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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website:
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ANNOUNCEMENTS

On June 21st, the following per curiam orders were issued:

Adopt, effective September 1, 2018, amendments to Rules of Civil Procedure 7, 10, 11, and Admin. Order 2.

Adopt, effective January 1, 2019, amendments to Rule of Civil Procedure 4, summons form, Rule 12, and Admin. Order 18.

Adopt, effective immediately, amendments to various Sup. Ct. Rules dealing with filing of number of paper copies and the repeal of Rule 1-8.

Publish for comment, through September 1, 2018, recommendations of the Civil Practice Committee.

Publish for comment, through September 1, 2018, recommendations of the Criminal Practice Committee.

Publish for comment, through September 1, 2018, recommendation of the Automation Committee to amend Admin. Order 8.

Publish for comment, through September 1, 2018, recommendation of the Automation Committee to amend Admin. Order 19.

Publish for comment, through September 1, 2018, recommendation of the Automation Committee to amend Admin. Order 21.

CRIMINAL

Longeway v. State, 2018 Ark. App. 356 **[interference with court-ordered custody]** Arkansas Code Annotated § 9-19-303 governs civil-enforcement actions and does not control criminal prosecutions for interference with court-ordered custody pursuant to Ark. Code Ann. § 5-26-502. (Wright, H.; CR-17-870; 6-6-18; Vaught, L.)

Williams v. State, 2018 Ark. App. 349 **[sufficiency of the evidence; residential burglary]** To establish that appellant committed the offense of residential burglary, the State had to prove that he unlawfully entered the victim's residence with the intent to commit theft of property. The circuit court erred when it found appellant guilty of residential burglary based on an intent to commit some other offense punishable by imprisonment. (Johnson, L.; CR-17-446; 6-6-18; Harrison, B.)

Rogers v. State, 2018 Ark. 242 **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant's conviction. **[Ark. R. Evid. 609]** Appellant sought to impeach the victim with her prior misdemeanor-theft conviction. Because the Supreme Court has held that theft crimes involve dishonesty and are automatically admissible pursuant to Rule 609(a), it was unnecessary for appellant to proffer the factual circumstances underlying the victim's conviction. Accordingly, the circuit court abused its discretion by refusing to admit this evidence under Rule 609(a). However, because the evidence of appellant's guilt was overwhelming and the trial court's error was only slight, the Supreme Court concluded that the error was harmless. (Wright, H.; CR-17-916; 7-12-18; Wood, R.)

CIVIL

Agility Financial Credit Union v. Largent, 2018 Ark. App. 358 **[foreign judgment/Rule 44]** The trial judge found that the registration of the foreign judgment was null and void for failing to comply with Arkansas Rule of Civil Procedure 44, and that any liens on Largent's property

stemming from that registration were also null and void. On appeal, Agility argues that the circuit court erred in finding that Arkansas Rule of Civil Procedure 44 controlled and Agility's judgment was not properly registered. Rule 44 is the exclusive mechanism for authenticating foreign judgments. (Piazza, C.; CV-17-416; 6-6-18; Hixson, K.)

Blackwood's Island v. Stodola, 2018 Ark. App. 357 **[limitations]** The appellants presented no proof that they had occupied the island property for any purpose. The City and the County presented evidence of the City's possession of the island that was consistent with ownership of the property. Since at least 1999, the City had constructed public trails, walls, and signage and continuously maintained the property. Of particular importance is the communication between appellant Wilkins and the City in December 2003 in which the City in no uncertain terms claimed exclusive ownership of the island property. This letter put the appellant on actual notice that the City was claiming ownership of the island property. Thus, the seven-year statute of limitations began to run, at the latest, in December 2003, and would have expired in December 2010. (Piazza, C.; CV-17-416; 6-6-18; Hixson, K.)

Lawson v. Simmons Sporting Goods, 2018 Ark. App. 343 **[personal jurisdiction]** Arkansas does not have specific jurisdiction over Simmons in light of the Supreme Court's decision in *Bristol-Myers*. Even though the facts of *Bristol-Myers* are distinct from the facts here, the Supreme Court's rationale in rejecting California's sliding-scale test in *Bristol-Myers* implicates our application of the Eighth Circuit five-factor test in *Lawson I*. In *Lawson I*, there was little affiliation between the forum and the underlying controversy. However, based on the other factors from the Eighth Circuit five-factor test—the nature and quality of Simmons's contacts with Arkansas, the quantity of such contacts, the interest of Arkansas in providing a forum for its residents, and the convenience of the parties— the court concluded that specific jurisdiction existed. That analysis of specific jurisdiction is improper under *Bristol-Myers. Bristol-Myers* prevents a court from exercising specific jurisdiction when there is no connection between the cause of action and the forum. In other words, this court cannot use the other factors to create specific jurisdiction. Accordingly, because there was no affiliation between Arkansas and the underlying controversy in *Lawson I*, and because *Bristol-Myers* requires such an affiliation for specific jurisdiction to exist, the circuit court properly dismissed the complaint for lack of personal jurisdiction. (Glover, D.; CV-16-83; 6-6-18; Abramson, R.)

Law v. Wal-Mart Stores, Inc., 2018 Ark. App. 352 **[proper party]** Law filed her complaint and had 120 days from that date to achieve the proper notice on Wal-Mart Stores Arkansas, LLC. Although the statute of limitations had expired by the time Wal-Mart Stores, Inc., filed its answer, asserting that it was not the correct party, there was still time to achieve the proper notice on Wal-Mart Stores Arkansas, LLC, in the event that such notice had not already occurred. Law contends in her reply brief that an attempt at amending a complaint is not guaranteed to be successful, but she fails to offer any reason for not making such an attempt or to

identify any obstacles to a successful amendment here. As Law notes, both entities had the same registered agent for service of process, whom she had successfully served with the original complaint shortly after its filing. In allowing the relation-back in *Bell,* the plaintiff's mistake in naming the defendant in the original complaint was understandable. Law's mistake may also have been understandable given the fictitious-name registrations, although had both entities been discovered she could have named both as defendants. Nevertheless, her failure to act upon being informed of the proper defendant is not understandable. Wal-Mart Stores, Inc., did nothing to enhance a belief by Law that she had sued the proper party; instead, it informed Law of the proper party in its first pleading. Under these circumstances Wal-Mart Stores, Inc., did not take advantage of any confusion created by the similar fictitious names. (Duncan, X.; CV-17-802; 6-6-18; Klappenbach, M.)

R.W. Distributors, Inc. v. Texarkana Tractor Co., 2018 Ark. App. 345 **[default judgment]** Defendant sought to set aside a default judgment by attacking the pleadings on which judgment had been entered. Texarkana Tractor asserted that it obtained a number of mowers from R.W. for sale in its facilities, it had not sold the items and had demanded the Defendant take the items back pursuant to A.C.A. § 4-72-304, and that R.W. had refused to repurchase the goods. In liberally construing these pleadings, these are sufficient allegations that Texarkana Tractor had contracted with R.W. to provide goods for sale in its stores and that Texarkana Tractor terminated the contract when it demanded that R.W. "take the items back." R.W. also argues that Texarkana Tractor's complaint fails to state a claim because it did not allege that the inventory was new, unsold, undamaged, and complete. Texarkana Tractor alleged that R.W. had provided the equipment within the past 24 months and that it had not sold the items. These are sufficient allegations that the inventory was new, unsold, undamaged, and complete. The circuit court did not err in denying R.W.'s motion to set aside the default judgment to Texarkana Tractor. (Pierce, M.; CV-17-1072; 6-6-18; Abramson, R.)

Harris v. Parrish, 2018 Ark. App. 348 **[qualified immunity/summary judgment]** The record indicates that Parrish had set out to investigate an altercation occurring on property that he owns, and a material question of fact remains as to whether he posed a threat to law enforcement officers at any time and whether Harris's use of force upon Parrish was objectively unreasonable and a violation of Parrish's constitutional rights. Simply because Parrish may have been fortunate that the physical damage was less than it could have been does not render Parrish's damaged ear, painful legs, injured wrist, and possibly resulting stroke de minimis. Whether injuries are de minimis is not the appropriate standard for evaluating excessive force under the Fourth Amendment. De minimis injury does not foreclose a claim of excessive force under the Fourth Amendment. Because there remains a material question of fact as to whether the force used by Harris was objectively reasonable under the circumstances, summary judgment was properly denied. (Rogers, R.; CV-17-556; 6-6-18; Gladwin)

W.N. v. D. H. S., 2018 Ark. App. 346 **[child maltreatment registry/appeal]** The evidence was sufficient to support the ALJ's finding of neglect by inadequate supervision. Arkansas Code Ann. § 12-18-103 provides that the agency was required to prove that TN's caretaker failed to appropriately supervise TN, and that WN's act or omission resulted in the child being left alone at an inappropriate age creating a dangerous situation or a situation that put the child at risk of harm; or that the child was left in inappropriate circumstances creating a dangerous situation or a situation that put the child at risk of harm. The relevant evidence is as follows. WN was responsible for taking TN to daycare the morning of July 24, 2015. WN strapped the child in the car seat, and at some point, in his journey WN lost awareness of TN's presence in the car and failed to remove TN from his car seat. It was a hot day, with temperatures reaching the nineties. The ALJ concluded that "[t]his act or omission placed TN in inappropriate circumstances creating a dangerous situation and in a situation, that put TN at a risk of harm." Giving the undisputed evidence presented by the parties its most probative force, the agency's decision is supported by substantial evidence. (Griffen, W.; CV-17-717; 6-6-18; Virden, B.)

Dept. Finance and Administrations v. Naturalis Health, LLC, 2018 Ark. 224 **[medical marijuana licenses]** The circuit court lacked subject-matter jurisdiction. Because the circuit court lacked jurisdiction over this matter, this appeal is reversed and dismissed. (Griffen, W.; CV-18-356; 6-21-18; Wood, R.)

Dept. Veteran Affairs v. Mallett, 2018 Ark. 217 **[sovereign immunity]** In *Andrews*, the supreme court held that the legislature may "never" authorize the state to be sued, and it was in the application of the constitutional provision to a statutory act for monetary relief. Since *Andrews*, the court has not had the occasion to consider other actions against the state, such as allegations that state actors are acting outside their constitutional duties, whether acting in a manner that is ultra vires, arbitrary, capricious, in bad faith, or refusing to perform ministerial duties. (Griffen, W.; CV-17-1020; 6-21-18; Wood, R.)

JUVENILE

Bales v. Ark. Dep't. of Human Servs., 2018, Ark. App. 351 **[Adjudication-sufficiency of the evidence; reasonable efforts]** Evidence was sufficient for determination that children were dependent-neglected where infant was not gaining adequate weight in mother's custody, the environmental conditions of the home were unsuitable, including chickens living in the bathroom. Additionally, at adjudication, where DHS shows that removal of a child was in the child's best interest and necessary to the protection of the health and safety of the child, it is not required to prove reasonable efforts. (Sullivan, T.; JV-17-27; June 6, 2018; Harrison, B.)

Brown v. Ark. Dep't. of Human Servs., 2018, Ark. App. 354 **[Award of permanent custody to noncustodial parent in DN proceeding]** Mother appealed after trial court resolved DN case by awarding permanent custody of child to father. Children were removed from mother after an

incident where the mother's husband, the children's stepfather, threatened to kill himself with a handgun, forced the children into a closet, and was discovered to have a drug problem. In contrast, the children's father was found to be fit and appropriate and the trial court found it in the children's best interest to be in his custody. The appellate court affirmed, finding that the trial court correctly applied the best interest standard. (Arnold, G.; JV-17-22; June 6, 2018; Glover, D.)

Scott v. Ark. Dep't. of Human Servs., 2018, Ark. App. 347 **[TPR—sufficiency of the evidence]** Although appellant father had completed most of the services ordered, the trial court's determination that the father was not a stable, safe parent and that no further services would result in a successful reunification was not clearly erroneous. The father's lack of progress in counseling and continued relationship with his ex-wife with whom he had a history of domestic violence were a likely predictor of potential harm when considering whether the child could be returned to the father. Termination on the grounds of aggravated circumstances was affirmed. (Sullivan, T.; JV-16-14; June 6, 2018; Virden, B.)

Thomas v. Ark. Dep't. of Human Servs., 2018, Ark. App. 355 **[TPR—sufficiency of the evidence]** Termination was proper where children were removed due to inadequate food and clothing, inadequate bathing, and exposure to marijuana and the mother failed to remedy the circumstances. Although she complied with parts of the case plan, the mother continued to demonstrate poor decision-making by failing to take her son to counseling and failing to insure that he had his medication. The appellate court declined to consider the mother's argument that the Americans with Disabilities Act may apply to her because she may have a disability and that DHS should have tested her for a disability because the mother did not raise this argument at the trial court level. Termination was affirmed. (James, P.; JV-15-1264; June 6, 2018; Whiteaker, P.)

Bentley v. Ark. Dep't. of Human Servs., 2018, Ark. App. 374 **[TPR—sufficiency of the evidence]** Two-month old removed from mother with symptoms of shaken-baby syndrome and bone fractures. The mother's boyfriend was ultimately charged with second-degree assault. By the time of the TPR hearing, DHS had worked with the mother for two years but the mother had made little progress. The court found that the mother did not meaningfully participate in services or benefit from them. After testimony revealed numerous incidences of the mother lying to various people, including the drug-and-alcohol examiner, the psychological examiner, her doctors, other providers, and the DHS caseworker, the court found that the mother lacked all credibility and was one of the most dishonest witnesses the court had experienced. Giving deference to the trial court's findings pertaining to credibility and finding no clear error, the appellate court affirmed the termination order. (Zuerker, L.; JV-14-513; June 20, 2018; Vaught, L.)

Bryant v. Ark. Dep't. of Human Servs., 2018, Ark. App. 375 **[TPR—sufficiency of the evidence]** Termination of father's rights based on the ground of aggravated circumstances was affirmed after it was shown that the father allowed the child to have continued contact with the "toxic" biological mother whose rights had previously been terminated and a no-contact order had been entered. The court's lengthy written findings demonstrated concerns with the father's credibility and ability to parent the child. Declining to reweigh the evidence as requested by the appellant, the appellate court affirmed. (Branton, W.; JV-15-755; June 20, 2018; Hixson, K.)

McHenry v. Ark. Dep't. of Human Servs., 2018, Ark. App. 368 **[TPR—sufficiency of the evidence]** Termination on the ground of aggravated circumstances was affirmed where the court found it unlikely that continued services would result in a successful reunification. The court noted that the decision was difficult, given that the mother had made progress. However, the court noted that the case had been open over twenty months, and the juvenile code is child-centered, requiring a parent to resolve his or her issues timely enough to prevent termination. The appellate court could not find the trial court's findings clearly erroneous, and so the termination was affirmed. (Keaton, E.; JV-16-193; June 20, 2018; Harrison, B.)

Ward v. Ark. Dep't. of Human Servs., 2018. Ark App. 376 **[Adjudication—parental unfitness]** While the focus of an adjudication hearing is the child and whether the child is dependent-neglected, one basis for finding a child dependent-neglected is parental unfitness. Here, the mother had a history of mental health issues and substance abuse and told investigators that she had died recently while traveling to Arkansas from another state, that she could not remember whether she attempted suicide in 2016, and that she had allowed her husband, a drug user, to inject her with an unknown substance. The court also considered certified orders from the state of Ohio which reflected the removal of the mother's older children for similar reasons. On this evidence, the appellate court found no clear error in finding the mother unfit. (Halsey, B.; JV-17-211; June 20, 2018; Murphy, M.)

U. S. SUPREME COURT

Currier v. Virginia **[double jeopardy/severance]** Petitioner Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. Because the prosecution could introduce evidence of Mr. Currier's prior burglary and larceny convictions to prove the felon-in-possession charge, and worried that evidence might prejudice the jury's consideration of the other charges, Currier and the government agreed to a severance and asked the court to try the burglary and larceny charges first, followed by a second trial on the felon-in-possession charge. At the first trial, Mr. Currier was acquitted. He then sought to stop the second trial, arguing that it would amount to double jeopardy. Alternatively, he asked the court to prohibit the state from relitigating at the second trial any issue resolved in his favor at the first. The trial court denied his requests and allowed the second trial to proceed unfettered. The jury convicted him on the felon-in-possession charge. The Virginia Court of Appeals rejected his double jeopardy arguments, and the Virginia Supreme Court summarily affirmed.

Held: The judgment is affirmed. (No. 16–1348; June 22, 2018)

Carpenter v. United States **[search/cell sites]** Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called "cell sites." Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery

suspects, prosecutors were granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

> *Held*: The Government's acquisition of Carpenter's cell-site records without arrant was a Fourth Amendment violation.

This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security.

The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. §2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under §2703(d) is not a permissible mechanism for accessing historical cell-site records. Not all orders compelling the production of documents will require a showing of probable cause. A warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e.g.*, exigent circumstances—may support a warrantless search. (No. 16–402; June 22, 2018)