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ANNOUNCEMENTS

On February 27th, Supreme Court issued per curiam order:

> Rule XVI of the Rules Governing Admission to the Bar, Admission on Motion, amended effectively immediately, to provide that movant has been primarily engaged in the active practice of law for **three of the five years** immediately preceding the date upon which the application is filed.

CRIMINAL

Taliaferro v. State, 2020 Ark. App. 68 **[sufficiency of the evidence; internet stalking of a child]** Arkansas Code Annotated § 5-27-306(a)(1) provides: (a) a person commits the offense of internet stalking of a child if the person being twenty-one years of age or older knowingly uses a computer online service, internet service, local internet bulletin board service, or any means of electronic communication to: (1) seduce, solicit, lure, or entice a child fifteen years of age or younger in an effort to arrange a meeting with the individual for the purpose of engaging in:

(A) sexual intercourse; (B) sexually explicit conduct; or (C) deviate sexual activity. A violation of this subsection is a Class B felony if the person "attempts to arrange a meeting with a child fifteen years of age or younger," even if a meeting never takes place. Our Supreme Court has held that "effort to arrange a meeting" means that the defendant "must have made a determined attempt to organize or plan a coming together." In appellant's case, the messages between appellant and the minor victim demonstrate that appellant never "made a determined attempt to plan to meet" the minor victim. The evidence established that the meetings that were discussed in the messages between appellant and the minor victim were all "hypothetical." Thus, there was not substantial evidence to support appellant's conviction for internet stalking of a child. (Arnold, G.; CR-19-397; 2-5-2020; Abramson, R.)

Lilly v. State, 2020 Ark. App. 88 **[sufficiency of the evidence; first-degree terroristic threatening]** Pursuant to Ark. Code Ann. § 5-13- 301(a)(1)(A), a person commits the offense of terroristic threatening in the first degree if, with the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person. The conduct prohibited by the statute is the communication of the threat with the purpose of terrorizing another. There are factors to consider when determining whether there is a "true threat." The five factors, while not exclusive, are (1) the reaction of the recipient of the threat and of other listeners; (2) whether the threat was conditional; (3) whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence; (4) whether the threat was communicated directly to its victim; and (5) whether the maker of the threat had made similar statements to the victim in the past. The court must conduct an objective analysis focusing on how a reasonable person would have taken the statement and using the foregoing factors. In appellant's case, appellant, who is a former Marine and VA patient, communicated directly to the VA that "it looks to me like the VA isn't going to be happy until they've caused me to kill someone, preferably one of them" and, regarding VA employees, to "kill them all and let God sort them out." A VA employee was very concerned by the statement, deleted it from the Facebook page, and notified investigators. In the recorded interview, the employee explained that when dealing with veterans who are trained to shoot and kill people, they must take these kinds of threats seriously. After considering the foregoing evidence together with the relevant factors, it was reasonable for the VA to take appellant's statement as a true threat. Accordingly, the trial court did not err when it denied appellant's request for a directed verdict. (Johnson, L.; CR-19-524; 2-5-2020; Murphy, M.)

Washburn v. State, 2020 Ark. App. 90 **[rape-shield statute]** The trial court did not abuse its discretion when pursuant to the rape-shield statute, it excluded evidence that the victim in appellant's case was facing rape and/or sexual assault charges in juvenile court because the evidence was not relevant to the issue of whether appellant was guilty of the charges against him and any probative value of the evidence was substantially outweighed by the prejudicial effect it would have on the jury. (Huckabee, S.; CR-19-533; 2-5-2020; Brown, W.)

Adams v. State, 2020 Ark. App. 107 **[sufficiency of the evidence; violation of an order of protection]** The Benton County Circuit Court entered an order of protection that prohibited appellant from initiating contact with his children. Thereafter, appellant "tagged" his children in several of his Facebook posts. On appeal from his conviction, the appellate court concluded that tagging the children in the posts constituted "contact" with his children, which was in violation of the order. Thus, substantial evidence supported appellant's conviction for violation of an order of protection. (Karren, B.; CR-19-502; 2-12-2020; Hixson, K.)

Garner v. State, 2020 Ark. App. 101 **[sufficiency of the evidence; possession of methamphetamine; possession of drug paraphernalia]** Constructive possession of contraband means knowledge of its presence and control over it. A defendant's exclusive control of the premises is enough to raise an inference of control and knowledge of the substance, but joint control of the premises requires some further "additional factor linking the accused" or an admission connecting the accused with the illegal drugs. Additional factors linking the accused to the illegal drugs may include: (1) the proximity of the contraband to the accused; (2) whether it is in plain view; (3) who owns the property where the contraband is found; (4) an obvious strong smell or chemical odor of illegal drugs; and (5) an accused's suspicious behavior, coupled with physical proximity to the contraband. A totality of the circumstances is considered when determining whether sufficient additional incriminating factors support a finding of constructive possession. In appellant's case, the only evidence that linked appellant to a bag of methamphetamine was the presence of his girlfriend's ID in the room of the jointly occupied house in which the drugs were found. On review, the Court of Appeals held that a jury could not have concluded, without speculating, that appellant constructively possessed the methamphetamine. The Court noted that merely residing in a jointly occupied premises where multiple drugs are found cannot sustain a conviction for possession of methamphetamine. Accordingly, the State did not present substantial evidence that appellant constructively possessed the methamphetamine. Additionally, the State failed to show that appellant had knowledge of a pipe that was found in a tin in a kitchen cabinet of the jointly occupied house or that he exercised dominion or control over the pipe. The pipe was recovered from the kitchen, which was an area open to other individuals in the house. The State did not present the jury with additional evidence linking appellant to the pipe. Because the jury was left to speculate about the ownership of the pipe, there was not substantial evidence to support appellant's conviction for possession of drug paraphernalia. (Tabor, S.; CR-19-492; 2-12-2020; Harrison, B.)

Beard v. State, 2020 Ark. 62 **[admission of evidence]** A witness's testimony opining or directly commenting on the truthfulness of a victim's statement or testimony is generally inadmissible. The rationale behind this rule is that such testimony invades the province of the jury, which alone determines the credibility of the witnesses and apportions the weight to be given to the evidence. It is erroneous for the circuit court to permit an expert, in effect, to testify that the victim of a crime is telling the truth. The circuit court in appellant's case abused its discretion

when it permitted an investigator from the Crimes Against Children Division of the Arkansas State Police to testify that she found the allegations of sexual abuse were true and that the victims were credible. In appellant's case, the victims' testimony was the only evidence supporting appellant's conviction. There were no independent eyewitnesses or physical evidence. Because the case turned on the victims' credibility, the circuit court's error could not be considered harmless. (Williams, C.; CR-19-543; 2-13-2020; Wynne, R.)

Davis v. State, 2020 Ark. App. 120 **[speedy trial]** Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending. Because appellant asserted his claim of error only under the Sixth Amendment and there is not a Sixth Amendment speedy-trial right due to pre-indictment or pre-arrest delay, the trial court did not err when it denied his motion to dismiss. (Sims, B.; CR-19-484; 2-19-2020; Klappenbach, N.)

Stuart v. State, 2020 Ark. App. 131 **[sufficiency of the evidence; aggravated assault]** The jury could have reasonably inferred from the evidence that appellant's fighting with an armed police officer in an altercation at such close range that the officer's gun could easily discharge created a substantial danger of death or serious physical injury to the officer. Thus, there was substantial evidence to support appellant's aggravated-assault conviction. (Webb, G.; CR-19-744; 2-19-2020; Murphy, M.)

Green v. State, 2020 Ark. App. 130 **[conflict of interest]** The trial court correctly determined that appellant failed to establish that the fact that appellant's trial counsel's law partner was involved in a romantic relationship with the prosecutor created a conflict of interest pursuant to Rule 1.10(a) of the Arkansas Rules of Professional Conduct. (Laser, D.; CR-19-711; 2-19-2020; Hixson, K.)

Mabry v. State, 2020 Ark. 72 **[sufficiency of the evidence; rape]** On appeal, appellant argued that the circuit court erred when it determined that he was a "guardian" for purposes of Arkansas Code Annotated § 5- 14-103(a)(4). The evidence presented at trial established that the victim, who was sixteen years old at the time of trial, his mother, and his brother had lived with appellant off and on since the victim was about seven years old. The victim also testified that appellant was like a father figure to him and that he called him his stepfather. Additional testimony from the victim established that appellant supported the family financially and decided how money was spent, that he disciplined the children, and that he made major decisions such as when the children were ready to perform any dangerous activity like mowing the lawn. The victim's mother also testified that appellant disciplined the children and told them which chores to do around the house. The foregoing testimony from the victim and his mother provided substantial evidence to support the jury's finding that appellant was a person "who by virtue of a

living arrangement is placed in an apparent position of power or authority over a minor" for purposes of Ark. Code Ann. § 5-14-101(3). (Halsey, B.; CR-19-319; 2-20-2020; Hudson, C.)

Hall v. State, 2020 Ark. App. 135 **[speedy trial]** The time period between a nolle prosse and the subsequent refiling is excluded from computing the time for a speedy trial if the charge was nolle prossed for good cause. Good cause is demonstrated when the State has good reason to nolle prosse and there is no indication that the State is simply trying to evade the speedy-trial requirement. Appellant was required to raise the issue of "good cause to nolle prosse" at the time the State moved to nolle prosse the charge for it to be reviewed on appeal. (Hearnsberger, M.; CR-19-534; 2-26-2020; Gruber, R.)

Scaggs v. State, 2020 Ark. App. 142 **[sufficiency of the evidence; first-degree sexual assault]** Substantial evidence supports appellant's conviction for first-degree sexual assault of his daughter's teenage boyfriend. Arkansas Code Annotated § 5-14-124 (a)(1)(D) requires that the State prove that the defendant was "a person in a position of trust or authority over the victim." A babysitter or chaperone is sufficient to establish that a person is in a position of trust or authority over a victim. In appellant's case, there was ample evidence for the jury to conclude, without resorting to speculation or conjecture, that appellant was in a position of trust or authority when he performed oral sex on the victim. The victim was fifteen years old; appellant permitted the victim to visit appellant's daughter and spend the night at appellant's home; and appellant was the only adult present. The jury was free to rely on its common sense to conclude that as the sole adult present, appellant was in a position of authority over a child visiting his home. Further, the jury was free to reject victim's testimony that appellant was not his babysitter. (Putman, J.; CR-19-607; 2-26-2020; Gladwin, R.)

CIVIL

Loftin v. First State Bank, 2020 Ark. App. 66 **[equitable tolling]** There is no dispute that the applicable statute of limitations for an oral contract is three years and has run. Loftin was aware in 2010 that FSB failed to make payments on the annuity pursuant to the oral agreement. The statute of limitations ran in 2013. Loftin argues that the circuit court erred in finding that the doctrine of equitable tolling is inapplicable. Equitable tolling is not applicable to the facts of this case. Loftin has not alleged anything that prevented him from bringing an action against FSB based on the agreement. While it may not have been beneficial for Loftin as an executive officer to file a complaint to enforce the annuity agreement, there was no allegation that he was prevented from doing so. Likewise, there was no allegation of fraudulent concealment that would have tolled the statute of limitations. (Bryan, B.; CV-19-279; 2-5-20; Gruber, R.)

Memphis Scale Works, Inc. v. McNorton, 2020 Ark. App. 77 **[discovery sanctions]** In arguing that striking the complaint was not warranted, Memphis focuses on the fact that it had produced numerous requested documents, that it agreed to provide Accurate other information once it was available, and that there was no prejudice caused by a looming trial date. It contends that it did not engage in a "pattern of actions" or the type of flagrant violations that warrant striking pleadings. To the contrary, Memphis did not respond to Accurate's good-faith letters to attempt to resolve the discovery dispute. At the hearing on the motion to compel, extensive discussions were had regarding Interrogatory No. 3, but Memphis provided absolutely no response by the court's deadline, which was nearly eleven months after the interrogatory was first served. The response it provided after the deadline with the motion for sanctions pending remained incomplete. The failure to undertake adequate steps to provide complete discovery responses supports the severe sanction. While the dismissal of a complaint with prejudice is obviously a severe sanction, dismissal is a sanction expressly provided for under Rule 37 when a party fails to comply with an order to provide discovery. Memphis was the plaintiff in this case, and as such, it chose to utilize the court system to attempt to redress alleged wrongs. To allow it to bog down the judicial system through delay and willful noncompliance with the circuit court's order would be imprudent. Although the requested discovery was not propounded by separate McNorton, striking the pleading to McNorton's benefit was justified. The amended complaint alleged that Accurate had tortiously interfered with the nonsolicitation and nondisclosure agreement between Memphis and McNorton, and Memphis sought unspecified monetary damages against the defendants collectively. McNorton and Accurate filed a joint answer to the amended complaint. The discovery sought by Accurate for its defense would have been used in the defense of McNorton as well. Accordingly, the dismissal of the claims against McNorton was proper. (Martin, D.; CV-19-212; 2-5-20; Klappenbach, M.)

Quinn v. O'Brien, 2020 Ark. App. 83 **[fiduciary duty]** The circuit court found that O'Brien, as an officer and a director of Heartland bank, owed no duty to Quinn to inform him that he would have to pay his loans prematurely. O'Brien had a fiduciary duty to the bank not to its customer. While Quinn may expect special treatment given his relationship with the bank, there is nothing alleged that would indicate that Heartland Bank was under a duty to give special treatment to Quinn that is not afforded to any other customer. In effect, Quinn is alleging that he was entitled to insider information for purposes of his personal banking business by virtue of his status as an officer, director, or shareholder. That is simply not the case. O'Brien did not have a duty to advance Quinn's personal business interests over the interests of Heartland Bank, Rock Bancshares, or its shareholders. The bank and its officers and directors owed a duty to the Federal Reserve Board to keep the report and information contained therein confidential. However, the regulation confers no similar duty on the bank to Quinn individually. Here, the circuit court found that the bank owed no duty to Quinn in connection with the release of the bank examiner's report. (McGowan, M.; CV-19-338; 2-5-20; Whiteaker, P.)

Steve's Auto Center v. Arkansas State Police, 2020 Ark. 58 **[sovereign immunity]** Appellants argue that the ASP policy prohibiting individuals with felony convictions from placement on the ASP Towing Rotation List is illegal, and therefore sovereign immunity does not bar their suit. However, ASP Rule 2.10 does not violate Ark. Code Ann. § 17-1-103. Since the ASP is not acting illegally, Appellants cannot overcome sovereign immunity. (Piazza, C.; CV-19-361; 2-6-20; Wynne, R.)

Watson v. City of Blytheville, 2020 Ark. 51 **[illegal exaction]** The circuit court found that the fee was not a tax – not an illegal exaction. Only those persons who directly benefitted from the City's sewer services were required to pay the fee, and the funds collected were accounted for separately and used only for their designated purpose. The proof is that the funds were designated for use for improvements to the sewer system required by the CAO and that revenue from the Milestone Study was only used to fund improvements to the City's sewer system. Simply because a utility fee generates a surplus in a utility fund, it is not a tax. Watson has failed to show that the excess was used for anything other than Milestone Study repairs. (Alexander, T.; CV-19-416; 2-6-20; Kemp, J.)

C & R Constr. Co. v. Woods Masonry, LLC, 2020 Ark. App. 105 **[substitution of parties]** The Smiths have not shown that their mistake in suing in their individual capacities as opposed to their corporate capacities was understandable. The circuit court found that determining the proper party was not difficult, and their mistake was not reasonable. Therefore, dismissal of the complaint under Rule 17 was proper. (Fogleman, J.; CV-18-198; 2-12-20; Vaught, L.)

Couch v. Grayson, 2020 Ark. App.108 **[involuntary dismissal]** The court abused its discretion in dismissing the complaint for lack of prosecution. Couch timely responded and requested a trial date each time it was prompted by the trial court. After the summary-judgment hearing, Couch communicated with Grayson via email but was unable to secure a trial date due to conflicts in Grayson's schedule. When asked by the trial court to report the status of the case, Couch filed a status report just three days later. In that status report, Couch requested that the trial court direct the parties to agree on a trial date after the trial court's next trial calendar was published. During the period of nonactivity, the court had not prompted action by either party. Moreover, the trial court did not give notice to Couch that the case would be dismissed for want of prosecution as prescribed by Rule 41(b) or give him an opportunity to show good cause to continue the case. (Harrod, M.; CV-19-213; 2-12-20; Hixson, K.)

Hickory Heights, LLC v. Taylor, 2020 Ark. App.98 **[arbitration]** There is no indication anywhere in the agreement that Mikeal had the authority to sign in a representative capacity. Delores did not agree to arbitrate, and Mikeal did not have the authority to agree to arbitration on her behalf. The circuit court did not err in determining that Hickory Heights cannot compel arbitration pursuant to an invalid agreement. (Griffen, W.; CV-19-280; 2-12-20; Virden, B.)

Thomas v. Robinson, 2020 Ark. App. 103 **[dismissal]** The Robinsons timely filed their complaint and served Thomas via warning order, and "[w]hen a plaintiff files his case during the limitations period, and serves it promptly but imperfectly under Rule 4, if the limitations period has expired then he deserves the grace period provided by our savings statute to refile his case and serve it properly." The circuit court's decision to dismiss the complaint without prejudice was proper. (Wyatt, R.; CV-19-350; 2-12-20; Harrison, B.)

USAA v. Norton, 2020 Ark. App. 100 **[payment of medical benefits]** Arkansas medical-payment statutes do not mandate payment of medical benefits only to the insured. Norton was the named first-payee, but the relevant statutes do not specify that the insured is always the sole payee, regardless of circumstances. The insured and/or insurer may not ignore assignments and liens. Norton ignores the USAA insurance-policy language stating benefits can be paid "to or for" the insured and the holding in *Woolsey* construing "to or for" as giving an insurer the right to pay a medical creditor directly. Under the insurance contract between the parties, USAA agreed to pay benefits "to or for" Norton, and it did so. USAA honored the assignment and lien as it was obligated by law to do. Had USAA paid Norton instead of BHMC as the assignee, it would have been subject to suit by BHMC for failure to honor the assignment. And if USAA had failed to pay BHMC the benefits when due, USAA could also have been liable for attorney fees, penalties, and interest. (Griffen, W.; CV-19-349; 2-12-20; Gladwin, R.)

Weeks v. Thurston, 2020 Ark. 64 **[ballot disqualification]** Appellant was disqualified from the ballot for the judicial office of circuit judge because of his conviction for a misdemeanor "fictitious tags" violation, section 27-14-306. Under the Constitution, an "infamous crime" with respect to a misdemeanor requires a finding of an act of deceit, fraud, or false statement. Strictly construing the statute, resolving all doubts in favor of the appellant, and in the absence of an intent requirement, a violation of section 27-14-306 did not require a finding or admission of deceit, fraud, or false statement. The circuit court's order is reversed, and appellant's name shall appear on the ballot and votes for him shall be counted. (Piazza, C.; CV-20-20; 2-13-20; Wynne, R.)

DHS v. Hogan, 2020 Ark. App. 134 **[Medicaid Benefits]** Appellant DHS appeals the circuit court's order reversing the decision of the DHS Office of Appeals and Hearings in which the circuit court found that appellee Hogan's application for Medicaid long-term-care benefits should have been granted. DHS argues that the circuit court's order reversing the administrative agency's decision to deny appellee benefits should be reversed and the agency's order affirmed. In its order, OAH found that the resource limit for Medicaid long-term-care eligibility is $2,000 and that during the months of June, July, August, and September 2017, the trust had over $128,500 in it. The irrevocable trust allows for payments to be made to Ms. Hogan, the primary beneficiary, for her health, support, medical care and welfare and, therefore, is considered

available to Ms. Hogan pursuant to E-304 and is considered a resource. Substantial evidence supports OAH's decision. The trust itself states that the distributions of principal and income can be used for appellee's health, support, medical care, and welfare. Thus, there are circumstances in which payments can be made to or for the benefit of appellee from the trust, making the trust an appropriate available resource for appellee. The circuit court's order reversing OAH focused on the discretion the trust given to the trustee; however, this discretion is irrelevant in determining whether the trust is a resource. (Wright, R.; CV-19-491; 2-19-20; Brown, W.)

Hanshew v. Martinez, 2020 Ark. App. 119 **[negligence-duty-entrustment of child]** The circuit court did not err in determining that case law requires a conscious and deliberate shifting of responsibility from the parent to the purported caretaker. The Hanshews urge that a question of fact informing duty exists. They argue that the standard for determining whether an adult assumed a duty of reasonable care to supervise a child lends itself to fact-finding: whether the child's parents entrusted the child to another adult, and whether that other adult accepted the entrustment. The question of what duty is owed is one of law. It is undisputed that there was not a conscious and deliberate shift of responsibility from the Hanshews to the Martinezes. Further, it is undisputed that the Martinezes did not recognize or accept responsibility from the Hanshews. Accordingly, the circuit court properly determined as a matter of law that no duty existed to form the basis of a negligence claim. (Schrantz, D.; CV 18-903; 2-19-20; Gladwin, R.)

Wood v. Kelley, 2020 Ark. App. 133 **[sovereign immunity]** Wood's complaint was brought against Kelley only in her official capacity. Wood's claims are against Wendy Kelley in her official capacity as director of ADC and are barred by sovereign immunity, and Wood has not plead facts sufficient to support the finding of any exception to the immunity. (Dennis, J.; CV-18-866; 2-19-20; Brown, W.)

Hitt v. Lyle, 2020 Ark. App. 124 **[partnership]** The evidence does not sufficiently rebut the presumption that Sink Farm was partnership property. The evidence in support of the presumption is overwhelming. The circuit court clearly erred in awarding Sink Farm to James as his separate property. The circuit court's decision to award the fifteen acres to Katherine as her separate property was not clearly erroneous. The evidence showed that this land was a gift to Katherine alone, evidenced by the plain language of the deed, which was executed by all partners. Although Shirley presents competing testimony, the circuit court was free to believe or disbelieve the testimony and assign the weight it afforded to it. The circuit court's decision to award the fifteen acres to Katherine as her separate property was not clearly erroneous. (Smith, P.; CV-18-401; 2-19-20; Switzer, M.)

BHC Pinnacle Pointe Hospital v. Nelson, 2020 Ark. 70 **[arbitration]** Employees brought class action against employer which asserted that employees agreed to arbitrate such disputes. Circuit court refused to compel arbitration. The agreements are governed by the Federal Arbitration Act

("FAA"). The order may be appealed interlocutorily pursuant to Rule 2(a)(12), which permits an interlocutory appeal of an order "pursuant to any statute in effect on July 1, 1979." Because the FAA was in effect on July 1, 1979, appellate jurisdiction is in accordance with the rule. Next, the arbitration agreements are not predispute jury-trial waivers and unenforceable because the agreements are governed by the FAA and not an Arkansas law. Arbitration agreements governed by the FAA constitute "a manner prescribed by law" in which one may waive the right to a jury trial. Lastly, the arbitration process set out in the agreement does not violate the Arkansas Minimum Wage Act's express prohibition against implementing additional procedural requirements before an employee can assert his or her rights under the Act. The AMWA's rule on administrative remedies is inapplicable to the arbitration agreement between private parties. Circuit court is reversed, and dispute may be arbitrated. (Fox, T.; CV-19-151; 2-20-20; Baker, K.)

Wade v. Bartley, 2020 Ark. App. 136 **[summary judgment]** Summary judgment was granted on claims for fraud, conversion, unjust enrichment, breach of fiduciary duty, civil conspiracy, and replevin. Because genuine issues of material fact remain to be decided, case is reversed and remanded for further proceedings. (Pierce, M.; CV-19-444; 2-26-20; Gruber, R.)

Phillipy v. Thompson, 2020 Ark. App. 146 **[standing]** Standing is an avoidance or affirmative defense, and because the appellee failed to affirmatively plead standing in the answer, the standing defense was deemed waived. **[collateral estoppel]** Appellants are bound by the findings in the 2014 order in the Haynie suit. The record reflects that Phillipy was served—as the registered agent for WRNC a/k/a DWM—with the complaint in the Haynie lawsuit on June 15, 2013, yet she elected not to file an answer. Appellants had a full and fair opportunity to be heard in the Haynie lawsuit. They chose not to avail themselves of the opportunity to be heard. Furthermore, the issues of who is the president of DWM and who owns the property were actually litigated in the Haynie lawsuit. The 2014 order expressly answered these two questions: DWM is the owner of the property, and Thompson is the president of DWM. These determinations were essential to the judgment in that the Haynies were seeking an easement over the property that was subject to the interest of appellees. Collateral estoppel applies in this case and appellants are bound by the findings in the 2014 order. (Mitchell, C.; CV-19-75; 2-26-20; Vaught, L.)

Mack v. Ivy, 2020 Ark. App. 144 **[summary judgment]** This case essentially involves a swearing match between the two parties. Mack sufficiently met his burden of demonstrating that genuine issues of fact exist. In granting summary judgment at this point, the trial court necessarily determined that Ivy's account of the facts was more credible. Such a credibility determination is inappropriate at the summary-judgment stage. (Henry, D.; CV-19-468; 2-26-20; Switzer, M.)

Wynne-Ark., Inc. v. Richard Baughn Constr., 2020 Ark. App. 140 **[discovery/confidential settlement agreement]** The circuit court's concluded that the confidential settlement agreement is relevant and discoverable before the right of contribution has attached—if it ever attaches. But the question here is whether the confidential settlement agreement is reasonably calculated to lead to the discovery of admissible evidence. The circuit court erred in its decision that the circumstances merit the immediate disclosure of the confidential settlement agreement. The particular circumstance giving rise to the motion to compel production of the agreement is that API and Kelley's reached a confidential settlement agreement as a result of mediation. The circuit court made no finding as to RBC's need for the information requested except that the right of contribution may arise at some point in the litigation. The right to contribution is "derivative in nature, and the cause of action does not accrue until one joint tortfeasor pays more than his or her share of liability." By determining that the right of contribution exists before a party has paid his or her fair share, the circuit court erred as a matter of law. **[joint tortfeasors]** Joint tortfeasors are defined as two or more persons or entities who may have joint liability or several liability in tort for the same injury to person or property. The operative word here is "may." The actual liability of the parties and the degrees thereof are issues to be decided by the jury. The circuit court cannot address that issue at this point because no evidence has been presented regarding the parties' possible joint-tortfeasor status, and when it is presented it will be for the jury to decide. Prior to the enactment of the CJRA, under joint and several liability, any and all of the joint defendants with a judgment against them were liable to the plaintiff for the entire judgment. The CJRA modified the UCATA; however, even after the CJRA, a claim for contribution still exists regarding joint tortfeasors. When two or more entities—through varying degrees of fault—"contribute" to another entity's damages, the parties may be referred to as "joint tortfeasors." (Proctor, R.; CV-18-585; 2-26-20; Virden, B.)

City of Fort Smith v. Merriott, 2020 Ark. 94 **[class action]** The issue presented in this case was whether a defendant waives the right to compel class notice by moving for summary judgment prior to notice, even if the motion is denied and no decision on the merits has been rendered? HELD: The defendant does not waive the right to compel pretrial notice. (Tabor, S.; CV-19-255; 2-27-20; Womack, S.)

Shelter Ins. Co. v. Lovelace, 2020 Ark. 93 **[insurance]** Insurance policy language excluding coverage for an intentional act, as applied to an innocent co-insured, is not void as against public policy. (Wyatt, R.; CV-19-578; 2-27-20; Wynne, R.)

DOMESTIC RELATIONS

Glover v. Glover, 2020 Ark. App. 89 **[divorce granted by default judgment]** The appellate court found no error in the circuit court's refusal to set aside the decree of divorce that was

granted by default. Defendants are presumed to know that if they do not respond, they will suffer default judgments and may suffer a monetary judgment against them. Appellee received the complaint and summons advising her that failing to respond within thirty days would result in default judgment, and she testified that she understood the legal process. The appellate court was not persuaded by her argument that Appellee took advantage of her by refusing to be straightforward with her on the status of the case, as the burden of diligence is on all parties to stay informed. (Schrantz, D.; CV-19-325; 2-5-20; Murphy, M.)

Price v. Price, 2020 Ark. App. 74 **[*Singletary* relocation order must make best interest and material change in circumstances findings]** The parties shared joint custody of their minor child, and Appellee requested to relocate out-of-state. The circuit court found that *Singletary* applied, but there were no findings in the order regarding a material change in circumstances from the time of the initial custody determination. Although the relocation order made the requisite best-interest finding, the appellate court reversed the relocation decision because the order was void of any material-change-in-circumstances finding. (Smith, V.; CV-19-589; 2-5-20; Gladwin, R.)

Cross v. Cross, 2020 Ark. App. 110 [**circuit court retained jurisdiction of supplemental support matter despite pending appeal**] The appellate court found that the circuit court had jurisdiction to hear Appellant's motion to modify his child-support obligation, despite the fact that a previous child-support order was pending before the appellate court. While a circuit court generally loses jurisdiction over the parties and subject matter once the record is lodged, that rule is not invariably applied in support cases. Furthermore, the issues raised in the first appeal (which related to service of the motion, the correct retroactive date, and the issue of a downward deviation from the chart amount) all related to the circumstances as they existed when Appellee filed her prior motion for modification. The issues raised in the pending motion relate to the changed circumstances that existed when he filed the new motion and is a matter supplemental to those on appeal. (Williams, L.; CV-19-291; 2-12-20; Murphy, M.)

Bray v. Bray, 2020 Ark. App. 111 **[the mere fact that a child has gotten older will not constitute a material change in circumstances]** The appellate court found no error in the circuit court's finding that there was not a material changes in circumstance to warrant a modification of custody. The appellate court further found that there were no material changes in circumstance to modify visitation. The mere fact that a child has gotten older will not constitute a material change; however, the passage of time coupled with other factors can justify a finding of a material change in circumstances. Here, the fact that the child is more interested in sports and other activities does not satisfy the "other factors" requirement. (Webb, B.; CV-19-273; 2-12-20; Brown, W.)

Chekuri v. Nekkalapudi, 2020 Ark. 74 **[marital funds spent during separation; division of property and award of alimony used as]** The appellate court found no error in the circuit court awarding Appellee one-half of marital funds that Appellant spent during the parties' separation. There was evidence from which the circuit court could have concluded that Appellant spent around $135,000 with the intent to defraud Appellee. Appellant did not request specific findings pursuant to Ark. R. Civ. P. 52; therefore, in the absence of a showing to the contrary, the appellate court presumes that the circuit court acted properly and made such findings of fact as were necessary to support its decision regarding the fraudulent spending. The appellate court also found no error in the circuit court equally dividing the marital assets. The circuit court clearly considered the facts listed in Section 9-12-315 and determined that an equal distribution of marital assets would be equitable even though both parties requested an unequal division. The circuit court was not required to state the basis and reasons for its award where it finds that an equal distribution is warranted. The circuit court also only awarded Appellee a fraction of the rehabilitative alimony that she requested, and alimony can be used to make the property division and dissolution of marriage as equitable as possible. Therefore, the alimony award was also affirmed. (Moore, R.; CV-18-594; 2-20-20; Hudson, C.)

Tompkins v. Tompkins, 2020 Ark. App. 122 **[military retirement divisible only if vested; jurisdiction in support case]** Because Appellant failed to present evidence to support a finding that Appellee's military retirement was vested at the time of the divorce, the appellate court found no error in the division of the same. Military retirement pay is marital property, but it is divisible only if it is vested at the time of the divorce. The appellate court found that the circuit court had subject matter jurisdiction over the child-support issue. Although the custody matters had to be heard in Germany pursuant to the UCCJEA, any parent having custody of a minor child may file a petition to require the noncustodial parent to provide support when the court has personal jurisdiction over the payor. (Naramore, W.; CV-19-219; 2-19-20; Klappenback, N.)

Emis v. Emis, 2020 Ark. App. 126 **[joint custody not appropriate]** The appellate court found that the award of joint custody was not proper because it is not an option for these parties. The mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and such an award is reversible error where cooperation between the parents is lacking. In this case, the parties have been involved in contentious litigation, both parents are engaged in an escalating power struggle, they have engaged law enforcement to gain the upper hand, they cannot successfully communicate or agree on almost anything, and they fight about such matters as haircuts, religion, education, and even the child's name. (Welch, M.; CV-19-77; 2-19-20; Whiteaker, P.)

PROBATE

In the Matter of the Adoption of L.W. and Z.W., Minors (Goins v. White), 2020 Ark. App. 79 [***in loco parentis*; intervention in adoption**] *In loco parentis* refers to a person who assumed all the obligations incident to the parental relationship and who has actually discharged those obligations. Despite the critical role that Appellant's played in caring for the children, the appellate court found no error in the circuit court's finding that Appellants did not stand *in loco parentis* to the minor children. Appellants also challenged the circuit court's refusal to allow them to intervene in the minors' adoption case because they have court ordered visitation rights. The Arkansas Supreme Court has found that grandparents who have been granted visitation rights (because their child is deceased) have a sufficient interest to entitle them to intervene for the limited purpose of offering evidence regarding whether the proposed adoption is in the best interest of the children. However, the appellate court found a critical distinction because the Appellants' daughter is alive, their rights are derivative of their daughter's rights, and those rights are being represented by their daughter in the adoption case. The appellate court found this matter to be more aligned with the Supreme Court's finding that a grandparent is only entitled to notice of an adoption when their child is deceased or when the grandparent has stood *in loco parentis*. Here, the Appellants' daughter is alive, and the Appellants did not stand *in loco parentis*. (Morledge, C.; CV-19-296; 2-5-20; Switzer, M.)

In the Matter of the Estate of Eunice Goye Smith, Deceased (Smith v. Smith), 2020 Ark. App. 113 [**statute of limitations when breach-of-fiduciary duty and constructive trust alleged; will set aside based on undue influence]** When making a determination about what statute of limitations applies in a case, the court must look to the facts alleged in the complaint itself to ascertain the area of law in which they sound. The facts alleged in this matter sound in tort, as the petition asserts that a constructive trust should be imposed because Appellant allegedly "breached his fiduciary duty as an agent holding power of attorney and used undue influence." The three-year statute of limitations for torts in Ark. Code Ann. 16-56-105 applies because of the breach-of-fiduciary claims, and the alleged breach occurred when the deed and survivorship agreement were executed. Therefore, the claims in the petition for constructive trust were time-barred. The appellate court found no error in the circuit court setting aside the decedent's will. When the proponent of the will procures the making of the will, a presumption of undue influence arises and the burden shifts to the proponent to prove beyond a reasonable doubt that the testator had testamentary capacity and was free from undue influence in executing the will. Although Appellant presented some evidence that the decedent did not appear coerced, none of those witnesses addressed the execution of the will nor were they present when it was executed. Furthermore, the circuit court found Appellant's witness less credible than Appellee's. Because Appellant failed to rebut the presumption of undue influence, the will admitted into probate was set aside. (Yeargan, C.; CV-18-855; 2-19-20; Gruber, R.)

In the Matter of the Adoption of B.R. (Raiteri v. Nowack), 2020 Ark. App. 115 **[adoption consent required]** The appellate court found error in the circuit court's ruling that Appellant failed to significantly and without justifiable cause communicate with or provide care and support for the child. The evidence showed that the mother barred his visitation for a 6-month period, and the call records showed that Appellant contacted the mother approximately once a month, but she did not respond. Furthermore, while there were gaps in payment of child support, the appellate court found they did not constitute a significant failure to provide support for one year warranting termination of Appellant's parental rights. (McSpadden, D.; CV-19-694; 2-19-20; Abramson, R.)

In the Matter of the Guardianship of Matthew Helton (Helton v. Stogsdill), 2020 Ark. App. 132 **[professional evaluation required in guardianship and evaluation must include the four statutory elements]** The appellate court found that the statutory requirements for entry of a guardianship by reason of incapacity were not met. The Supreme Court has held that compliance with Ark. Code Ann. 28-65-212 is mandatory, and the professional evaluation of an alleged incompetent must include the four specific findings required by statute. The evaluation did not include any recommendation as to the specific areas for which assistance is needed and the least restrictive alternatives available; therefore, the statutory elements were not satisfied. (Williams, T.; CV-19-474; 2-19-20; Murphy, M.)

JUVENILE

Chavez v. Ark. Dep't of Human Servs., 2020 Ark. App. 91 **[TPR—best interest]** Appellate court affirmed termination order where mother allowed the man who sexually abused her child back into the home and the children suffered physical abuse, including cigarette burns. On appeal, the mother argued that termination was not in the children's best interest. However, due to the risk of potential harm if the children were returned to the mother, the appellate court found no clear error in the termination order. (Zimmerman, S.; JV-18-63; February 5, 2020; Brown, W.)

Hensley v. Ark. Dep't of Human Servs., 2020 Ark. App. 78 **[TPR—adoptability]** Mother challenged order terminating her rights on the grounds that there was insufficient evidence that the children were adoptable. While not challenging grounds for termination, the mother argued that the only evidence in support of adoptability, the testimony of the DHS family service worker, was insufficient to establish adoptability. However, because the court found the family service worker to be credible and she testified that she had twenty years of experience as a caseworker, the appellate court agreed that the evidence was sufficient. The law does not require the testimony of an adoption specialist, evidence that adoptive parents have been identified, or even a finding that the children are likely to be adopted; instead, only evidence that the

likelihood of adoption was considered is required. (Sullivan, T.; JV-17-26; February 5, 2020; Klappenbach, N.)

Musick v. Ark. Dep't of Human Servs., 2020 Ark. App. 87 **[TPR—sufficiency of the evidence]** Evidence was sufficient to support termination based on aggravated circumstances where mother missed at least twenty visits with the children throughout case, failed to obtain housing, failed to obtain employment or income, was in a romantic relationship with a drug addict, and was arrested twice during the case. Considering all the circumstances, it appeared unlikely that additional services would result in a successful reunification. (Wilson, R.; JV-18-23; February 5, 2020; Hixson, K.)

Peterson v. Ark. Dep't of Human Servs., 2020 Ark. App. 75 **[TPR—mental health]** Order was entered terminating rights of parents after the department worked with the family for two years in an effort to remedy the conditions that brought the child into care. Both parents appealed but the terminations were affirmed. Both parents suffered serious mental health conditions that rendered them unable to appropriately, consistently care for a child and despite years of services, the evidence at the hearing supported the finding that no additional services could result in a successful reunification. Termination was affirmed based on aggravated circumstances. (Garner, T.; JV-17-22; February 5, 2020; Gladwin, R.)

N.R. v. State, 2020 Ark. App. 71 **[Motion to transfer]** The State moved to transfer a juvenile's delinquency case from juvenile court to circuit and the trial court agreed. The focus of the juvenile's argument on appeal was that the trial court wrongly found that there are no services available in juvenile court that are likely to successfully rehabilitate him. The appellate court found no clear error, as the trial court considered all the statutory transfer factors and made written findings concerning each factor. Due to the juvenile's history of prior delinquency cases and commitments to DYS, the appellate court found that several factors could have supported transfer and the trial court determines the weight of each factor. (Zimmerman, S.; JV-19-132 & B JV-19-170; February 5, 2020; Virden, B.)

Reeves v. Ark. Dep't of Human Servs., 2020 Ark. App. 72 **[Adjudication]** Order adjudicating child dependent-neglected was affirmed where child was removed from mother after mother was stopped, with the child in the car, after speeding and driving over the center line and her blood alcohol level was twice the legal limit. A finding of dependency-neglect does not require actual harm to a child, only a substantial risk of serious harm. Finding no clear error, the adjudication order was affirmed. (Zimmerman, S.; JV-19-49; February 5, 2020; Virden, B.)

Jackson v. Ark. Dep't of Human Servs. **[TPR—aggravated circumstances]** Termination order was entered after mother continued to test positive for alcohol on multiple occasions, including the day in between the two-day termination hearing. The child had been removed from the

mother after law enforcement found illegal drugs and paraphernalia in the home and the mother had allowed a parolee to live in the home. The child had been removed by the department on a previous occasion under similar circumstances. Because the services provided failed to remedy the mother's circumstances, the court found little likelihood that additional services would result in a successful reunification. Finding no clear error, the termination was affirmed. (Zimmerman, S.; JV-18-22; February 12, 2020; Abramson, R.)

Z.B. v. State, 2020 Ark. App. 121 **[Sex offender registration]** The defendant, now twenty-one years of age, filed a motion pursuant to Ark. Code Ann. §9-27-356(j) to remove his name from the sex offender registry for an offense committed when he was a juvenile and more than ten years ago. At the trial court, the State argued that the defendant was required to prove by a preponderance of the evidence that he does not pose a threat of safety to others and the trial court agreed. The defendant appealed, arguing that section (j) of the statute does not require him to present this proof once ten years have passed from the offense and the offender has reached the age of twenty-one. On appeal, the State reversed its position and agreed with the defendant's interpretation of the statute, conceding that he was not required to present evidence that he does not pose a threat to others. The appellate court agreed with the parties' interpretation, and the order denying the defendant's request to remove his name from the registry was reversed. (Elmore, B.; JV-08-325; February 19, 2020; Klappenbach, N.)

Lewis v. State, 2020 Ark. App. 123 **[Motion to transfer]** Defendant was seventeen-years old when he operated a motor vehicle under the influence of methamphetamine and marijuana and caused the death of another person. He was charged with negligent homicide as an adult in circuit court and moved to transfer. The trial court made detailed written findings concerning each statutory factor. Much of the defendant's evidence in favor of transfer focused on his traumatic family history and chaotic and unstable upbringing. The trial court found it unlikely that juvenile court services would be able to rehabilitate the defendant prior to the age of twenty-one, especially considering the long history of services he had already received. The trial court also found the seriousness of the offense significant. The appellate court will not reweigh the evidence on appeal and found no clear error in the trial court's findings, thus the order denying transfer was affirmed. (Taylor, J.; CR-17-2050; February 19, 2020; Switzer, M.)

Ring v. Ark. Dep't of Human Servs., 2020 Ark. App. 150 **[Adjudication-parental unfitness]** Order adjudicating an infant dependent-neglected was supported by the evidence where there was testimony of multiple serious injuries to a sibling due to physical abuse by the father and the mother was unwilling to protect the child from the father. The injuries to the sibling included brain damage and a skull fracture, and the mother was not willing to separate from the father or to limit his contact with the infant at issue. The appellate court affirmed the trial court's finding that the infant is dependent-neglected due to neglect or parental unfitness. (Huff, M.; JV-18-211; February 26, 2020; Brown, W.)

Tovias v. Ark. Dep't of Human Servs., 2020 Ark. App. 147 **[TPR—aggravated circumstances]** The trial court terminated the parental rights of a father on grounds of aggravated circumstances due to his failure to protect the child from abuse by the mother. The mother's rights as to a sibling had been terminated previously due to extensive physical abuse. Evidence at trial indicated that the father was not forthcoming about his relationship with the mother and remained in a relationship with her. The trial court questioned the father's credibility, finding that he was "willing to lie and cover for the mother." Finding no clear error, the appellate court affirmed the termination based on aggravated circumstances. (Zimmerman, S.; JV-18-384; February 26, 2020; Vaught, L.)

DISTRICT COURT

Henderson vs. State of Arkansas, 2020 Ark. App. 96 **[Sufficiency of Evidence] [Preservation of Argument for Appeal]** Contrell was convicted of third-degree battery and sentenced to twelve months in the county jail. On appeal, Contrell argued that the victim was not aware that she had suffered a physical injury; therefore, it was not a "physical injury" as defined by Ark. Code Ann. 5-26-305(a)(1) & (2). On appeal he challenged the sufficiency of the evidence. However, Contrell's sufficiency challenge was not preserved because he failed to state with specificity that the State's proof on the element of physical injury was lacking. (Phillips, G., CR-19-456; 2-12-20; Virden, Bart F.)

U.S. SUPREME COURT

McKinney v. Arizona **[Eddings error]** An Arizona jury convicted petitioner James McKinney of two counts of first-degree murder. The trial judge found aggravating circumstances for both murders, weighed the aggravating and mitigating circumstances, and sentenced McKinney to death. Nearly 20 years later, the Ninth Circuit held on habeas review that the Arizona courts violated *Eddings* v. *Oklahoma,* by failing to properly consider as relevant mitigating evidence McKinney's posttraumatic stress disorder. McKinney's case then returned to the Arizona Supreme Court. McKinney argued that he was entitled to a jury resentencing, but the Arizona Supreme Court itself reweighed the aggravating and mitigating circumstances, as permitted by *Clemons* v. *Mississippi,* and upheld both death sentences.

Held: A *Clemons* reweighing is a permissible remedy for an *Eddings* error, and when an *Eddings* error is found on collateral review, a state appellate court may conduct a *Clemons* reweighing on collateral review.

McKinney's argument that a jury must resentence him does not square with *Clemons*, where the Court held that a reweighing of the aggravating and mitigating evidence may be conducted by an appellate court. Because *Clemons* involved an improperly considered aggravating circumstance, McKinney maintains that it is inapposite here, where the case involves an improperly ignored mitigating circumstance. *Clemons*, however, did not depend on any unique effect of aggravators as distinct from mitigators. For purposes of appellate reweighing, there is no meaningful difference between subtracting an aggravator from one side of the scale and adding a mitigator to the other side. McKinney also argues that *Clemons* is no longer good law in the wake of *Ring* v. *Arizona,* and *Hurst* v. *Florida*, where the Court held that a jury must find the aggravating circumstance that makes the defendant death eligible. But that does not mean that a jury is constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. McKinney notes that the Arizona trial court, not the jury, made the initial aggravating circumstance finding that made him eligible for the death penalty. But McKinney's case became final on direct review long before *Ring* and *Hurst*, which do not apply retroactively on collateral review. (No. 18–1109; February 25, 2020.)