

APPELLATE UPDATE

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

<https://opinions.arcourts.gov/ark/en/nav.do>

ANNOUNCEMENTS

June 6, 2019:

Amendment to Supreme Court Rule 6-1 announced:

Rule 6-1. Extraordinary writs. The petitioner shall not identify the circuit court or judge as a respondent to the petition. Instead, the petitioner should identify as respondents all the other parties to the circuit court action. Circuit judges and other non-parties shall not be permitted to file any response except upon order of the Supreme Court requesting a response.

Pilot Program for filing of record and briefs electronically in lieu of abstracting:

IN RE ACCEPTANCE OF RECORDS ON APPEAL IN ELECTRONIC FORMAT AND ELIMINATION OF THE ABSTRACTING AND ADDENDUM REQUIREMENTS. We publish for comment proposed amendments to our court rules

that incorporate the electronic filing of case-initiating documents, that eliminate the

abstract and addendum requirements for appellate briefs, and that update our briefing rules. In cases with an electronically filed record, we authorize parties to proceed under today's proposed rules as a pilot project prior to formal adoption of the proposed rules.

CRIMINAL

Farmer v. State, 2019 Ark. App. 331 [**sufficiency of the evidence; capital murder; second-degree unlawful discharge of a firearm from a vehicle; fleeing**] Appellant argued the only evidence that directly implicated him in the offenses for which he was convicted was testimony from his accomplice, which was not corroborated, and if that testimony was excluded, there would be insufficient substantial evidence to support the convictions. Arkansas Code Annotated § 16-89-111 provides that a conviction may not be had in the case of a felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. Corroborating evidence is not sufficient if it merely shows that the offense was committed and the circumstances thereof. The corroboration must be sufficient, standing alone, to establish the commission of the offense and to connect the defendant with it. Corroborating evidence need not, however, be so substantial in and of itself to sustain a conviction. The test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. It is the defendant's burden to prove that a witness is an accomplice whose testimony must be corroborated. Based upon the facts in the case, appellant failed to meet his burden that the witness's testimony required corroboration. First, the witness testified that he was merely present in the car when the crimes occurred, and his testimony was unrefuted. Second, the circuit court did not find the witness to be an accomplice at law. Finally, an instruction was given to the jury to allow it to determine whether the witness was an accomplice and there was no indication that the jury made such a determination. Thus, the witness's testimony did not have to be corroborated and relying upon it was substantial evidence to support appellant's convictions. [**mistrial**] Appellant requested a mistrial based upon the fact that the State had several live bullets at counsel table during the trial. He argued that the State improperly attempted to influence the jury by displaying the bullets. The circuit court denied the motion but instructed the State to dispose of the bullets. The circuit court found that the mere presence of the bullets was not sufficiently prejudicial to warrant a mistrial. On review, the Court of Appeals determined that there was no evidence that: (1) the State's motive was to influence the jury; or (2) that the jury even saw the bullets. Thus, the appellate court concluded that the circuit court did not abuse its discretion when it denied the mistrial request. The Court of Appeals also noted that appellant did not request an admonition to the jury. His failure to do so, when such an admonition could have cured any prejudice from the allegedly improper conduct or display, precluded relief on appeal. (Fogleman, J.; CR-18-570; 6-5-19; Vaught, L.)

CIVIL

Locke v. State Farm, 2019 Ark. App. 329 [**insurance proceeds/guardianship**] State Farm paid the portion of the life-insurance proceeds due Katelynn to Amy as the permanent guardian of Katelynn's estate. Katelynn argues that all procedures were not properly followed in creating the guardianship and State Farm "had an affirmative duty to investigate whether the guardianship was valid and whether Amy Locke was fully authorized." Regardless of whether the letters of guardianship were improvidently issued, which is not the issue in this appeal, the fact remains that the letters of guardianship were issued and were in effect at the time State Farm disbursed Katelynn's insurance proceeds to Amy as her guardian. Arkansas Code Annotated section 28-65-216(b) protects State Farm in this situation because Amy presented to State Farm both the order appointing her permanent guardian and the letters of guardianship; the letters of guardianship were not revoked or canceled by the court at the time they were presented to State Farm; and State Farm relied in good faith on the letters of guardianship in releasing Katelynn's funds to Amy. (Elmore, B.; CV-18-1018; 6-5-19; Switzer, M.)

Box v. J.B. Hunt, 2019 Ark. App. 334 [**interlocutory appeal/jurisdiction of trial court**] After reversal on an interlocutory appeal, Box filed a motion for damages and attorney's fees against J.B. Hunt. J.B. Hunt argued that the trial court lacked jurisdiction to act on Box's motion because, while the appeal in Box I was pending, J.B. Hunt voluntarily dismissed its underlying complaint against Box. J.B. Hunt asserted that the case was closed and that because more than ninety days had elapsed since the trial court's order of dismissal, the case had been fully and finally dismissed. The trial court agreed with J.B. Hunt and entered an order finding that it lacked subject-matter jurisdiction to rule on Box's motion for damages and attorney's fees pursuant to Rule 60(c) of the Arkansas Rules of Civil Procedure. Box now brings this second appeal in the matter, challenging the trial court's order wherein the trial court found that it lacked jurisdiction to rule on Box's motion for damages and attorney's fees. Once the record is lodged in the appellate court, the trial court no longer exercises jurisdiction over the parties and the subject matter in controversy. It is clear from the record that the trial court entered its order of dismissal without prejudice during the period in which the interlocutory appeal in Box I was pending in this court. There is an exception to the rule that the trial court loses jurisdiction when the record is lodged in an interlocutory appeal. The trial court retains limited subject-matter jurisdiction over matters that are independent of, or collateral or supplemental to, the matters on appeal. J.B. Hunt's motion to dismiss was not collateral to the matter on appeal in Box I and therefore the exception does not apply. The preliminary injunction and temporary restraining order at issue in the first appeal were premised on J.B. Hunt's complaint and Box's alleged violations of the three employment agreements that contained the restrictive language, terms, and conditions; thus, the complaint was fundamentally and inextricably intertwined with the injunction and temporary restraining order. Because J.B. Hunt's motion to dismiss was not a collateral matter, the trial court did not have jurisdiction to rule on the motion, and the order

dismissing the case without prejudice is null and void. (Karren, B.; CV-18-698; 6-5-19; Hixson, K.)

Monsanto Co. v. State Plant Board, 2019 Ark. 194 [**sovereign immunity**] The ultra vires exception is still applicable and applies in this case. Where a claim is based on alleged ultra vires conduct on the part of the State, and the claimant seeks only declaratory and injunctive relief, sovereign immunity is inapplicable. Here, each of the remaining claims in Monsanto's amended complaint is based on allegations of ultra vires conduct on the part of the Plant Board. Moreover, Monsanto's amended complaint seeks only declaratory and injunctive relief, and does not seek monetary damages. Monsanto's claims are sufficiently developed, detailed, and specific as to properly allege ultra vires conduct, and under these circumstances, the Plant Board must address the merits of Monsanto's claims. (Piazza, C.; CV-18-548; 6-6-19; Hart, J.)

Banks v. Jones, 2019 Ark. 204 [**immunity**] Jones alleged she had been terminated from her employment at the Varner Unit due to racial and gender discrimination. Banks moved for dismissal, arguing that he was entitled to immunity from suit. Jones failed to state factual allegations that allege a deprivation of any constitutional right. Her conclusory and unsupported assertions simply will not suffice. Banks is thus entitled to qualified immunity against the Section 1983 claims and statutory immunity against the state law claims. (Guynn, A.; CV-18-24; 6-6-19; Womack, S.)

Prince v. State Highway Commission, 2019 Ark. 199 [**illegal exaction**] Appellants do not plead facts sufficient to establish that the Department engaged in a misapplication or illegal expenditure of public funds; therefore, their claim is not one for an illegal exaction. The circuit court was correct in finding that the complaint fails to state facts upon which relief could be granted. (Piazza, C.; CV-18-616; 6-6-19; Wynne, R.)

State Plan Board v. McCarty, 2019 Ark. 214 [**sovereign immunity**] Because the Farmers alleged that the process by which Board members are appointed violates the constitution, and because the Farmers sought only declaratory and injunctive relief, their constitutional claims are not subject to the sovereign immunity defense. (Fox, T.; CV-18-309; 6-13-19; Goodson, C.)

Hackie v. Bryant, 2019 Ark. 228 [**sovereign immunity**] The issue is whether the circuit court erred in concluding that Hackie's petition for review under the APA was barred by the state's sovereign immunity from suit. The petition for review in this case solely seeks review of Col. Bryant's administrative decision denying Hackie's application for a license. No cause of action is stated against Col. Bryant in the petition. Col. Bryant is acting in a quasi-judicial capacity and has no vested interest in the outcome of the appeal other than whether his decision to deny the application is upheld. A proceeding to challenge an administrative decision by a state entity is not one against the state for purposes of article 5, § 20. In considering Hackie's application, Col.

Bryant was simply carrying out the administrative duties prescribed to him by statute. The state was not sued, either directly or indirectly, by the filing of a petition for circuit-court review. The APA simply sets out the procedure to be followed. Because the state's sovereign immunity from suit does not apply to this proceeding, the circuit court erred by dismissing the petition on that basis. (Fox, T.; CV-18-623; 6-20-19; Wynne, R.)

Martin v. Smith, 2019 Ark 232 [**judicial immunity**] Here, the court ordered an agency to carry out the terms of the conditional release order rather than a specific individual. Because those functions must naturally be carried out by an individual, quasi-judicial immunity may extend to the individual under some circumstances. Dr. Smith's treatment of McFadden expressly arose from the conditional release order. Although Dr. Smith was not specifically identified in the order, he carried out the court-ordered treatment and reporting obligations as the organization's medical director and McFadden's treating physician. Moreover, he clearly communicated with the court at various times to report McFadden's condition and compliance with the court-ordered treatment regimen. In this case, Dr. Smith clearly served an integral role to the judicial process and is entitled to quasi-judicial immunity. (Pierce, M.; CV-18-813; 6-20-19; Womack, S.)

AR Game and Fish Comm. v. Heslep, 2019 Ark 226 [**sovereign immunity**] The Hesleps' request for injunctive relief does not seek to control the legal actions of AGFC. They do not seek to control the manner in which the road is used or maintained and, in fact, expressly recognize AGFC's regulatory authority over its property. Rather, they seek to enjoin only the (allegedly) illegal actions of AGFC in blocking their access to their property and accept reasonable restrictions on their use of the road. This is a continuing deprivation, not a one-time taking or one-time action by the State. Sovereign immunity does not bar the Hesleps' claims for injunctive relief. A state agency or officer may be enjoined from acting arbitrarily, capriciously, in bad faith, or in a wantonly injurious manner. Amendment 35 to the Arkansas Constitution vests in AGFC the "control, management, restoration, conservation and regulation" of the wildlife resources of the State, including WMAs and other AGFC properties used for those purposes. The essence of the Hesleps' claims is that AGFC illegally blocked their access to the road that is their only access to their property. [**temporary instruction**] AGFC also argues that the circuit court erred when it granted the Hesleps a temporary injunction and required AGFC to provide them with a key to the locked gate across the road on AGFC property pending this interlocutory appeal. The injunction must be dissolved for failure to comply with Rule 65. Rule 65(d) governs the contents and scope of every injunction and provides in pertinent part that "[e]very order granting an injunction . . . must: (A) state the reasons why it was issued." The order granting an injunction in this case is deficient for failure to state the reasons why it was issued. In addition, the circuit court failed to require that the Hesleps give security for the injunction as required by Rule 65(c). (Piazza, C.; CV-18-136; 6-20-19; Wynne, R.)

City of Fort Smith v. Wade, 2019 Ark. 222 [FOIA] FOIA's open-meeting provisions apply to email and other forms of electronic communication between governmental officials just as surely as they apply to in-person or telephonic conversations. It is unrealistic to believe that public business that may be accomplished via telephone could not also be performed via email or any other modern means of electronic communication. Exempting electronic communication would allow governmental officials who are so inclined to make decisions in secret, leave the public in the dark, and subvert the purpose of FOIA's open-meeting provisions. The City argues that even if email communication can qualify as a meeting, the emails in this instance were only "background information," and "non-decisional" information sharing. Here, no response was solicited; no decision was made; and the board discussed the proposed CSC rule change at its next public meeting. The emails here contain information, a recommendation, and unsolicited responses with no decision. The communication does not violate the open-meeting provisions. (Fitzhugh, M.; CV-18-351; 6-20-19; Goodson, C.)

DOMESTIC RELATIONS

Moore v. Moore, 2019 Ark. 216 [following the mandate on remand; dividing property unequally on remand; dividing marital livestock's offspring since livestock was not sold as ordered; decree is not effective until filed so reimbursements for principal payments began on that date] The appellate court found no error in the circuit court dividing the marital property unequally on remand. An inferior court has no power or authority to deviate from the mandate issued by the appellate court, and the question of whether the lower court followed the mandate involves a question of the lower court's jurisdiction. The circuit court did not violate the mandate by distributing the marital property unequally on remand, because the appellate court expressly invited the circuit court to do so by specifically referencing a "redistribution of the parties' property" when they remanded the issue of alimony to the circuit court. Furthermore, in support of its decision to order an unequal division of the property, the circuit court acknowledged the statutory factors, found that Appellee was disabled, and found that she had no income other than alimony and disability benefits. The appellate court also found no error in the circuit court's award of the marital livestock's offspring. No value was placed on the marital livestock when the divorce decree was entered, but the court ordered them sold with the proceeds to be equally divided. Since the livestock was not sold and Appellant retained use of the animals, the appellate court found that the circuit court awarding Appellee a value in the offspring was reasonable considering that the increase in the number of the livestock was specifically attributable to the number and kinds of livestock which it previously found to be marital property. Because Appellant did not sell the marital livestock as originally ordered, the appellate court also affirmed the circuit court's finding of contempt. Lastly, the appellate court found error in the amount Appellant was awarded for payments he made toward the principal on the mortgage. The terms of the decree allowed Appellant to be reimbursed for payments once the decree was

effective (i.e. filed), and he was not entitled to payments made during the parties' separation. (McCormick, D.; CV-18-433; 6-13-19; Goodson, C.)

PROBATE

Streit v. State of Arkansas, 2019 Ark. 218 [**attorney held in criminal contempt**] Arkansas Code Annotated section 16-10-108(c) controls the circuit court's power to punish for criminal contempt. A contemptuous act includes the "disorderly, contemptuous, or insolent behavior committed during the court's sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect due to its authority. If committed in the immediate view and presence of the court, contempt may be punished summarily. Criminal contempt preserves the power of the court, vindicates its dignity, and punishes those who disobey its orders. A court's contempt power should be used cautiously and sparingly. The appellate court found no error, as there was substantial evidence supporting its decision to hold Appellant, an attorney, in contempt. Appellant questioned the judge's integrity in open court, and he interrupted the court on at least three occasions. (Hughes, T.; CV-18-733; 6-13-19; Wood, R.)

JUVENILE

Yelvington v. Ark. Dep't of Human Servs., 2019 Ark. App. 337 [**TPR—best interest**] On appeal from order terminating her parental rights, mother argued that termination was not in the child's best interest because the department failed to prove that potential harm would result if the child were returned to her. The appellate court disagreed, first noting that because the mother raised this single issue on appeal, all other arguments challenging the trial court's order had been abandoned. The evidence was clear and convincing that the mother failed to protect the child from sexual abuse, thus the potential for harm was clear. The mother also challenged the permanency planning order changing the goal of the case to termination and the appellate court similarly affirmed, finding that a permanency planning goal must include consideration of a child's best interest, which here, all pointed to termination. (Zimmerman, S.; JV-18-263; June 5, 2019; Murphy, M.)

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

McDaniel v. Ark. Dep't of Human Servs., 2019 Ark. App. 335 (Coker, K.; JV-18-68; June 5, 2019; Hixson, K.)

DISTRICT COURT

Latham v. State of Arkansas, 2019 Ark. App. 323 [**Lack of Jurisdiction**] [**Criminal Procedure**] Latham pleaded guilty to driving while intoxicated and refusal to submit to chemical test in district court. He appealed those judgments to circuit court. He was found guilty of both offenses and then appealed the circuit court's denial of his motion for directed-verdict and motion for judgment notwithstanding the verdict. The appellate court did not reach the merits of Latham's arguments. Instead, it raised a jurisdictional issue sua sponte. The burden to perfect the appeal was on Latham and he failed to do so. Rule 36 of the Rules of Criminal Procedure requires strict compliance; therefore, the circuit court and appellate court lacked jurisdiction to hear this matter. (Haltom, B., 46CR-17-602; 6-5-19; Virden, B.)