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ANNOUNCEMENTS

REMINDER: Administrative Plans. 2017 is a year that all circuits are required to submit administrative plans to the Supreme Court. Plans are to be submitted by July 1st to be effective January 1, 2018.

CRIMINAL

Bates v. State, 2017 Ark. App. 123 **[sufficiency of the evidence; third-degree domestic battery]** There was substantial evidence to support appellant's conviction. **[jurisdiction]** There is a presumption in favor of jurisdiction in the place where the charge is filed by the State. The State need not prove jurisdiction unless evidence is admitted that affirmatively shows that the court lacks jurisdiction. Because appellant never presented the trial court with any affirmative evidence that the crime took place outside the county where the charges were filed, the circuit court did not err when it concluded that it had jurisdiction over the case. **[Ark. R. Evid. R. 803(2)]** The trial court did not abuse its discretion when pursuant to the excited-utterance exception to the hearsay rule, it allowed the victim's daughter to testify about statements made

by the victim to her family immediately upon regaining consciousness after she was physically attacked. (Fogleman, J.; CR-16-762; 3-1-17; Vaught, L.)

Douglas v. State, 2017 Ark. 70 **[motion for new trial]** Because there was nothing in the record to establish that appellant's family was denied entry to the courtroom during appellant's trial, the trial court did not abuse its discretion when it denied appellant's motion for a new trial, which was based upon his right to a public trial. (Singleton, H.; CR-16-615; 3-2-17; Wood, R.)

Wade v. State, 2017 Ark. App. 157 **[sufficiency of the evidence; second-degree murder]** There was substantial evidence to support appellant's conviction. **[admission of evidence]** In support of his justification defense, appellant sought to admit into evidence results from the victim's postmortem toxicology report. The trial court refused to admit the testimony. On review, the Court of Appeals concluded that because appellant did not know at the time of the shooting that the victim had ingested drugs, the toxicology report, which was conducted after the shooting, was irrelevant and the circuit court did not abuse its discretion in ruling that the probative value of the report was far outweighed by the danger of unfair prejudice. Thus, exclusion of the report was not an abuse of discretion. (Wright, J.; CR-16-605; 3-8-17; Murphy, M.)

Thompson v. State, 2017 Ark. App. 158 **[illegal sentence]** Appellant pleaded no contest to a Class A misdemeanor. Because his sentence was more than the statutory limitations for a Class A misdemeanor, it was illegal. Additionally, because appellant was sentenced following a probation revocation at a time when he was not on probation, his sentence resulting therefrom was illegal. (Griffen, W.; CR-16-826; 3-8-17; Brown, W.)

Pokatilov v. State, 2017 Ark. App. 150 **[sufficiency of the evidence; possession of a controlled substance with the purpose to deliver]** There was substantial evidence to support appellant's conviction. **[jury instructions; AMI Crim. 2d 64.420]** Because the model jury instruction that was given by the court was a correct statement of the law, the trial court did not abuse its discretion when it refused appellant's modified version of the instruction. **[motion to suppress]** After appellant was observed violating a traffic law, the law enforcement official had probable cause to stop appellant. During the traffic stop, appellant voluntarily gave consent to search the vehicle. Thus, the trial court did not err when it denied appellant's motion to suppress. (Huckabee, S.; CR-16-522; 3-8-17; Vaught, L.)

Cohns v. State, 2017 Ark. App. 177 **[double jeopardy]** When defense counsel refuses to consent to a mistrial but clearly indicates an unwillingness to continue the trial, the defendant can be said to have consented to a discontinuance of the trial. Under such circumstances, retrial is permissible under double-jeopardy principles because consent constitutes a waiver of a double-jeopardy claim. Although appellant's counsel did not agree to a mistrial, he unequivocally stated that he could not go forward with the trial, which evidenced his consent to terminate the

proceedings. Therefore, there was no constitutional double-jeopardy violation and the trial court committed no error in denying appellant's motion to dismiss. **[Ark. R. Crim. Pro. 4.7**] Rule 4.7 of the Arkansas Rules of Criminal Procedure does not necessarily require a recording of a custodial statement as a prerequisite to admissibility of the statement, but is simply a consideration for the trial court when determining admissibility of the statement. Because the challenged statement in appellant's case was taken in the parking lot of a convenience store rather than a police station or jail, Rule 4.7 was not implicated. (Clawson, C.; CR-16-383; 3-15-17; Hixson, K.)

Wells v. State, 2017 Ark. App. 174 **[sufficiency of the evidence; possession of a controlled substance]** There was substantial evidence to support appellant's conviction. **[motion to suppress; evidence]** A store employee witnessed appellant put store merchandise down his pants and leave the store without paying for the items. Pursuant to Ark. R. Crim. Pro. 3.1, this information provided law enforcement officials with reasonable suspicion that a crime had occurred, which allowed them to stop and question appellant. The observation by the employee also gave rise to utilization of the shoplifting presumption and detention found in Ark. Code Ann. § 5-36-102. Because the stop and search of appellant were permissive, the trial court correctly denied appellant's motion to suppress. **[motion to suppress; statements]** Whenever the accused offers testimony that his confession was induced by violence, threats, coercion, or offers of reward then the burden is on the State to produce all material witnesses who were connected with the controverted confession or give adequate explanation for their absence. In appellant's case, there was never any allegation that his statement was coerced or induced by violence, threats, or offers of reward. Thus, the material-witness rule was inapplicable and it was not error for the trial court to deny appellant's motion to suppress his statement, which was based upon an alleged violation of that rule. **[jury instruction; alternative sentencing]** The circuit court, which explicitly considered appellant's criminal history and determined that an alternative sentence of probation would not be appropriate, did not abuse its discretion in refusing appellant's request for an alternative sentencing instruction. (Fogleman, J.: CR-16-298; 3-15-17; Whiteaker, P.)

Andruszczak v. State, 2017 Ark. App. 183 **[continuance]** The trial court did not abuse its discretion when it granted the State's request for a continuance, which was based upon the State's need to travel to another State to depose a witness. The State exercised diligence by requesting the continuance as soon as the witness was discovered and the witness, who was elderly and ill, was not available to travel to Arkansas to attend court. (Cooper, T.; CR-16-715; 3-29-17; Abramson, R.)

Williams v. State, 2017 Ark. App. 198 **[motion to suppress; photo identification]** The trial court did not err in denying appellant's motion to suppress an out-of-court identification because

the facts established that the identification was reliable. (Pearson, W.; CR-16-620; 3-29-17; Brown, W.).

Johnson v. State, 2017 Ark. 206 **[new trial]** The trial court did not abuse its discretion when it denied appellant's request for a new trial because the "newly discovered" evidence, which formed the basis for the request, would not have impacted the outcome of appellant's trial. (Richardson, M.; CR-16-719; 3-30-17; Baker, K.)

Hinton v. State, 2017 Ark. 207 **[prison garb]** Because appellant was being prosecuted for crimes committed during his incarceration, the fact that appellant wore prison garb was something that was known, or by necessity would become known during trial, and could pose no prejudice. Accordingly, the circuit court did not commit error in requiring appellant to wear his prison garb during the trial. (Dennis, J.; CR-16-720; 3-30-17; Baker, K.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Lovelace v. State, 2017 Ark. App. 146 (battery in the first degree; theft of property) CR-16-723; 3-8-17; Glover, D.

Shelton v. State, 2017 Ark. App. 195 (first-degree murder; committing a terroristic act) CR-16-950; Vaught, L.

CIVIL

Grant County Unified Community Council, Inc. v. Pennington, 2017 Ark. App. 116 **[summary judgment]** The facts set forth in the depositions of both Pennington and Riley directly conflict as to whether Pennington had agreed to exclude sleep time from the computation of her paycheck or if she had agreed to a cap on her wages. The circuit court weighed this evidence and found that there was no agreement, either implied or express, and that there was no "meeting of the minds" necessary for an express agreement to form. The circuit court erred in awarding summary judgment because material facts were in dispute. Because of the conflicting testimony, it is impossible to discern that either party is entitled to a judgment as a matter of law. (Williams, C.; CV-16-564; 3-1-17; Virden, B.)

Tilley v. Malvern National Bank, 2017 Ark. App. 127 **[jury trial/waiver]** The right to a jury trial does not extend to foreclosure proceedings. Since Amendment 80, the clean-up doctrine has disappeared because any circuit court now has subject-matter jurisdiction to hear all justiciable

matters, and it has the power to grant all remedies to the parties before it. Accordingly, on Tilley's counterclaim and third-party complaint asserting causes of action for breach of contract, promissory estoppel, violations of the ADTPA, tortious interference, negligence, and fraud, there is a right to a jury trial. However, the loan agreement contained a predispute contractual waiver of the right to a jury trial. Pursuant to Arkansas law, Tilley was bound to know the contents of the agreement. The jury waiver clause in the loan agreement is enforceable. (Wright, J.; CV-15-1068; 3-1-17; Hixson, K.)

Fulmer v. Hurt, 2017 Ark. App. 117 **[pierce corporate veil]** The trial court applied the correct legal standard and appropriately granted summary judgment because appellants failed to meet proof with proof in their summary-judgment pleadings. The record reflects that appellants offered no proof that appellees illegally abused the corporate entity HHI or engaged in fraud, deception, or conduct sufficient to justify piercing the veil. In order to pierce a corporate veil, a plaintiff must have evidence of fraud, illegal conduct, or abuse of an entity for the specific purpose of injuring a third party. Appellees were granted summary judgment because appellants produced insufficient proof to justify piercing the veil of HHI. HHI has incurred annual losses, yet Hurt and Hoover have contributed money every year to keep HHI in business, have not dissolved HHI or formed another entity to avoid payment of the judgment, and have not taken assets from the business, either personally or for the benefit of any third party. The requisite business formalities set out in the Arkansas statutes have been followed, and appellants failed to demonstrate in their summary-judgment pleadings that HHI, as a separate legal entity, has been abused in any form to cause them injury. (Weaver, T.; CV-16-107; 3-1-17; Gladwin, R.)

Warren v. Frizell, 2017 Ark. App. 129 **[new trial motion]** Warren argues that a new trial should have been granted due to misconduct by Frizell's attorney. The improper conduct Warren complains about took place during closing arguments. The court admonished the attorney and subsequently found him in contempt and fined him $800. According to Warren, he is entitled to a new trial because of the egregious conduct. The trial court maintained firm control over the proceedings as evidenced by the admonishment to counsel, the finding of contempt, and the re-giving of AMI Civil 101A. Additionally, Warren has not meet his burden of demonstrating a reasonable possibility that prejudice resulted from the conduct of the attorney. The court did not err in denying the motion for new trial. (Gray, A.; CV-15-1033; 3-1-17; Brown, W.)

Crutchfield v. Tyson Foods, Inc., 2017 Ark. App. 121 **[pleadings]** The causes of action for fraud, promissory estoppel, unjust enrichment, and negligence are barred by the statute of limitations. The claim for violation of the Deceptive Trade Practices was properly dismissed for failure to state facts to support the claim. The plaintiffs have not pled facts demonstrating that Tyson's alleged unequal treatment of the growers with which it contracts for the production of chickens is a "consumer-oriented act or practice." (Sutterfield, D.; CV-16-176; 3-1-17; Klappenbach, M.)

Perroni v. Sachar, 2017 Ark. 59 **[subject matter jurisdiction]** This case involves a judicial-discipline matter between the Commission and a judge. The circuit court determined that it lacked subject-matter jurisdiction to hear an appeal from the Commission. Pursuant to amendment 66 of the Arkansas Constitution, as well as Ark. Code Ann. sections 16-10-401 through 16-10-411, and the Rules of Procedure of the Arkansas Judicial Discipline and Disability Commission, a review of the Commission's decision lies exclusively with the supreme court. The circuit court properly dismissed the complaint for lack of subject-matter jurisdiction. (McGowan, M.; CV-16-435; 3-2-17; Kemp, J.)

Mississippi County Arkansas v. City of Osceola, 2017 Ark.71 **[special election]** The court held that the amended sales-and-use-tax ordinance, the resolution, and the bond ordinance were invalidated by Act 81 and enjoined the special election for approval of those ordinances by the electors of Mississippi County. The circuit court did not abuse its discretion in enjoining a special election for issuing bonds when the collateral funds would be derived from a tax that constituted an illegal exaction. (Laser, D.; CV-17-123; 3-2-17; Wynne, R.)

Douglas v. Shelby Taylor Trucking, Inc., 2017 Ark. App. 156 **[unjust enrichment]** The existence of a valid written contract ordinarily precludes recovery on an unjust enrichment basis and that is true in this case. (Williams, C.; CV-16-664; 3-8-17; Hixson, K.)

Almeida v. Metal Studs, Inc., 2017 Ark. App. 162 **[order]** Almeida's sole argument on appeal is that he was sanctioned for an order that was not written or entered so the circuit court's sanctions in this case should be reversed. The circuit court's decision to continue and reschedule a hearing in open court does not fall within the ambit of Arkansas Rule of Civil Procedure 58. The rescheduled hearing was set for a specific day, a specific time, on the record in open court, and with Almeida and his counsel present. No subsequent written order memorializing the court's setting was required to compel Almeida's attendance given the circumstances. (Smith, T.; CV-16-40; 3-8-17; Harrison, B.)

Stuart v. Ark. DFA, 2017 Ark. App. 139 **[administrative appeal/ driver's license]** Stuart appeals from the circuit court's order affirming the Arkansas Department of Finance and Administration's Office of Driver Services' decision to suspend his commercial driving privileges for one year and his noncommercial driving privileges for six months. He argues that the police officer did not have reasonable grounds for initiating a traffic stop and that the statement-of-rights form did not adequately inform him of the consequences of refusing a chemical test. The validity of the traffic stop is not an issue for the administrative hearing. The administrative hearing covers the issues of whether the arresting law enforcement officer had reasonable grounds to believe that the person (1) had been operating a motor vehicle while intoxicated or impaired or (2) refused to submit to a chemical test for the purpose of determining

the alcohol concentration or controlled substance contents. There is no doubt that Stuart refused to submit to a chemical test, and the circuit court found this refusal was the "true reason" for the disqualification and suspension of Stuart's commercial and noncommercial driving privileges. Moreover, Stuart's rights were explained to him, and he indicated that he understood those rights. Any attempt to now argue that he did not understand his rights is not well taken. The statement-of-rights form adequately communicated the choices available and the possible consequences of those choices; and Stuart made his choice. (Glover, D.; CV-16-519; 3-8-17; Harrison, B.)

Commercial Fitness Concepts, LLC v WGL, LLC, 2017 Ark. App. 148 **[conversion]** There was sufficient evidence to establish that Commercial Fitness improperly exercised dominion and control over the property. Ordinarily, the proper measure of damages for conversion of property is the fair market value of the property at the time and place of its conversion Here, the evidence presented to prove damages for the conversion was evidence of the replacement value and not its fair-market value. Fair-market value was the proper measure of damages. (Scott, J.; CV-16-652; 3-8-17; Glover, D.)

Johnson v. Blytheville School Dist., 2017 Ark. App. 147 **[contract]** Court dismissed for failure to state a claim for breach of contract. The exclusive power to enter into initial written employment contracts on behalf of a school district with district employees, not including day-to-day substitutes, lies with the district's board of directors. Moreover, the written employment contract must comply with statutory requirements. Here, there was no written contract between Johnson and the Blytheville School District. (Davis, B.; CV-16-664; 3-8-17; Hixson, K.)

Williams v. Shackleford., 2017 Ark. App. 149 **[med-mal/prejudgment interest]** The jury in this case rendered a general verdict on damages, and the verdict did not itemize how much was awarded for medical expenses, for pain and suffering, or for any other element of damages. Because it was a general verdict, there was no basis on which to award prejudgment interest. (Piazza, C; CV-16-287; 3-8-17; Whiteaker, P.)

City of Benton v. Alcoa Road Storage, Inc., 2017 Ark. 78; *City of Benton v. Teeter*, 2017 Ark. 80 **[condemnation/costs]** In condemnation action, trial court erred in awarding municipality attorney's fees. Here, the statute provides for "costs occasioned by the assessment." The terms "costs" or "expenses" when used in a statute do not ordinarily include attorneys' fees. Also, the circuit court correctly found that expert witness fees incurred by a landowner to establish the calculation of its just compensation are not "costs occasioned by the assessment." (Arnold, G.; CV-16-22; 3-9-17; Kemp, J.)

Farris v. Conger, 2017 Ark. 83 **[limitations-contract/negligence]** The amended complaint sounded in contract – not negligence. It sets forth specific promises under the contract. Although

it also described breaches of duty and attempted fraud and asked for punitive and exemplary damages, it nevertheless was an action under the contract. The circuit court erred in failing to apply the five-year statute of limitations for contract claims. (Compton, C.; CV-16-430; 3-9-17; Hart, J.)

Pritchett v. Spicer, 2017 Ark. 82 **[municipal referendum]** The circuit court did not err when it held that the ordinance governs the time for filing a referendum petition; that Act 1093 is void to the extent it established contrary deadlines for filing referendum petitions for local measures; and that the deadline for filing a referendum petition is thirty days after the passage of an ordinance. (Hearnsberger, M.; CV-16-607; 3-9-17; Baker, K.)

NAACP v. Bass, 2017 Ark. App. 166 **[contempt]** Contempt for failing to obey court order affirmed. (Hill, V.; CV-15-798; 3-15-17; Abramson, R.)

Stone v. Washington Regional Medical Center, 2017 Ark. 90 **[deed]** Prior to the 1909 Deed, the Stones only possessed a reversionary interest that could be released. They released that reversionary interest by creating a charitable trust of the property to be "held in trust and maintained as a city Hospital" with the condition to establish another hospital in the event that the location changed. There was no possibility of reverter. The 1909 Deed effectively released and terminated any reversionary interest of the Stones that was created in the 1906 Deed. **[quiet title]** WRMC satisfied the elements of legal title and possession to sustain a quiet-title action. (Beaumont, C.; CV-16-277; 3-16-17; Kemp, J.)

Truman Arnold Companies v. Miller County Circuit Court, 2017 Ark. **[workers' comp]** Commission has exclusive jurisdiction to determine whether it has jurisdiction over claims for negligent supervision and sexual harassment. (Jones, C.; CV-16-233; 3-16-17; Wood, R.)

Pritchett v. City of Hot Springs, 2017 Ark. 96 **[annexation]** The area may be annexed under the procedure set forth in Ark. Code Ann. section 14-40-501. The key word is "includes" from subsection (ii). Essentially, subsection (ii) provides an example of unincorporated areas that are "completely surrounded" by a municipality. It is clear by the description of the example in subsection (ii) that the legislature's use of "completely surrounded" was not intended to limit the tract to those areas in which a city surrounds the tract. Other areas may still qualify. This is true here, where the area to be annexed does not have four distinct sides. The phrase "completely surrounded" as used in section 14-40-501(a) includes the area at issue in this case, which has no borders other than those with a single municipality and a lake. (Wright, J.; CV-16-840; 3-16-17; Wood, R.)

Muntaqim v. Hobbs, 2017 Ark. 97 **[preliminary injunction]** The circuit court denied appellant's motion for a preliminary injunction based on the documents before it and did not hold a hearing

on the merits. It was an abuse of the court's discretion to not hold a hearing. The allegations could constitute irreparable harm to the appellant's religious liberties and the allegations arise from disputed facts which could change the outcome of the injunction. The complexity and the rights in question warrant a hearing. (Dennis, J.; CV-15-789; 3-16-17; Womack, S.)

Bradshaw v. Fort Smith School Dist., 2017 Ark. App. 196 **[FOIA]** The circuit court found that the statutorily required notice was provided to all necessary media outlets and that the statute does not require that an agenda be provided. Bradshaw's FOIA claim also fails because she cannot show prejudice. Although the statute allows interested individuals to do so, Bradshaw never requested that she be provided personal notice of any meetings of the Board, and nothing in the statute requires notice to the general public. FOIA simply requires notice to the media, which was provided, and the media was present for the committee meeting to which Bradshaw objects. (Cox, J.; CV-16-189; 3-29-17; Vaught, L.)

Hagar v. Shull, 2017 Ark. App. 185 **[med-mal issues/evidence/verdict form]** Court did not err in its evidentiary rulings involving impeachment evidence and limitations on cross-examination. An appellant has the burden of demonstrating reversible error. Here, it is questionable whether Dowdy's proffered testimony and user log significantly contradicted Dr. Shull's statement that he viewed the x-ray. Appellant also argues that the circuit court erroneously admitted evidence that some of the drugs found in Scott's system were not prescribed to him. In this case, Dr. Shull's experts attributed Scott's death in part to the ingestion of several drugs that, when acting together, were toxic and suppressive to respiratory drive. In light of this evidence, Dr. Shull's reliance on the defense of comparative fault made the source of the medications relevant. The court was not bound to provide separate verdict interrogatories for appellant's claims of negligence and wrongful death. (Honeycutt, P.; CV-15-1380; 3-29-17; Gladwin, R.)

Harris v. Beth, 2017 Ark. App. 186 **[municipal immunity/police officer/police dog]** Officer failed to establish a prima facie entitlement to summary judgment. Section 21-9-301 provides immunity to municipal employees for acts committed during the performance of their official duties except to the extent there is liability coverage. A defendant has to plead and prove an absence of liability coverage to be entitled to the immunity afforded by the statute. Harris failed to plead and prove that the city lacks liability coverage. (Arnold, G.; CV-16-32; 3-29-17; Harrison, B.)

Hall v. Prescott School Dist., 2017 Ark. App. 184 **[summary judgment]** The core of this case is whether teaching prekindergarten (pre-K) qualifies as performing the duties of a full-time teacher under Ark. Code Ann. section 6-17-2403(c)(3)(A). The circuit court incorrectly awarded summary judgment because, in answering the question of what constitutes a full-time teacher, the circuit court improperly made a factual finding regarding the material fact that is in dispute in this case. Specifically, it found that teaching in a pre-K program does not count toward

performing the full-time duties of a teacher for a full school year with a valid Arkansas teaching license within the meaning of the statute. Hall's argument is that it does, while the District contends that it does not. (Culpepper, D.; CV-16-845; 3-29-17; Abramson, R.)

Spencer v. Air EVAC, Inc., 2017 Ark. App. 193 **[unjust enrichment]** Spencer argued that the circuit court, not the Workers' Comp Commission, had jurisdiction to allow the recovery of attorney's fees for services rendered in the collection of Air Evac's medical bills. Spencer pled a cause of action for unjust enrichment. In the complaint, Spencer alleged that his clients, Prock and Edmisten, were injured on the job, that Air Evac provided air ambulance services to his clients, that Air Evac was entitled to payment for services rendered, and that Spencer's clients could not afford to pay. In the complaint, Spencer further alleged that he successfully represented Prock and Edmisten in their claims, which included the payment to Air Evac. Spencer argues that, but for Spencer's efforts on behalf of his clients, Air Evac would not have been paid. Thus, he asserts he is entitled to attorney's fees from Air Evac. Spencer's complaint failed to state a cause of action for unjust enrichment. Spencer alleges that Air Evac provided medical services to his clients and that they were entitled to receive payment for the services rendered. However, for a court to find unjust enrichment, a party must have received something of value to which he is not entitled and which he must restore. One who is free from fault cannot be held to be unjustly enriched merely because he has chosen to exercise a legal or contractual right. While Air Evac may have benefited from Spencer's actions in obtaining payment from the employer, so did Spencer's clients because they were no longer personally liable on the claim. Spencer contracted with his clients to obtain just such a result and was compensated for his services. Thus, Spencer has no viable claim for unjust enrichment. (Webb, G.; CV-16-862; 3-29-17; Whiteaker, P.)

Ark. State Police Retirement System v. Sligh, 2017 Ark. 209 **[sovereign immunity]** Sovereign immunity bars this action. (Pierce, M.; CV-16-304; 3-30-17; Goodson, C.)

DOMESTIC RELATIONS

Westin v. Hays, 2017 Ark. App. 128 **[change in custody]** This case originated as an agreed order of paternity in 2010 following the birth of the parties' child in which the appellant mother was awarded sole custody. In 2015, the appellee father sought custody based upon changed circumstances. The appellant raised two points on appeal. The first was that the court erred in allowing evidence based upon facts not pleaded, but the appellant did not raise her due-process argument below, and thus, did not preserve it for appeal. The second point on appeal was that the court clearly erred in finding that change in custody to the appellee father was in the best interest of the child. However, the court stated in general the factors that should be considered and ruled that, considering all the evidence, the change was in the best interest of the child, and

the Court of Appeals did not find clear error in that ruling. The decision was affirmed. (Fowler, T.; No. CV-16-410; 3-1-17; Murphy, M.)

Honeycutt v. Honeycutt, 2017 Ark. App. 113 **[oral amendment of pleadings; modification of alimony; arrearages]** The circuit court modified the alimony payments from the appellee husband to the appellant wife. On appeal, she contends the court erred (1) in allowing the appellee to amend orally his pleadings at the hearing, (2) in reducing his monthly alimony obligation, and (3) in improperly setting off arrearages. On the first issue, the Court of Appeals found that Arkansas Rule of Civil Procedure 15(b) allows the amendment of pleadings to conform to the evidence introduced at trial. The question of whether pleadings may be amended to conform to the evidence is within the sound discretion of the trial court. Here, the appellant did not meet her burden to prove material prejudice or a manifest abuse of discretion. Second, the reduction in alimony was based upon changed circumstances in the appellee's employment and earnings, which the appellant did not dispute. The Court of Appeals said it was clear from the court's order that it considered not only the change in appellee's income but also the factors that caused it. There is no indication that the court failed to consider appellant's financial need as well as the appellee's ability to pay in reducing the monthly obligation from $1700 to $800. The Court found no abuse of discretion. Finally, the trial court found that the appellant was in no position to compensate the appellee for his attorney's fees and travel costs in connection with this case. The court ruled that any arrearage he owed was set aside and he would begin his reduced alimony payments on a date certain. However, the Court of Appeals noted that it could "plainly see where the equities lie" based upon its de novo review, and it modified the unpaid arrearage and reduced it to judgment. The case was affirmed as modified. (Williams, L., No. CV-16-589; 3-1-17; Gruber, R.)

Pelts v. Pelts, 2017 Ark. Ark 98 **[divorce—military retirement benefits]** The first issue in this case is whether the appellant husband's active duty retirement payments were vested at the time of divorce and therefore subject to division then. The Supreme Court said the answer lay in whether the reserve retirement statutory scheme, in which he undisputedly has a vested interest, is distinct from the active duty statutory scheme. The Supreme Court found that both statutes and case law on vesting support established that his vested property interest in the reserve retirement system at the time of his divorce is distinct from his potential future interest in active duty payments. If the appellant opted to leave the military immediately, it is undisputed that he would receive no share of the active-duty retirement payments that would otherwise begin ten years before his anticipated reserve retirement. "An interest that is contingent on continued employment is too speculative to be vested and subject to division." The Court reversed the circuit court's division of his "speculative and nonvested interest in active-duty retirement benefits." The appellant's second contention is that the court erred in ordering him to maintain survivor-benefit-plan coverage. He has not yet opted into a survivor-benefit plan, but he can do so while on active duty or when he begins receiving reserve retirement payments at age 60. The

appellee argues that the circuit court acted within its discretion and that the costs will be borne by both parties in proportion to the division of the retirement payments. The Supreme Court said the appellee's argument "ignores the inequality in the actual *benefit* of the survivor benefit," which will accrue only to the appellee. The Court held clear error in the court's unequal division of property without giving sufficient justification for why he must bear a share of the costs. The Court reversed and remanded for the circuit court to enter a decree consistent with its opinion. (Feland, W.; No. CV-16-151; 3-16-17; Womack, S.)

Medeiros v. Medeiros, 2017 Ark. App. 122 **[spousal support; UIFSA]** This is the second time this case has been before the Arkansas Court of Appeals. *Medeiros v. Medeiros (Medeiros I)*, 2016 Ark. App. 522. In this appeal, the appellant ex-wife appeals from a circuit court order barring enforcement of her claim of spousal support from the defendant that was ordered in the parties' 1991 California divorce decree, which she registered in Arkansas in 2014 pursuant to UIFSA. She first argues that the trial court erred in allowing the appellee to challenge the registration and then in applying laches to bar her enforcement of the decree. The Court of Appeals noted that UIFSA provides for the proper registration of a decree and for enforcement of a decree from another state. Here, the Court of Appeals found no record that the appellee was ever served with notice setting forth the very specific UIFSA requirements. In *Medeiros I*, the Court had noted that while the record indicated that appellee was served with a "Notice," no copy of the document was in the record, nor did the parties settle and supplement the record with documents served on him when the case was initiated. The record still does not include the missing "Notice." The Court held that he was never served with notice required under UIFSA specifying correct time limitations or procedures for contesting the registration. Because he was not properly notified, the Court held the California support order was not confirmed by operation of law. Therefore, the trial court's finding that his response would be treated as timely and he would be allowed to present his defenses was correct. The trial court was also correct in applying the Arkansas law of laches as a defense to the support order. The appellant waited twenty-five years to initiate a proceeding to collect spousal support. There was also evidence that the appellee never claimed child support from her in those twenty-five years, even though that was a remedy available to him, which is now barred. For twenty-five years, there was no evidence that she ever intended to assert her alimony claim, although the parties interacted throughout that time period. The trial court did not err in finding that he successfully established the defense of laches. The decision was affirmed. (Webb, G.; No. CV-16-168; 3-1-17; Whiteaker, P.)

Berry v. Berry, 2017 Ark. App. 145 **[alimony]** In this post-divorce modification-of-alimony case, the appellant ex-husband alleged material changes in circumstances in arguing for a termination of alimony. His primary argument was that the appellee ex-wife's mother had died and left her a sizeable inheritance and that she no longer needed alimony. He argued that other facts, including her voluntary increase in her investment and retirement accounts, showed that

she no longer needed alimony. In its opinion, the circuit court reviewed the division of assets in the original divorce proceedings, including the fact that the appellee had testified to her mother's ill health and her potential inheritance at the time of the divorce, so it was contemplated when the original alimony award was made, and therefore was not a material change in circumstances. The Court of Appeals found that some of the appellee's arguments were based upon the trial court's findings of the parties' credibility. The Court found no clear error or abuse of discretion. The decision was affirmed. (Moore, R.; No. CV-16-766; 3-8-17; Klappenbach, M.)

Johnson v. Young, 2017 Ark. App. 132 **[child support; material change in circumstances]** The parties divorced in 2005. Under their settlement agreement, the appellant mother was given primary custody of the two children and the appellee father was ordered to pay $800 child support a month, with the parties to divide equally the children's tuition and daycare expenses. In 2014, the appellant filed a motion to change venue and for contempt and modification of the previous child-support order. The Court of Appeals said that the Arkansas child support scheme is governed by Supreme Court Administrative Order No. 10, with its accompanying family support chart. The trial court's order must recite the amount of support required by the chart and recite whether the court deviated from that amount. Here, the circuit court did not use the correct method to calculate the appellee's income. The circuit court did not follow the approach mandated by Administrative Order No. 10 and *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007). The court found a true income of $3,300 a month. His tax returns, his own testimony, and the testimony of his father reflected an amount considerably in excess of that. In fact, he paid more in federal income taxes alone than his purported annual salary. He provided no proof of his true income and admitted that he signed his tax returns. His own affidavit of financial means reflects a monthly income of $6,000. The Court of Appeals reversed and remanded for findings consistent with its opinion. On the second point, that the circuit court clearly erred in not modifying the appellee's child-support payments, the Court noted that the question whether a material change in circumstances has occurred is governed by Arkansas Code Annotated section 9-14-107(a)(1) (Repl. 2015). The Court said that even if the payor's income has not changed that much, there are other factors that may lead to a material change in circumstances, such as passage of time, remarriage, the children's ages, income changes, the parties' finances, debts, ability to meet current and future obligations, and the child-support chart. Because it is not clear from the record whether the trial court found a material change of circumstances, the Court remanded to the circuit court to make a finding. (Morledge, C.; No. CV-16-478; 3-8-17; Abramson, R.)

Harley v. Dempster, Sr., 2017 Ark. App. 159 **[standing; child support]** This opinion was substituted on the grant of a rehearing in the Court of Appeals. The action was originally filed as a complaint against the appellee for the support of his two minor children with the appellant. The plaintiff in the action was the Office of Child Support Enforcement, and the appellant mother of the children was listed as the assignor. He was served with the petition, but did not

answer or appear at the hearing. The circuit court ordered him to pay child support through the Child Support Clearinghouse. He did not pay his child support, and in March 2015, the OCSE filed for modification of the amount due and sought a judgment for arrears, over $26,000. The appellee was served, but failed to file an answer again. The court issued an order of modification and found that he would receive credit toward the arrears of $6,000, an amount paid by his parents voluntarily for private-school tuition for the children. The appellee herein filed an appeal was filed and a decision issued by the Court of Appeals on December 7, 2016 by a nine-judge panel dismissing the appeal upon finding that the appellee did not have standing to appeal the lower court's decision. Three dissents were filed with the majority opinion. That opinion is vacated and this opinion is substituted as the majority opinion. Neither party raised the issue of standing on this appeal. However, the Court of Appeals noted that the Arkansas Supreme Court has raised the issue of standing on its own, citing *Swindle v. Benton Cty. Cir. Ct.*, 363 Ark. 118, 211 W.W.3d 522 (2005). The Court of Appeals said that, in light of its previous decision and its grant of rehearing, it must be discussed. The Court looked at whether the appellant mother was a party, and second, whether she had a pecuniary interest in the litigation to give her standing to bring the appeal. Noting that throughout the case brought by OCSE, she was listed as "OCSE Assignor" in the case style, along with OCSE as the plaintiff and the appellee Dempster as the defendant. The Court noted that many cases have more parties than just one plaintiff and one defendant. Setting out its reasons, the Court concluded that she was a party. Therefore, if she had a pecuniary interest in the income, she also would have standing to bring this appeal. The Court said the custodial parent of children owed child support has a pecuniary interest in the amount of child support. After deciding those preliminary issues, the Court of Appeals considered the issue of the reduction in arrears for the credit given for the paternal grandparents' payment of the children's Montessori School tuition. The appellant alleged that the trial court erred in reducing the amount of delinquent support by that amount. The Court said her arguments may have been persuasive but the Court was not able to address them. A setoff is an affirmative defense that must be raised in a responsive pleading or it is waived. Appellee did not file a responsive pleading at all, but neither the appellant nor OCSE objected on that ground. Therefore, the argument is not preserved for the Court's review. The same applies to her second point, that the trial court abused its discretion by allowing a setoff because it did not conform to Arkansas Code Annotated section 9-14-236. She did not raise the applicability of the statute below, nor did she obtain a ruling from the trial court that would allow the appellate court to review the decision. She also raised the issue that the trial court's decision was clearly erroneous. The evidence was that the appellee's parents paid the $6,000 tuition as volunteers because they wanted their grandchildren to attend the school. There was some evidence that the appellee, who paid no child support, was unaware of his parents' generosity. When taken to court two times, he did not answer the summons either time. The appellant relied on government assistance to care for her children. The tuition was not child support. There is evidence that the grandparents did not even know their son did not support his children. The tuition payments were not made by the appellee and were not made to the appellant or the OCSE. The Court

found the trial court's credit of $6,000 was clearly in error and an abuse of discretion, and the Court reversed and remanded to the trial court for entry of an order consistent with its opinion that complies with Arkansas Code Annotated section 9-14-233, which governs arrearages. (Smith, V.; No. DV-15-918; 3-8-18; Virden, B.)

Smith v. Murphy, 2017 Ark. App. 188 **[order of protection—corporal punishment]** The State District Court Judge, who heard this case on referral from the Administrative Judge in the Circuit, entered an order of protection for five years against a noncustodial father for one instance of corporal punishment of his four-year-old with a leather belt, which occurred when the child visited his father in Texas. The issue on appeal was whether the evidence was sufficient to support the entry of the order. The Court of Appeals held that it was and set out evidence that described the injury "that spanned from the child's upper-back to his knees and caused some bruising and mental anxiety." The mental anxiety included the child's saying that he wanted to kill himself and his being placed in a facility for inpatient mental-health treatment. The case has a good discussion of Arkansas case law on what has and has not been found to be domestic abuse under the Domestic Abuse Act. The decision was affirmed. (Casady, S.; No. CV-16-784; 3-29-17; Harrison, B.)

Cooper v. Kalkwarf, 2017 Ark. App. 200 **[child custody--relocation]** The appellant father appeals the order granting the appellee mother's request to relocate to Texas with the parties' minor son. For reversal, the appellant contends the trial court erroneously applied the presumption in favor of relocation as set out in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). The Court of Appeals agreed and reversed the decree. When the parties divorced, they entered into an agreement for custody, incorporated but not merged into the decree. In interpreting the agreement, the circuit court noted that, under the agreement, the appellee wife would have primary physical custody and that the parties would share joint, legal custody, and that the father would have reasonable and liberal visitation as set out in the agreement. The circuit court considered whether *Hollandsworth* or *Singletary v. Singletary*, 2013 Ark. 506, 431 S.W.3d 234 applied. The court said it looked to the contract between the parties, the testimony of the parties about their intent, and the conduct of the parties in reaching its conclusion, finding that the parties did not share true joint custody, that the appellee mother was the primary custodian, and that it used the *Hollandsworth* factors to decide the issue of relocation, presuming that it is in the child's best interest to relocate with the primary custodian. The Court of Appeals held that the court erred in relying on *Hollandsworth* and that the trial court's result was not correct for the wrong reason. The Court said that under *Singletary*, a parent wishing to relocate in a joint-custody situation must first show a material change in circumstances, and that appellant did not plead or show such a change. Because she failed to show such a material change in circumstances, the decision was reversed. (Smith, V.; No. CV-16-897; 3-29-17; Brown, W.)

PROBATE

Farrow v. Fuller, et al., 2017 Ark. App. 144 **[decedent's estates—real property]** The appellant was the business partner and long-time romantic partner of the decedent, Richard Bloch. They had a child together within their thirty-five-year relationship, but never married. Their relationship ended in 2012 and litigation ensued over the restaurant they owned together, separate appellee Autumn Breeze, Inc. The litigation ended with a settlement agreement. Bloch married separate appellee Fuller on January 1, 2015; he died intestate on March 6, 2015, and Fuller was appointed personal representative of his estate. Appellant filed a petition to have the restaurant property and a house removed from the estate, arguing that she and Block jointly purchased them with deeds held as "joint tenants with the right of survivorship." She claimed the settlement agreement did not change the ownership of the properties, which she contended passed to her at Bloch's death. At the hearing in circuit court, the personal representative claimed that the estate should be entitled to the properties under the settlement agreement. She also claimed that the estate was insolvent without the properties and that the equities of the case and the changed circumstances of the parties supported the imposition of a constructive trust in favor of the estate. The trial court found that the settlement agreement stated the parties' intentions with respect to dissolution but was only partially performed, and that no documents modifying property ownership or responsibility were ever executed. With respect to the house, the court found it was not possible to attempt to carry out the terms of the agreement and it granted the petitioner's petition to remove the house from the estate. With the restaurant property, the court found that the intent of the Settlement Agreement was that appellant and decedent would share an equal interest in the property. The court declined to remove the property from the estate but ordered the ownership interest in the warranty deed be converted to a tenancy in common. The appellant argued that the court erred in converting a joint tenancy to a tenancy in common and in disposing of two identically titled properties in different ways when title to both properties passed to her as the surviving joint tenant. The Court of Appeals agreed, noting that "[a] joint tenancy with right of survivorship may be created in real property by conveyance to two or more persons, regardless of their relationship to each other." Both deeds in question conveyed the properties to appellant and decedent "as joint tenants with right of survivorship." Both passed to her at the decedent's death. The Court said that title to both properties vested solely in appellant upon Bloch's death, and the estate has no interest in the properties. Therefore, the Court affirmed in part and reversed in part. (Jackson, S.; No. CV-16-684; 3-8-17; Klappenbach, M.)

JUVENILE

State v. Griffin, 2017 Ark. 67 **[suppression]** Suppression motion should have been denied. When a minor is in the custody of DHS, he can waive right to remain silent when the juvenile is being tried as an adult. Arkansas Code Ann. Section 9-27-317 is not applicable. (Lindsay, M.; CR-16-704; 3-2-17; Goodson, C.)

DHS v. State, 2017 Ark. App. 137 **[d-n]** DHS unsuccessfully challenged court order that juvenile placed in its custody after a rape charge was to receive treatment by arguing that the order was tantamount to controlling where it housed him. Order does not dictate placement but states that he must receive treatment and does not violate Ark. Code Ann. Section 9-28-207. (James, P.; CR-16-792; 3-8-17; Gladwin, R.) [See Also 2017 Ark. App 138]

DHS v. Lewis, 2017 Ark. App. 140 **[d-n]** Trial court did not err in finding insufficient evidence of dependency neglect. Baby's fall was undisputed to be an accident, and findings were based on judge's credibility determinations. (Warren, J.; CV-16-601; 3-8-17; Harrison, B.)

Selsor v. DHS, 2017 Ark. App. 182 **[termination parental rights]** Trial court did not err in terminating parental rights for failure of parents to provide stable housing. (Branton, W.; CV-16-1045; 3-15-17; Murphy, M.)

Greenhill v. DHS, 2017 Ark. App. 194 **[termination parental rights]** Trial court did not err in terminating parental rights for failure of parents to satisfy the twelve-months-failure-to remedy ground. (Spears, J.; CV-16-1077; 3-29-17; Whiteaker, P.)

Howell v. DHS, 2017 Ark. App. 154 **[termination parental rights]** Trial court did not err in terminating parental rights for failure of parents to satisfy the failure-to-remedy ground. (Zimmerman, S.; CV-16-960; 3-8-17; Vaught, L.)

Meredith v. DHS, 2017 Ark. App. 120 **[termination parental rights]** Trial court did not err in terminating parental rights based on the best interests of the child ground. (Braswell, T.; CV-16-1005; 3-1-17; Harrison, B.)

Jones v. DHS, 2017 Ark. App. 125 **[termination parental rights]** Trial court did not err in terminating parental rights based on the failure to remedy ground and the best interests of the child ground. (Elmore, B.; CV-16-921; 3-1-17; Vaught, L.)

Terrones v. DHS, 2017 Ark. App.115 **[termination parental rights]** Trial court did not err in terminating parental rights based on the subsequent factors ground and the best interests of the child ground. (Branton, W.; CV-16-1001; 3-1-17; Abramson, R.)