

# APPELLATE UPDATE

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## CRIMINAL

*Ward v. State*, 2019 Ark. App. 516 [**recusal**] The judge in appellant's case, was without authority to preside over appellant's revocation proceeding. The judge lost jurisdiction pursuant to his recusal in the underlying criminal action and he could not reconsider his recusal in the subsequent revocation proceeding. (McCormick, D.; CR-19-345; 11-6-19; Klappenbach, N.)

*Savage v. State*, 2019 Ark. App. 532 [**agreement not to prosecute**] An agreement not to prosecute must be enforced if the defendant shows that the agreement existed and that he or she relied on the agreement to the appellant's detriment. When deciding whether a valid contract was entered into a court should remain mindful of two legal principles: (1) a court cannot make a contract for the parties but can only construe and enforce the contract that they have made; and (2) in order to make a contract there must be a meeting of the minds as to all terms, using objective indicators. Additionally, both parties must manifest assent to the particular terms of the contract. In appellant's case, there was a fact that was unknown to the parties at the time that the contract was entered into which made the agreement impossible to perform. Thus, appellant could not prove that he relied on the agreement to his detriment. (Ramey, J.; CR-18-1027; 11-13-19; Virden, B.)

*King v. State*, 2019 Ark. App. 531 [**right to counsel**] Immediately before his hearing was set to begin, appellant requested a continuance to obtain a different public defender. The trial court denied appellant's request. On appeal, the Court explained that while constitutionally guaranteed, the right to counsel of one's choosing is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. Once competent counsel is obtained, any request for a change in counsel must be considered in the context of the public's interest in the prompt dispensation of justice. Additionally, once a defendant has accepted representation by an attorney, the fact that the defendant is dissatisfied with counsel's efforts does not entitle him to appointment of a different attorney. Factors to be considered by the trial court in determining whether to grant a continuance for the purpose of obtaining new counsel include whether there was adequate opportunity for the defendant to employ counsel; whether other continuances have been requested and granted; the length of the requested delay; whether the requested delay is for legitimate reasons; whether the motion for a continuance was timely filed; whether the defendant contributed to the circumstances giving rise to the request for a continuance; whether the reason for the discharge of existing counsel was solely for the purpose of obtaining a continuance; and whether the request was consistent with the fair, efficient, and effective administration of justice. The trial court does not have to consider every factor when determining whether to grant a continuance for the purpose of obtaining new counsel and the trial court is not required to make any findings on those factors. Appellant's stated reasons for requesting different counsel were that his current counsel was "not representing [him] right" and was not working with him. Counsel explained that appellant was not happy with the State's plea offer and wanted him to negotiate further. Appellant's request to change counsel was made just before his revocation hearing was set to begin. Appellant did not offer compelling reasons for wanting the change of counsel, did not identify any substitute counsel, and did not allege that counsel was incompetent. Based upon the foregoing facts, the trial court did not abuse its discretion when it denied appellant's motion. (Wilson, R.; CR-18-649;11-13-19; Virden, B.)

*Ledwell v. State*, 2019 Ark. 334 [**sufficiency of the evidence; negligent homicide**] Appellant was convicted of negligent homicide. Criminal negligence sets a higher bar than civil negligence. It requires "something more" than a mere failure to exercise reasonable care. The negligent conduct must constitute a "gross deviation" from the standard of care that a reasonable person would have exercised in the actor's situation. The facts surrounding the homicides are as follows: Appellant negotiated a turn, he became distracted, accelerated within the speed limit, entered the wrong lane, collided with an oncoming car, and catastrophically caused the deaths of four people. Although appellant attempted to swerve back and decreased his application of the accelerator in the last second, he did not apply his brakes. There was no evidence that he was speeding, driving erratically, under the influence of alcohol, or using a phone. Appellant did not receive a traffic citation for his conduct. The State failed to present any evidence that the purpose of appellant's conduct, given the situation, amounted to a gross deviation from the standard of

care. Without an explanation, the jury was forced to speculate and conjecture in reaching its conclusion. Accordingly, the trial court erred when it denied appellant's motions for directed verdict. (Williams, C.; CR-18-839; 11-14-19; Wood, R.)

*Lowery v. State*, 2019 Ark. 332 [**404 (b) pedophile exception**] Appellant sought to exclude certain testimony from his trial because he was facing charges over the conduct that was the subject of the testimony in a different county. The challenged testimony, which was from another person that appellant sexually assaulted, was offered pursuant to the pedophile exception. The Supreme Court concluded that the trial court did not abuse its discretion when it admitted the testimony and noted that trial court only has jurisdiction to control the evidence that is admitted in the trial in the county where the case is pending and cannot control the admission of evidence in another county. Additionally, the Court noted that the arguments raised by appellant for excluding the evidence, which were based upon how the admission of the 404 (b) evidence in one case could impact the trial strategy in the case pending in the other county, was speculative. (Jones, C.; CR-19-248; 11-14-19; Hart, J.)

*Price v. State*, 2019 Ark. 323 [**sentencing**] A conviction imposed on a juvenile sentenced as an adult may be used as the basis for an increased penalty imposed under the habitual-offender statute. (Guynn, A.; CR-18-1029; 11-14-19; Kemp, J.)

*Gray v. State*, 2019 Ark. App. 543 [**justification defense**] Where there is evidence that would support a finding of self-defense, the justification jury instruction is appropriate notwithstanding the defendant's testimony that he did not commit the crime. In appellant's case, it was error for the trial court to require appellant to choose between the defenses of general denial and justification. (Johnson, L.; CR-19-260; 11-20-19; Gruber, R.)

*Hendrix v. State*, 2019 Ark. 351 [**continuance**] Prior to his trial, appellant sought and received fitness to proceed and criminal responsibility examinations. Both examinations revealed that he suffered from alcohol, cannabis, and methamphetamine use disorders. Appellant was ultimately deemed fit to stand trial and capable of being held criminal responsible for his conduct. On the day before trial, appellant sought a continuance to seek an independent criminal responsibility examination. At the hearing on appellant's motion, he advised the court that he had not sought assistance from a different expert, nor had he subpoenaed any witness to testify on the issue of his mental condition at the trial. The circuit court found that appellant had not acted diligently and denied his motion. Based upon the foregoing, the Supreme Court concluded that the trial court did not abuse its discretion when it denied appellant's request for a continuance to obtain an independent mental evaluation. The Supreme Court further noted that appellant did not point to any specific information that the continuance would have garnered that would have impacted or changed the outcome of his trial. Additionally, appellant did not attempt to raise an

affirmative defense of lack of criminal responsibility at trial. Accordingly, he failed to show any prejudice from the denial of the continuance. (Williams, C.; CR-19-347; 11-21-19; Womack, S.)

## CIVIL

*Roach v. Whitehead*, 2019 Ark. App. 525 [**contract damages-speculative**] Roach argues that subsequent sales can form an appropriate basis for ascertaining the value of the property at the time of the breach. Here, there was no subsequent sale that can be used to determine the amount of damages. And while there was a contract to purchase the property, the court explicitly found that there was no credible evidence of what the value of the land might have been at the time of the breach. (Richardson, M; CV-18-760; 11-6-19; Murphy, M.)

*Silver Springs Property Owners Assoc. v. Arey*, 2019 Ark. App. 520 [**tax exemption**] The only issue in the appeal is whether the circuit court erred in finding that Silver Springs did not prove beyond a reasonable doubt that its recreational-use facilities were used exclusively for public purposes. A “public purpose” contemplates that the use must be common to all and not to a particular group. Silver Springs, while open to everyone, provides preferential access to the residents of the subdivision located within the improvement district because residents pay a lower monthly fee. The court also found that portions of the clubhouse are leased out to a third-party vendor who provides restaurant services, manages the bar, and operates with a view toward profit. When public land is leased or rented out for private uses, ad valorem tax is imposed, even if the profits go back into the public treasury. (Phillips, G; CV-19-72; 11-6-19; Vaught, L.)

*Blanchard v. City of Springdale*, 2019 Ark. App. 522 [**eminent domain/attorney’s fees and costs**] SWSC identified its general authority to act under Ark. Code Ann. §§18-15-401 et seq., as well as other eminent-domain statutes. However, it is evident that in this case that SWSC was not exercising its eminent-domain powers under Ark. Code Ann. §§ 18-15-401 et seq., for any waterworks project, but was instead proceeding under Ark. Code Ann. § 14-235-210, which authorizes eminent-domain proceedings for sewer systems as provided in Ark. Code Ann. §§18-15-301 to -303. Accordingly, there is not a statutory basis for the award of attorney’s fees. Expert witness fees were not allowable as costs, but the appraisal fee is. (Duncan, X.; CV-19-83; 11-6-19; Hixson, K.)

*City of Gravette v. Centerton Waterworks*, 2019 Ark. App. 540 [**annexation water works**] The protection of 7 U.S.C. § 1926(b) prevents the City of Gravette from acquiring the Centerton’s water facilities. (Schrantz, D.; CV-18-990; 11-13-19; Murphy, M.)

*Dollar General Corp. v. Elder*, 2019 Ark. App. 526 [**slip and fall**] Sufficient evidence on issues of unreasonably dangerous condition and landlord’s failure to maintain. Chiropractor was

qualified as expert and was allowed to opine on medical issues. (Ryan, J.; CV-18-313; 11-13-19; Gruber, R.)

*Industrial Welling Supplies, LLC v. Pinson*, 2019 Ark. App. 325 [**class certification**] The circuit court did not err in its findings regarding commonality, predominance, and superiority, and it properly certified the class. The employees have established a common question that precedes an individualized inquiry that would otherwise make a class impractical. To the extent that employee contracts and noncompete agreements vary amongst class members, such differences, if there are any of significance, can be addressed through utilization of subclasses. The issue of whether Industrial Welding breached the terms of its contracts and noncompete agreements predominates because a common wrong has been alleged against Industrial Welding that may be resolved before individual issues or defenses. The superiority requirement is satisfied because a class action is the more “fair and efficient” way to adjudicate the case. Here, it was admitted that employees of Industrial Welding were treated the same with respect to when they earned vacation time and when they either took it or were compensated for it. To the extent that employee contracts and non-compete agreements vary amongst class members, such differences, if there are any of significance, can be addressed through utilization of subclasses, and the class can be decertified after common questions have been litigated, if the circuit court decides it is appropriate to do so. (Guthrie, D.; CV-19-175; 11-14-19; Kemp, J.)

*Vaughn v. Mercy Clinic*, 2019 Ark. App. 329 [**class certification**] The proposed class includes individuals who worked for Cooper Clinic for more than one year “on the date of their termination,” and “were terminated” and “were not paid for their vacation time.” The circuit court erred in denying class certification. A class did exist. The circuit court abused its discretion by relying on payments to defeat Rule 23’s requirements. (Tabor, S.; CV-19-217; 11-14-19; Hudson, C.)

*Johnson v. Schumacher Group*, 2019 Ark. App. 545 [**summons**] Dr. Johnson argues that the circuit court erred by ruling that the summonses were fatally defective under Ark. R. Civ. P. 4(b) because they incorrectly warned the defendants that judgment by default **will**—as opposed to **may**—be entered against them. According to Dr. Johnson, this was a mere grammatical error, and it did not otherwise prevent the defendants from being notified of the pendency of the lawsuit or deny them the opportunity to be heard. However, the supreme court has required strict compliance with the requirements of Rule 4(b), and the rule specifically requires that summonses notify defendants that default judgments may—not will—be entered against them. The defendants appropriately objected to the defective summonses by reserving a challenge in their answer and later filing a motion to dismiss. Their request for attorney’s fees in connection with a protective order did not waive their challenge to the circuit court’s jurisdiction. (Sutterfield, D.; CV-18-509; 11-20-19; Gladwin, R.)

*Johnson v. Pope Emergency Group, LLC*, 2019 Ark. App. 544 [**employment**] The appellate court did not decide, based on the record presented, whether the public policy exemptions to the termination of an at-will employee should be extended to an independent contractor. The evidence demonstrated that Pope terminated the employment agreement because St. Mary's requested Dr. Johnson's removal from the emergency department. Pope was within its rights to terminate employment. (Sutterfield, D.; CV-18-511; 11-20-19; Abramson, R.)

*Infinity Healthcare, LLC v. Boyd*, 2019 Ark. 346 [**class certification**] For reversal, appellants argue that the six class-certification requirements were not met: numerosity, commonality, typicality, adequacy, predominance, and superiority. The supreme court reviewed each factor and affirmed the circuit court's class certification. (Griffin, W.; CV-19-362; 11-21-19; Hudson, C.)

## DOMESTIC RELATIONS

*Carr v. Carr*, 2019 Ark. App. 513 [**property settlement agreement enforcement; award of permanent and rehabilitative alimony**] The appellate court found that the circuit court did not err in enforcing the parties' property settlement agreement that was undisputedly agreed on by the parties and read into the record by both parties' attorneys without objection. It was filed with, and approved by, the circuit court. The appellate court also found no error in the circuit court's award of permanent and rehabilitative alimony. The record indicates that the circuit court heard evidence of Appellee's need, Appellant's ability to pay, the spendable incomes of the parties, and the standard of living that Appellee had become accustomed to during the marriage. The circuit court did not simply calculate the award of alimony by a mathematical formula, and the circuit court is not required to consider or acknowledge any secondary factors that the court could consider in determining alimony. In regard to the rehabilitative alimony, the appellate court found no error in the circuit court considering factors such as earning ability and bonuses in its calculation of alimony, even if Appellee waived her right to his bonuses in the property settlement agreement. The appellate court also found no merit in Appellant's contention that the court cannot award rehabilitative alimony because Appellee failed to present a rehabilitative plan with goals and requirements that she must meet in order to become self-sufficient. Appellant made no request for such a plan, and Ark. Code Ann. Section 9-12-312(b) does not mandate such a plan. The evidence indicates a large disparity in the parties' incomes, and the appellate court found no abuse of discretion in the awards of alimony. (McCain, G.; CV-18-1063; 11-6-19; Gladwin, R.)

*Hargis v. Hargis*, 2019 Ark. 321 [**procedural due process claim regarding hearing on attorney's fees request**] Appellant challenged the award of attorney's fees premised solely on her assertion that procedural due process mandates an evidentiary hearing on the parties' relative

financial abilities. Due process requires an opportunity to present reasons, either in person or in writing, why proposed action should not be taken. An evidentiary hearing, however, is neither a required, or most effective, method of decision-making in all circumstances. The appellate court found that Appellant was provided ample opportunity to submit evidence on the relative financial abilities of the parties, yet she declined to take full advantage of it. The appellate court further recognized that a hearing on the amount of attorney's fees is not required in domestic relations proceedings because the circuit court has presided over the proceedings and is familiar with the case. Therefore, the appellate court found no error in the circuit court's refusal to conduct a hearing based on the alleged disparity of income of the parties. (Williams, L.; CV-18-912; 11-7-19; Womack, S.)

*Wadley v. Wadley*, 2019 Ark. App. 549 [**material change of circumstances and best interest to modify visitation; failure to pay child support cannot be punished summarily and party must receive notice so that he has reasonable time to defend**] Having considered the evidence, the circuit court's credibility findings, the weight given to the evidence by the circuit court, and a de novo review, the appellate court found no error in the circuit court's finding that a material change of circumstances had occurred and that it was in the child's best interest to modify visitation. The circuit court found that the parties had been unable to get along, both parties had moved and Appellant had a new job, Appellant used drugs while the child was in his custody, that he had at least two girlfriends in a 5-month period after the divorce and that they stayed overnight when the child was present, that he left the child with a girlfriend to care for him 90% of the time, and that he authorized new girlfriends to pick up the child from daycare. The appellate court dismissed the contempt finding regarding child support arrearages. Failure to pay support is not the type of contempt that can be punished summarily; therefore, he was entitled to notice of the contempt accusation and a reasonable time to defend it. Appellee never filed a motion for contempt on the issue of the child-support arrearages so he was never put on notice that he would be defending such contempt. (Smith, V.; CV-19-406; 11-20-19; Vaught, L.)

## **PROBATE**

*In the Matter of the Adoption of T.A.D., a Minor Child*, 2019 Ark. App. 510 [**stepparent adoption; failure to support was not justifiable; child's best interest**] The appellate court found that the circuit court erred in denying the stepparent adoption. The appellate court found that the biological father's failure to support the child for more than one year was unjustifiable and his consent to the adoption was not required. The father's imprisonment did not toll his responsibilities to support his child. Furthermore, the father's claims that the child-support office informed him that his case had been canceled and that the mother thwarted his efforts to pay support were not adequate excuses for the father's total failure to support the child for seven years. Furthermore, the appellate court found that the circuit court erred in finding that it was in

the child's best interest for the adoption to be denied. Even though the law favors a natural parent, the undisputed evidence shows that the biological father has had no relationship with the child since 2011, he has not paid support since 2010, he last saw the child in 2011, and he has only sent the child two letters in 2011 and 2013. The biological father lost his preference as the natural parent when he ignored his parental duties and shifted them to the stepfather who has fulfilled the role of the father. (Foster, H.; CV-19-81; 11-6-19; Abramson, R.)

## JUVENILE

*Everly v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 528 [**TPR—best interest**] Termination was in child's best interest where mother was in no better position at termination hearing than she was at start of case. At the termination hearing, the mother was noncompliant with the case plan, had a recently new boyfriend whom she was living with and relying upon for support, and admitted illegal drug use. Throughout the case, the daughter had not visited with the mother except during two counseling sessions, and the DHS caseworker testified that the mother was in worse condition than when the case started and that the daughter was at risk of harm if returned to the mother. The daughter did not want to see the mother and asked that rights be terminated. The appellate court rejected the mother's argument that termination was error where the daughter could have been placed in the custody of relatives, finding that alternatives less restrictive than termination were not in the child's best interest under the circumstances. Finding no clear error, the termination order was affirmed. (Hendricks, A.; CV-19-453; November 13, 2019; Gruber, R.)

*Redden v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 539 [**TPR—sufficiency of the evidence**] Where case was opened due to parental unfitness and related drug use and mother continued to test positive for methamphetamine six days before termination hearing, among other issues, the evidence was clear and convincing that termination was in the children's best interest. The order terminating the mother's rights was not clearly erroneous. (Zimmerman, S.; CV-19-592; November 13, 2019; Hixson, K.)

*Mixon v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 554 [**Permanent custody awarded to fathers**] Children were removed from mother after neglect due to mother's drug use; mother was subsequently ordered to family treatment drug court. When mother repeatedly failed to follow treatment plan, department filed motion to terminate reunification services. After a hearing on the motion, the court placed permanent custody of the children with their fathers. Mother appealed, arguing that she had no notice that permanent custody would be considered at the hearing. However, because she failed to object at the hearing and raise the issue below, the argument was not preserved for appeal. The mother also argued that there was insufficient evidence to change custody. The appellate court agreed with the trial court, finding no clear error

where a preponderance of the evidence established that the mother had been unstable for a significant period of time, but neither father had contributed to the dependency-neglect of the children. Because the welfare and best interest of the children is the primary consideration, the appellate court was not left with a firm conviction that a mistake occurred and the trial court was affirmed. (Brown, E.; CV-19-568; November 20, 2019; Murphy, M.)

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

*Hardiman v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 542 (Talley, D.; CV-19-407; November 13, 2019; Brown, W.)

*Pace v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 533 (Branton, W.; CV-19-520; November 13, 2019; Virden, B.)

## DISTRICT COURT

*Conery vs. State of Arkansas*, 2019 Ark. App. 529, [**Sufficiency of Evidence**] [**Preservation of Argument for Appeal**] Conery was convicted of second-degree terroristic threatening in district court. Her subsequent appeal to circuit court also resulted in a conviction. Conery appealed to the Court of Appeals arguing the State failed to present sufficient evidence that would allow the fact-finder to reasonably infer Conery had the requisite mental state for her actions to constitute second-degree terroristic threatening. The Court of Appeals found that Conery's motion to dismiss during the trial did not state with specificity the grounds for dismissal; therefore, the issue was not preserved for appeal. The Court of Appeals also identified two clerical errors on the sentencing order. (Sims, B., CR-19-116; 11-13-19; Abramson, R.)

*Treat vs. State of Arkansas*, 2019 Ark. 326, [**District Court**] [**Lack of Jurisdiction**] [**Criminal Procedure**] Treat was convicted of driving while intoxicated and speeding in district court and appealed to the circuit court. The State moved to dismiss arguing that Treat failed to strictly comply with Rule 36 of the Rules of Criminal Procedure. The circuit court granted the State's motion to dismiss. Treat appealed to the Court of Appeals who agreed with the circuit court and dismissed the appeal for lack of jurisdiction. More specifically, the Court of Appeals found that there was no duty on the part of the clerk to prepare and certify the record within thirty (30) days under Rule 36 (c) because Treat failed to pay the five-dollars (\$5.00) certification fee authorized by Arkansas Code Ann. §16-17-124. The Court of Appeals also found that the subsequent submission of the affidavit under Rule 36(d) was ineffective to extend the deadline under Rule 36 due to the initial failure to pay the five-dollar (\$5.00) certification fee. Treat then filed a petition for review with the Supreme Court. The Supreme Court declined to read subsection (c) and (d) of Rule 36 of the Rules of Criminal Procedure together and declined to find that a

defendant must first satisfy the provisions in subsection (c) before proceeding under subsection (d). Accordingly, the filing of Treat's affidavit under Rule 36 (d) triggered jurisdiction of the appeal from district court. Reversed and Remanded; Court of Appeals Opinion Vacated. (Edwards, R., CR-18-750; 10-14-19; Baker, K.)