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CRIMINAL

Wilson v. State, 2019 Ark. App. 249 **[sentencing]** Following revocation of his suspended sentences in three cases, appellant was sentenced to various terms of imprisonment and a new suspended sentence. The sentences were ordered to run consecutively. Arkansas Code Annotated § 5-4-307(b)(2) provides that "[t]he period of a suspension or probation also runs concurrently with any federal or state term of imprisonment or parole to which a defendant is or becomes subject to during the period of the suspension or probation." Thus, suspended sentences for one or more crimes must run concurrently with terms of imprisonment imposed for separate crimes. Based upon the foregoing statutory provision, appellant's sentence was illegal to the extent that his suspended sentence was ordered to run consecutive to the terms of imprisonment. (Wilson, R.; CR-18-221; 5-1-19; Gladwin, R.)

Lovett v. State, 2019 Ark. App. 261 **[motion to suppress]** Appellant asserts that the trial court erred when it failed to suppress his custodial statements because they were the product of a law enforcement officer's false promise of leniency. A statement induced by a false promise of reward or leniency is not a voluntary statement. When a police officer makes a false promise that misleads a prisoner and the prisoner gives a confession because of that false promise, then the

confession has not been made voluntarily, knowingly, and intelligently. A person seeking to have a statement excluded on the basis that a false promise was made must show that the confession induced by the false promise was untrue. In determining whether there has been a misleading promise of reward, the court will consider the totality of the circumstances. The totality determination is subdivided into two main components: the statement of the officer and the vulnerability of the defendant. Prior to appellant making the challenged statement, the law enforcement official told him that he would recommend that appellant receive mental health treatment or drug abuse rehabilitation. He also advised appellant that he would "go to bat" for him. The appellate court concluded that the officer's go-to-bat statement was not a blanket statement to help appellant but rather it was an affirmation of the statement that the officer had just made regarding making a recommendation to the prosecutor about appellant receiving treatment. The officer made the recommendation to the prosecutor; thus, the statement was not a false promise. Accordingly, the trial court did not err when it denied appellant's motion to suppress. (Pearson, W.; CR-18-878; 5-8-19; Klappenbach, N.)

Sossamon v. State, 2019 Ark. App. 262 **[motion to suppress]** Appellant was driving a vehicle that was stopped by law enforcement. During the stop, the owner of the car consented to a search of the vehicle. Appellant advised the officer that she had bags in the vehicle and that she did not want them searched. The officer permitted her to remove the bags. After finding contraband in a purse that was left in the car, which belonged to the owner of the vehicle, the officer determined that he had probable cause to conduct a warrantless search of appellant's bags. On appeal, the appellate court concluded that the owner's consent to search the vehicle did not automatically extend to consent to search appellant's bags outside of the vehicle. The court also explained that discovering drugs in a purse that belonged to the owner of the car, did not supply the requisite probable cause to search appellant's bags. Thus, the trial court erred in denying appellant's motion to suppress the contraband that was found in appellant's bags during the traffic stop. (Yeargan, C.; CR-18-930; 5-8-19; Whiteaker, P.)

Tomes v. State, 2019 Ark. App. 267 **[revocation]** To revoke probation the circuit court must find that the defendant violated a written condition of his probation. In appellant's case the circuit court determined that appellant violated the conditions of his probation by failing to report an address change and by failing to report to his probation officer. Because there was nothing in appellant's conditions of probation that required him to report to his probation officer or to notify the probation officer of a change of address, there was insufficient evidence to support the revocation. (Cottrell, G.; CR-18-562; 5-15-19; Gruber, R.)

Craven v. State, 2019 Ark. App. 271 **[admission of evidence]** Appellant sought to introduce evidence that the State's witness lied in a statement to law enforcement and the facts surrounding the falsehood. Appellant asserted that the evidence of the witness's untruthfulness demonstrated bias. At trial, once the witness admitted that he lied to law enforcement, the trial court limited

further cross-examination on that issue. On appeal, the Court of Appeals determined that the trial court did not abuse its discretion when it limited the testimony and explained that establishing that a witness may have been untruthful is not the same as demonstrating bias. The appellate court also noted "once a witness acknowledges having made a prior inconsistent statement, the witness's credibility has successfully been impeached. In other words, '[a]n admitted liar need not be proved to be one.'" (Sims, B.; CR-18-806; 5-15-19; Harrison, B.)

Barefield v. State, 2019 Ark. 149 **[*Zinger* evidence]** Pursuant to the legal principles outlined in *Zinger v. State,* 313 Ark. 70, 852 S.W.2d 320 (1993), which governs admission of evidence of alternative perpetrators, a defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence that does no more than create an inference or conjecture as to another's guilt is inadmissible. *Zinger* does not require that any evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. The standard for admission of incriminating evidence against a third person, as set forth in *Zinger,* is merely an application of the Arkansas Rules of Evidence to a specific type of evidence. Pursuant to Ark. R. Evid. 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." However, according to Ark. R. Evid. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. In appellant's case, he sought to introduce what was characterized as *Zinger* evidence. The evidence included photographs of footprints at the crime scene and testimony from numerous witnesses about other individuals' possible involvement in the crimes. Because the proffered evidence was irrelevant, more prejudicial than probative, or could not be sufficiently linked to the crimes charged, the trial court did not abuse its discretion when it excluded the evidence. (Pearson, W.; CR-18-325; 5-16-19; Wynne, R.)

Mondy v. State, 2019 Ark. App. 290 **[admission of evidence]** The trial court did not abuse its discretion when it permitted a school counselor to testify that the victim informed her that appellant touched her "private parts" with his hand and his mouth because the testimony was not offered for the truth of the matter asserted, which the court advised the jury in a limiting instruction, but rather was admitted to explain the basis for the counselor contacting the child-abuse hotline. **[Ark. R. Evid. 404 (b)]** Appellant asserted that evidence that he committed similar prior bad acts seventeen years before the current crime was too remote in time to be relevant. The trial court admitted the evidence and the appellate court concluded that while the prior crime was temporally removed from the current charges, they were very similar in

character. In both instances, appellant was accused of sexually abusing girls who were approximately six years old by committing very similar sexual acts. Both times, he had a close family or domestic relationship with the girls and committed the acts at home. Thus, the Court of Appeals concluded that there was no abuse of discretion as to the court's finding that the prior conviction was admissible under Rule 404(b). **[jury instructions]** Giving alternative-sentencing instructions is discretionary, but courts must exercise that discretion on a case-by-case basis. A review of the record in appellant's case demonstrated that the circuit court did not apply a blanket rule when it denied appellant's request for an alternative-sentencing instruction but instead considered several things such as: (1) the fact that appellant had been charged with multiple counts; and (2) the fact that appellant had now been convicted of three counts of sexual assault against very young children. Additionally, appellant could not demonstrate prejudice from the court's denial of his request for an alternative-sentencing instruction because the jury imposed a sentence more severe than the minimum sentencing option presented to it, indicating that it would not have imposed an alternative sentence had it been provided that option. Therefore, the circuit court's denial of appellant's request for an alternative-sentencing instruction was not erroneous. (Pearson, B.; CR-18-579; 5-22-19; Vaught, L.)

Boyd v. State, 2019 Ark. App. 308 **[Ark. R. Crim. P. 15.2]** Appellant was convicted of aggravated robbery and theft of property. The convictions stem from appellant robbing a bank. When appellant was arrested, law enforcement officials seized money that was found on appellant's person. Thereafter, appellant sought return of the money pursuant to Rule 15.2 of the Arkansas Rules of Criminal Procedure. The circuit court denied the petition and returned the money to the bank that was robbed. Because the State presented sufficient circumstantial evidence to support the conclusion that the bank, and not appellant, was the lawful owner of the money in dispute, the circuit court's denial of appellant's motion was not clearly erroneous. Additionally, the appellate court noted that the circuit court was not required to believe appellant's self-serving assertion that the money came from his Social Security benefits. (Wright, H.; CV-18-687; 5-29-19; Harrison, B.)

Philpott v. State, 2019 Ark. App. 314 **[jurors]** Persons comprising the venire are presumed to be unbiased and qualified to serve. During voir dire in appellant's case, a panel member indicated a desire to have appellant testify. Appellant challenged the potential juror for cause and the trial court refused to strike the juror. Although the juror indicated that he would like "to hear from [appellant]," he also stated that he would not hold it against appellant if he decided not to testify. Thus, the circuit court did not abuse its discretion when it denied appellant's request to strike the juror. (Green, R.; CR-18-798; 5-29-19; Vaught, L.)

Pargament v. State, 2019 Ark. App. 311 **[motion to suppress]** Appellant was stopped by law enforcement officials for violating Ark. Code Ann. § 27-51-305, following too closely. Appellant petitioned the trial court to suppress contraband seized during the traffic stop. The motion was denied. On appeal, the appellate court concluded that a review of the totality of the circumstances established that the trial court clearly erred in finding the law enforcement official had probable cause to stop appellant. The Court of Appeals explained that the facts and circumstances within the officer's knowledge were not sufficient to permit a person of reasonable caution to believe appellant had committed the traffic offense of following too closely to the vehicle that pulled in front of him. Instead, the "fault" in this situation lay more with the driver who pulled into appellant's lane, and the officer did not allow enough time for appellant to correct the situation that he admittedly did not cause. Accordingly, the trial court erred when it denied appellant's motion to suppress. (Cottrell, G.; CR-18-789; 5-29-19; Switzer, M.)

Davis v. State, 2019 Ark. App. 303 **[*Batson* challenge]** In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court of the United States set forth a three-step inquiry that courts conduct when intentional discrimination threatens to infect the juror-selection process by way of peremptory strikes. When challenging a peremptory strike that is allegedly racially motivated, the defendant must make a *prima facie* showing sufficient to infer that the prosecution exercised its strikes to exclude one or more jurors based on the defendant's race. Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for the strike. A prosecutor's proffered race-neutral reason does not have to be persuasive or even plausible. The most critical step in a *Batson* challenge is often the final one, during which the circuit court must decide whether the defendant has met his or her burden of demonstrating purposeful discrimination under the relevant circumstances. The connection between the second and third *Batson* steps is this: if the prosecutor offers a facially race-neutral reason for a peremptory strike, then the court moves to the third step, which requires it to credit or reject the reason. A defendant's challenge to a strike can turn on whether the circuit court believes the prosecutor's race-neutral reason for the attempted strike. Considerations that help a court determine whether to accept or reject a race-neutral reason are: the prosecutor's demeanor; how reasonable or improbable the given reasons are; and whether the given explanation has some basis in accepted trial strategy. A circuit court does not have to simply accept the race-neutral reason given. In appellant's case, the circuit court mistakenly thought that it could not reject the State's proffered race-neutral reasons for striking potential African-American jurors. Thus, the court erred in its application of the third step in the *Batson*-challenge process. (Haltom, B.; CR-18-492; 5-29-19; Harrison, B.)

Swanigan v. State, 2019 Ark. App. 296 **[challenge to pretrial identification]** Appellant requested that the circuit court suppress a pretrial photo-lineup identification of him. He asserted that the photo lineup was unduly suggestive and unreliable. The trial court denied his request. A pretrial identification violates the Due Process Clause when there are suggestive elements in the

identification procedure that make it all but inevitable that the victim will identify one person as the culprit. Reliability is the linchpin in determining the admissibility of identification testimony. The circuit court looks at the totality of the circumstances in making a reliability determination, considering the following factors: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pretrial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pretrial identification procedure. In appellant's case, the circuit court's determination that the identification was sufficiently reliable was not clearly erroneous. The witness, who participated in the photo-lineup identification of appellant, testified that she was almost struck by a fastmoving, older-model, white Cadillac with a blue top while she was at work. She said that the car was going the wrong way through the one-way parking lot and she looked at the driver, who was looking at her, as the car passed. She said he was "really, really dark" and had "really, really like big eyes," and was wearing a white t-shirt. She described the car and the driver in detail to the officers within thirty minutes of witnessing the event. The witness made the photo identification of appellant the day after the event. The officer, who presented the lineup to the witness, said that she told him that she was certain the person in the photo was the driver. The foregoing facts do not demonstrate that there is a substantial likelihood of misidentification. Thus, the circuit court did not err when it denied appellant's motion to suppress. **[Ark. R. Evid. 608]** Because embezzlement, a form of theft, is not a crime that is probative of untruthfulness and thus is not admissible under Rule 608(b), the circuit court did not abuse its discretion when it refused to allow appellant to cross-examine one of the State's witnesses about an alleged embezzlement. (Wright, J.; CR-18-429; 5-29-19; Gruber, R.)

CIVIL

Pleasant v. State, 2019 Ark. App. 248 **[attorney's fees]** Pulaski County Circuit Court's award of $115,200 in attorney's fees and $6,247.47 in costs for the State's successful claim against appellants for violations of the Arkansas Deceptive Trade Practices Act affirmed. (Fox, T.; CV-18-883; 5-1-19; Virden, B.)

Board Trustees APERS v. Garrison, 2019 Ark. App. 245 **[retirement benefits]** Arkansas Public Employees Retirement System (APERS) issued findings of fact and conclusions of law finding that all former employees of county-owned nursing homes were not eligible for membership in APERS. They were not "county employees" eligible for APERS benefits because they were paid from revenues generated by the patients of the nursing homes rather than from appropriations made by the quorum courts of each county. Additionally, to be county employees, Arkansas Code Ann. § 24-4-302 requires all of the definitions in Ark. Code Ann. § 24-4-101(14), (17), and

(27) must be applied to determine eligibility for membership in APERS. The statute is not construed in the disjunctive. (Gray, A.; CV-17-865; 5-1-19; Abramson, R.)

Koppers, Inc. v. Trotter. **[class certification]** The order in the present case stated in relevant part, "[T]he court finds that the requirements of Arkansas Rule of Civil Procedure 23 are satisfied and therefore GRANTS the motion for class certification." The order defined the class, but it failed to define the class claims, issues, or defenses. Further, the order failed to provide any analysis of the six Rule 23 factors. Therefore, the case is remanded with instructions to enter an order that complies with Rule 23. The circuit court must conduct an analysis to determine whether the Rule 23 requirements have been met, and that analysis must be reflected in the circuit court's order. (Piazza, C.; CV-18-228; 5-2-19; Kemp, J.)

Miracle Kids Success Academy, Inc. v. Maurras, 2019 Ark. 146 **[contract]** The circuit court correctly rejected Miracle Kids' attempt to use extrinsic evidence to interpret the agreement because the agreement was plain and unambiguous. Because the agreement was silent as to the maturity date, it was payable on demand. (Gray, A.; CV-18-114; 5-9-19; Wood, R.)

JMD Constr. Services, LLC v. General Const. Solutions, Inc., 2019 Ark. App. 268 **[contract]** The circuit court's decision that the contract was ambiguous -- meaning of "curing" – "sealing" of concrete – is affirmed, and it properly considered permissible parol evidence and found that GCS was not responsible for the curing of the concrete in this case. (Bryan, B.; CV-18-552; 5-15-19; Abramson, R.)

E B Management Co. v. Houston Specialty Ins. Co., 2019 Ark. App. 294 **[insurance]** A plain reading of the contract shows that an "assault and battery incident" is a "harmful or offensive contact between or among two or more persons." The circuit court did not err in finding that the definition is not ambiguous as there is not more than one equally reasonable interpretation of the definition. Griffin was physically removed from the stage by an employee of Ernie Biggs, removed from the establishment, and released onto the sidewalk where he landed and hit his head. These actions fit squarely within the policy's definition of "assault and battery incident" since being thrown out of an establishment cannot be reasonably found to be anything other than "harmful or offensive," and it occurred between two persons—Tice and Griffin. Houston Specialty is required to defend under the A&B Coverage and not the CGL Coverage. No one argues that it failed to do so. Appellants would have this court read an intent element into the contract that simply is not there in order to "give rise to the possibility of coverage" under the CGL coverage. The lack of inclusion of such an element, which Houston Specialty could have included in its definition but declined to do, does not make the term "inherently unreasonable" or ambiguous. (Griffen, W.; CV-18-892; 5-22-19; Brown, W.)

Williams v. Bank of the Ozarks, 2019 Ark. App. 281 **[guaranty]** The Benton County Property Owners' Improvement District (the "District") issued $4.4 million in special-assessment bonds to fund the construction of infrastructure improvements for the proposed Sugar Creek subdivision in Benton County. Appellants were investors in the development company that made the improvements to the land, and each executed guaranty agreements in which they guaranteed payment of the principal and interest due on the bonds at maturity. The bonds matured ten years later with an unpaid principal balance of $3.48 million. Special-assessment taxes, which the District pledged as security for repayment of the bonds, were also delinquent. Appellee Bank, as trustee for the bondholders, sued the appellants for breach of contract when they failed to pay the unpaid balance according to the terms of their guaranty agreements. Appellants assert that the Bank's alleged failure to collect the special tax after the bonds had matured was a material alteration and an impairment of collateral that released them from liability. The guaranty agreements were absolute and unconditional, and therefore, the liability of the appellants as guarantors became fixed upon default. The subsequent failure to collect the special tax after the bonds had matured did not materially alter the terms of the guaranty agreements. The appellants also waived any defense of impairment of collateral when they agreed that their obligations were absolute and unconditional, and any omission by the Bank did not affect their liability. (Duncan, X.; CV-17-1040; 5-22-19; Virden, B.)

Worsham v. Day, 2019 Ark. 160 **[attorney's fees]** Worsham's motion for attorney's fees had to be filed and served no later than fourteen days after entry of judgment. On May 25, 2016, the circuit court entered the judgment in this matter. Because neither party appealed the judgment, the May 25 order concluded the rights of the parties to the subject matter at issue. Accordingly, the final judgment that triggered the Rule 54(e) fourteen-day period was entered on May 25, 2016. The record demonstrates that Worsham's motion for attorney's fees was not filed until June 12, 2017, well past the fourteen-day deadline. The attorney's-fees motion was untimely. (Sutterfield, D.; CV-18-151; 5-23-19; Baker, K.)

Crain v. Byrd, 2019 Ark. App. 316 **[arbitration]** Here, there is an arbitration provision, but it is in the operating agreements, which are earlier, separate documents from the Mutual Release Agreement. There is no arbitration provision in the actual contract that appellee is suing on nor is there a reference to the operating agreements in the Mutual Release Agreement. Appellants drafted the Mutual Release Agreement and could have included an arbitration provision much like the one drafted in the operating agreements. There is not a valid agreement to arbitrate between the parties. (Griffen, W.; CV-18-1053; 5-29-19; Murphy, M.)

Lone's RT 92, Inc. v. DJ Mart, LLC, Ark. App. 318 **[fraud]** The parties entered into a contract for the sale of a gas station from appellant to the appellees. Appellant's arguments rely mainly on the terms of the contract, while the appellees' arguments—upon which the circuit court necessarily made its ruling—relied totally on Singh's testimony. According to Singh, at multiple

points prior to signing the contract and thereafter, appellant—through its agent—promised to provide new pumps within two months of the contract date. Singh asserted that this induced him to sign the contract. Singh also asserted that appellant failed to disclose its tax liability and the "real status" of the gas pumps. Singh expressly stated that he would not have entered into the contract had he known the latter fact. The circuit court expressly found the above-referenced statements and omissions to be "material and fraudulent misrepresentations and omissions." Appellant argues that the circuit court clearly erred in finding that it committed (1) fraud by omission by failing to disclose (a) unpaid real estate taxes and (b) the real status of the inoperability and disrepair of the gas pumps, and (2) misrepresentation. Fraudulent representation by one party to another must relate to a past event or present circumstance; projections of future events or conduct cannot support a fraud claim as a matter of law. However, an exception to the "future events" rule arises if the promisor, at the time of making the promise, has no intention to carry it out. The circuit court's reference to appellant's statements promising to buy new pumps as material and fraudulent in addition to appellant's ultimate denial that it ever made such statements support appellant's lack of intent to carry out the statement—a promise—that the court found it made. Trial court's finding of fraud is affirmed. (Fox, T.; CV-18-1010; 5-29-19; Brown, W.)

Milligan v. Singer, 2019 Ark. 177 **[sovereign immunity]** A claim under the Arkansas Whistle-Blower Act (AWBA) is barred by the state's sovereign immunity. Singer is seeking damages against Milligan, not injunctive relief and named Milligan solely in his official capacity. A suit against a state official in his or her official capacity is not a suit against that person; rather, it is a suit against that official's office. (Piazza, C.; CV-17-653; 5-30-19; Wynne, R.)

Rhodes v. The Kroger Co., 2019 Ark. 174 **[price fixing]** On appeal, Rhodes argues that Ark. Code Ann. section 4-75-501 provides them with a vested right to equal pricing; the exceptions added by Act 850 of 2017 do not apply retroactively. Act 850 is substantive law in that it defines the parameters of section 4-75-501 in a way that was not previously set forth in the statute. Accordingly, it cannot be given retroactive application. The functional-availability doctrine operates to keep the focus of an anti-price-discrimination statute on the actions of the seller– – not the result that may be affected by the conduct of the buyer. Accordingly, the rationale underlying the functional-availability doctrine is relevant to section 4-75-501 cases. Section 4-75-501 proscribes two broad categories of conduct by a seller: selling covered goods at a greater cash price and willfully refusing to give all rebates and discounts on a nondiscriminatory basis. The purpose of the statute is to prevent a seller from acting in a discriminatory manner. The functional-availability doctrine operates to keep the focus of the statute on the conduct of the seller by preventing a consumer from creating a situation—such as refusing to use a Kroger Plus Card—which results in a consumer's failing to receive a discount or rebate, thus invoking the punitive provisions of the statute. Here, it is not disputed that Kroger has consistently and uniformly offered its Kroger Plus Card to all the named plaintiffs. Further, it was only the named

plaintiffs' willful refusal to take part in the Kroger Plus program that created the situation that is the primary focus of the class-action complaint. Thus, Kroger has not violated section 4-75-501 by willfully refusing or failing to give the discounts afforded to Kroger Plus Card holders to all persons, so Rhodes has failed to state a viable cause of action as a matter of law. **[senior-citizen discount]** While Rhodes's complaint asserts that purchasers effectively paid a different price for certain manufactured goods, completely absent is any allegation that these purchasers asserted that they wished to receive the senior-citizen discount and that Kroger, through its employees or agents "willfully refuse[d] or fail[ed] to allow" the discount. Because the focus of section 4-75-501 is on the conduct of Kroger, the absence of any factual allegation regarding the mens rea is fatal to this cause of action. (Piazza, C.; CV-18-63; 5-30-19; Hart, J.)

Yang v. City of Little Rock, 2019 Ark. 169 **[municipal immunity]** Affidavits sufficiently establish that the City did not possess general-liability insurance at the time of the accident to cover Yang's claims. Because the City put forth proof that it did not have insurance coverage for the negligence claims alleged by Yang, t the City is entitled to municipal immunity under section 21-9-301. **[civil rights claims]** Yang's section 1983 claims are without merit, to-wit: Yang contends that the City violated his son's civil rights because (1) the City failed to provide competent emergency services, thereby depriving his son of his life and liberty interests; (2) the City's water rescue operations policy prevented rescue attempts by anyone other than a designated water rescue unit, and that policy deprived his son of his life and liberty interests; (3) his son had a substantive property right to rescue services, and as a result, he was deprived of due process. (Fox, T.; CV-18-109; 5-30-19; Kemp, J.)

DOMESTIC RELATIONS

Haley v. Elkins, 2019 Ark. App. 247 **[retroactive child support discretionary in divorce case; division of rental proceeds and marital business; personal injury battery claim in divorce; circuit court does not have to make specific findings when it denies attorney's fee request]** The appellate court found no error in the circuit court's denying a retroactive child support request. The record contained ample evidence to justify the refusal to award it, and it is within the circuit court's discretion to decline to award retroactive child support in a divorce case. There was also no error in the circuit court's refusal to require Appellee to pay Appellant for a portion of the rental proceeds collected during the marriage. The funds were collected and placed into a joint bank account. Arkansas law presumes that property placed in both spouses' names is marital property, and Appellant produced no evidence that only Appellee benefited from the withdrawals of the funds. The appellate court found no error in the circuit court's denial of Appellant's personal-injury claim, i.e. that Appellee intentionally injured her. Appellant had the burden to prove battery, and Appellant failed to present any evidence of damages she sustained from the alleged battery. There was also no error in the division of the martial business, as the

circuit court received ample evidence that the parties only owned ½ of the business to be divided. Lastly, the appellate court found no error in the refusal to award Appellant attorney's fees, as there was evidence of both parties' incomes, and there was no requirement for the circuit court to make specific findings when it denies such a request. (Reif, M.; CV-18-209; 5-1-19; Abramson, R.)

Pratt v. Pratt, 2019 Ark. App. 264 [**unequal division of marital property**] The appellate court found no error in the circuit court's unequal division of the parties' martial property. The circuit court specifically considered the short length of the marriage, the court weighed the contributions of each party in its unequal division of the property, and the court explained its reasons for not dividing the marital property equally. While the circuit court must consider the factors set forth in the statute and state its reasons for dividing the property unequally, it is not required to list each factor in its order or to weigh all the factors equally. Furthermore, the specific enumeration of the factors within the statute does not preclude a circuit court form considering other relevant factors if the exclusion of other factors would lead to absurd results or deny the intent of the legislature to allow for the equitable division of property. (Guthrie, D.; CV-18-796; 5-8-19; Hixson, K.)

Ballegeer v. Ballegeer, 2019 Ark. App. 269 **[reverse auction of property in effect awarded an unequal distribution of property; the court found no contempt despite restraining order preventing the sale of property; division of martial business account not required because funds did not belong to business**] The circuit court found that the parties were each entitled to one-half interest in the marital business in the amount of $183,000. The circuit court ordered that Appellee shall have the first right to buy Appellee's interest at the price of $183,000, and if he refuses, then Appellant would have the right to purchase at the same price. The value would then decrease in $5,000 increments until one party exercises the right to buy. The appellate court found that this was allowing a reverse auction between the parties, and it may force one party to accept an amount that is less than $183,000 for his or her one-half interest. This, in effect, awarded an unequal distribution of property without stating a basis for the same. The appellate court found no error in the circuit court's order regarding martial property that Appellee sold despite the circuit court's order restraining the parties from doing so. There was evidence that each sold item was inventoried and the sale proceeds were accounted for; therefore, the circuit court's order was neither arbitrary nor groundless. The appellate court also found no error in the circuit court's refusal to divide the corporate bank account, as many of the funds were payments for services that were filtered through the business and then paid to subcontractors. If the account was divided, the business would have been insolvent and unable to maintain its business. (Medlock, M.; CV-18-200; 5-15-19; Gladwin, R.)

Pace v. Pace, 2019 Ark. App. 284 [**not in the child's best interest to modify joint-custody arrangement**] While the appellate court recognized concerning aspects to this case, they found

that the evidence did not demonstrate that the parties have reached a state of discord and animosity to a degree and frequency that they cannot communicate and agree on the proper care for their child. The evidence further showed that the child is a happy and healthy young girl, and that many of the instances as evidence of bad parenting consisted of what appear to be one-time occurrences. The circuit court is at a better vantage point for discerning what custody arrangement between these parents is in the child's best interest. Therefore, the appellate court found no error in the circuit court's finding that it was not in the best interest of the parties' child to modify their joint-custody arrangement. Note: this was a nine-judge panel with a four-judge dissent. (Haltom, B.; CV-18-787; 5-22-19; Harrison, B.)

JUVENILE

Blackwood v. Ark. Dep't of Human Servs., 2019 Ark. App. 254 **[TPR-best interest]** Appellant father appealed termination of rights, arguing that, although he was currently incarcerated and had been to prison on six separate occasions, it was not in the child's best interest to terminate. The appellate court disagreed, affirming the trial court's termination order. The court noted that a parent's past behavior over a meaningful period of time is a good indicator of future behavior and is sufficient evidence of potential harm that would result if the child were returned to the father. (Zimmerman, S.; JV-17-49; May 1, 2019; Hixon, K.)

Burns v. Ark. Dep't of Human Servs., 2019 Ark. App. 253 **[TPR—abandonment]** Father appealed order terminating his parental rights to twins. The termination was affirmed on the grounds of abandonment, where clear and convincing evidence showed that the father failed to participate in the case altogether. The father's failure to contact DHS, failure to request services, and failure to attend hearings amounted to abandonment of the children. (Clark, D.; JV-17-137; May 1, 2019; Whiteaker, P.)

Heath v. Ark. Dep't of Human Servs., 2019 Ark. App. 255 **[TPR—best interest]** Appellate court affirmed termination where, at time of termination hearing, father remained unable to resume custody of child. Father argued that termination was not in child's best interest because the child was placed with the maternal grandmother and there was no risk of harm. The appellate court was unconvinced. While the child was currently placed with the maternal grandmother, the mother's rights had been terminated and because the grandmother's rights are derivative of the mother's rights, the placement could change and cannot be considered permanent. Under these circumstances, termination was appropriate. (Clark, D.; JV-17-220; May 1, 2019; Murphy, M.)

Covin v. Ark. Dep't of Human Servs., 2019 Ark. App. 259 **[TPR—best interest]** Mother appealed order terminating her parental rights, arguing termination was not necessary and not in the child's best interest because the parental rights of the father were not terminated. The

appellate court affirmed termination, pointing out that the termination hearing for the father had merely been postponed, thus he could not be considered a permanent placement at this juncture. Because the mother had wholly failed to comply with the case plan and complete services, termination of her rights was in the child's best interest due to the potential harm that would result if the child were returned to her. (Hendricks, A.; JV-11-585; May 8, 2019; Virden, B.)

Drane v. Ark. Dep't of Human Servs., 2019 Ark. App. 256 **[TPR—sufficiency of the evidence]** The appellate court affirmed the trial court's order terminating parental rights, deferring to the trial court's finding that the mother lacked credibility. The underlying issue was that the child had accused her stepfather of sexual abuse and the allegations were found true by the Crimes Against Children Division of the State Police. Regardless, the mother allowed the stepfather to remain in the home with the child, which resulted in removal by DHS and the start of a dependency neglect case based on failure to protect. At the termination hearing nearly two years later, the mother testified that she did not believe the allegations of sexual abuse and had only recently initiated divorce proceedings against the stepfather because it was required of her. The court was concerned that the mother had not demonstrated the ability to protect her children and specifically found that the mother was not credible. Termination on the grounds of aggravated circumstances was affirmed. (Zimmerman, S.; JV-17-37; May 8, 2019; Gruber, R.)

Wright v. Ark. Dep't of Human Servs., 2019 Ark. App. 263 **[TPR—sufficiency of the evidence]** Termination affirmed on grounds of aggravated circumstances where mother had been receiving DHS services for nearly three years and during that time had lived in eleven different homes, had eight different jobs, lacked transportation for five months, had failed to complete counseling and take prescription medication as prescribed, and otherwise demonstrated a history of instability. (Zuerker, L.; JV-15-457; May 8, 2019; Vaught, L.)

Glover v. Ark. Dep't of Human Servs., 2019 Ark. App. 278 **[TPR—sufficiency of the evidence]** Order terminating mother's rights to one-year-old was affirmed where mother continued testing positive for illegal drugs, remained unemployed, lacked stable housing, did not follow through with counseling, and was not honest on the drug and alcohol assessment. In sum, the mother had failed to take steps to remedy the cause of removal. (Elmore, B.; JV-17-148; May 15, 2019; Brown, W.)

Joslin v. Ark. Dep't of Human Servs., 2019 Ark. App. 273 **[TPR—sufficiency of the evidence]** There was no clear error in trial court's decision to terminate father's parental rights, where he failed to resolve the issues that led to removal, the children were adoptable, and there was a risk of potential harm if the children were returned to the father's custody. Trial court did not manifestly abuse its discretion in refusing to allow the father to call one of the children to testify, where the same evidence was demonstrated through other witnesses and the child's testimony would have been cumulative. (Medlock, M.; JV-17-115; May 15, 2019; Klappenbach, N.)

Libokmeto v. Ark. Dep't of Human Servs., 2019 Ark. App. 274 **[ADJUDICATION—sufficiency of the evidence]** The appellant failed to make hearsay objections during the adjudication hearing, thus the argument was waived and could not be brought up on appeal. Appellant's argument that the trial court could not have found statements made by the child credible when the court did not witness the child's testimony was an argument that was also waived, as it was based on the hearsay objection. At the hearing, a sexual assault nurse testified about statements that the child made to an interviewer at the Child Advocacy Center. Because the evidence was presented without objection, adjudication was affirmed. (Zimmerman, S.; JV-18-761; May 15, 2019; Switzer, M.)

Langston v. Ark. Dep't of Human Servs., 2019 Ark. 152 **[TPR—motion by attorney to withdraw]** Appellant mother notified her attorney via email a day before the termination hearing that he was fired and that she planned to hire a new attorney. The morning of the termination hearing, the attorney made a motion to withdraw prior to the proceedings. Appellant was not present at the hearing. The trial court denied the motion, the termination hearing was conducted, and Appellant's rights were terminated. On appeal, Appellant argued that the denial of her attorney's motion to withdraw violated her constitutional right to an attorney of her choosing and that she suffered from ineffective assistance of counsel. However, because these arguments were not made at the trial court level, they cannot be considered on appeal. The appellate court found that Appellant's motion was not timely, as she had been served with notice of the termination hearing over a month earlier, had sufficient time to request new counsel, and failed to do so until the morning of the hearing. (Williams, L.; JV-17-179; May 16, 2019; Womack, S.)

Allen-Grace v. Ark. Dep't of Human Servs., 2019 Ark. App. 286 **[TPR—best interest]** Termination affirmed where mother's continued substance abuse issues throughout the case created a risk of harm in returning the children to her. The children had been in stable placements with paternal grandparents throughout the case and were doing well. The grandparents were willing to adopt, thus termination was in the children's best interest.
(Zimmerman, S.; JV-17-482; May 22, 2019; Harrison, B.)

Williams v. Ark. Dep't of Human Servs., 2019 Ark. App. 280 **[TPR—sufficiency of the evidence]** There was no clear error in order terminating parental rights of father who was serving a thirty year prison sentence for a second-degree murder conviction that had occurred only two years earlier. (Wilson, R.; JV-16-196; May 22, 2019; Abramson, R.)

Arnold v. Ark. Dep't of Human Servs., 2019 Ark. App. 300 **[TPR—sufficiency of the evidence]** Both parents appealed order terminating their parental rights to two children. The appellate court found no clear error in the trial court's finding that there was clear and convincing evidence of

grounds for termination based on factors that arose subsequent to the filing of the dependency neglect petition. Both parents failed to complete the services that were ordered and made little effort until after the permanency planning hearing. At termination hearing, the trial court found that the environmental conditions of the home had not been corrected despite a year of services. The appellate court also found no clear error in the trial court's finding that termination was in the children's best interest, where they were found to be adoptable and they could not be returned to their parents due to the risk of potential harm. (Medlock, M.; JV-17-110; May 29, 2019; Virden, B.)

Jones v. Ark. Dep't of Human Servs., 2019 Ark. App. 299 **[TPR—sufficiency of the evidence]** After the appellant mother failed to remedy her substance abuse issues and failed to complete treatment, failed to secure stable and appropriate housing, and the court found that there was little likelihood that further services would result in successful reunification, parental rights were terminated. On a de novo review, the appellate court found no clear error in termination on grounds of failure to remedy and aggravated circumstances and in the finding that termination was in the children's best interest. (Wright, R.; JV-16-179; May 29, 2019; Abramson; R.)

K.F. v. State, 2019 Ark. App. 312 **[DELINQUENCY—accomplice to endangering the welfare of a minor]** Appellant, K.F., posted a Snapchat video showing herself activating a stun gun device near a one-year-old baby who K.F.'s friend, MaKayla, was babysitting at the time. The video suggests that K.F. touches the baby with the device because the baby is heard crying and another friend is heard saying "do it again," although the video does not show the stun gun actually touching the baby. K.F. was subsequently charged with endangering the welfare of a minor, and after a hearing, the court adjudicated K.F. delinquent as an accomplice to the offense. The elements of endangering the welfare of a minor are that (1) a parent, guardian, or person legally charged with the care or custody of a minor or supervision of a minor (2) purposely engages in conduct creating a substantial risk of death or serious physical injury to the minor. K.F.'s argument on appeal is that she is not in the class of persons to which the offense applies—she was not a parent, guardian, or personal legally charged with the care or custody of a minor or supervision of a minor, MaKayla was. Accomplice liability, pursuant to Ark. Code Ann. § 5-2-403, requires that a person assist another person in committing the offense. However, K.F. was the person who committed the harmful act to the child. Thus, she did not qualify as an accomplice and the adjudication on this basis was reversed. (Braswell, T.; JV-18-189; May 29, 2019; Whiteaker, P.)

P.J., v. State, 2019 Ark. App. 315 **[DELINQUENCY—sexual assault; sufficiency of the evidence]** Appellant's objections to the sufficiency of the evidence for second-degree assault that he raised on appeal were not preserved below because he failed to make a motion for dismissal at the close of the evidence as is required by Rule 33.1(b) of the Arkansas Rules of Criminal Procedure. He was also adjudicated delinquent of two counts of third-degree assault, which he

appeals on the basis that there was no evidence that he created the apprehension of imminent physical injury. In one instance, the victim testified that P.J. threatened to hit her on the buttocks so hard that it would hurt, and he then followed through with that threat and left a hand-shaped bruise on her buttocks. This constitutes sufficient evidence of the apprehension of imminent physical injury. In the second instance, the victim testified that P.J. grabbed her by the clothing and reached his hand into her bra before the victim was able to jerk away. Again, this evidence is sufficient to show that P.J. purposely caused the apprehension of immediate physical injury. (Lusby, R.; JV-18-12; JV-18-13; JV-18-14; May 29, 2019; Hixson, K.)

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

Meisch v. Ark. Dep't of Human Servs., 2019 Ark. App. 283 (Clark, D.; JV-17-169; May 22, 2019; Gladwin, R.)

Baltimore v. Ark. Dep't of Human Servs., 2019 Ark. App. 313 (Branton, W.; JV-17-557; May 29, 2019; Whiteaker, P.)

DISTRICT COURT

Hannah v. State, 2019 Ark. App. 525 **[Failure to Object] [Preservation of Argument for Appeal]** Hannah was convicted of one count of second-degree criminal mischief and three counts of failure to appear in district court and appealed to the circuit court. She failed to appear for any of her scheduled circuit court trial dates. The circuit court affirmed the district court's decision. On appeal, Hannah argued that the circuit court erred by improperly interpreting Rule 36(h) as mandatory rather than discretionary and failed to consider why she did not appear at previous trial dates. Hannah's arguments are not preserved for appeal. She did not argue that the rule allowed the circuit court to exercise its discretion in affirming the district court, nor did she urge the circuit court to allow her to present evidence about why she had failed to appear previously. Issues raised for the first time on appeal will not be considered because the circuit court never had an opportunity to make a ruling. (Wilson, R.; 470CR-16-119; 5-1-19; Whiteaker, P.)

Dover v. State, 2019 Ark. App. 260 **[Lack of Jurisdiction]** Dover was convicted in district court of no seat belt, careless driving, possession of an open container in a vehicle, failure to carry a driver's license, driving while intoxicated (DWI), and refusal to submit to a chemical test. He filed a certified copy of the district-court docket sheet in circuit as the notice of appeal on the charges of DWI and refusal to submit to chemical test. The record did not indicate that Dover made a written request to the district court clerk to compile the record, to serve the written request on the prosecuting attorney, or to file that request with the district court clerk. Dover's

failure to strictly comply with Rule 36 deprived the circuit court and the appellate court from jurisdiction. (Morledge, C.; 62CR-18-26; 5-8-19; Gladwin, R.)

U. S. SUPREME COURT

Franchise Tax Board of California v. Hyatt **[STATES SOVEREIGNTY]** *Nevada* v. *Hall* held that the Constitution does not bar suits brought by an individual against a State in the courts of another State.

Held: *Nevada* v. *Hall* is overruled; States retain their sovereign immunity from private suits brought in courts of other States.

State sovereign immunity in another State's courts is integral to the structure of the Constitution. The problem with Hyatt's argument—that interstate sovereign immunity exists only as a matter of comity and can be disregarded by the forum State—is that the Constitution affirmatively altered the relationships between the States so that they no longer relate to each other as true foreign sovereigns. Numerous provisions reflect this reality. Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. And Article IV imposes duties on the States not required by international law. The Constitution also reflects alterations to the States' relationships with each other, confirming that they are no longer fully independent nations free to disregard each other's sovereignty (No. 17–1299; May 13, 2019)