The statement was excluded from evidence based upon hearsay. On appeal, the appellate court concluded that because the challenged statement was not made while appellant was perceiving the event or immediately thereafter, the trial court did not abuse its discretion when it excluded the testimony. (Sims, B.; CR-17-821; 4-18-18; Virden, B.)

Rounds v. State, 2018 Ark. App. 267 [**motion to suppress**] At the time appellant was stopped by law enforcement, the totality of the circumstances did not provide reasonable suspicion that appellant was committing, had committed, or was about to commit a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property sufficient to justify the stop pursuant to Ark. R. Crim. P. 3.1. Specifically, the evidence presented by the State did not demonstrate that the officers had specific, particularized, and articulable reasons to indicate appellant was involved in criminal activity. Without reasonable suspicion that appellant was involved in criminal activity, the traffic stop was unconstitutional. Because the stop was not justified, the trial court erred in denying appellant's motion to suppress the items that were seized. (Piazza, C.; CR-17-708; 4-25-18; Glover, D.)

Dortch v. State, 2018 Ark. 135 [**Ark. Code Ann. § 5-65-202; implied consent**] The United States Supreme Court in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) concluded that motorists cannot be deemed to have consented to submit to a blood test based upon the threat of committing a criminal offense if consent is refused. At the time of appellant's "search," Arkansas's implied-consent law imposed criminal penalties upon a person who refused to submit to a blood test. Because the refusal to submit to a blood test pursuant to Ark. Code Ann. § 5-65-202 (Supp. 2015) would have resulted in the imposition of criminal penalties, the statute, as applied to appellant, is unconstitutional. Accordingly, the circuit court clearly erred in finding that the "blood draw from [appellant] did not implicate the Fourth Amendment." (Kemp, J.; CR-17-76; 4-26-18; Baker, K.)

CIVIL

Middleton v. Middleton, 2018 Ark. App. 237 [**amend pleading to conform to evidence**] The decision to grant a motion to amend the pleadings to conform to the evidence, while liberal, is still discretionary; amendment is only mandatory when the issue has been expressly or impliedly consented to. Here, there was no manifest abuse of discretion by the circuit court in denying appellants' motion to amend the pleadings. (Putman, J.; CV-17-738; 4-4-18; Brown, W.)

Skender v. Union Pacific Railroad Co., 2018 Ark. App. 234 [**equitable tolling**] Skender asserts that equitable tolling should apply to save his claim, contending that equitable tolling is appropriate when a plaintiff timely files an otherwise defective pleading or when the plaintiff has been induced or tricked by the opposing party to allow the filing deadline to pass. The trial court found, however, that Skender had not acted diligently in pursuing his claim. The trial court found that UPRR timely answered Skender's complaint in December 2015, asserting the defenses of "insufficiency of process" and "insufficiency of service of process"; yet Skender never sought to clarify UPRR's insufficient service-of-process assertions and took no further action on the case until UPRR filed its motion to dismiss over a year and a half later. The trial court further found that Skender undertook no discovery of his claims and did not respond to UPRR's discovery requests until after UPRR was forced to file a motion to compel. Under these facts, equitable tolling does not apply, and the trial court's dismissal of plaintiff's FELA actions with prejudice is affirmed. (Wyatt, R.; CV-17-363; 4-4-18; Whiteaker, P.)

Farm Credit Midsouth v. Bollinger, 2018 Ark. App. 224 [**breach fiduciary relationship**] The Bollingers have not shown anything more than an ordinary debtor-creditor relationship between them and Farm Credit. The mere fact that there is a long-term relationship, without more, is insufficient to establish a fiduciary relationship. There has been no showing that Farm Credit has been "intimately involved" with the Bollingers' operations so as to elevate the relationship to a "special relationship" for which fiduciary duties are owed. Thus, the circuit court correctly

directed a verdict on the breach of fiduciary relationship. [**tortious interference**] Because the Bollingers failed to prove two of the elements of the cause of action for tortious interference—that there was a termination or breach of their relationship with Riceland and that Farm Credit used improper means to achieve that result—the circuit court erred when it failed to grant Farm Credit’s motion for a directed verdict on this claim. [**negligence-duty assumed**] Although Farm Credit may not have owed the Bollingers a duty, the jury may have found that it had assumed a duty when Charlene Zachary told Fred Bollinger, Jr., that she would handle it. A party who gratuitously undertakes a duty can be liable for negligently performing that duty. Here, the evidence was such that the issue of whether Zachary said that she would handle the excessive-yield matter and, if so, whether she was negligent in doing so, presented a jury question. (Honeycutt, P.; CV-16-739; 4-4-18; Virden, B.)

Williamson v. Williamson, 2018 Ark. App. 236 [**breach fiduciary relationship**] Appellee father gave appellant son a broad durable power of attorney that allowed him to act on father’s behalf. This power allowed son to act for father’s benefit. It was undisputed that son exercised his power while father was confined. However, the trial court concluded that appellant breached his fiduciary duty by failing to “meet the requisite standards of fair dealing, good faith, honest, and loyalty” and that he “converted” some of appellee’s money and property. However, the evidence does not support all of the court’s findings. On remand, the trial court must redetermine, consistent with this opinion, whether appellee father sustained his burden of showing what portion, if any, of the disputed funds were specifically attributable to a breach of fiduciary duty for self-dealing or converted by appellant inconsistent with appellee’s rights. (Carnahan, C.; CV-17-538; 4-4-18; Hixson, K.)

Ark. Community Correction v. Barnes, 2018 Ark. 122 [**Sovereign Immunity**] Under the AWBA (whistle blower act), if there is unlawful adverse action on behalf of a public employer, then the employee may claim injunctive relief, reinstatement, compensation, and attorneys’ fees. The General Assembly clearly intended to subject the State to liability under the AWBA. Per the holding in *Andrews*, to the extent the legislature subjected the State to liability in the AWBA, it is prohibited by article 5, section 20 of the Arkansas Constitution. ACC was entitled to judgment as a matter of law, and the circuit court erred when it denied ACC’s motion for judgment on the pleadings based on sovereign immunity. The only issue before this court is whether the General Assembly’s choice to abrogate sovereign immunity in the AWBA is prohibited by the constitution. It is. (Fox, T.; CV-17-496; 4-12-18; Womack, S.)

Cagle v. Van Buren School District, 2018 Ark. App. 259 [**teacher termination**] Cagle argues that delivering a transcript of the hearing before the board does not substantially comply with the statutory requirement of “written findings.” Arkansas Code Annotated section 6-17-1510(c) requires the school board to deliver “specific written conclusions with regard to the truth of each reason given the teacher in support of the recommended termination” While delivering a

copy of the hearing transcript is not what was intended by the statute, based on the specific facts of this case, delivery of the transcript constituted substantial compliance with the statutory requirement. Only substantial compliance with the statute is required. School districts should be mindful of the statute's written-findings requirement. In this case, no prejudice was shown. (Medlock, M.; CV-17-876; 4-18-18; Vaught, L.)

Entergy v. Francis, 2018 Ark. App. 250 [**work product**] Entergy contends that the circuit court abused its discretion by finding that the two root-cause evaluations did not qualify for the work-product privilege because they were created in the ordinary course of business. Specifically, Entergy asserts that, while its own policy required the root-cause evaluations, they had a far different character than those it performs in the ordinary course of business. Unlike more routine root-cause evaluations, those at issue here followed a severe accident that was certain to engender litigation; they were performed with the involvement of counsel; and they required a much more complex level of investigation. Entergy therefore contends that the two root-cause evaluations are "opinion work product" that warrant protection from disclosure even upon another party's showing of substantial need. Entergy failed to meet its burden of proving that it created the root-cause evaluations in a form that was different from those it creates in the ordinary course of business. The circuit court did not abuse its discretion when it ordered Entergy to produce those documents to Bigge. The circuit court's order, therefore, is affirmed as it pertains to Entergy's production of the root-cause evaluations to Bigge. However, the circuit court abused its discretion when it ordered Entergy to produce the root-cause evaluations to Francis, who did not propound discovery seeking those documents. (Sutterfield, D.; CV-17-243; 4-18-18; Abramson, R.)

Glenn v. Bubbus, 2018 Ark. App. 252 [**lease-fixtures**] In determining whether an article remains personal property or becomes a fixture, the following factors are considered: (1) whether the items are annexed to the realty, (2) whether the items are appropriate and adapted to the use or purpose of that part of the realty to which the items are connected, and (3) whether the party making the annexation intended to make it permanent. In this case, when considering intent, it is vital to consider the language of the lease, which provided that Bubbus could remove any property that he put on the premises, even items that might otherwise be considered trade fixtures, as long as he could remove them without causing damage to the structures on the premises. The circuit court did not err in finding that Bubbus should have been allowed to remove his electrical equipment. There was ample testimony that the poles, meter boxes, and wires could be removed from the property with no damage to the real property and with minimal interruption of electrical service to the residents of the mobile homes. The poles and electrical equipment were installed for the benefit of Bubbus and his tenants, and the parties' intent in the lease reflects that Bubbus would be able to remove the electrical equipment at the termination of the lease. (Sutterfield, D.; CV-17-580; 4-18-18; Abramson, R.)

Pleasant v. McDaniel, 2018 Ark. App. 254 [ADTPA] A claim of common-law fraud and a claim under the statutory provisions of the ADTPA are distinctly different. Appellants' assertion that Rule 9 of the Arkansas Rules of Civil Procedure is the proper pleading standard for this particular statutory claim is incorrect. (Fox, T.; CV-17-405; 4-18-18; Virden, B.)

Apprentice Information Systems, Inc. v. DataScout, 2018 Ark. 146 [FOIA] DataScout sued only AIS, a private corporation, that provided electronic record-keeping services to the county. DataScout cannot sue AIS alone under FOIA and direct AIS to produce public records because it is a private corporation and is not the custodian of the public records. [Tortious Interference with Business Expectancy] To establish a claim of tortious interference with business expectancy, DataScout had to prove: (1) it had a business expectancy with a third party; (2) AIS knew of the expectancy; (3) AIS intentionally interfered and caused a breach or termination of the expectancy; and (4) it resulted in damages. DataScout failed prove the first element—the existence of a business expectancy with a third party. Here, the circuit court identified no third party with whom DataScout had a business expectancy. The court solely referenced a generalized business goal of “one-stop shop of public data available for paid subscribers.” DataScout did not prove that it had a business expectancy with any particular person or entity. [ADTPA] The ADTPA does not “provide for a private cause of action seeking injunctive relief.” (Duncan, X.; CV-16-575; 4-26-18; Wood, R.)

Apprentice Information Systems, Inc. v. DataScout, 2018 Ark. 149 [ADTPA] The ADTPA prohibits any “unconscionable, false, or deceptive act or practice in business, commerce, or trade.” Ark. Code Ann. § 4-88-107(a)(10) (Repl. 2011). The elements of such a cause of action are (1) a deceptive consumer-oriented act or practice which is misleading in a material respect and (2) injury resulting from such act. Here, the circuit court clearly erred in finding that DataScout was a consumer for purposes of the ADTPA. AIS and DataScout were competitors in the market of selling counties' public data, and there is simply no “consumer-oriented act” as required for a cause of action under the ADTPA. (Duncan, X.; CV-17-377; 4-26-18; Wynne, R.)

DOMESTIC RELATIONS

Hewett v. Hewett, 2018 Ark. App. 235 [no material change sufficient to change custody; reversible error to award joint custody when cooperation between the parties is lacking] The appellate court found that there was insufficient evidence of a material change in circumstances warranting modification of custody and that the award of joint custody was not in the child's best interest. The only circumstances referenced in the circuit court's order were the parents' inability to communicate civilly and work together to make parenting decisions, and these facts do not demonstrate a change considering the parties' hostile history. Furthermore, the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the

child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and such an award is reversible error when cooperation between the parties is lacking. (Schrantz, D.; CV-17-612; 4-4-18; Vaught, L.)

Atherton v. Atherton, 2018 Ark. App. 245 [**valuation of business; personal goodwill in nonprofessional business**] The appellate court found no error in the circuit court's valuation of the marital business. The tax returns indicated that the business was growing and becoming more profitable. The circuit court also found credible testimony that there were substantial cash assets taken in by the business that are not necessarily reflected in financial documents, and that the business was providing income and benefits in excess of what was reflected on the tax returns. Appellant represented and certified by his signature on two financial statements regarding the value of the business, and the circuit court valued the business at one-half of Appellant's represented amount. Lastly, although it is settled law that personal goodwill is not a proper consideration in dividing a professional business upon divorce, this concept has not been extended to encompass a nonprofessional business such as the one involved here. The appellate court could not ascertain any significant personal goodwill in a business such as this, which involves the selling of motors to operate gates, nor did the circuit court find any. (McCallister, B.; CV-17-742; 4-11-18; Hixson, K.)

Townsend v. Townsend, 2018 Ark. App. 246 [**registered foreign decree could only be enforced and not modified**] The appellate court found that the circuit court lacked authority to modify the foreign divorce decree because there is no evidence that the requirements of Ark. Code Ann. 9-19-203 were met. The foreign decree was properly registered in Arkansas following the process set forth in the UCCJEA. However, pursuant to the UCCJEA (9-19-203), the decree could not be modified unless (1) the court of the other state determined it no longer had jurisdiction or that Arkansas was a more convenient forum; or (2) the child, the child's parents, and any person acting as a parent do not presently reside in the other state. Because these requirements were not proven, the circuit court only had the authority to enforce the existing decree and make changes that were ministerial in nature. (Compton, C.; CV-17-511; 4-11-18; Murphy, M.)

Franks v. Franks, 2018 Ark. App. 266 [**premarital agreement enforced; marital property division**] The appellate court found that the circuit court did exactly what it was supposed to do -- it enforced the prenuptial agreement in dividing the parties' premarital property, and it divided the jointly held marital property equally. By the clear terms of the parties' prenuptial agreement, Appellee's retirement plan and pension are excluded as his separate premarital property. The retirement plan may have changed names and had additional accumulations, but it is still the same retirement plans listed in the agreement. While Appellant had access to the account so she could withdraw money upon Appellee's request, this does not change the ownership of the account. Furthermore, while Appellant used her inheritance toward the marital home held as tenants by the entirety, that does not impact its status as marital property to be

equally divided. Appellant did not challenge the validity of the prenuptial agreement; instead, she argues that enforcing the agreement results in an equitable distribution of property. Parties contemplating marriage may, by agreement, fix the rights of each in the property of the other differently than established by law. (Medlock, M.; CV-17-885; 4-25-18; Harrison, B.)

PROBATE

In the Matter of the Estate of Lois Jean Edens, 2018 Ark. App. 226 [**recusal according to Ferguson**] The appellate court found that an objective review of the record revealed that appellant's attorney had a contentious relationship with the circuit judge that has continued over the course of several years. While each allegation from appellant's motion for recusal viewed in isolation may not have been sufficient, the appellate court found that those allegations as a whole could be perceived as bias against the attorney, and by extension, the client. Because the circuit court's impartiality was reasonably brought into question, Rule 2.11 of the Arkansas Code of Judicial Conduct required the trial court to recuse according to *Ferguson v. State*, 2016 Ark. 319. (Hughes, T.; CV-17-746; 4-4-18; Virden, B.)

JUVENILE

Lawrence v. Ark. Dep't. of Human Servs., 2018, Ark. App. 223 [**TPR—sufficiency of the evidence; ICWA**] Appellant mother asked appellate court to review the trial court's lack of compliance with notice provisions of ICWA, even though the mother failed to raise the issue below, requesting an exception to the preservation rule for ICWA cases, but the appellate court declined to review the issue. Appellant's remaining arguments were found to be without merit and termination was affirmed. (Halsey, B.; JV16-65; April 4, 2018; Abramson, R.)

Clark v. Ark. Dep't of Human Servs., 2018, Ark. App. 243 [**TPR—due process; sufficiency of the evidence**] Father who was incarcerated throughout most of the proceedings argued on appeal that he was denied due process because DHS did not notify him what he needed to do to maintain his parental rights, DHS failed to communicate with him, and DHS failed to transport him to hearings or provide him with copies of court orders. The appellate court found that since the due process argument was not specifically raised below it was not preserved for appeal. Evidence was sufficient to support termination based on ground of abandonment where father took no steps to make contact with children during the pendency of the case, even during the periods of time when he was not incarcerated. Accordingly, the order of termination was affirmed. (Hendricks, A.; JV-16-195; April 11, 2018; Klappenbach, N.)

Buck v. Ark. Dep't of Human Servs., 2018 Ark. App. 258 [**TPR—right to counsel**] Parent from whom custody is removed is entitled to counsel at all stages of a dependency neglect proceeding, and if the parent is indigent, counsel shall be appointed at the outset of the case when requested. Failure to appoint counsel under these circumstances is reversible error. (Hendricks, A.; JV16-245; April 18, 2018; Whiteaker P.)

Harjo v. Ark. Dep't of Human Servs., 2018, Ark. App. 268 [**TPR; ICWA**] Under ICWA, evidence beyond a reasonable doubt is required for termination of a parent's rights. The appellate court agreed with the trial court's finding of evidence beyond a reasonable doubt based on factors that arose subsequent to the filing of the original petition, where the mother continued to use illegal drugs throughout the case and did not attend rehab until well over a year into the case, failed to attend counseling, and otherwise failed to follow the case plan. (Zimmerman, S.; JV-16-9041; April 25, 2018; Hixson, K.)

Rickman v. Ark. Dep't of Human Servs., 2018 Ark. App. 261 [**TPR—sufficiency of the evidence**] Ample evidence supported the trial court's finding that termination was in the child's best interest and that potential harm could result if the child were returned to the mother's custody, where the child had been in foster care for three years, the mother was addicted to Adderall, suffered from borderline functioning, was in an unstable and abusive relationship with an alcoholic, and the home was dirty. (Wilson, R.; JV-14-110; April 25, 2018; Gruber, R.)

Taylor v. Ark. Dep't of Human Servs., 2018 Ark. App. 264 [**TPR—sufficiency of the evidence**] Order terminating rights on the grounds of aggravated circumstances was affirmed on the basis that there was little likelihood that services would result in successful reunification, after the department had been working with the family for several years with little improvement. The court found clear and convincing evidence of potential harm if the child were returned and that termination was in the child's best interest, where rights were previously involuntarily terminated as to another child, the mother suffered from borderline intellectual functioning, PTSD, and major depression with psychotic features, and had unstable housing and income. (Wilson, R.; JV-14-59; April 25, 2018; Gladwin, R.)

Young v. Ark. Dep't of Human Servs., 2018, Ark. App. 270 [**Adjudication—findings against mother reversed but adjudication affirmed**] Mother of children adjudicated dependent-neglected appealed adjudication order that included specific findings that she physically abused the children. While a preponderance of the evidence did not support the court's findings of physical abuse by the mother, and there was evidence that the injuries could have been caused by the mother's boyfriend, the adjudication was affirmed because the children were found to be dependent-neglected and the child's status as dependent-neglected is the focus of an adjudication rather than who is at fault for the situation. (Hewett, M.; JV-17-665; April 25, 2018; Murphy, M.)

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

Bradley v. Ark. Dep't. of Human Servs., 2018 Ark. App. 233 (Jackson, S.; JV16-22; April 4, 2018; Glover, D.)

Allen v. State, 2018 Ark. App 244 [**Transfer to juvenile court denied**] The appellant, who was seventeen at the time of the transfer hearing, was charged with two counts of aggravated robbery and theft of property by threat of serious injury, after allegedly robbing the victims at gunpoint and stealing their cell phones and wallets. The circuit court found that Allen was specifically targeting Hispanic males as victims due to their reluctance to call law enforcement. After considering the ten statutory factors and hearing testimony from witnesses who supported transfer to juvenile court, the court denied the motion to transfer based primarily on the seriousness of the offense. Considering that Allen had three cases already pending in juvenile court, did not have a strong support system at home, had behavioral issues and was two years behind in school, the court was not convinced that the juvenile court had adequate resources to rehabilitate Allen prior to his twenty first birthday. Finding no clear error, the appellate court affirmed. (Wright, H.; CR-16-3487; April 11, 2018; Glover, D.)

Sharp v. State, 2018 Ark. 255 [**Transfer to juvenile court denied**] Appellant was fifteen when he and his friends broke into a home, tied up the victim with a shoelace, shot the victim, and robbed him. He filed a motion to transfer to juvenile court and for an EJJ designation. The trial court denied the motion and the appellate court affirmed, finding that the trial court had appropriately considered the statutory factors. The trial court placed great weight on the seriousness of the crime, and the appellate court found this emphasis proper, noting that the trial court has the discretion to decide the weight afforded to each factor. (Tabor, S.; CR-16-117; April 18, 2018; Gladwin, R.)

Clinkscale v. State, 2018 Ark. 271 [**Transfer to juvenile court denied**] Evidence showed that appellant was affiliated with a gang when he participated in a drive-by shooting at a convenience store involving one victim who survived the shooting. After considering the ten statutory factors, the trial court did not find clear and convincing evidence that the case should be transferred to juvenile court, and the appellate court held that a trial court's transfer decision will not be reversed absent clear error and the evidence will not be reweighed on appeal. Because the trial court considered all ten factors and made written findings concerning each factor, the appellate court could not find clear error. (Wright, H.; CR-17-624; April 25, 2018; Brown, W.)