APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

NOVEMBER 2016
VOLUME 24, NO. 3

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 or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

REMINDER: Pursuant to Administrative Order No. 14, Circuits are to notify the Supreme Court by February 1, 2017 of the Administrative Judge selection.

CRIMINAL

Whitlow v. State, 2016 Ark. App. 510 **[right to self-representation]** A defendant in a criminal case may invoke his right to defend himself pro se provided that: (1) the request to waive the right to counsel is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. A request to proceed pro se is not unequivocal if the request is merely an attempt on the part of the defendant to have another attorney appointed. Because appellant did not unequivocally state that he wanted to represent himself, but rather advised the court that he either wanted an attorney other than the one the court appointed or to represent himself, the trial court did not error when it denied appellant's motion to allow him to represent himself. (Sims, B.; CR-15-620; 11-2-16; Gladwin, R.)

Ortega v. State, 2016 Ark. 372 **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant's conviction. (Hearnsberger, M.; CR-16-106; 11-3-16; Wynne, R.)

Luper v. State, 2016 Ark. 371 **[Rule 37]** Because appellant failed to establish that the performance of his trial counsel had an actual prejudicial effect on the outcome of the trial or that but for the actions of his attorney the results of the trial would have been different, the circuit court did not err when it denied appellant's Rule 37 petition. Additionally, because the court file and records from the case did not conclusively show that appellant was entitled to postconviction relief, the trial court did not err when it did not hold an evidentiary hearing on appellant's petition. (Green, R.; CR-16-244; 11-3-16; Brill, H.)

Cogburn v. State, 2016 Ark. App. 543 **[jury instructions; affirmative defense; Ark. Code Ann. § 5-74-106 (d)]** From the evidence presented at appellant's trial, there was no basis from which the jury could conclude that appellant did not have firearms readily accessible for his use. Thus, the trial court did not abuse its discretion when it refused to give the affirmative defense jury instruction that is found at Ark. Code Ann. § 5-74-106 (d). (Yeargan, C.; CR-16-285; 11-9-16; Hixson, K.)

Thompson v. State, 2016 Ark. 383 **[mootness doctrine]** A defendant's right to a direct appeal from his or her criminal conviction continues after his service of confinement. Thus, the mootness doctrine does not bar a direct appeal from appellant's criminal-contempt conviction, despite the fact that appellant has already served his sentence. **[contempt]** The rules of civil procedure do not apply in a criminal contempt proceeding. Therefore, service by mail pursuant to Rule 5 of the Rules of Civil Procedure was not sufficient notice to appellant of the show cause order that was issued in his case. (Hughes, T.; CR-16-207; 11-10-16; Baker, K.)

Morris v. State, 2016 Ark. App. 546 **[*Miranda*; motion to suppress]** The circuit court erred in finding that appellant was not "in custody" when he was interrogated by the police immediately prior to his arrest. Thus, appellant's statement, which was made during an interrogation without his having been informed of his *Miranda* rights, should have been suppressed. (Lindsay, M.; CR-16-200; 11-16-16; Virden, B.)

Prickett v. State, 2016 Ark. App. 551 **[motion to suppress]** The law enforcement official had reasonable cause to believe that appellant's driver's license was still suspended one day after he had previously verified the suspension. A belief that appellant was still committing a traffic violation by driving on a suspended license was all that was required for the law enforcement official to have had sufficient probable cause to initiate a traffic stop. Because the officer had probable cause to stop appellant, the circuit court correctly denied appellant's motion to suppress

the evidence that was obtained during the traffic stop. (Gibson, B.; CR-16-272; 11-16-16; Glover, D.)

Robinson v. State, 2016 Ark. App. 550 **[sufficiency of the evidence; second-degree sexual assault]** There was substantial evidence to support appellant's conviction. **[rape-shield statute]** The trial court was well within its discretion to reject appellant's motion to present evidence about his victim's relationship with her boyfriend because the evidence he wanted to offer was irrelevant. Specifically, whether the victim had a motive to lie was irrelevant in light of the evidence that appellant's semen was found on the victim's bed on the night of the alleged assault. **[Ark. R. Evid. 404 (b)]** The trial court did not abuse its discretion when it permitted the victim to testify that appellant had crudely commented on the size of her breasts thereby establishing that appellant had noticed her in a sexual way. Appellant's awareness of his victim's physical development and his comparing her to an actress was relevant to allow the jury to infer that he had a sexual attraction to the victim—a circumstance that illustrated his state of mind with regard to her and thus was admissible under Rule 404 (b). (Lindsay, M.; CR-16-317; 11-16-16; Gruber, R.)

Dennis v. State, 2016 Ark. 395 **[self-representation]** Because appellant did not unequivocally invoke his right to self-representation, the circuit court did not err when it denied appellant's request to allow him to proceed without counsel. **[Ark. R. Evid. 804 (b)(1)]** In determining the admissibility of former testimony pursuant to Ark. R. Evid. 804 (b)(1), the court's focus is on the nature of the hearing where the prior testimony was given and whether there existed a similar motive for cross-examination. In appellant's case, because the prior testimony was elicited at a full-fledged hearing and because the motive for the cross-examination at the prior hearing was similar to the motive at trial, the circuit court did not abuse its discretion by allowing the admission of prior testimony from a suppression hearing at appellant's trial. (Piazza, C.; CR-15-724; 11-17-16; Goodson, C.)

Kinsey v. State, 2016 Ark. 393 **[jury instructions]** Arkansas Model Instruction—Crim. 2d 705 is a complete statement of the law. **[admission of evidence; past behavior]** Pursuant to Ark. Code Ann. § 16-97-103(5), relevant character evidence is admissible at the penalty phase of a trial even if it was inadmissible in the guilt-innocence phase of a trial. In appellant's case, when his attorney posed a broad question regarding appellant's aggressiveness, the door was opened to questions regarding specific instances in which appellant had displayed aggression. Additionally, the broad question put appellant's character at issue and the testimony was permissible pursuant to Ark. Code Ann. § 16-97-103. (Tabor, S.; CR-15-521; 11-17-16; Baker, K.)

Washington v. State, 2016 Ark. App. 565 **[Ark. R. Evid. 901]** The authentication or identification requirement as a condition precedent to admissibility of evidence pursuant to Rule 901 of the Arkansas Rules of Evidence is satisfied by evidence sufficient to support a finding

that the matter in question is what its proponent claims. For purposes of the Rule, the testimony of a witness with knowledge that a matter is what it is claimed to be can authenticate evidence. Additionally, the appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances can be used to authenticate evidence. **[Ark. R. Evid. 404 (b); reverse]** For "reverse 404 (b) evidence" to be admissible, the alleged prior wrongs by someone other than the targeted defendant must be so closely connected in time and method that the evidence can cast doubt upon whether the defendant committed the crime. (Fogleman, J.; CR-16-344; 11-30-16; Harrison, B.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):
Procella v. State, 2016 Ark. App. 515 (theft of scrap metal; first-degree criminal mischief) CR-16-380; 11-2-16; Virden, B.

Allen v. State, 2016 Ark. App. 537 (rape) CR-16-218; 11-9-16; Abramson, R.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence.

Simington v. State, 2016 Ark. App. 514 (probation) CR-16-31; 11-2-16; Virden, B.

CIVIL

Entmeier v. City of Fort Smith, 2016 Ark. App. 517 **[discovery]** Entmeier argues that the circuit court erred in failing to grant him additional time to complete discovery before ruling on appellees' motion. The circuit court rejected Entmeier's argument, stating that the motion for summary judgment had been filed almost eighteen months after Entmeier had initiated the lawsuit and that no discovery efforts had been conducted during that time. Additionally, Entmeier did not review the documents that had been provided to him before the summary judgment hearing. The circuit court did not abuse its discretion in refusing to withhold its ruling on the motion to allow Entmeier to conduct additional discovery. **[summary judgment/whistle-blower]** The circuit court found that Entmeier had failed to meet proof with proof. The court found the statements of Entmeier's father to be mere hearsay, uncorroborated by those who allegedly had made the statements. The court also noted that Entmeier himself testified to many of the performance issues and that he had been silent regarding these performance issues in his response to appellees' evidence. The circuit court determined as a matter of law that appellees had an affirmative defense to Entmeier's claim and that his termination was due to poor job performance. Entmeier has failed to demonstrate the existence of a genuine issue of material fact that he was not terminated for poor job performance. (Tabor, S.; CV-16-93; 11-2-16; Gladwin, R.)

Progressive Eldercare Services-Saline, Inc. v. Cauffiel, 2016 Ark. App. 523 **[charitable immunity/nursing home]** *Watkins v. Ark. Elder Outreach* and its progeny are on point and require affirmance of the circuit court's denial of Progressive's motion for summary judgment. As did the plaintiff in *Watkins,* Cauffiel has presented a question of fact on the issue of whether Progressive abused the charitable form. Cauffiel presented evidence that Progressive, which appears on paper to not have a profit, is actually making a significant profit but is funneling its profits to other companies that it owns or that are related entities. Similar to the argument made by the nursing home in *Watkins,* Progressive contends that its payments to its related entities are reasonable. However, in *Watkins,* the reasonableness of payments to related entities was a question of fact precluding summary judgment. Cauffiel also presented evidence that Progressive was using a related captive insurer, which Cauffiel's expert testified was a structure consistent with a for profit company; not a nonprofit. This evidence also raises a question of fact on the issue of Progressive's intent, which precludes summary judgment. Progressive argues that the circuit court was required to determine as a matter of law whether it was entitled to charitable immunity and that *Watkins* and its progeny have erroneously converted what is a question of law into a question of fact in all cases where a plaintiff alleges abuse of the charitable form. The case at bar (along with *Watkins* and its progeny), which was presented to the circuit court on a summary judgment motion, cannot be decided as a matter of law because there are genuine issues of material fact on the issue of the legitimacy of the charitable form. It is a question for the trier of fact to determine. This does not mean that in every case where a plaintiff challenges a nursing home's charitable form a question of fact is raised, effectively eliminating charitable immunity. A review of the facts in each case is required to determine whether the party opposing summary judgment presents sufficient evidence to create a genuine issue of material fact. In cases where a genuine issue of material fact does not exist, the circuit court can rule on the charitable immunity issue as a matter of law. However, if the evidence presented creates a genuine issue of material fact, the matter cannot be determined as a matter of law, and summary judgment is inappropriate. (Arnold, G.; CV-15-681; 11-2-16; Vaught, L.)

See also: *Progressive Eldercare Svcs.-Bryant, Inc. v. Price,* 2016 Ark. App. 528
Progressive Eldercare Svcs.-Saline, Inc. v. Garrett, 2016 Ark. App. 518

Alexander v. Eastern Tank Services, Inc., 2016 Ark. App. 544 **[summary judgment/ADA]** Appellant contends that the circuit court erred in concluding that he failed to produce sufficient evidence to show that genuine issues of fact remain to be tried with respect to whether the discharge of his employment was motivated by discrimination in violation of the Americans with Disabilities Act (ADA) and the Arkansas Civil Rights Act (ACRA). The trial court was correct in its conclusion that appellant failed to present a prima facie case of discrimination. Where a plaintiff fails to present a prima facie case that the adverse employment action was due to the plaintiff's disability, the plaintiff has failed to establish causation, in which case summary judgment is appropriate. Alexander's effort to create a discriminatory purpose behind his being laid off was simply not supported by proof but was rather undergirded by mere allegations and suppositions that did not rise to the level of proof sufficient to withstand summary judgment. Appellant failed to show that there was a

genuine issue as to a material fact or that reasonable differing inferences could have been drawn from the undisputed facts. (Cox, J.; CV-16-440; 11-9-16; Hoofman, C.)

Epley v. John Gibson Auto Sales, 2016 Ark. App. 540 **[contract]** The court found that the GMC was sold "as is" but that the salesman had promised Ms. Epley that she could return the vehicle in three days if it was not satisfactory. Because Gibson failed to comply with this promise, the circuit court denied its claim for a deficiency judgment. The court further found that Epley's continued use of the vehicle acted as a complete set off against any refund of any moneys she had paid for the vehicle. These findings are not clearly erroneous. (Wright, J.; CV-16-140; 11-9-16; Gruber, R.)

Mountain Pure, LLC v. Clear Water Holdings, LLC, 2016 Ark. App. 542 **[contempt]** Appellants argue that the circuit court abused its discretion in denying their petition for contempt. The evidence presented supports the circuit court's finding that McAfee's actions in this regard did not rise to the level of contemptible conduct. The circuit court could conclude from Bonney's testimony that McAfee did not order Bonney to delete data from the terminal server. To the contrary, McAfee ordered Bonney to remove the terminal server from the network so it could be delivered to Stacks. McAfee testified that to his knowledge there was no usable data on the terminal server that had been deleted prior to its delivery to Stacks. Under these facts McAfee's conduct could, at most, rise to the level of negligence for unknowingly delivering the terminal server that had some data deleted. A circuit court abuses its discretion when it acts thoughtlessly and without due consideration. Here, it is clear that at the conclusion of the contempt hearing the circuit court was displeased with McAfee's conduct. However, the court took the matter under advisement and, after careful consideration of the entire record, concluded that McAfee's actions did not rise to the level of contemptible conduct. Based on the language of the April 13, 2015 order, along with the evidence in this case, the court did not abuse its discretion. (Pierce, M.; CV-16-122; 11-9-16; Vaught, L.)

Alexander v. Alexander, 2016 Ark. App. 554 **[deed reformation/attorney's fees]** In this case, Curtis's complaint referenced the warranty deed between his father and him, but he never alleged that there had been a breach of the contract. Instead, he merely sought reformation of the deed to reflect the correct legal description to the property. In addition, he asked for Avery's quitclaim deed to be set aside. In neither of these prayers for relief did Curtis allege that a contract had been breached. Because he made no claims for any sort of contract-related relief, section 16-22-308 did not apply, and the circuit court erred in awarding attorney's fees. (Wyatt, R.; CV-16-264; 11-16-16; Whiteaker, P.)

Midfirst Bank v. Sumpter, 2016 Ark. App. 552 **[Betterment Act]** Sumpter's claims against MidFirst are essentially for the cost and expenses of the improvements to the Bedford property, plus interest paid and accrued to her lender, Fidelity National Bank. Sumpter also has a claim for the increased value of improvements against Carolyn Bedford under the Betterment Act. Both claims by Sumpter emanate from the improvements to the Bedford property. The claim against MidFirst is for the actual cost of improvements, while the claim against Carolyn Bedford is for the increased value of her property. Sumpter cannot receive

both remedies because it would amount to a double recovery. The Betterment Act provides relief under these circumstances. Sumpter clearly made improvements to the Bedford property while she believed herself the true owner and while she held color of title from the foreclosure sale. The evidence introduced in the record indicates that the value of improvements to the Bedford property for work provided by Sumpter was $9,650. Based on the application of the Betterment Act, the damages sustained by Sumpter are not the costs of the improvements, but rather the increased value of the improvements. The amount of rents received should be set off from the recovery amount. **[conversion]** The plaintiff must show the fair market value at the time of the conversion. If the only testimony as to the value of the items taken is the replacement cost and there is no evidence as to the fair market value, a judgment for conversion cannot stand. (Hill, V.; CV-16-470; 11-16-16; Glover, D.)

United Food and Commercial Workers Union v. Wal-Mart Stores, Inc., 2016 Ark. 397 **[injunction]** A permanent injunction was issued that prohibited union from trespassing on Wal- Mart's private property for non-shopping purposes. The National Labor Relations Act does not preempt Wal-Mart's trespass suit. The union argues that to claim trespass on shopping center common areas that Walmart owns but does not presently hold the right to exclusively possess, Walmart must prove that the union unreasonably interfered with its rights to use its property. This argument is without merit. Walmart has retained the right to possess its common areas, and its possessory rights include the right to exclude those who are not lawfully present. However, the injunction is too broad as it includes all non-shopping activity. Supreme court modified it as follows: after the words "non-shopping activities" and "non-shopping conduct" and "non- shopping purposes," insert "such as picketing, patrolling, parading, demonstrations, "flash mobs," handbilling, solicitation, and manager confrontations." This language was included in the preliminary injunction and properly limits the scope of the order to those activities that were proven by Walmart to cause irreparable harm. (Scott, J.; CV-15-900; 11-17-16; Wynne, R.)

Briggs v. Magness, 2016 Ark. **576 [restrictive covenants]** At issue in this case is the interpretation of a protective or restrictive covenant on the use of land. Briggs argues that the application of the "unfettered use" rule allows it to use Tract A to access its adjacent BPVE development and that the trial court erred in deciding otherwise. The trial court determined that Briggs's intended use of Tract A as access to a separate subdivision was inconsistent with the use of Tract A as stated in the restated bill of assurance. The trial court's application of the "unfettered use" rule to these restrictive covenants was not erroneous. Because the restated bill of assurance contains restrictions preventing Briggs's intended use of Tract A, and there is no existing easement to otherwise allow for access across Tract A, the trial court is affirmed. (Piazza, C.; CV-16-133; 11-30-16; Hixson, K.)

Lyle Farms Partnership v. Lyle, 2016 Ark. 577 **[prenuptial agreement]** Looking at the prenuptial agreement, it is clear that the requirements of section 9-11-402 were not met because the parties did not include an acknowledgment. Appellants argue that since the parties included the word "acknowledge" in the body of the agreement itself, and because the notary signed and affixed his seal, this should satisfy the acknowledgment requirement of the statute. However, this argument is without merit. The supreme court has long held that an

acknowledgment is a formal declaration or admission before an authorized public officer by a person who has executed an instrument that such instrument is his act and deed. Appellants also contend that any defects in the acknowledgment can be cured by the curative provisions of section 18-20-208. However, this argument is also without merit. Here, there was no acknowledgment, defective or otherwise. Therefore, the curative provisions of the statute cannot be held to supply an acknowledgment when, in fact, there is none. Finally, appellants argue that appellee should be equitably estopped from claiming that the prenuptial agreement is void and unenforceable, because she entered into the agreement and accepted the benefits of the marriage until James's death; and now she seeks to "renege on her promise ... and receive benefits which she previously agreed she would not ever seek." The court rejected this defense in the order, stating that the "fact that the parties acted under the assumption for several years that the prenuptial agreement was valid does not correct the requirement of the statute that the agreement must be properly and legally acknowledged." (King, K.; CV-16-162; 11-30-16; Brown, W.)

Rousse v. City of Jonesboro, 2016 Ark. 580 **[appeal-resolution/ACA 14-46-425]** Appellant timely filed a notice of appeal within thirty days of the city council's resolution. He also filed a timely copy of the city council's resolution being appealed. Therefore, he satisfied the record requirement under Rule 9. Thus, the trial court erred in dismissing the appeal due to appellant's failure to file a complaint, as he was under no obligation to do so. (Honeycutt, P.; CV-16-479; 11-30-16; Brown, W.)

Southern Farm Bureau Ins. Co. v. Shelter Ins. Co., 2016 Ark. 563 **[auto insurance]** Roberson was driving a vehicle owned by a third party when it was rear-ended by an uninsured vehicle, forcing his car into the back of the vehicle in front of him. Roberson was insured by Farm Bureau, and the car he was driving was insured by Shelter. Having been injured in the accident, Roberson filed a lawsuit seeking damages from both insurance companies under their UM provisions. Shelter settled the matter with Roberson, obtained a release for itself and Farm Bureau in exchange for $6000, and left it for the trial court to decide the respective liabilities of the two insurers. Primary automobile insurance coverage follows the vehicle, not the person. By reading the applicable statute together - Arkansas Code Annotated section 23-89-215 and section 23-89-403(a)(1)-it can be inferred that the legislature intended that UM coverage, like liability insurance, follows the automobile because it requires that UM coverage be offered on every liability policy. Because the legislature explicitly deviated from the general rule by providing that no-fault benefits follow the person, see Arkansas Code Annotated section 23-89-204(b), it is clear that the legislature intended that auto insurance, other than no-fault benefits, follows the vehicle rather than the person. The Arkansas Supreme Court's interpretation of section 23-89-403 is dispositive of this case-that coverage on vehicles involved in an accident is primary unless specifically stated by the legislature. Here, there is no coverage under Farm Bureau's policy for this claim. Shelter insured the vehicle involved in this accident, and, thus, its policy provided the primary UM coverage available to Roberson. The Shelter policy provides that if a UM claim is also "covered" by another policy, its coverage is secondary. Roberson's claim is not covered under Farm Bureau's policy because he was injured in a nonowned auto that had primary coverage. Moreover, the UM claim was settled for less than Shelter's limits and,

therefore, Shelter's was the only policy applicable to Roberson's claim. (Gibson, B.; CV-16-306; 11-30-16; Gladwin, R.)

DOMESTIC RELATIONS

Langston v. Brown, 2016 Ark. App. 535 **[child support – income for purposes of child support]** In this child support case, the circuit court granted the appellee noncustodial father's motion to reduce child support and made the award retroactive, awarding child support of $542 per month based on an estimated income of $60,000 per year; it imputed $2,500 to the account balance in appellant custodial mother's bank account on the date the divorce decree was entered; it made half of the $700 the appellee's wife spent on insurance attributable to the child's health insurance; it ordered that the camera placed in the child's room was not required to be removed but that it must be non-operational when the child was in the appellee's care during his visitation; and it denied appellant's motion to have appellee's tax refunds considered income for child support purposes. On appeal, the Court of Appeals reversed the imputation of $2,500 to her bank account on the date the divorce decree was entered; the Court ordered division of the $177.71 that was in the account at the time of the entry of the decree. The Court said the evidence before the trial court was simply that the appellant took money from the account before the divorce degree, as was permitted, so the circuit court clearly erred on this point. On the issue of error based upon the court's granting appellee's motion to reduce child support, the Court of Appeals pointed out the appellee's reason for requesting a reduction. He left his job as an employee at Walmart to purchase and run a guns and ammunition store. In this case, all facts regarding appellee's earning capacity came from appellee alone. The circuit court stated that it was accepting the amount it imputed to him as income, $60,000, based upon materials he submitted, as well as the amount an assistant manager at Walmart made as income. It also accepted his reason for leaving the job. These were credibility issues for the circuit court. The circuit court also found that getting his last couple of years of tax returns would not be useful (or reliable) because those would reflect his former job, not his new business, which meant his income basis for setting child support was particularly difficult. On the health insurance deduction, the Court of Appeals found no error in the circuit court's decision to attribute half or a third of the health insurance difference (for family coverage) to the parties' child. On the issue of the removal of a video camera from the child's room, the Court of Appeals said the appellant offered no authority or convincing argument to support allegations of error and that she never offered the circuit court any proof or assertion of harm to the child. Finally, on the issue of error in denying appellant's motion that appellee's tax refunds be considered income for child support purposes, the Courts of Appeals said that modification of child support requires a change in circumstances. The appellee had claimed zero dependents for tax purposes in all 28 years that he worked at Walmart. Therefore, the appellant showed no changed circumstances; he was doing what he had done throughout the parties' marriage. The Court reversed on the issue of imputing $2,500 to the appellant's account balance on the day the decree was entered and affirmed on all other issues. (Brantley, E.; No. CV-16-60; 11-2-16; Brown, W.)

Walden v. Jackson [Walden I], 2016 Ark. App. 578 **[paternity; name change; child support; Rule 60 of the Arkansas Rules of Civil Procedure]** The circuit court entered a paternity order on July 8, 2015, finding the appellee was the father of the child, based upon the results of a paternity test and changing the child's surname to his father's. The court also denied retroactive child support. On July 30, 2015, the appellant filed a notice of appeal from the paternity order. In the notice, she stated that she was filing as a precaution in the event that the July 8, 2015 order was deemed a final order subject to appeal. The appellant opined in the notice of appeal that it was not a final order because issues remained to be resolved concerning the court's decision to change the child's surname and to deny retroactive child support, as set forth in her "Motion to Alter or Amend Paternity Order and to Modify or Vacate Findings of Fact, and Brief in Support," which "are currently pending." She said that she did not abandon her pending issues or the pending motion, but that upon entry of a final order subject to appeal, she abandoned any pending but unresolved claims to the extent that she could as a party defendant. In its decision, the Court of Appeals noted that an order is final when it dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. The issues the appellant said were unresolved were expressly addressed by the circuit court when it changed the child's surname and denied retroactive child support. Those were not in issue until the appellant filed her motion to alter or amend the paternity order and to modify or vacate findings of fact and brief—which she filed one day after she filed her notice of appeal. The Court of Appeals said, "[a]ccordingly, contrary to appellant's assertion, the July 8, 2015 paternity order was a final order, and appellant's appeal was timely." Subsequently, on August 13, 2015, the appellee answered the appellant's motion she filed the day after she filed the appeal, then the appellee filed a motion to dismiss. Appellant filed an amended response on September 17, 2015, and a hearing was set on October 20, 2015. After the hearing, the circuit court entered a letter opinion in which it outlined its application of the *Huffman* factors to its best interest findings for the name change. It vacated its previous denial of retroactive child support, which it awarded, and entered a new order to that effect on December 15, 2015. Under Rule 60(a) of the Rules of Civil Procedure, the court had 90 days of filing its final order to vacate a judgment, order or decree to correct errors or mistakes or to prevent a miscarriage. After that ninety-day period, the court loses jurisdiction to modify or vacate the decree. Here, the circuit court's December 15, 2015 order was entered 170 days after the entry of its July 8, 2015 paternity order, which exceeded the ninety-day limitation, so the court had no jurisdiction. The decision was reversed and dismissed. (Ryan, J.; No. CV-16-235; 11-30-16; Brown, W.)

Walden v. Jackson [Walden II], 2016 Ark. App. 573 **[name change; retroactive child support; mootness]** This case is a companion case to *Walden I*, 2016 Ark. App. 578, set out above, a paternity action in which the court found the appellee to be the father of the child, ordered future child support, and denied retroactive support. The appellant argued on appeal that this appeal is moot because of a subsequent order entered by the circuit court after this appeal was filed. The Court of Appeals found it is not moot because of the appellate court's holding in *Walden I* that the circuit court lacked jurisdiction to modify the order. In that appeal, the Court of Appeals reversed and dismissed. In this appeal, the court reversed and remanded the case on both the name change and the retroactive child support issues. On the issue of name change, the remand is for the court to provide an analysis of the name change under the *Huffman* factors and to determine whether the name change is in the child's best interest. On the issue of retroactive support, the Court reversed based upon what it said is the plain language of Ark. Code Ann.

Section 9-10-111(a) (Repl. 2015), that an award of child support under the statute must begin on the date of the child's birth. The circuit court's finding that the appellee is not required to pay retroactive support because he lacked contact with the child violated the statute, which provides no exceptions. In addition, the Court said that case law is clear that a parent's child support obligation does not depend on his relationship or visitation with the child. The court also noted that the parties agreed that the child's mother had repeatedly offered the appellee opportunities to see the child, which he did not do. (Ryan, J., No. CV-15-878; 11-30-16; Vaught, L.)

Sherman v. Boeckmann [Boeckmann I], 2016 Ark. App. 535 **[marital property]** The Court of Appeals noted that this appeal and the one to follow "arise out of very contentious and protracted divorce litigation between [the parties]." The dispute centers on the ownership of four family businesses. The appellant wife owned 100% of the stock in Logan Centers, Inc.; the appellee husband owned 100% of the stock in Boeckmann and Sons, Inc.; and the parties each owned 50% of the stock of both B and L Properties, Inc. and L and K Properties, Inc. There was not good valuation made of any of the properties during the course of the litigation. When it came to dividing these properties, the decree awarded each party one-half of the stock in each of the four corporations. Other marital property, real and personal, was ordered sold, with the proceeds divided equally between the parties. On appeal, the appellant argued that the circuit court erred in (1) failing to make specific findings regarding the value of the four corporate entities; (2) awarding one-half of the stock in the four corporations to each party; and (3) failing to adopt the valuation of the Logan Center or to seek an independent valuation. In affirming the circuit court in all respects, the Court of Appeals said the circuit court has the discretion to place a value on a marital asset that is within the range of the evidence submitted and that the circuit court did not err in failing to value the corporations. The Court said the circuit court could award the stock in the four corporations half to each party under the pertinent statute or could make an unequal division of the stock. Finally, the circuit court was not required to appoint an expert to value the four corporations—that was left to the sound discretion of the trial court. (Bell, K.; No. CV-14-353; 11-30-16; Harrison, B.)

Sherman v. Boeckmann [*Boeckmann II*], 2016 Ark. App. 568 **[postdegree award]** In the first case involving these parties, 2016 Ark. App. 535, summary set out above, the circuit court granted a divorce and awarded each party one-half of the stock in four family business corporations the parties agreed are marital property. Following that decision, the appellee filed a total of four petitions for contempt between October 29, 2013 and January 24, 2014, to which the appellant responded. A hearing was held on November 25, 2013, addressing predecree petitions and also some postdecree petitions. All of the contempt petitions involved the appellant's alleged withdrawals of money from various accounts for her personal use, therefore allegedly violating a mutual restraining order entered by the court. He also alleged that she increased her own salary from the amount set by the court in a temporary order during the pendency of the divorce. Appellant filed a motion to dismiss the January 2014 petition for contempt, making various arguments about her authority to act in the ordinary course of running the business. On February 5, 2014, the court entered an order from the November 25, 2013 contempt hearing, making various orders from which the appellant appealed. In late February 2014, a hearing was held on appellant's motion to dismiss and appellee's two petitions for contempt, dismissing all allegations that occurred as a result of the bench ruling from the November 2013 hearing. The court disposed of all other issues in a letter opinion in March 2014, ordering, among other things,

that appellant reimburse the Logan Center for various sums from personal funds and awarding the appellee $439,000, sums that appellant had been ordered to pay previously. She had also been ordered to remove her children as signatories from bank accounts, certificates of deposit, or similar actions. The appellant was ordered to pay appellee's attorney's fees of $20,000 from personal funds. On appeal the appellant argues that the circuit court lacked jurisdiction over the matter so that the order appealed from is void; that the court erred in granting judgment to appellee for funds appellant used to pay her state and federal taxes; that the court erred in controlling the action of the Logan Center (one of the four entities for which the stock was split between the parties), a separate entity, in four specified ways. The Court of Appeals found that the circuit court retained jurisdiction of the matter, as set out in the decree "to enter any orders in the future necessary to effect the terms of this decree." The Court said that in the postdecree pleadings the appellee asked not only to hold the appellant in contempt, but to distribute money equal to those the appellant had withdrawn from the parties' various personal and corporate accounts that the circuit court had found to be marital property—carrying out the division of marital property already announced in its decree, which was within the court's express reservation of jurisdiction. The Rule 60 time limits do not apply to this jurisdiction. The Court also found the court's order with respect to the payment of appellant's tax obligation—the finding that an offset was appropriate—was not clearly wrong. The appellant also challenged the court's jurisdiction over the operation of the Logan Center, a nonparty corporation, by controlling and limiting the amount of money spent by the corporation. Among other things, she argued that the court erred in requiring the appellant to reimburse the corporation for $162,000 she had removed from the corporation's accounts and in finding that she spent $58,000 in Logan Center funds for her personal benefit. The withdrawals occurred after the decree had been entered, when the appellant was using funds that had been awarded to her and were her personal property—and there was no showing that she withdrew more than half the funds, so it was error to require her to reimburse the corporation for these funds. In addition, the court erred in ordering the appellant's house and its contents sold with the proceeds divided between the parties equally. The house was not marital property; it was purchased after the decree was entered. The result was a windfall for the appellee. The circuit court did not err in ordering appellant's children removed as signatories to the accounts because she failed to show prejudicial error or to support her argument with convincing legal authority. The court did not err either in awarding attorney's fees to the appellee, a decision that was within the court's discretion in this domestic relations case. The decision was affirmed in part; reversed in part; and remanded in part. (Bell, K.; No. CV-14-1096; 11-30-16; Harrison, B.)

Rice v. Rice, 2016 Ark. App. 575 **[modification of custody—changed circumstances]** The appellant mother appealed from the circuit court's granting a directed verdict on her motion to change the custody of the parties' two children from the appellee father to her based upon a material change in circumstances. In affirming, the Court of Appeals said the circuit court clearly acknowledged that there had been changes but had properly considered whether the changes had any detrimental impact on the children, finding that they did not. The Court said it reviewed the evidence in the light most favorable to the nonmoving party, giving the proof presented its highest probative value, and taking into account all reasonable inferences deducible therefrom, affirming because there was no substantial evidence introduced from which a reasonable fact-finder could find that the changes had a negative impact on the couple's children. The Court also noted that changes of circumstances in the noncustodial parent's circumstances

are not sufficient, standing alone, to justify modifying custody, but may be considered in conjunction with changes in the custodial parent's circumstances. Here, however, the appellant's motion for change in custody applied only to changes in the appellee's circumstances, so the court could consider only those changes, not hers. She raised no objection to the court's reliance on only the appellee's circumstances, so she did not preserve the error for appeal, precluding the Court of Appeals from considering it. (Davis, B.; No. CV-16-457; 11-30-16; Vaught, L.)
Smith v. Smith, 2016 Ark. App. 571 **[alimony]** The appellant husband appealed from the circuit court's denial of his request for alimony. The Court of Appeals considered the facts of this case and the rules governing the award of alimony to a spouse. The Court found no abuse of discretion in the denial. Even though the appellant is disabled and has a need for alimony, that need must be balanced by the other spouse's ability to pay. The appellee will not have the ability to pay alimony if she makes her planned move from her mother's home. In addition, there was evidence that the appellant has the ability to earn additional money over and above his disability income. The decision was affirmed. (Hendricks, A.; No. CV-16-170; 11-30-16; Glover, M.)

PROBATE

CMS Investment Holdings, LLC v. Estate of Robert M. Wilson, Jr., Deceased **[decedent's estate – claims against the estate]** The circuit court denied two claims the appellant, CMS Investment Holdings, LLC (CMSIH) made against the appellee estate. The issues on appeal were whether CMSIH's claims were timely made and whether the circuit court erred by denying them. The Court of Appeals found no error and affirmed the circuit court's order denying CMSIH's claims. The Court affirmed the decision that CMSIH was not a known or reasonably ascertainable creditor, and that its claims were untimely filed. The opinion includes a good review of the issues surrounding the issue of the timeliness of claims made against an estate and factual consideration that may enter into a court's making such decisions. (Smith, V.; No. CV-15-716; 11-16-16; Abramson, R.)

JUVENILE

Trotty v. Ark. Dep't of Human Services, 2016 Ark. App. 557 **[DN Adjudication – sufficiency]** The circuit court found that the juveniles were dependent-neglected because the appellant could not explain how she had the children in her care, they had no guardian, appellant had a prior history of sexually exploiting her daughters, and she admitted that she had not enrolled a child in school and that child had missed an entire school year. Appellant's admission of educational neglect was sufficient to support the dependency-neglect finding. (Hudson, A.; CV-16-683; 11-16-2016; Hixson, K.)

Canada v. Ark. Dep't of Human Services, 2016 Ark. App. 564 **[DN PPH – Relative Custody]** The trial court's decision to place appellant's children with relatives was not clearly erroneous. Appellant's failure to comply with court orders based on uncontroverted evidence and evidence that she failed to remain in contact with DHS was a sufficient basis for the court to conclude that it would not be safe to return her children to her custody. (Talley, D.; CV-16-690; 11-30-2016; Abramson, R.)

Peeler v. Ark. Dep't of Human Services, 2016 Ark. App. 534 **[DN PPH – Guardianship]** It was not necessary for the court to rule on a motion for intervention prior to considering a petition for guardianship in an open dependency-neglect case. A.C.A.§ 28-65-107(c)(1) specifically provides that petitions for guardianship shall be filed in an open juvenile cases if the juvenile is subject to case under the Arkansas Juvenile Code. (Bell, K.; CV-16-75; 11-2-2016; Hoofman, C.)

Stanley v. Ark. Dep't of Human Service, 2016 Ark. App. 581 **[TPR – adoptability]** There was sufficient evidence as to adoptability where the worker testified that the children were adoptable. The foster parents and therapist also testified as to the children's progress in school, emotional capabilities, and characteristics. **[potential harm]** There was sufficient evidence as to potential harm based on the totality of the circumstances that included evidence of appellant's continued history with DHS concerning environmental neglect and evidence of parental unfitness, drug use and neglect. (Branton, W.; CV-16-710; 11-30-2016; Brown, W.)

Burkett v. Ark. Dep't of Human Service, 2016 Ark. App. 495 **[DN Adjudication & TPR – Stay]** During the maltreatment investigation of the sexual abuse of his son, appellant was charged with two counts of rape of his nephews. The adjudication and termination hearings were held on the same day based on appellant's sexual abuse of his child and parental unfitness. Appellant only appealed the court's denial of his motion to stay the proceedings pending the criminal proceedings. The circuit court did not abuse its discretion in denying to stay both proceedings. **[Fifth Amendment]** Appellant argued that his inability to speak in his own defense impaired his ability to defend himself and violated his Fifth Amendment rights. The state has a clear policy to provide permanency in a reasonable time frame viewed from the child's perspective. No criminal trial date had even been scheduled in appellant's criminal case. Further, the appellate court noted that there was a TPR ground that the court found that did not depend on the appellant's testimony or proof of sexual abuse. **[Sixth Amendment]** Appellant's argument that the denial of the stay violated appellant's Sixth Amendment right to effective assistance of counsel in the criminal proceeding was speculative. The appellate court noted that it would not speculate as to the effectiveness of appellant's counsel who yet to represent appellant at a criminal proceeding that had not yet been scheduled. (Smith, T.; CV-16-686; 11-30-2016; Gruber, R.)

Rodgers v. Ark. Dep't of Human Service, 2016 Ark. App. 569 **[TPR – [aggravated circumstances]** There was sufficient evidence to support the court's finding of aggravated circumstances where appellant's child had been chronically abused both physically and emotionally. The child's testimony alone of daily beatings supported a finding of extreme or repeated cruelty. **[failure to remedy]** Appellant cites no authority for the proposition that the circuit court is limited to determining whether the stated basis for the adjudication had been remedied. The statute is not based on the adjudication ground but specifically states, "the conditions that caused removal." The child's testimony, which the court found credible, dealt with the safety of the child and the fears he expressed if he returned home. (Wilson, R.; CV-16-496; 11-30-2016; Harrison, B.)

Howerton v. Ark. Dep't of Human Service, 2016 Ark. App. 560 **[TPR – parental rights]** Appellant was married to mother when the child subject to dn case was born. As a result, he was named as the father. However, Edgar was named on the child's birth certificate and later confirmed by DNA testing to be the father. A termination petition was filed as to both fathers and the court terminated rights as to both fathers. Appellant argued that once Edgar was found to be the legal father, appellant was divested of any parental rights and had no rights to be terminated. The appellate court agreed and found that once Edgar was the father, it changed appellant's legal status and he was no longer the father. Appellant had no rights to be terminated. TPR reversed as to appellant. (Halsey, B.; CV-16-561; 11-16-2016; Brown, W.)

Geatches v. Ark. Dep't of Human Service, 2016 Ark. App. 526 **[TPR – parental rights]** Appellant failed to preserve his argument for appeal that he never had parental rights and therefore he had no rights to terminate. Appellant was put on notice throughout the case that he was being treated as the father in the pleadings and orders. He had the opportunity to object and obtain a ruling on the issue and failed to do so. (Medlock, M.; CV-16-33; 11-2-2016; Vaught, L.)

Martin v. Ark. Dep't of Human Services, 2016 Ark. App. 521 **[TPR - potential harm]** Appellant failed to seek medical treatment for his child's injuries, chose his wife over his children, and there was concern that appellant would not protect the children from their mother when she was released from prison. At the termination hearing when pressed appellant said he did not know if she had injured her children. **[mistake of fact]** Appellant argued that the termination was based on a mistake of fact that the juveniles were adjudicated dependent-neglected as a result of abuse. He argued that he and his wife stipulated to inadequate supervision. Yet, there was evidence that the children suffered injuries. The mother of the children had also been found responsible in a separate criminal proceeding of causing the injuries to the children. Appellant had the responsibility to have his children's injuries timely examined and he failed to do so, which resulted in surgery and a six week stay the hospital for his child. Appellant failed to protect his children which resulted in injuries and failed to protect his children after they received injuries. **[failure to remedy]** The circuit court did not err in terminating Appellant's parental rights based on the failure to remedy ground. The trial court did not find appellant credible and found that appellant would not protect his children's health and safety if they were returned which is the reason they were removed. **[subsequent factors]** There was sufficient evidence of this ground where appellant remained ambivalent about whether his wife caused his children's injuries. Although he got a divorce the morning of the TPR hearing, he still expressed doubt that his wife was responsible, despite a criminal proceeding that found her responsible. The trial court found he lacked credibility and the ability to keep the children from harm. Appellant also had no plan to care for the children if they were returned to his custody. (King, K. CV-16-576; 11-2-2016; Glover, D.)

Ashmore v. Ark. Dep't of Human Services, 2016 Ark. App. 536 [Supplemental abstract and addendum ordered] (James, P.; CV-16-539; 11-9-2016; Gladwin, R.)

Ark. Dep't of Human Service v. Lewis, 2016 Ark. App. 533 [Supplemental addendum ordered] (Warren, J..; CV-16-601; 11-2-2016; Hixson, K.)

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

Minor v. Ark. Dep't of Human Services, 2016 Ark. App. 549 [subsequent factors, involuntary termination, aggravated circumstances] (Keaton, E.; CV-16-646; 11-16-2016; Virden, B.)

DISTRICT COURT

Taylor v. State, 2016 Ark. 392 **[District Court Appeal] [Right to Jury Trial].** Appellant was convicted at a bench trial in circuit court following an appeal from district court. For reversal, appellant contends that the circuit court erred in not obtaining a valid jury-trial waiver before proceeding to a bench trial. There is no right to jury trial in district court, but when a case is appealed to circuit court the matter is tried de novo and the defendant is entitled to a jury trial. The right to a jury trial is inviolate and the defendant is entitled to be tried by a jury without even making a motion. A defendant may waive the right in writing or in open court. There must be a waiver. There was no waiver here, thus defendant did not waive his right to a jury trial and the conviction must be reversed and remanded. (Wright, J.; CR-16-433; 11/17/2016; Brill, J.)

U.S. SUPREME COURT

Bravo-Fernandez v. US **[DOUBLE JEOPARDY]**

A jury convicted petitioners Bravo and Martinez of bribery in violation of 18 U.S.C. 666. Simultaneously, the jury acquitted them of conspiring to violate §666 and traveling in interstate commerce to violate §666. Because the only contested issue at trial was whether Bravo and Martinez had violated §666, the jury's verdicts were irreconcilably inconsistent. Unlike the guilty verdicts in *Powell,* however, petitioners' convictions were later vacated on appeal because error in the judge's instructions unrelated to the verdicts' inconsistency. In the First Circuit's view §666 proscribes only *quid pro quo* bribery, yet the charge had permitted the jury to find petitioners guilty on a gratuity theory. On remand, Bravo and Martinez moved for judgments of acquittal on the standalone §666 charges. They argued that the issue-preclusion component of the Double Jeopardy Clause barred the Government from retrying them on those charges because the jury necessarily determined that they were not guilty of violating §666 when it acquitted them of the related conspiracy and Travel Act offenses. The District Court denied the motions, and the First Circuit affirmed, holding that the eventual invalidation of petitioners' §666 convictions did not undermine *Powell's* instruction that issue preclusion does not apply when the same jury returns logically inconsistent verdicts.

> *Held:* The issue-preclusion component of the Double Jeopardy Clause does not bar the Government from retrying defendants, like petitioners, after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated for legal error unrelated to the inconsistency.

(No. 15-537; November 29, 2016)