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CRIMINAL

McClendon v. State, 2019 Ark. 88 **[mistrial]** During appellant's trial, he requested a mistrial based upon a witness mentioning that appellant was previously incarcerated, testimony which was in violation of a motion in limine. The circuit court denied the request for a mistrial and gave an admonition to the jury. On review, the Supreme Court concluded that the State had not elicited the improper testimony but rather that it was an inadvertent remark and that any prejudice suffered by appellant was cured by the trial court's admonition. Thus, the trial court did not abuse its discretion when it denied appellant's request for a mistrial. (Haltom, B.; CR-18-329; 4-4-19; Wood, R.)

Berkley v. State, 2019 Ark. App. 206 **[speedy trial]** Appellant, who was not brought to trial until 1337 days after his arrest, established a prima facie violation of his right to a speedy trial. Thus, the burden shifted to the State to establish that any delay exceeding the twelve-month period was the result of the defendant's conduct or other good cause. A review of the record established that 972 days were properly excluded from the speedy-trial calculation based upon: (1) a request by appellant to continue his trial until he resolved criminal charges pending in another state; (2) appellant's incarceration in another state; (3) appellant being "unavailable" for trial; and (4) the filing of appellant's speedy-trial motion and the hearing thereon. Accordingly, the trial court

correctly denied appellant's motion to dismiss based upon a speedy-trial violation. (Webb, G.; CR-18-373; 4-10-19; Gladwin, R.)

Guthrie v. State, 2019 Ark. App. 203 **[Rule 37]** Appellant asserted that his attorney was ineffective because he did not question or strike a venireperson who appellant claimed: (1) had a relative that had brought criminal charges against appellant; and (2) had another relative that had been married to appellant's cousin. At the hearing on the post-conviction petition, the juror testified that he was estranged from his family and was unaware of any potential conflict that would have prevented him from serving on appellant's jury. Appellant's attorney also testified that appellant did not advise him that there was a conflict until after the jury was selected. He further testified that he gave appellant the "final call" on which jurors would be on his jury. To prevail on an allegation of ineffective assistance of counsel with regard to jury selection, a petitioner first has the heavy burden of overcoming the presumption that jurors are unbiased. To accomplish this, a petitioner must demonstrate actual bias, and the actual bias must have been sufficient to prejudice the petitioner to the degree that he was denied a fair trial. Bare allegations of prejudice by counsel's conduct during voir dire that are unsupported by any showing of actual prejudice do not establish ineffective assistance of counsel. Additionally, even when a prospective juror is related to a party in the pending case, the prospective juror can still serve by consent of the parties. Under no circumstance are parties compelled by law to exclude certain jurors because of their status. On appeal from the denial of appellant's petition, the Court of Appeals concluded that appellant failed to establish actual bias by the juror. The appellate court further held that appellant did not show that his trial counsel performance was deficient such that it fell below an objective standard of reasonableness. Thus, the trial court did not err in denying appellant's Rule 37 petition. (Fogleman, J.; CR-18-812; 4-10-19; Virden, B)

Claggett v. State, 2019 Ark. App. 208 **[sufficiency of the evidence; second-degree murder]** Appellant asserts that there was insufficient evidence to establish that his conduct was the cause of the victim's death. Specifically, appellant acknowledged that the victim died from injuries sustained in his home. However, appellant suggested that it was possible that the victim suffered his injury when, after being struck by appellant, he hit the bed, got up, and fell over. Appellant also noted that it was possible that the care by the doctors at the hospital could have caused, or at least contributed to, the victim's death. He further noted that the medical examiner testified that he did not know whether the victim's death would have occurred without the complications from the surgeries. Based upon the foregoing facts, appellant argued that the jury had to rely on conjecture and speculation as to whether appellant's actions were the cause of the death. On review, the Court of Appeals explained that when there are concurrent causes of death, conduct that hastens or contributes to a person's death is a cause of death. The Court further explained that while the concurrent causes—the surgical complications, ensuing epidural hematoma, and pneumonia—may have contributed to the victim's death, appellant's conduct in beating and kicking the victim in the head, thereby causing the initial subdural hematoma, was the cause of his death. The medical examiner unambiguously testified that the victim would not have required surgery if he had not had significant trauma to his head and that he died as a result of the traumatic head injury. That trauma was caused by appellant's actions. The victim's death would

not have occurred but for the conduct of the appellant operating either alone or concurrently with another cause. Thus, the appellate court concluded that substantial evidence existed to support appellant's conviction and the trial court did not err in denying the directed-verdict motion. (Dennis, J.; CR-18-964; 4-10-19; Whiteaker, P.)

McCarley v. State, 2019 Ark. App. 222 **[sufficiency of the evidence; simultaneous possession of drugs and firearms]** Appellant was convicted of simultaneous possession of drugs and firearms. To convict one of possessing contraband, the State must show that the defendant exercised control or dominion over it. Neither exclusive nor actual physical possession, is necessary to sustain a charge of possessing contraband; rather, constructive possession is sufficient. Constructive possession may be implied when the contraband is in the joint control of the accused and another; however, joint occupancy alone is insufficient to establish possession or joint possession. The State must establish in a prosecution for possessing contraband: (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband. The control and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. In appellant's case, appellant was found in the living room, and the firearms were found in the bedroom, under a bed, within arm's reach of a different individual. There were no additional factors present that allowed an inference that appellant had control or knowledge of the firearms. The guns were not found in a common area of the home; thus, they were not found in appellant's proximity nor in plain view. There was no evidence that the bedroom in which the guns were found belonged to appellant. Accordingly, the State failed to prove that appellant constructively possessed the firearms because it did not show that the guns were in appellant's care, control, or management and the trial court erred when it failed to direct a verdict on the charge. (Johnson, K.; CR-18-868; 4-17-19; Gladwin, R.)

Henderson v. State, 2019 Ark. App. 220 **[juries]** Although the three jury panels that appeared for appellant's trial consisted of all white venirepersons, appellant failed to establish a systematic exclusion of African American jurors. The jury venire was drawn by random selection from a computer. The computer randomly selects the names of potential jurors based upon driver's license, Arkansas-ID records, and voter registration records. Additionally, the jury manager explained that race is not indicated on the juror questionnaires and the races of potential jurors are unknown and not a consideration when forming the jury panels. Appellant failed to provide any evidence of a prima facie case of racial discrimination, and the circuit court did not abuse its discretion by the denying appellant's motion to strike the jury panels. (Hearnsberger, M.; CR-18-775; 4-17-19; Virden, B.)

Lowe v. State, 2019 Ark. App. 231 **[witness disclosure]** Appellant sought to introduce the testimony of a witness that was not previously disclosed on a witness list to the State. He asserted that he did not have to disclose the witness because the witness was offering rebuttal testimony. Genuine rebuttal witnesses need not be disclosed because neither the State nor the defense would necessarily know in advance of the need for such testimony. The circuit court

concluded, and the appellate court affirmed, that the witness was not a proper rebuttal witness because appellant, who knew the nature of the witness's testimony, would not have been surprised by the testimony and should have been prepared to present the witness's testimony. Because the witness was not a rebuttal witness, his identity should have been disclosed to the State. Thus, the trial court did not abuse its discretion when it imposed a discovery-violation sanction and excluded the witness. (Wright, H.; CR-18-657; 4-17-19; Murphy, M.)

Torres v. State, 2019 Ark. 101 **[extraterritorial jurisdiction]** Appellant was convicted of capital murder. He was charged with capital murder under two alternative theories, rape-felony-murder and child-abuse murder. The rape that formed the basis for the felony-murder theory did not occur in Arkansas. Arkansas Code Annotated § 5-1-104 outlines the applicable law for extraterritorial jurisdiction. For purposes of appellant's case, for the statute to apply, the State would have had to establish that either: (1) the rape occurred in Arkansas; or (2) a result that is an element of the rape occurred in Arkansas. The "result" of the rape in appellant's case was the death of the victim, which occurred in Arkansas. However, death is not an element of the offense of rape. Thus, the State failed to establish that the extraterritorial jurisdiction applied, and Arkansas did not have jurisdiction over the conduct alleged to have been rape. Accordingly, there was insufficient evidence to support the rape-felony-murder conviction. Additionally, the error associated with the rape-felony-murder conviction tainted the entire verdict because the jury completed a general verdict form and the appellate court was unable to determine which theory of murder the jury based appellant's conviction upon. (Karren, B.; CR-17-89; 4-18-19; Baker, K.)

King v. State, 2019 Ark. 114 **[admission of evidence]** Appellant sought to exclude a recorded phone conversation from admission at trial. He argued that the call was recorded in violation of Ark. Code Ann. § 5-60-120, which prohibits a person from intercepting and recording telephone conversations between two parties unless that person is a party to the communication, or one of the parties has given prior consent to such interception and recording. The trial court denied appellant's request and the Supreme Court concluded that the trial court did not abuse its discretion. The Court explained that while the statute makes the recording of the conversations unlawful, it does not proscribe the admissibility of an unlawful recording. **[hearsay]** Appellant requested that the trial court exclude a statement made by the deceased victim. Appellant asserted that the statement was hearsay and violated the Confrontation Clause. In the challenged statement, the victim said that she intended to spend the weekend that she was murdered with appellant. On review from the trial court's admission of the statement, the Supreme Court held that testimony about what someone plans to do in the future is not hearsay pursuant to Ark. R. Evid. 803(3). Thus, the trial court did not abuse its discretion when it admitted the statement. (Wright, H.; CR-18-366; 4-18-19; Wood, R.)

Thornton v. State, 2019 Ark. 124 **[illegal sentence]** Appellant was convicted of capital murder, felon in possession of a firearm, unauthorized use of a vehicle, and abuse of a corpse. In his only point on appeal, appellant argued that the circuit court erred in denying his motion for directed verdict on the capital-murder charge. The Supreme Court agreed, and the Court reversed and

dismissed "the conviction." Thereafter, the State filed a "motion for the circuit court to consider the lesser included offenses" of capital murder. The circuit court granted the motion and appellant was convicted of first-degree murder. The trial court determined that the convictions for felon in possession of a firearm, unauthorized use of a vehicle, and abuse of a corpse had not been affected by the Supreme Court's decision and those were included on the amended sentencing order following the new trial. Appellant appealed the first-degree murder conviction. The Supreme Court concluded that the circuit court did not have jurisdiction to consider the State's motion and again reversed and dismissed appellant's conviction. Following the second appeal, appellant filed a petition to correct an illegal sentence in the circuit court. He argued that when the Supreme Court "reversed and dismissed his conviction" in his first appeal, that reversed and dismissed all of his convictions including the convictions for felon in possession of a firearm and abuse of a corpse. The circuit court disagreed and dismissed appellant's petition. On review from the dismissal of the petition, the Supreme Court noted that an appellate-court mandate should be construed in accordance with both its letter and spirit. The reader should take into account the appellate court's opinion and the circumstances it embraces. After reviewing its previous opinion and mandate in appellant's case, the Court concluded that the appeal related only to the sufficiency of the evidence to support the capital-murder conviction and if the Court had meant to reverse the other convictions the Court would have used the word "convictions" rather than "conviction" or it would have revered the entire "judgment." Consequently, the circuit court did not clearly err in dismissing appellant's petition to correct an illegal sentence. (Guynn, A.; CR-18-40; 4-25-19; Kemp, J.)

CIVIL

Gibbons v. Anderson, 2019 Ark. App. 193 **[arbitration/trust]** Relying on the arbitration clauses in the Trust, the appellants contend that the trial court was required to compel arbitration because there was a valid agreement and the scope of the arbitration clause encompassed the dispute. Among the states that have addressed the issue, the common theme is that while a trust agreement may contain an arbitration provision, the arbitration provision cannot compel arbitration to determine the validity of the trust itself. In the present case, the appellee beneficiaries seek to set aside the Amendment to the Trust on grounds that the Amendment was procured through undue influence while the grantor was under the influence of heavy narcotics or otherwise incompetent. This is a challenge to the validity of the Amendment. Because the appellees are challenging the validity of the Amendment itself, this is a determination for a court and not one for arbitration. Accordingly, the trial court's order denying the appellants' motion to compel arbitration is affirmed. (Cottrell, G.; CV-18-367; 4-3-19; Hixson, K.)

Arman v. CHI St. Vincent, 2019 Ark. App. 187 **[estate/wrongful death/plaintiff]** Survival claims must be filed by the personal representative of the estate or a special administrator because the claim belongs to the decedent's estate and no one else. See Ark. Code Ann. § 16-62-101(a). On the alleged wrongful-death claim, only the statutory beneficiaries may receive

damages. And if every beneficiary does not join the complaint then the beneficiary class must be represented by a duly appointed representative. Steve was the duly appointed representative for the wrongful-death statutory beneficiaries and was the proper party plaintiff in the tort case. (Williams, L.; CV-18-450; 4-3-19; Harrison, B.)

Fudge v. Parks, 2019 Ark. App. 191 **[partnership]** The trial court essentially determined that because Fudge had failed to prove fraud, the dissolution agreement controlled. The parties in this case entered into a dissolution agreement, resolving all claims the parties may have to the partnership and each other. In fact, the parties agreed that the dissolution agreement constituted a "full and complete settlement of all issues, rights, claims or demands that each has against the other concerning the partnership known as 2 Bar P Farms." The dissolution agreement further stated that upon the signing of the agreement, the partnership known as 2 Bar P Farms would fully and completely be dissolved with no assets remaining and that each party would completely release each other from "any claim, demand or liability derived from the operation of 2 Bar P Farms." The court determined that the dissolution agreement, absent more, controlled. Fudge simply failed in her burden of proving fraud, improper dealing, or breach of fiduciary duty. (Webb, G.; CV-18-808; 4-3-19; Whiteaker, P.)

Peck v. Peck, 2019 Ark. App. 190 **[trust/limitations]** While these claims nominally sound in tort, they were predominately assertions of a breach of trust. Peck's allegations clearly involve claims that Finley breached her duties as trustee in her administration of the trusts. Thus, Peck alleged in each count a "violation by a trustee of a duty the trustee owed to a trust beneficiary." Ark. Code Ann. § 28-73-1001(a). The existence of a cause of action outside the trust context does not allow that action to supersede the trust action. Because Peck has alleged various breaches of trust under the Arkansas Trust Code (ATC), the ATC's limitations period, rather than the more general three-year tort limitations period, controls. The ATC provides two separate time periods within which a beneficiary may commence a proceeding for breach of trust against a trustee: a one-year period listed in subsection (a) and a five-year period listed in subsection (c) that applies only if subsection (a) does not apply. Here, only the one-year period in subsection (a) is of concern. Subsection (a) sets forth two requirements that a "report" must contain in order to trigger the running of the limitations period: (1) that the report adequately discloses the existence of a potential claim for breach and (2) informs the beneficiary of the one-year time limit for commencing an action. Under the plain language of subsection (1), the one-year period begins to run from "the date the beneficiary . . . was sent a report that adequately disclosed the existence of a potential claim for breach of trust[.]" Ark. Code Ann. § 28-73-1005(a). Thus, the one-year statute of limitations is triggered only by sending a report to the beneficiary or the beneficiary's representative that meets the statutory-disclosure requirements. The determination that the limitations period has run simply cannot be made without first determining that Finley sent a compliant report, including whether the report notifies the beneficiary of the time limits for filing a claim against the trustee. Whether a report meets the

statutory-disclosure requirements is a question of fact. Here, Peck argued below that the reports provided by Finley were inadequate and did not meet the disclosure requirements of section 28-73-1005 to trigger the statute of limitations. Finley disagreed. Therefore, a material question of fact existed concerning the adequacy of the reports. (Fox, T.; CV-18-102; 4-3-19; Whiteaker, P.)

McClendon v. Farm Bureau Ins., 2019 Ark. App. 216 **[insurance]** Appellant maintains that it was error for the court to conclude that the insurance policy taken out with Farm Bureau was casualty insurance. He further contends that even if it was casualty insurance, it was still error for the court to find that it was not also property insurance. Based on the broad statutory language concerning property insurance and the statute stating that an insurance policy can fall under two or more types of insurance, there remain genuine issues of material fact that need to be resolved. Thus, summary judgment was not appropriate in this case, and it is remanded for the trial court to resolve the question of whether this policy can be both casualty insurance and property insurance. (Morledge, C.; CV-18-751; 4-10-19; Brown, W.)

John v. Faitak, 2019 Ark. App. 215 **[judicial immunity]** The circuit court appointed appellee to perform a psychological examination of appellants and to conduct monthly mediation sessions with them, referring to appellee as a "counselor" in the order and the sessions were referred to as "counseling." Said counseling was agreed to by the parties. All interaction with appellee between any party and appellee was in his role as "counselor." These meet the four factors listed in *Chambers I* and therefore support the circuit court's determination that appellee was acting within the scope of his appointment. Contrary to appellant's wishes, as noted in *Chambers I*, judicial immunity is not waived simply because he may have not been a good therapist. (Threet, J.; CV-17-862; 4-10-19; Brown, W.)

Garrett v. Progressive Eldercare Services, 2019 Ark. App. 201 **[abatement]** The issue on appeal is whether the savings statute extends the limitations period for Garrett's lawsuit. Ms. White passed away while her lawsuit against appellees was pending; the case was nonsuited; and Garrett, as Ms. White's executor, filed a new lawsuit. Garrett contends that he was entitled to the benefit of Ms. White's nonsuit and that his subsequent refiling pursuant to the savings statute cured the "procedural defect" of his failure to revive the action within one year of Ms. White's death. The savings statute does not apply to the facts of this case. First, the premise of Garrett's argument is incorrect. He contends that the plaintiff, Ms. White, nonsuited her case. Ms. White, through her attorney-in-fact, did not nonsuit her case. Rather, she passed away while her case was still pending. At that point, her case abated. Garrett is correct that her case was, in fact, nonsuited, but not by her. This fact is critical to his case. That he happened to be serving as her attorney-in-fact in her lawsuit does not change the nature of that action. The action abated before a nonsuit was taken. When the plaintiff passes away while prosecuting the plaintiff's claims, the real party in interest must be substituted prior to the nonsuit in order to take advantage of the savings statute. (Arnold, G.; CV-18-744; 4-10-19; Gruber, R.)

Pulaski County School Dist. v. Delaney, 2019 Ark. App. 210 **[FOIA]** On appeal, PCSSD argues that the circuit court erred in finding that it was required to provide electronic copies of documents to Delaney because the requested records were not readily available or readily convertible to electronic form and because PCSSD is not required to create a record. The circuit court ruled that the AFOIA required PCSSD to provide Delaney electronic copies of the requested records by scanning them at no charge. Because the evidence is undisputed that the financial records were in an electronic format and there is no evidence that they were not readily convertible, the circuit court did not clearly err in requiring PCSSD to provide the financial records to Delaney in an electronic format. (Welch, C.; CV-18-800; 4-10-19; Vaught, L)

Reynolds Forestry v. Colbey, 2019 Ark. App. 209 **[contract]** The circuit court did not clearly err when it determined that Reynolds was the first to materially breach the contract by refusing to pay for the work that Colbey completed on the Nevada 440 tract. Although payment on the invoices was not yet due when Colbey decided to terminate the contract on September 10, 2014, "the anticipatory breach of a contract justifies the other party to treat the contract at an end and permits an action for a breach of the contract." The evidence at trial demonstrated that as early as August 22, 2014, Reynolds conditioned payment for Colbey's work on the Nevada 440 tract on the completion of the Nevada 411 tract, and the threats to withhold payment continued until after Colbey had ceased work on September 7, 2014. The circuit court also did not clearly err by determining that Colbey's violation of BMPs was not a material breach. According to the terms of the contract, Colbey's violation of BMPs, alone, did not excuse Reynolds from paying for Colbey's completed work. Indeed, the contract anticipates that it will continue even after such violations occur, entitling Reynolds to only "postpone operations [under the contract]" and providing that "the period of postponement shall be deemed an extension of the contract period." The contract also allows Colbey to cure any damage from "destructive practices," including, for purposes here, removing debris from "all weather creeks and streams." (Culpepper, D.; CV-18-11; 4-10-19; Vaught, L.)

Welch v. Faulkner, 2019 Ark. App. 207 **[exhumation]** The Welches, as Shannon's next of kin, are not prevented from disinterring her and burying her in the family plot, as the plain wording of the statute and regulations pertaining to disinterment allow the next of kin to make that decision. The Welches, as Shannon's next of kin, are in complete agreement—they want Shannon disinterred and reburied in a cemetery where their family can be buried together. Cynthia, Shannon's mother-in-law, has no say in Shannon's disinterment. Likewise, Shannon's stepson, Joshua, has no say in the matter; he is not Shannon's child, and he had not yet attained majority, a requirement of Arkansas Code Annotated section 20-17-102(d)(1). Pursuant to regulation, the circuit court's order shall also include a directive allowing the casket to be opened to remove Bobby's cremains. (Fitzhugh, M.; CV-18-730; 4-10-19; Gladwin, R.)

Davis Nursing Assoc. v. Neal, 2019 Ark. 91 **[charitable immunity]** In 2015, the court of appeals held that the circuit court erred in determining on summary judgment that DLCC was immune from suit. Specifically, the court of appeals identified facts that needed further development and concluded that reasonable persons could reach different conclusions based on the undisputed facts presented. On remand, the circuit court submitted the charitable-immunity question to the jury. The circuit court erred in doing so. The ultimate question of charitable immunity is a matter of law for the court to decide. The cases are reversed and remanded for the circuit court to hear evidence and determine whether DLCC is entitled to charitable immunity. If the existence of charitable immunity turns on disputed factual issues, then the jury may determine the facts, and the circuit court will subsequently determine whether those facts are sufficient to establish charitable immunity. (Dennis, J.; CV-18-814; 4-11-19; Kemp, J.)

KW-DW Properties, LLC v. Arkansas State Highway Commission, 2019 Ark. 95 **[condemnation]** After hearing all the instructions, the jury returned a verdict stating, "We, the jury, find and fix just compensation to be awarded to KW-DW Properties, LLC at $36,000." Although KW-DW argues that the verdict should be in addition to the amount deposited as an estimate, it is assumed that the jury followed the circuit court's instructions. The instructions clearly stated the amount awarded should be for damages to the "whole" property after the taking and specifically instructed the jury that it could consider damages to the remaining property. KW-DW did not object to the jury instructions or request any special interrogatories. (Hughes, T.; CV-18-47; 4-11-19; Goodson, C.)

Crum v. Siems, 2019 Ark. App. 232 **[boundary by acquiescence]** Here, the circuit court found that the evidence did not establish by a preponderance of the evidence that the parties, by their conduct, accepted a particular monument as visible evidence of the property line. As the circuit court noted, there were only three to four trees and they did not extend the length or even the vast majority of the property. The turn-row cannot make up for this shortcoming. While caselaw acknowledges that a boundary by acquiescence can be represented by a turn-row, the turn-row in this specific case does not qualify. The turn-row here is a very primitive, noncultivated strip of land. Based on the exhibits introduced at trial that included numerous photos of the disputed area, it is not clear that the turn-row runs the entire length of the two properties. The circuit court finding that the Crums' purported boundary line is incapable of being used as an accurate marker of a boundary is affirmed. **[adverse possession]** The Crums explain that they have utilized and maintained the property to the west of the line of trees and eastern edge of the turn-row (including the turn-row itself) for over four decades—since they purchased the land. They further assert that the Siemses never took issue with the Crums' use of the property. However, the Siemses did take issue with the Crums' use of the property based on Richard's testimony that after his dad passed away in 2004, he continually had to police the line. As the circuit court found, the evidence was conflicting as to whether the Crums' use of the turn-row was exclusive. There is no evidence that the Crums ever excluded the Siemses from the turn-row or gated it.

John said he gave the Siemses permission to use the turn-row, but there was no evidence he intended to oust the Siemses. In fact, the testimony established that John apparently asked permission of the Siemses to put a culvert in at the end of the turn-row to access the gravel road to the north, the Siemses denied permission, but the culvert appeared anyway. The court found the Siemses to be more credible. Giving due deference to the circuit court's superior position to make credibility determinations and weigh the evidence, the circuit court did not err in declining to find adverse possession. (Henry, D.; CV-18-863; 4-17-19; (Murphy, M.)

Anita, LLC v. Centennial Bank, 2019 Ark. App. 217 **[preliminary injunction/closing road access]** In the injunction order, the circuit court specifically found that in the absence of an injunction there would be irreparable harm because Anita G would be able to engage in uses of the disputed property which would realistically diminish or destroy the public's use of the roadway even if Centennial Bank ultimately prevailed in the suit. Such diminution or elimination of access could not be rectified by simply awarding monetary damages. There is ample evidence to support the circuit court's findings. Anita G planned to build a 40,000-square-foot shopping center on the property and that, had the lawsuit not been filed, it would have started construction. If construction had begun, it would be difficult—if not impossible—to afford relief to Centennial Bank because monetary damages would not suffice under these facts. The circuit court did not abuse its discretion in concluding that Centennial Bank demonstrated that irreparable harm will result in the absence of an injunction. Centennial Bank also demonstrated likelihood of success on the merits as to the issue of the nature of the use of the road. The testimony elicited at the preliminary-injunction hearing demonstrates long-term use of Dayton Avenue by many drivers who did not seek or receive permission to do so and that the CCFA acquiesced to that use. Notably, the evidence indicated that many more cars traveled Dayton Avenue than traveled the road in Gazaway. The circuit court did not clearly err in finding that Centennial Bank rebutted the presumption of permissive use of Dayton Avenue and demonstrated that the use of Dayton Avenue was open, notorious, and adverse. (Lusby, R.; CV-18-227; 4-17-19; (Gruber, R.)

Fisher v. Boling, 2019 Ark. App. 225 **[trust]** This case concerns the interest of the estate of Wanda Boling-Fisher in her grandfather's trust. In summary, Wanda and her brother Eric Boling had evenly divided an annual income distribution generated by the trust. The trust would not be terminated, and the assets distributed until certain contingencies had occurred; Wanda died before those contingencies occurred. Wanda had no children but was married, and her widower became the administrator of her estate. Eric asserted that the trust's terms dictated that Wanda's interest reverted to him (Eric) because he was the sole remaining child of their father and the intended beneficiary. Wanda's estate asserted that her interest had vested during her lifetime and became an asset of her estate. The Circuit Court entered an order in Eric's favor. The plain language of this trust evinces H.E.'s intent, and it is the settlor's intent to which courts are to give effect. Section 6 of this residuary trust makes clear that H.E. intended that after his son Charles died, his 75 percent interest was to be managed "for the benefit of the children or the

descendants of my son Charles." Wanda, who was specifically named as one of Charles's children in the trust, was a proper and intended recipient of the income generated by the trust from the time her father died and until she died. When Wanda died, there remained only one child or descendant of Charles, and that was Eric. Nowhere in the trust document does H.E. direct that any income or corpus be distributed to a beneficiary of the estate of a distributee, as Wanda's estate argues. It is abundantly clear that H.E.'s overriding intent was to establish an income stream to provide for the needs of direct descendants during their lifetimes and to ultimately distribute the assets to his then living direct descendants. Because Wanda died without leaving a descendant, her portion of the interest in the trust she was receiving transferred to Eric and will continue to be paid to Eric or his children until such time as Wilma dies, at which time the interest and corpus will be distributed to Eric or his living descendants or their heirs pursuant to the trust's terms. Consequently, the order of the circuit court granting summary judgment to Eric, which gave effect to H.E.'s intentions, is affirmed as modified. (Philhours, R.; CV-18-490; 4-17-19; (Klappenbach, M.)

Briney v. Bauer, 2019 Ark. App. 227 **[filing extensions]** The circuit court clearly discussed and determined that no Rule 6(b)(2) exception applied to the facts of this case. It is true the Brineys' attorney had computer problems on the day the answer to the counterclaim was due. However, this difficulty only explains why the answer was not filed within the allotted time. It does not explain why the motion to extend was not filed before the expiration of the allotted time. In fact, the only reason a motion to extend time was not filed before the answer was due was simply that Nixon did not think to file it. The court determined that this reason did not fall into one of the exceptions in Rule 6(b)(2). The motion for extension of time was made after the expiration of time for the Brineys' answer to be filed and the reason for delay in its filing did not fall within one of the exceptions in Rule 6(b)(2). The circuit court did not abuse its discretion in denying the Brineys' motion for extension of time because there was no mistake, inadvertence, surprise, excusable neglect, or other just cause for failure to file a timely answer; thus, it properly struck their answer, and the resulting default judgment was not an abuse of discretion. **[default judgment]** None of the reasons for setting aside a default judgment apply to the facts of this case, and it is not necessary to discuss whether the Brineys demonstrated a meritorious defense because the circuit court did not abuse its discretion in finding that none of the reasons set forth in Rule 55(c)(1) were applicable. (Threet, J.; CV-18-811; 4-17-19; (Whiteaker, P.)

Stephens Production Co. v. Mainer, 2019 Ark. 118**[class certification]** Stephens Production Company appeals from an order granting appellees' motion for class certification. Stephens contends that the trial court erred by granting the motion because the requirements of numerosity and superiority were not met. Here, the circuit court considered the number of potential claimants known at the time to exist and determined that joinder of all potential claimants would be impractical. This court has held that when the numerosity question is a close one, the balance should be struck in favor of a finding of numerosity in light of the trial court's option to later

decertify. Given the standard of review and the trial court's option to decertify at a later date, circuit court is affirmed on this point. A class action is the superior method of adjudicating this controversy. Proceeding as a class action is also fair to both sides, as each will be permitted to present evidence on the issue of whether appellant's cessation of royalty payments was permissible. The trial court did not abuse its discretion in determining that the superiority requirement is satisfied here. (Sutterfield, D.; CV-18-931; 4-18-19; Wynne, R.)

Walther v. Wilson, 2019 Ark. 105 **[attorney fees/illegal exaction]** Here, sovereign immunity is not applicable, and a substantial benefit has been conferred to the benefit of the taxpayers. Having determined that attorney's fees are permitted in this case, based on the record, the circuit court did not make any findings with respect to what a reasonable attorney's fee would be in this case and awarded the one-third in fees that Wilson had requested. Accordingly, the case is remanded to the circuit court for it to consider the *Chrisco* factors in determining whether the amount of fees requested by Wilson is reasonable under the circumstances. (Piazza, C.; CV 18-601; 4-18-19; Baker, K.)

DHS v. Ledgerwood, 2019 Ark. 121 **[contempt]** The agency did not violate the express terms of the circuit court's order; therefore, the contempt order was in error. The record reveals that DHS complied with subsection 204(c)'s requirements when adopting the emergency rule. It provided a written statement explaining its finding of imminent peril to the public health, safety, or welfare absent the emergency rule. To the extent the circuit court disagreed with the stated reasons for the emergency rule, that is not a basis for the contempt order. The statement provided an explanation for the finding and did not merely parrot the statutory language of imminent peril. And the legislature found that explanation meritorious, as it voted to approve the emergency rule and permitted DHS to file it with the Secretary of State. DHS thus "properly promulgated" the emergency rule under the statutorily prescribed process. To be sure, the permanent injunction was issued because of the circuit court's finding that DHS had failed to substantially comply with the APA's notice and public comment requirements. But the express terms of the permanent injunction order did not preclude the adoption of an emergency rule utilizing the RUGs methodology. It simply required that any such rule be "properly promulgated." DHS did just that when adopting the emergency rule. (Griffen, W.; CV-18-617; 4-18-19; Womack, S.)

DOMESTIC RELATIONS

Williams v. Williams, 2019 Ark. App. 186 **[best interest considerations in custody case]** The appellate court found no error in the circuit court's best interest considerations and no error in the award of joint custody in the parties' divorce action. The circuit court did not err in considering Appellant's move as a factor in its custody decision nor did the circuit court err in considering the possibility that Appellant might relocate out-of-state. Furthermore, an attorney ad litem's

recommendation and the child's stated preference on custody is not binding on the circuit court. Lastly, although Appellant alleged that joint custody was inappropriate because of the lack of cooperation and communication between the parties, the circuit court specifically found that the parties had a history of working together to solve scheduling conflicts and make mutual decisions. (Jackson, C.; CV-18-491; 4-3-19; Gladwin, R.)

Carrillo v. Ibarra, 2019 Ark. App. 189 **[joint custody requires mutual ability of parties to cooperate]** The appellate court found no error in the circuit court awarding Appellee sole custody. While there is a statutory preference for joint custody, this preference does not override the ultimate guiding principle, which is to set custody that comports with the best interest of the child. The circuit court expressly stated that it considered but rejected joint custody because the parties could not communicate and cooperate. Arkansas law remains that 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 the circuit court gave great weight to its finding that the level of cooperation and communication that is required for joint custody was lacking here. (Jamison, L.; CV-18-459; 4-3-19; Klappenbach, N.)

Cox v. Cox, 2019 Ark. App. 197 **[relocation using *Hollandsworth* presumption]** The appellate court found that the circuit court erred in denying the custodial parent's request to relocate and by placing the burden on Appellant to prove that her relocation was "advantageous" or "better". The *Hollandsworth* presumption in favor of relocation is automatic, and it was not Appellant's burden to prove that the move was beneficial. Appellant did not have the burden to show that the schools were better or that she will make more money by relocating; case law does not require that a custodial parent have concrete plans instead of "speculative" ones when relocating. Appellant filed a motion to relocate, and she was afforded the presumption in favor of relocation. Nothing more is required of Appellant. Appellee, as the noncustodial parent, had the burden to provide evidence to rebut the presumption. Applying the *Hollandsworth* factors to the evidence presented at the hearing, Appellee failed to rebut the presumption in favor of relocation, as he offered no evidence that the move was against the children's best interest. (Beaumont, C.; CV-18-430; 4-3-19; Brown, W.)

Reynolds v. Reynolds, 2019 Ark. App. 211 **[failed to meet burden of material change; evidentiary ruling resulted in no prejudice]** The appellate court found no error in the circuit court denying Appellant's petition for a change of custody based on the finding that Appellant failed in his burden to prove a material change of circumstances affecting the child's best interest. The circuit court specifically found that this is not a parental-alienation case, and the record supports this conclusion. The appellate court also found no error in the circuit court's refusal to admit certain Facebook conversations into evidence. Appellant was allowed to question the person who sent the Facebook comments, and the circuit court indicated that her testimony in this regard was not instrumental to its decision in this case; therefore, the Facebook

conversation would have been largely cumulative to what was already before the court. Appellant failed to show that the circuit court's evidentiary rulings resulted in any prejudice, and the appellate court will not reverse an evidentiary ruling absent a showing of prejudice. (Wright, J.; CV-17-844; 4-10-20; Hixson, K.)

Grimsley v. Drewyor, 2019 Ark. App. 218 [**joint custody award upheld; alimony not appropriate simply based on disparity of income; law firm partnership interest is marital property; distribution of debt; lump-sum child support not appropriate because inheritance was not liquidated and was unreasonable amount**] The appellate court found no error in the circuit court's finding that it was in the best interest of the children to award joint custody. There was evidence that the parties had raised the children as a team and that the children were excelling. Although Appellant argued that the parties were hostile with no trust between them, most joint-custody situations involve some amount of disagreement. The appellate court found that there was error in the award of permanent alimony in the amount of $3,787 based on the facts of the case. The parties have equal earning capacities, and both work full-time as attorneys. Neither party stayed home to raise the children, and they will share joint custody with equal physical custody. The law does not require Appellant to pay permanent alimony to support Appellee's decision to work a job with more flexibility when it results in such an inequitable distribution of their monthly incomes. The appellate court found no error in the circuit court's ruling that Appellant's partnership interest at her law firm was marital property and should be equally divided. Appellant became an equity partner two years before the parties were divorced, and she borrowed the money from the bank during the marriage to purchase the membership. The appellate court also found no error in the circuit court's order that the parties were equally responsible for the line of credit. Although there was conflicting testimony regarding where the money was spent from the line of credit, a circuit court can decide what debts should be allocated between the parties in a divorce case based on their relative ability to pay. Lastly, the appellate court found error in the one-time lump sum child support award in the amount of $1.25 million, constituting 25% of a $5 million inheritance from Appellant's father. An increase in a noncustodial parent's investment account is not "income" required to be included in the calculation of a child-support obligation until the noncustodial parent "realized a gain." For the same rationale, Appellant's inheritance should not have been considered "income", as none of the assets were liquidated, and she received no money with any of the inherited property which included stock certificate, an investment account, and a lot. The appellate court also expressed concern that the $1.25 million was unreasonably high and that the court made no findings about their needs or best interest to support such a large child-support award. (Karren, B.; CV-18-688; 4-17-19; Gruber, R.)

Chekuri v. Nekkalapudi, 2019 Ark. App. 221 [**money spent by one spouse during separation should not have to be reimbursed to other spouse absent a finding of fraud or bad faith; retirement account is marital despite being opened after filing of divorce**] The appellate

court found error in the circuit court awarding appellee one-half of the money that Appellant spent during the parties' separation in the absence of a finding of fraud or bad faith. A spouse is not entitled to be reimbursed in a divorce proceeding for every nonconsensual transfer of marital funds made by the other spouse in the absence of proof on an intent to defraud. Although Appellee points to evidence that Appellant spent significantly more money after separation, nowhere in the Appellee's pleadings below or in any of the circuit court's findings can we find the word "fraud" or any of its derivatives. The appellate court found no error in the circuit court dividing Appellant's retirement account at his job that he obtained after he filed for divorce. The circuit court considered the relevant factors and determined that the retirement account was created during the marriage, that it was marital property, and that each party was entitled to one-half. Note: the appellate court remanded the alimony award for the circuit court to reconsider because the appellate court reversed the property award. Alimony and the division of marital property are often so intertwined in order to balance the equities of the parties that a change in one may necessitate an adjustment to the other. (Moore, R.; CV-18-594; 4-17-19; Virden, B.)

Becker v. Becker, 2019 Ark. App. 230 [**denial of alimony modification following employment termination**] The appellate court found no error in the circuit court's decision denying a modification in alimony. The circuit court found that Appellant's ability to pay alimony was not affected by his termination from employment, as he has sufficient financial resources to continue to pay. The circuit court also found that Appellee's need for alimony had not been challenged by Appellant. The primary factors to be considered in making or changing alimony are the need of one spouse and the ability of the other spouse to pay. Despite argument to the contrary, by not modifying the original alimony award, the circuit court was not granting Appellee a windfall of the increased value of marital property previously distributed between the parties; it was instead upholding the original alimony award based on the Appellee's need and Appellant's ability to pay from the resources available to him. (Taylor, J.; CV-18-6361 4-17-19; Hixson, K.)

PROBATE

In the Matter of the Guardianship of EMR and DCR, Minors, 2019 Ark. 116 [**court must apply a fit-parent presumption on both prongs of the termination of guardianship statute if there is no specific finding of unfitness in guardianship order**] Arkansas Code Annotated 28-65-401(b)(3) provides that a guardianship may be terminated if the guardianship is (A) no longer necessary, and (B) no longer in the best interest of the ward. Because there was no specific finding of "unfitness" in the 2013 permanent guardianship order, the appellate court found that Appellant was entitled to the fit-parent presumption that the guardianship was no longer necessary when she so informed the court in her petition to terminate the guardianship. Appellant did not consent to the guardianship, but it was awarded following a contested hearing in 2013 at which time the circuit court stated from the bench that appellant had shown "a complete

disregard for parental responsibility." The appellate court found that this was not sufficient to recognize a finding of parental unfitness. Appellees had the opportunity to challenge appellant's fitness or to show exceptional circumstances that would overcome the fit-parent presumption, but the appellate court found that the circuit court erred in finding that the reason for originally granting the guardianship still existed; therefore, it was no longer necessary. Regarding the second prong of the statute, whether the guardianship is no longer in the best interest of the ward, the appellate court found that the circuit court failed to accord appellant the presumption that a fit parent acts in her children's best interest. The appellate court further found that the presumption that appellant has acted in her children's best interest was not rebutted on the record, and that the circuit court erred in finding that it remains in the children's best interest to leave the guardianship intact. (McCain, G.; CV-18-310; 4-18-19; Wynne, R.)

Montigue v. Jones, 2019 Ark. App. 237 [**rebuttable presumption of undue influence when grantee procures a deed while in a confidential relationship with the grantor; leading questions permitted on direct examination of adverse party**] A rebuttable presumption of undue influence or lack of mental capacity arises upon a showing that the grantee procured the deed while in a confidential relationship with the grantor. In that instance, the grantee must go forward with evidence that the grantor possessed both the required mental capacity and freedom of will. Procurement has been extended to situations in which the grantee caused the deed to be prepared and participated in its execution. Further, there is no set formula by which the existence of a confidential relationship may be determined, but it may arise between a person who holds power of attorney and the grantor of that power. Because there was no testimony of procurement on one piece of the property, the appellate court found no error when the circuit court determined that the evidence did not warrant shifting the burden to Appellee. However, on the other two transfers of property, the appellate court found that there was evidence of procurement by a person in a confidential relationship warranting a presumption that the decedent lacked the mental capacity and free will to execute the bills of sale. Lastly, the appellate court found error when the circuit court ruled that Appellant was not entitled to ask leading questions of the adverse party on direct examination. (Blatt, S.; CV-18-21; 4-24-19; Gladwin, R.)

In the Matter of the Estate of Eliza Bond, Deceased, 2019 Ark. App. 241 [**holographic will requirements; burden of proving lack of testamentary intent and incompetency**] Arkansas Code Annotated 28-25-104 provides that when the entire body of a will and the signature is written in the handwriting of the testator, the will may be established by the evidence of at least 3 credible disinterested witnesses to the handwriting and signature of the testator, notwithstanding there may be no attesting witnesses to the will. A holographic will does not need to be dated to be valid because the statute does not require it to be. Likewise, the statute contemplates the admission of wills without attestation. Testamentary intent is established within the four corners of the will demonstrating that the writer intended to make a testamentary disposition. The lack of date and attestation does not indicate a lack of testamentary intent, and consideration of extrinsic

evidence is unnecessary in this case. Appellants also failed to meet the burden of proving incompetency at the time the will was executed, and the appellate court declined to shift the burden to Appellees simply because the will was undated. (Johnson, K.; CV-18-32; 4-24-29; Murphy, M.)

Morris v. Clark, 2019 Ark. 130 **[guardian must prove unfitness to challenge a termination of guardianship, when the parent has not previously been determined unfit]** The appellate court found that, when a parent who has not previously been determined to be unfit petitions for termination of an existing guardianship over his or her minor child, circuit courts ordinarily should only decline to terminate the guardianship where the guardian contests the parent's fitness and establishes that the parent is presently unfit. A circuit court's determination that it would be in a minor ward's best interests for a guardianship to remain in place, standing alone, is insufficient to defeat a fit parent's substantive Due Process interest in raising his or her own child. There is a constitutional presumption that a fit parent acts in his or her child's best interests, so where the parent has not previously been found unfit, weighing "best interests" at the outset of the termination inquiry is inappropriate. None of this, however, shall be construed to prohibit a guardian in such cases from actually raising and contesting the issue of the natural parent's "fitness" when the natural parent petitions to terminate the guardianship. (Jamison, L.; CV-18-143; 4-25-19; Hart, J.)

JUVENILE

Williams v. Ark. Dep't of Human Servs. 2019 Ark. App. 194 **[Continuance]** There was no error in the court's refusal to grant a motion for continuance where the motion was made by the attorney when the parent failed to return to court after the lunch break. The trial court did not abuse its discretion in denying the motion where the parent gave no explanation for her failure to return to court and no good cause was shown in support of the motion. (Wilson, R.; JV-15-104; April 3, 2019; Hixson, K.)

Clark v. Ark. Dep't of Human Servs. 2019 Ark. App. 223 **[Relative placement; TPR]** The trial court's decision to terminate parental rights and allow adoption by the foster family was clearly erroneous where the children's grandparents were available for placement of the children, were found to be appropriate, and wanted custody of the children. Under these circumstances, termination was contrary to the public policy of our state that relatives are preferred when placing children in permanent homes. The trial court found that it was not in the children's best interest to be placed with the grandparents in Indiana because, despite having sufficient financial resources and the capability, the grandparents did not participate in the court proceedings and had not seen the children in over two years. However, the grandfather testified that throughout the proceedings, he called DHS at least 32 times and that it was not until he emailed the DCFS

Director that DHS finally initiated an ICPC home study. The appellate court found the trial court's conclusion that the grandparents were uninterested in participating in the proceedings to be clear error in the face of the grandparents' testimony concerning their efforts to be involved and noted that no evidence was presented that the grandparents had been provided notice of the court hearings. The appellate court noted that DHS failed to fulfill its duty to locate the grandparents and communicate with them. (Zimmerman; S.; JV-17-233; April 17, 2019; Harrison, B.)

Tovias v. Ark. Dep't of Human Servs. 2019 Ark. App. 228 **[TPR—status as parent]** Trial court erred in treating the "legal father" as a parent for purposes of the aggravated circumstances ground for termination of parental rights. In both the probable cause and adjudication orders, the court identified the defendant as the putative father. In the next order, granting the motion to terminate reunification services, the court identified the defendant as the "legal father" but did not specify a basis for the finding, such as an acknowledgement of paternity or DNA testing confirming that he was the biological father. At the termination hearing, the department sought termination on the grounds of aggravated circumstances, which applies only to a "parent." Termination was clearly erroneous where the defendant's classification as "legal father" did not meet the statutory definition of parent as set out in Ark. Code Ann. § 9-27-202(40). (Zimmerman, S.; JV-18-95; April 17, 2019; Whiteaker, P.)

Hopfner v. Ark. Dep't of Human Servs., 2019 Ark. App. 236 **[TPR]** Where there was clear and convincing evidence of grounds for termination and it was in the children's best interest, termination was proper and is affirmed. (Zimmerman, S.; JV-17-20; April 24, 2019; Virden, B.)

Barton v. Ark. Dep't of Human Servs., 2019 Ark. App. 239 **[TPR]** Where there was clear and convincing evidence of grounds for termination and it was in the children's best interest, termination was proper and is affirmed. (Wilson, R.; JV-15-128; April 24, 2019; Vaught, L.)

Minor Children v. *Ark. Dep't of Human Servs.* 2019 Ark. App. 242 **[Timeliness of notice of appeal]** Notice of appeal in dependency-neglect proceedings must be filed within twenty-one days from entry of order, even where appeal is being made pursuant to Ark. R. App. P. Civ. 2(d) as an appeal from a final order awarding custody rather than pursuant to Supreme Court Rule 6-9 as an appeal from one of the dependency-neglect orders specified therein. The notice of appeal filed more than twenty-one days after entry of order was thus untimely. (James, P.; JV-17-11; April 24, 2019; Brown, W.)

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

Riggs v. Ark. Dep't of Human Servs. 2019 Ark. App. 185 (Clark, D.; JV-17-131; April 3, 2019; Abramson, R.)

DISTRICT COURT

Treat v. State of Arkansas, 2019 Ark. App. 212 **[Lack of Jurisdiction]** Treat was convicted of driving while intoxicated and speeding in district court and appealed to the circuit court. The State moved to dismiss arguing that Treat had failed to pay the five-dollar ($5.00) fee that is required when a district court clerk is asked to certify a record for an appeal to circuit court; and failure to pay the fee deprived the circuit court of jurisdiction over Treat's appeal. The circuit court found for the State. Arkansas Rule of Criminal Procedure 36 governs the procedure for appealing from district court to circuit court. The 30 day filing requirement of Rule 36 is strictly enforced and is jurisdictional in nature. Furthermore, the language in Rule 36(c) shows a clear intention that the clerk of the district court is not required to prepare and certify the necessary record unless the defendant has filed a written request with the clerk of the district court *and* has paid any fees of the district court that are authorized by law. Arkansas Code Ann. §16-17-124 authorizes such fees. Thus, the circuit court lacked jurisdiction to entertain the appeal. (Edwards, R.; 73CR-17-861; 4-10-19; Murphy, M.)

SUPREME COURT OF THE UNITED STATES

Bucklew v. Precythe **[8th Amendment]** In *Baze* v. *Rees*, the Court concluded that a State's refusal to alter its execution protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." Petitioner Russell Bucklew was convicted of murder and sentenced to death. The State of Missouri plans to execute him by lethal injection using a single drug, pentobarbital. Mr. Bucklew presented an as-applied Eighth Amendment challenge to the State's lethal injection protocol, alleging that, regardless whether it would cause excruciating pain for *all* prisoners, it would cause *him* severe pain because of his particular medical condition. The District Court dismissed his challenge. The Eighth Circuit, applying the *Baze-Glossip* test, remanded the case to allow Mr. Bucklew to identify a feasible, readily implemented alternative procedure that would significantly reduce his alleged risk of pain. Eventually, Mr. Bucklew identified nitrogen hypoxia, but the District Court found the proposal lacking and granted the State's motion for summary judgment. The Eighth Circuit affirmed.

Held: *Baze* and *Glossip* govern all Eighth Amendment challenges, whether facial or as-applied, alleging that a method of execution inflicts unconstitutionally cruel pain. Mr. Bucklew has failed to satisfy the *Baze-Glossip* test. He fails for two independent reasons to present a

triable question on the viability of nitrogen hypoxia as an alternative to the State's lethal injection protocol. First, an inmate must show that his proposed alternative method is not just theoretically "feasible" but also "readily implemented." Even if nitrogen hypoxia were a viable alternative, neither of Mr. Bucklew's theories shows that nitrogen hypoxia would significantly reduce a substantial risk of severe pain. (No. 17–8151; April 1, 2019)