

# APPELLATE UPDATE

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## CIVIL

*Cooper Realty Investments, Inc. v. City of Bentonville*, 2022 Ark. App. 155 [**summary judgment; merger doctrine**] The trial court entered a declaratory judgment in favor of the City stating that any prior agreements between the parties regarding the transfer of an eighty-nine-acre tract of land surrounding and including Lake Bella Vista and the Lake Bella Vista Dam merged into a subsequently executed special warranty deed, that the special warranty deed established all of the City's contractual requirements as to the property and the dam, and that the special warranty deed did not require the City to rebuild the damaged dam or limit the City from completely removing it. It is a general principle of law that an agreement made for the sale of lands merges into a deed subsequently executed. There are exceptions to the doctrine of merger in cases involving mutual mistake of fact, misrepresentation, or the perpetration of a fraud. Additionally, there is an exception for contract provisions that were intended to survive closing. Here, the appellate court held that the language of the agreement in this case articulated an intent that the provisions regarding upkeep of the dam would survive closing. Moreover, the special warranty deed contained a reversion clause stating that if the property was not used for the intended purpose of public recreation, it reverted to a third party, indicating that the parties intended to create ongoing obligations as to how the property could be used and managed. Therefore, the exception to the general merger rule

involving contractual provisions or agreements that were not intended to be merged into the deed applied here. (Scott, J.; 04CV-19-1031; 4-6-22; Vaught, L.)

*J.E. Bonding, Inc. v. State*, 2022 Ark. App. 157 [**bond-forfeiture**] The circuit court entered an order denying the appellant's motion to set aside judgment. On appeal, appellant argued that the circuit court abused its discretion by failing to set aside the bond-forfeiture order pursuant to Rule 60 of the Arkansas Rules of Civil Procedure. This rule provides that to correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order, or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk. Arkansas Code Annotated § 16-84-207, which governs bond forfeitures, requires that a defendant be brought before the circuit court within seventy-five days of the bond-notification date. Here, the defendant was required to be brought before the circuit court within seventy-five days of the bond-notification date, which did not happen. Moreover, the appellant based its argument below on a printout from the Arkansas Department of Correction's (ADC) website indicating that the defendant was incarcerated in the ADC. There was no affidavit or certification accompanying an ADC website printout to establish its authenticity or accuracy, nor was it introduced at the hearing. Further, the bonding agent did not submit an affidavit in support of the motion or testify at the hearing on the motion. The circuit court did not abuse its discretion in denying the appellant's motion to set aside the judgment. (Hearnsberger, M.; 26CR-20-185; 4-6-22; Murphy, M.)

*James v. Mounts*, 2022 Ark. App. 158 [**life insurance policy; contract; beneficiary change**] The circuit court awarded the death benefits of a life insurance policy owned by appellant's ex-husband to his children. Appellant was the named beneficiary on the policy, but the circuit court found that the deceased had effectively changed the beneficiary designation. On appeal, appellant argued that the circuit court erred in its finding. The rights of designated beneficiaries in life insurance policies are determined in accordance with contractual law, with some exceptions. Substantial compliance with an insurance policy's provisions regarding changing beneficiaries may also be acceptable if the insured had done everything reasonably possible to effect a change in beneficiary. When a life insurance policy reserves to the insured the right to change the beneficiary but specifies how the change may be made, the change must be made in the manner and mode prescribed by the policy. One exception is that an insured may change the beneficiary in a will or a divorce decree, but to do so, the language in the will or decree must be sufficient to identify the insurance policy and explicit in its intent to change the beneficiary. Here, both the policy and the policy change form contemplated signatures and dates in order to change the beneficiary. The policy change form explicitly provided that if it was not signed and dated, the request would not be processed. The deceased attempted to change the beneficiaries of his life insurance policy from his ex-wife to his children by sending notice to his insurance company. The insurance company sent a letter to the deceased while he was still alive that the notice he provided was not satisfactory. The deceased had time to send in a complaint form or follow up with the company to make sure his request was carried out. As such, the deceased had not done everything reasonably possible to effect a change

in beneficiary prior to his death. Therefore, the appellant was entitled to the proceeds of her late ex-husband's life insurance policy because the beneficiary on the policy had not changed. (Guthrie, D.; 52CV-18-154; 4-6-22; Murphy, M.)

*Funding Metrics, LLC v. Letha's Pies, LLC*, 2022 Ark. 73 [**class action waiver; contract law**] The trial court granted class certification in a lawsuit brought by appellees for alleged violations of the Arkansas Securities Act. On appeal, appellant argued that the trial court abused its discretion by refusing to enforce the class-action waiver in their written agreement as a bar to class certification. The essential elements of a contract are: (1) competent parties; (2) subject matter; (3) consideration; (4) mutual agreement; and (5) mutual obligations. Mutuality of obligation does not require a precisely even exchange of identical rights and obligations between the contracting parties. It is enough that the duty unconditionally undertaken by each party be regarded by the law as a sufficient consideration for the other's promise. The mutuality of obligation must be based on the entire agreement, not just the arbitration clause, and the failure of a party to receive precisely the same benefit from the arbitration agreement as the other party does not negate the entire contract's mutuality of obligation. Here, the appellee entered into a written agreement to sell appellant a sum of their future receivables in exchange for an immediate payment. The written agreement contained a class-action waiver provision. The appellate court held that the class-waiver was enforceable pursuant to Arkansas contract law. Further, the waiver was applicable to claims to enforce the Arkansas Securities Act because the parties' relationship was governed by their written agreement, and the language of the class-action waiver was broad. The agreement waived any right to assert any claims against the other party as a representative action, except where such waiver is prohibited by law as against public policy. Also, the complaint sought the rescission of the agreement, and return of fees and profits obtained under their agreement. [**Arkansas securities law**] The Arkansas Securities Act states that parties cannot waive compliance with the Act. Specifically, any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order under this chapter is void. There is no provision in the Arkansas Securities Act regarding class actions. Here, although the appellee waived its right to bring a class-action, it did not waive compliance with any provision, rule, or order set forth in the Arkansas Securities Act. Therefore, the circuit court erred in granting class certification. (Threet, J.; 72CV-19-1917; 4-7-22; Baker, K.)

*Norman v. Craft*, 2022 Ark. App. 165 [**default judgment**] The trial court denied appellant's motion and amended motion to set aside a default judgment entered against him. On appeal, appellant argued that the trial court abused its discretion in failing to set aside the default judgment under Rule 55 of the Arkansas Rules of Civil Procedure. The rule states that when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court. Here, appellant did not fail to plead in this case, because he filed an answer and amended answer to appellee's complaint. Additionally, appellant's failure to attend the final hearing cannot be construed as a failure to otherwise defend. The reporter's notes to Rule 55 state that the word plead in Rule 55(a) has

independent meaning from the phrase otherwise defend and that the latter is referring to the filing of motions. Because appellant filed an answer and amended answer to appellee's complaint, he did not fail to plead, and because his failure to attend the final hearing did not fall within the meaning of failing to otherwise defend, Rule 55 did not apply to this case, and appellant was not in default. Therefore, the trial court erred in denying the motion to set aside default judgment. (Batson, B.; 10CV-20-53; 4-13-22; Vaught, L.)

*Bentonville School District v. Sitton*, 2022 Ark. 80 [**Covid-19; masks; temporary restraining order**] The trial court entered an order granting appellees' motion for a temporary restraining order (TRO) and enjoining the enforcement of a school district's mask policy in favor of appellees. On appeal, appellant argued that the trial court abused its discretion in ruling that the appellant's mask policy violated the parents' constitutional rights to care for their children, the appellant lacked authority to issue its school policy, and that the parents suffered irreparable harm. Two issues must be considered when determining whether to issue a TRO: (1) whether irreparable harm will result in the absence of an injunction or restraining order and (2) whether the moving party has demonstrated a likelihood of success on the merits. [**parents' constitutional rights**] In the context of a public health crisis, a state action is susceptible to constitutional challenge only if it, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law. Parents have a liberty interest in shaping their child's education, however, the government has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. Here, appellant stated in its policy that masks were recommended by the Centers for Disease Control and Prevention in school settings. Appellant also emphasized in its policy that it was following the recommendations of its Reopening Task Force that included medical professionals, Personnel Policy Committee, the District Administration, and the directives of the Arkansas Department of Health and the Governor. Thus, the appellate court held that the appellant's policy supported a real or substantial relation to protecting the students' health during the COVID-19 pandemic. Additionally, the Supreme Court held that appellant's policy was not, beyond all question, a plain, palpable violation of the parents' constitutional rights to care for their children. [**school district's authority**] School districts may only act through a board of directors. A broad discretion is vested in the board of directors of each school district in the matter of directing the operation of the schools. State statutes allow for a school's broad authority to determine its policies. Based on this precedent, appellant properly authorized its mask policy. Therefore, the circuit court abused its discretion in finding that appellant's policy violated the appellees' constitutional rights and was enacted without proper authority. [**irreparable harm**] Irreparable harm is the touchstone of injunctive relief. Harm is normally considered irreparable only when it cannot be adequately compensated by money damages or redressed in a court of law. Here, because appellant had the authority to promulgate its mask policy and the policy did not violate appellees' fundamental rights, the appellees failed to show that irreparable harm would result in the absence of a TRO. The circuit court erred in granting the parents' motion for a TRO. (Duncan, X.; 04CV-21-2181-5; 4-14-22; Kemp, J.)

*Rutledge v. Remmel*, 2022 Ark. 86 [**sovereign immunity; injunctive relief**] The circuit court denied appellant’s motion to dismiss holding that the appellant was not entitled to sovereign immunity because the facts as alleged in the complaint showed the appellant had been acting ultra vires and without legal authority. Additionally, the trial court held that the appellant wasn’t entitled to qualified immunity because the alleged facts showed she acted in bad faith and in an injurious manner. A lawsuit against a state official for injunctive relief can overcome sovereign immunity if the suit adequately pleads the official acted illegally, unconstitutionally, or ultra vires. The complaint must assert facts that, if proven, would demonstrate a legal violation. Bare-bones allegations unsupported by law do not survive an immunity defense. Here, appellees asked the trial court for an injunction against the appellant to prohibit further actions that exceed her authority and a money judgment for an illegal exaction ordering repayment to the state treasury. After reviewing the facts pleaded by the appellees, the appellate court held that none of the facts or legal allegations established that the appellant exceeded any legal authority. Appellee’s request for injunctive relief should have been summarily dismissed because the appellees failed to plead facts to overcome sovereign immunity. [**illegal exaction**] Appellees also brought an illegal exaction claim against appellant in her individual capacity. State officers and employees receive immunity from liability and suit for acts or omissions, other than malicious acts or omissions, occurring within the course and scope of their employment. It applies unless plaintiffs have pleaded sufficient facts to support a finding that the acts or omissions were committed maliciously. Malice is defined as intent and disposition to do a wrongful act greatly injurious to another. Here, appellees did not allege that the appellant, in her individual capacity, acted with intent and disposition to do a wrongful act greatly injurious to another. The trial court should have summarily dismissed the individual-capacity claim as appellees failed to meet their pleading burden to surmount statutory immunity. (Welch, M.; 60CV-21-341; 4-14-22; Wood, R.)

*Friday v. MCSA, LLC*, 2022 Ark. App. 169 [**savings statute**] The circuit court dismissed appellant’s complaint. On appeal, appellant argued that the circuit court erred by finding that he did not properly commence a new action pursuant to the savings statute. The clerk shall assign a new case number and charge a new filing fee for the filing of any case that is refiled after having been dismissed. A new case number is mandatory in a case that is refiled after having been dismissed. In the present case, appellant moved for a voluntary nonsuit, and the court dismissed the complaint without prejudice. Appellant then filed another complaint in the same case number as the original complaint and did not pay a filing fee. Therefore, the circuit court did not err in dismissing the appellant’s second complaint. (Singleton, S.; 70CV-14-226; 4-20-22; Abramson, R.)

*Cazort v. Garner*, 2022 Ark. App. 186 [**attractive nuisance; negligence**] On appeal, appellants argued that the circuit court erred in granting summary judgment on their claim of attractive nuisance. One who maintains upon one’s premises a condition, instrumentality, machine, or other agency that is dangerous to children of tender years by reason of their inability to appreciate the peril and that may reasonably be expected to attract children of tender years to the premises is

under a duty to exercise reasonable care to protect them against the dangers of the attraction. Ponds, lakes, streams, reservoirs, and other bodies of water do not constitute an attractive nuisance in the absence of any unusual element of danger. In the absence of any unusual element of danger, a swimming pool should be treated no differently. Here, the circuit court found, in part, that there was no unusual condition in or near appellees' pool, nor was one alleged by the appellants, which would mask the inherent danger of a body of water. Therefore, the circuit court did not err in finding that appellees' swimming pool was not an attractive nuisance. (Martin, D.; 72CV-18-1534; 4-27-22; Gruber, R.)

*DJS Development, LLC v. Brawley*, 2022 Ark. App. 199 [**quiet title; subject-matter jurisdiction**] The trial court quieted title in appellees on the basis of a finding of boundary by acquiescence and denied the appellant's posttrial motion to vacate the judgment and dismiss for lack of subject matter jurisdiction. On appeal, appellant challenged the trial court's subject-matter jurisdiction and its finding of boundary of acquiescence. Arkansas Code Annotated § 18-60-502(b)(2)(A) states that a petitioner shall send notice by certified mail to the last known address in duplicate, with one copy addressed by name to the person entitled to notice and the other copy addressed to 'occupant', and if the certified mail is returned undelivered, the petitioner shall send a second notice by regular mail. Additionally, the statute provides that if the petitioner has knowledge of any other person who has, or claims to have, interest in the lands, the petitioner shall so state, and the person or persons shall be summoned as defendants in the case. Also relevant to this appeal, Ark. Code Ann. § 18-60-503(a)(1) states in part that upon the filing of the petition, the clerk of the court shall publish a notice of the filing of the petition on the same day of each week, for four (4) weeks in some newspaper published in the county, if there is one, and if not, then in some newspaper having a circulation in the county. Here, the court was informed that not all necessary parties were present through the appellant's motion to vacate the judgment. Appellees failed to join a party or their heirs and did they did not comply with notice requirements—they published notice for only two weeks instead of the required four weeks' notice. Due to this failure and oversight, the court erred in denying the motion to vacate. (Ratton, R.; 68CV-18-256; 5-4-22; Murphy, M.)

*City of McCrory v. Wilson*, 2022 Ark. App. 200 [**inverse-condemnation; statutory immunity**] The trial court denied the appellant's motion for summary judgment alleging statutory immunity. On appeal, appellant argued that the appellees' claim, although labeled as one for inverse condemnation, is a negligence claim for which it is entitled to statutory immunity and the trial court erred in denying the judgment in its favor. Arkansas Code Annotated § 21-9-301(a) states that it is declared to be the public policy of the State of Arkansas that all counties, municipal organizations, school districts, public charter schools, special improvement districts, and all other political subdivisions of the state and any of their boards, commissions, agencies, authorities, or other governing bodies shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance. Summary judgment is to be granted by a circuit court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to summary judgment as a matter of law. Once a moving party has

established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. Instances of negligence, with respect to which a city has immunity from suit, if sustained for a long time, may amount to inverse condemnation. Here, the appellee had four sewer backups, that stopped after the appellant installed a backflow preventer. The appellate court held that the sewer backups in this case did not rise to a level sufficient to support an inverse-condemnation claim. Therefore, the appellant's actions did not constitute a taking of the appellees' property. Additionally, there was no proof that the value of the appellees' property had substantially diminished—the evidence presented established that the value increased—therefore, the inverse-condemnation claim failed as a matter of law. Because the appellees' claim sounded in negligence, the tort-immunity statute was applicable. Appellant provided an affidavit of the mayor stating the city did not have insurance to provide coverage for the appellees' claim. Therefore, because the appellant put forth proof that it did not have insurance for the negligence claim alleged by the appellees, it is entitled to statutory immunity. The trial court erred in denying the appellant's motion for summary judgment. (Glover, D.; 74CV-19-40; 5-4-22; Brown, W.)

*Rovnaghi v. Ronaghi*, 2022 Ark. App. 203 [**statute of frauds; contract**] The circuit court entered a judgement against the appellant ordering him to pay \$362,000 to the appellee for a breach of contract. On appeal, appellant argued the circuit court erred in denying his motions for directed verdict and judgment notwithstanding the verdict (JNOV) based on the statute of frauds. The statute of frauds requires a contract to be in writing if the contract or promise is incapable of performance within a year. The full performance on the part of one party and the part performance of the opposing party operates to take an oral agreement out of the statute of frauds. Even where the statute of frauds is found to apply, the parties are not discharged from their obligations for any portions of the contract that were performed. Here, the parties entered into an oral contract to have 2,400-2,500 rugs cleaned due to smoke damage, which would have taken the appellee more than a year to complete. The appellant paid the appellee \$50,000 and gifted ninety-one rugs because he said he felt bad for the appellee and not due to an obligation under any oral contract. Therefore, the circuit court did not err in finding that partial payment took the agreement out of the statute of frauds and denying the motions for directed verdict and JNOV. (Fox, T.; 60CV-17-518; 5-11-22; Harrison, B.)

*Berryhill v. Lester*, 2022 Ark. App. 205 [**abuse-of-process; summary judgment**] The circuit court entered an order granting appellee's summary judgment motion and dismissing appellant's complaint with prejudice. On appeal, appellant argued that the circuit court erred by granting summary judgment on her abuse-of-process claim. To prove the tort of abuse of process, the following elements must be established: (1) a legal procedure set in motion in proper form, even with probable cause, and even with ultimate success, (2) the procedure is perverted to accomplish an ulterior purpose for which it was not designed, and (3) a willful act in the use of process which is not proper in the regular conduct of the proceeding. The test of abuse of process is whether a judicial process is used to extort or coerce. The key to the tort is the improper use of process after

its issuance to accomplish a purpose for which the process was not designed. It is the purpose for which the process is used, once issued, that is important in reaching a conclusion. Here, the appellant filed a complaint as administratrix for her son's estate, arguing that the appellees initiated a criminal proceeding to coerce her son to complete an anger-management program, which would be an improper purpose of the criminal-justice system. Appellant relied on appellees' depositions where they stated that they asked a law enforcement officer whether appellant's son could be ordered to attend anger management instead of being charged with a felony. The evidence merely showed that the appellees suggested to law enforcement, not appellee's son, that he attend anger management in lieu of a felony punishment. The circuit court correctly determined that neither coercion nor extortion was a reasonable inference to be drawn from the appellees' comment. Therefore, the circuit court did not err in granting summary judgment. (Singleton, S.; 14CV-18-115; 5-11-22; Abramson, R.)

*Griffith v. Juarez*, 2022 Ark. App. 206 **[property; quiet title; forged deed; minor]** The circuit court dismissed with prejudice the appellant's petition to quiet title. Two issues were appeal, whether a forged deed filed of record divest a minor owner of an estate in land inherited by intestate succession and whether filing a forged deed of record affect a true owner's title to their land within the meaning of the recording statute. **[forged deed]** The statute of limitations provides that no person or their heirs shall have any action, either in law or equity, for any lands, tenements, or hereditaments after seven years once their right to commence the suit has come. All suits, either in law or equity, for the recovery of any lands, tenements, or hereditaments shall be had within seven years next after the title or cause of action accrued and no time after the seven years shall have passed. The fact that a deed is forged does not overcome the statute of limitations. Here, even accepting the fact in appellant's complaint as true – that she was unaware of her property interest, her signature was forged, and she had no idea that any conveyance occurred – a petitioner is required to make a "reasonable inquiry" in such cases. **[recording statute]** The recording statute provides that every deed bond, or instrument of writing affecting the title, in law or equity, to any real or personal property within this state which is or may be required by law to be acknowledged or proved and recorded shall be constructive notice to all persons from the time the instrument is filed for record in the office of the county recorder of the proper county. If a public record such as a deed is filed, then a claimant cannot allege concealment. Here, appellant alleged that her mother and stepfather told her that she had no inheritance from her father and forged her signature on a deed conveying property to them when she was fourteen years old. The appellees filed their forged deed in Pulaski County, which is an act in direct opposition to concealment, according to case law. Appellant could have found her father's name in the grantee index as having received his interest from his mother, a pertinent real estate conveyance that a reasonable inquiry would have revealed. The statute of limitations began to accrue when the appellant reached eighteen years old, and at that time she was charged with constructive notice of the deed. Because the appellant did not file her petition until after the seven-year statute of limitations had accrued, the circuit court did not err in dismissing the appellant's petition. (Fox, T.; 60CV-20-4048; 5-11-22; Virden, B.)



*McCue v. Dominguez*, 2022 Ark. App. 211 **[show of good cause]** The circuit court denied appellant’s motion for default judgment, finding that they had not complied with Rule 4 of the Arkansas Rules of Civil Procedures requiring good cause to be shown to extend the time for service, and dismissed the case with prejudice. The circuit court also found that the “green card” was defective and that service by publication of warning orders violated due process. On appeal, the appellants argued that they showed good cause for the extensions they sought by detailing their efforts to serve appellees in their first motion for extension of time and then incorporating those allegations in their subsequent motions. The showing of good cause to extend the period for service must be made prior to the granting of an extension, meaning that a plaintiff seeking to extend the time to obtain service must show good cause for why that particular extension is necessary. Here, the appellants properly obtained their first extension within 120 days of filing suit against the appellees. However, the appellants’ second motion for extension of time did not state any cause, it merely incorporated the allegations from the original motion and added that appellants’ attorneys had been in contact with an unnamed potential insurance carrier. The appellants’ third and fourth motions also did not state good cause for an extension of time. The third motion stated they added another party to the litigation and the fourth motion asserted that they were attempting to negotiate a settlement. The appellants’ fifth and sixth motions for extension of time also did not contain any cause for the extensions. Therefore, the circuit court did not err in finding that appellants failed to show good cause for the extension, notwithstanding previous findings of good cause in the orders granting those extensions. **[warning orders]** Rule 4 of the Arkansas Rules of Civil Procedure, was amended in 2018 by moving much of what had been former Rule 4(f) on warning orders to new Rule 4(g)(3). The amended Rule 4(g)(3)(D) of the Arkansas Rules of Civil Procedure states that no judgment by default shall be taken pursuant to this subdivision unless the party seeking the judgment or his or her attorney has filed with the court an affidavit stating that 30 days have elapsed since the warning order was first published or posted. The affidavit shall be accompanied by the required proof of publication or posting of the warning order. If a defendant or other interested person is known to the party seeking judgment or to his or her attorney, the affidavit shall also state that 30 days have elapsed since a letter enclosing a copy of the warning order and the complaint was mailed to the defendant or other interested person. Here, when the warning orders were issued and first published, they complied with the rule in effect at that time. However, the other steps required by amended Rule 4(g) of the Arkansas Rules of Civil Procedure before service by warning order was effective occurred after the effective date of the amendments, and appellants failed to comply with those steps. For example, appellants did not state in the affidavit filed with their motion for default judgment that thirty days had elapsed since the warning order was first published or that a copy of the warning order and the complaint were mailed to appellees. These were not new requirements added when Rule 4 of the Arkansas Rules of Civil Procedure was amended. Thus, appellants did not comply with either the version of Rule 4 in effect when the warning orders were issued, or the later version as amended. **[statute of limitations]** The statute of limitations for negligence actions is three years. The circuit court may dismiss the action as to any defendant not properly served within 120 days on the court’s own initiative. Here, appellants never obtained personal service on appellees within the three years. The warning orders did not strictly comply with the requirements of Rule 4 and were completed outside the three years and well past the last valid extension of time for service Therefore, the circuit court did not err in

dismissing the complaint against the appellees with prejudice and did not abuse its discretion in denying appellants' motion for default judgment. (Morledge, C.; 62CV-17-44; 5-11-22; Barrett, S.)

*Dye v. Precision Foundation & Specialties*, 2022 Ark. App. 220 [**breach of contract; usury; evidence; attorney's fees**] The circuit court entered a judgment awarding the appellee damages for breach of contract against the appellants for a cause of action arising from a residential-construction repair. On appeal, the appellant argued that the appellee failed to strictly comply with the statutory notice requirement in Ark. Code Ann. § 18-44-115, which precluded a judgment in its favor, and that the contract was usurious, which voided the contract. Appellee also cross-appealed, arguing that it should have been awarded attorney's fees as a matter of law and contract. [**statute retroactive application**] Appellants argued that the circuit court should have applied a later version of Ark. Code Ann. § 18-44-115 retroactively. Retroactivity is a matter of legislative intent. Unless it expressly states otherwise, the courts presume the legislature intends for its laws to apply only prospectively. However, this rule does not ordinarily apply to procedural or remedial legislation. The strict rule of construction does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only support a new or more appropriate remedy to enforce an existing right or obligation. Procedural legislation is more often given retroactive application. The cardinal principle for construing remedial legislation is for the courts to give appropriate regard to the spirit which promoted its enactment, the mischief sought to be abolished, and the remedy proposed. Here, the appellees contracted with reference to the existing law. Furthermore, retroactive application in this case would have been contrary to Arkansas law against impairing vested rights. The appellate court would not apply an amendment retroactively that would eliminate the obligation of one party to perform under the terms of a contract the party admittedly entered into while also depriving another of its contractual right to be paid. [**usury**] The maximum lawful rate of "interest" on loans or contracts shall not exceed 17% per annum. All contracts having a rate of interest in excess of the maximum lawful rate of 17% shall be void as to principal and interest. A late charge is a penalty in nature for delinquency and does not render the transaction usurious, even when provided for in the instrument evidencing it. The rationale being that agreements for penalties to induce prompt payment are free from usury because the buyer has it in his power to avoid the penalty by discharging the debt when it is due. However, such an agreement will be declared usurious if it is shown to be a mere contrivance to avoid usury, and the real intention is a loan or forbearance of money and the taking of more than legal interest. Two of the principal factors in determining if the charge is truly a penalty is whether the charge is fixed in amount and whether it is assessed as a one-time charge. They are indicators of whether the charge is designed to induce prompt payment and whether the borrower has in it the power to avoid the charges. Here, the appellate court found that the late fees were not usurious because the appellants could have avoided the late fees by performing their obligation and making prompt payment pursuant to their contract. [**attorney's fees**] Generally, attorney's fees are not allowed except when expressly provided by statute. Even if certain fees are not awarded by statute or rule, such fees may still be due under the language of a contract. When the parties enter into a written contract that specifically provides for the entitlement to certain fees incurred in the enforcement of the

contract, the agreement is enforceable according to its terms. Here, the contract provided: “Client will reimburse PFS, Inc. for all time spent and expenses (including fees of any attorney, collection agency, and/or court costs) incurred in connection with collecting any delinquent account.” Therefore, given the plain language of the contract mandating an award of attorney’s fees, the circuit court erred in not awarding appellee’s attorney fees and expert-witness expenses. **[costs and expenses]** Rule 54(d) of the Arkansas Rules of Civil Procedure gives the circuit court discretion in deciding whether to award a prevailing party certain costs. The rule covers costs such as filing fees and other fees charged by the clerk, fees for service of process and subpoenas, fees for the publication of warning orders and other notices. Therefore, the circuit court here was within its discretion in awarding appellee costs for the service fee and the filing fee. (Scott, R.; 04CV-17-1591; 5-11-22; Hixson, K.)

*Combs v. Elite Title Company, Inc.*, 2022 Ark. App. 231 **[covenant not to compete]** The circuit court granted an amended preliminary injunction enjoining appellants from conducting similar business as their former employer. On appeal, appellants asserted that the appellate court should find that the noncompete provision is unenforceable in its entirety. An injunction may be granted if the petitioner shows (1) that it is threatened with irreparable harm; (2) that this harm outweighs any injury that granting the injunction will inflict on other parties; (3) a likelihood of success on the merits; and (4) that the public interest favors the injunction. The test for determining the likelihood of success on the merits is whether there is a reasonable probability of success in the litigation. Consideration of this issue will require determining whether the requirements for a noncompete agreement were met. The burden is on the party challenging the covenant to show that it is unreasonable, and covenants not to compete are reviewed on a case-by-case basis. Here, appellants signed confidentiality and noncompetition agreements that prohibited employees from working for a direct competitor of appellee and/or soliciting current and former customers of appellee during their employment and for a period of two years after their employment ended within a three-county geographic area. The agreement also prohibited employees from using or disclosing appellee’s confidential information and trade secrets. **[protectable interests]** Appellants first argument was that the agreements were invalid as overly broad since it only prohibited ordinary competition and did not cover a legitimate business interest. Appellee’s trade secrets and confidential information were not readily ascertainable by members of the general public or generally known by those in the industry, and appellee took many steps to protect the privacy of this information. Thus, the appellate court held that the circuit court did not abuse its discretion in finding that appellee had a protectable interest in its pricing strategies, customer lists, customer relationships and its title plant. **[overly broad]** Appellants also argued that the agreements and the preliminary injunction were overly broad. The enforceability of a covenant not to compete depends upon its reasonableness in light of the particular facts of the case. A reasonably drawn covenant not to compete is an effective means by which a principal may protect its customers and its confidential information from appropriation and use by former agents or competitors. Here, the circuit court found that the covenants not to compete were not unreasonable or that they were solely for the purpose of preventing either one of these defendants from working in the industry. The appellate court held that the circuit court did not err in its finding. **[blue**

**penciling]** Appellants also argued that since the agreements were entered prior to 2015, common law applied, which prohibited blue penciling, or editing, of the agreements. While the circuit court may not “blue pencil” agreements under statute, the severability clauses in agreements provided authority, regardless of any statutory provision, to construe the agreements in a manner that could be upheld under the law. The noncompetition agreement contained a severability clause, so the parties agreed to permit reformation of the non-compete agreement to any extent necessary to make it enforceable under the law, which the circuit court found supported a finding of likelihood of success on the merits. The agreements gave express authority for the circuit court to reform them. Therefore, the circuit court did not abuse its discretion in holding that appellee demonstrated a likelihood of success on the merits of its complaint and irreparable harm in the absence of the preliminary injunction. (Martin, D.; 72CV-21-671; 5-18-22; Abramson, R.)

*Nichols v. Swindoll*, 2022 Ark. App. 233 [**attorney malpractice; statute of limitations**] The circuit court granted appellees’ motion to dismiss, which asserted that any negligence claim brought by the appellant was barred by the applicable three-year statute of limitations and that appellant failed to adequately plead that the appellees fraudulently concealed their malpractice. On appeal, appellant argued that it was erroneous to dismiss her complaint because her attorneys fraudulently concealed their malpractice from her, which tolled the statute of limitations. The statute of limitations for legal-malpractice negligence actions is three years, and absent concealment, it begins to run upon the occurrence of the wrong. Fraud suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. In order to toll the statute of limitations, the fraud perpetrated must be concealed. Not only must there be fraud, but the fraud must also be furtively planned and secretly executed so as to keep the fraud concealed. To prevail on a motion to dismiss a complaint on the basis of a statute-of-limitations defense, it must be barred on its face. To rebut a limitations defense, a plaintiff must describe specific acts committed for the purpose of concealing a cause of action. Here, the allegations made in appellant’s complaint did not describe any overt act to hide information from appellant or any fraudulent concealment of the alleged malpractice. Instead, the allegations made sweeping conclusions about what appellant believed her attorneys’ intentions were as they proceeded with litigation in the underlying case. Therefore, the circuit court did not err in granting appellees’ motion to dismiss and entering the order dismissing appellant’s complaint. (Griffin, W.; 60CV-21-1321; 5-18-22; Klappenbach, N.)

*Camden Progressive Eldercare Services, Inc. v. Whitney*, 2022 Ark. App. 239 [**charitable immunity; summary judgment**] The trial court denied the appellant’s motion for summary judgment. On appeal, appellant argued that the trial court erred. Factors for determining whether an organization is entitled to charitable immunity include: (1) whether the organization’s charter limits it to charitable or eleemosynary purposes; (2) whether the organization’s charter contains a “not-for-profit” limitation; (3) whether the organization’s goal is to break even; (4) whether the organization earned a profit; (5) whether any profit or surplus must be used for charitable or

eleemosynary purposes; (6) whether the organization depends on contributions and donations for its existence; (7) whether the organization provides its services free of charge to those unable to pay; and (8) whether the directors and officers receive compensation. Additionally, a pivotal issue in determining one's entitlement to charitable immunity is whether the charitable form has been abused. Although disputed factual issues concerning an organization's charitable status may be presented to a jury, the ultimate question of charitable immunity remains a matter of law for the court to decide. The summary-judgment standard in charitable immunity cases is whether there are disputed material facts or whether there are undisputed facts with differing interpretations. If there are disputed material facts regarding charitable immunity, then summary judgment is improper because these disputed facts must be submitted to the jury for its findings. If, however, there are undisputed facts and merely differing interpretations of those facts, then summary judgment is proper if reasonable persons could not reach different conclusions based on those undisputed facts. In the present case, the trial court denied appellant's motion for summary judgment after finding that issues of material facts existed as to appellant's claim of charitable immunity. Having reviewed the record, the appellate court held that the trial court erred in finding that issues of material fact existed as to whether appellant was entitled to charitable immunity. There were no issues of material fact in this case; rather there were different interpretations of undisputed facts. The trial court should grant summary judgment if, upon review of the evidence, the court determines that reasonable persons would not reach different conclusions on the undisputed facts. It was not necessarily an error to deny summary judgment on the merits of charitable immunity but rather the trial court erred in deciding that the issue of charitable immunity would proceed to trial in this case. (Guthrie, D.; 52CV-17-158; 5-18-22; Hixson, K.)

*James v. George's Inc.*, 2022 Ark. App. 244 [**retaliation and disability discrimination; motion to amend**] The circuit court entered an order to dismiss appellant's complaint with prejudice and denied appellant's request for leave to amend. On appeal, appellant argued the circuit court erred in dismissing her retaliation and disability-discrimination claims under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure and also maintained that the circuit court erred in denying her motion to amend the complaint. [**motion to dismiss**] Appellant challenged the dismissal for three claims for retaliation, disability-discrimination, and gender-discrimination brought under the Arkansas Civil Rights Act (ACRA). A complaint should be dismissed if it fails to state facts upon which relief can be granted. The ACRA prohibits an employer from retaliating "against any individual because the individual in good faith has opposed any act or practice made unlawful by this subchapter or because the individual in good faith made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. A plaintiff may state a claim for retaliation or discrimination either by providing direct evidence or by satisfying the elements of the *McDonnell-Douglas* test. An employee may establish a direct evidence discrimination or retaliation claim by demonstrating that an illegitimate criterion was a motivating factor in the employment decision. The plaintiff must demonstrate a "specific link" between the alleged discriminatory animus or protected action and the adverse decision sufficient to demonstrate that the discriminatory animus actually motivated the adverse decision or, in a retaliation case, that the adverse decision was in retaliation for protected conduct. The *McDonnell-*

*Douglas* test requires a plaintiff to demonstrate: (1) that she engaged in statutorily protected conduct; (2) that her employer took an adverse action against her; and (3) that there was a causal connection between the adverse action and the protected activity. In the present case, appellant failed to state a retaliation claim through either direct evidence or the *McDonnell-Douglas* test. The complaint presented no allegations directly demonstrating that appellant participated in a protected activity or that discrimination was a motivating factor in appellee's decision to terminate her. Additionally, appellant's complaint failed to meet the first and third elements of the *McDonnell-Douglas* test. Because the complaint failed to plead any facts establishing a causal connection between her alleged statutorily protected activities or her alleged disability and her termination, the circuit court properly dismissed the complaint for failure to state a claim of retaliation. The complaint also failed to state a claim of disability discrimination on the basis of either the direct-evidence standard or the *McDonnell-Douglas* test. The analysis was the same for a disability claim, and no direct evidence was provided regarding the disability claim. The circuit court did not err in dismissing her disability-discrimination claim by finding that appellant's complaint failed to allege sufficient facts demonstrating that she was disabled pursuant to the ACRA. Appellant's complaint also failed to state a claim of gender discrimination under either the direct-evidence standard or the *McDonnell-Douglas* test. The complaint presented only conclusory allegations regarding her qualifications. **[motion to amend]** A circuit court is vested with broad discretion in allowing or denying amendments to a complaint. One factor the circuit court may consider in denying a request to amend a complaint is how much time has passed since the filing of the original complaint. Here, the circuit court denied appellant's request for leave to amend her complaint due to unreasonable delay in litigating the matter. The incidents in the appellant's complaint occurred almost six years earlier and she first filed her claim in federal court over three years earlier. Appellant requested leave to amend her complaint as part of her response to appellee's motion to dismiss. The appellant did not attempt to file an amended complaint or propose how she would amend the complaint during the litigation. The appellate court held that the circuit court did not abuse its discretion. Additionally, the circuit court did not err in its decision to dismiss the case with prejudice because appellant failed to link any protected activity, disability discrimination, retaliation, or gender discrimination to her termination, and any further opportunity to continue this litigation through an amended complaint would be futile and prejudicial to appellee. (Threet, J.; 72CV-19-2687; 5-25-22; Abramson, R.)

*Hawkins v. Willis*, 2022 Ark. App. 249 **[Rule 60(b) Arkansas Rules of Civil Procedure]** The circuit court granted appellee's motion for relief pursuant to Rule 60(b) of the Arkansas Rules of Civil Procedure motion. On appeal, appellant argued that the circuit court abused its discretion. Rule 60(1) of the Arkansas Rules of Civil Procedure provides that to correct errors or mistakes or to prevent the miscarriage of justice, the court may modify or vacate a judgment, order, or decree on motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk. Rule 60(b) provides that notwithstanding subdivision (a) of this rule, the court may at any time, with prior notice to all parties, correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed

in the appellate court and thereafter while the appeal is pending may be so corrected with leave of the appellate court. Here, the circuit court entered an order in 2011 that included an attached survey that set out the boundaries of the property in question. The circuit court entered another order in 2014. The circuit court made a finding that the legal description attached to the 2014 order was attached in error and did not reflect the parties' agreement regarding the parking area. The 2014 order made no reference to altering the 2011 order but attached an incorrect legal description in reference to the 2011 order. Under the particular facts as presented in this case, the appellate court held that circuit court did not err by granting relief under Rule 60(b) of the Arkansas Rules of Civil Procedure. (Laser, D.; 51CV-09-57; 5-25-22; Gladwin, R.)

*Harvey v. Heim*, 2022 Ark. App. 267 [**service of process; medical-malpractice**] The circuit court entered an order granting appellee's motion to dismiss with prejudice, finding that appellant's medical-malpractice complaint was barred by the statute of limitations. On appeal, appellant argued that his action was not time-barred because he effected service on appellee sufficient to trigger the benefit of the savings statute. A plaintiff must file a medical-malpractice cause of action within two years from the date of the wrongful act complained of. An action must also be "commenced" before the statute of limitations expires in order to take advantage of the provision of the savings statute. For purposes of the savings statute, a suit is commenced when the complaint is timely filed, and service of the complaint and summons (effective or defective) is completed within the 120-day period required by Rule 4(i) of the Arkansas Rules of Civil Procedure. Rule 4(f)(1)(A) of the Arkansas Rules of Civil Procedure governs the steps that must be completed by process servers in the event a defendant refuses to accept personal service. Rule 4(f)(1)(A) provides that in order to obtain valid service, once the process server makes his or her purpose clear, and the defendant refuses to receive service, the process server must then leave the papers in close proximity to the defendant. Here, the appellant contended that the process server attempted service and that the appellee refused to present himself for personal service. Appellant argued following the failed service attempt the appellant sent the summons and complaint to appellee's office address via first-class mail. In the case at bar, there was no evidence of the mailing of documents to appellee, other than the affidavit of appellant's counsel. Consequently, the only evidence of service, or the attempted service, is appellant's return-of-service form, which established that he was unable to obtain service, not that appellee refused service. Thus, there was no service of the summons and complaint within the applicable statute of limitations. Service is not completed upon mailing, but upon receipt. Here, appellee submitted an affidavit specifically denying that he had received the papers by mail, and appellant failed to provide evidence to the contrary. Accordingly, appellant failed to carry his burden of demonstrating compliance with the service rules. Furthermore, even had there been proof of mailing the summons and complaint the day after service was allegedly refused, the appellant failed to offer authority to support a conclusion that mailing the summons and complaint by first-class mail the day following refusal of service satisfies the close-proximity requirement of Rule 4(f)(1)(A) of the Arkansas Rules of Civil Procedure. Because appellant failed to obtain service on appellee within the two-year time frame allowed for medical-malpractice actions, he cannot avail himself of the benefit of the savings statute, and his action is barred by the applicable statute of limitations. The circuit court correctly

dismissed the appellant's complaint with prejudice. (Delay, G.; 66FCV-21-43; 5-25-22; Brown, W.)

*Bolding v. Arkansas Public Employees Retirement System*, 2022 Ark. App. 275 [**agency review; APERS**] The circuit court affirmed a decision by the Arkansas Public Employees Retirement System (APERS) Board of Trustees denying appellant's claim that she was entitled to a cost-of-living adjustment (COLA). On appeal, appellant argued that the circuit court erred in affirming the agency's decision. The Arkansas Administrative Procedure Act (APA) provides that a reviewing court may reverse or modify the agency's decision if it concludes that the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions, (2) in excess of the agency's statutory authority, (3) made upon unlawful procedure, (4) affected by other error or law, (5) not supported by substantial evidence of record, or (6) arbitrary, capricious, or characterized by abuse of discretion. According to Ark. Code Ann. § 24-8-902(a), a local government that has established a municipal judge's retirement fund shall contribute an amount of money to APERS that shall represent the actuarially determined accrued liability for those court clerks and former court clerks who are covered by the municipal judge's retirement fund on December 31, 2004. Arkansas Code Annotated § 24-8-903(a) further provides that all municipal court clerks and district court clerks who are members of a municipal judge's retirement fund on December 31, 2004, shall become members of APERS on January 1, 2005. Here, appellant was a municipal court clerk in Dermott for approximately twenty years when she retired in 1991. She received monthly retirement benefits from her local plan, the Dermott Municipal Clerk Retirement Fund. On January 1, 2005, appellant's monthly retirement benefits were transferred from her local plan to the Arkansas District Judge Retirement System (ADJRS) and began being administered by APERS. To the extent that appellant became a member of APERS on January 1, 2005, she failed to prove that she subsequently accrued at least five years of service credit under APERS to become a vested member of APERS, which would have entitled her to benefits under APERS, such as a COLA. Appellant was brought into APERS as an existing retiree from her local plan, and APERS merely administered her benefits based on what her local plan had paid APERS. Substantial evidence supported appellee's finding that appellant's local plan did not include a COLA, and the appellate court concluded that she was not entitled to a COLA under APERS pursuant to Ark. Code Ann. § 24-8-903(a) because she failed to show that she had become a vested member. The circuit court did not err in affirming the agency's decision. (Wright, H.; 60CV-19-4050; 6-1-22; Virden, B.)

*Parsons v. Preferred Family Healthcare, Inc.*, 2022 Ark. App. 277 [**motion to dismiss**] The circuit court granted appellee's motion to dismiss the appellant's illegal-exaction complaint. On appeal, appellant argued that the circuit court erred in dismissing his complaint. Specifically, the appellant argued that the circuit court failed to resolve all inferences in the complaint in his favor and erred in finding the facts alleged did not constitute an illegal exaction. On a motion to dismiss, the court considers the factual allegations to be true and views them in the light most favorable to the nonmoving party. If the complaint fails to allege a required element of the alleged cause of action,



dismissal is entirely appropriate. In order to establish an illegal-exaction case, the complaint must sufficiently allege that the State either: (1) lacked authority to act; or (2) failed to follow the applicable statute(s). Before a public-funds type of illegal-exaction case will be allowed to proceed, there must be facts showing that monies generated from tax dollars or arising from taxation are being misapplied or illegally spent. A corporation is not liable for its employees' criminal acts when those employees are not acting within the scope of their employment, i.e., when they are acting for their own personal interests. Here, after reviewing the complaint, assuming all of the allegations were true and viewing it in the light most favorable to appellant, there were no allegations that the State, itself, acted wrongfully. Appellant's former employees fraudulently billed Medicaid instead of Medicare in order to personally pocket the difference, medical services were provided to citizens of the State. The facts as alleged in the complaint show that many people, including its former employees, committed fraud against the State through improper billing practices involving Arkansas Medicaid funds. Taking all of the facts alleged in the complaint as entirely true, the State was not the wrongful actor, which was not sufficient to establish an illegal-exaction cause of action. Therefore, the circuit court did not err in granting appellee's motion to dismiss. (Scott, J.; 04CV-20-1302; 6-1-22; Gladwin, R.)

*York v. GALR, LLC*, 2022 Ark. App. 287 **[landlord duties to third parties]** The circuit court dismissed appellant's amended complaint against an apartment complex and its management company, finding that the complaint failed to state facts upon which relief could be granted. On appeal, appellant argued that the circuit court erred in finding that the apartment complex and its management company did not owe him a duty and that he was not an invitee on the premises. **[contractual duty]** Appellant first argued that the appellees had a contractual duty to protect him as a result of their agreement to be bound by the U.S. Department of Housing and Urban Development (HUD) regulations and in their Housing Assistance Program (HAP) contract. Here, appellant failed to state any facts to indicate how the HAP contract extended a duty to protect third parties or that appellees intended the general public to be third-party beneficiaries to those contracts. The appellate court held that the HUD regulations did not create a contractual duty, as the statute cited by appellant in his amended complaint did not pertain to safety in the sense of protection from criminal activity, but the physical condition of the premises. Additionally, the HUD regulations required appellee to provide safe and secure housing only to its tenants. **[assumption of duty]** Appellant argued next that because the appellees took general security measures at the apartments by hiring security and contracting with off-duty police officers, it assumed a duty to protect him from criminal attack. General security measures taken by a landlord or property owner will not impose a duty to prevent all crime. Here, the fact that appellees took actions in an attempt to deter crime did not necessarily imply that they also assumed a duty to prevent all crime. Moreover, appellant did not allege what this security entailed or that it even covered securing the parking lot in question. Thus, even if appellees assumed some duty, it is unclear the extent of the duty owed or that appellees breached that duty. **[invitee status]** Appellant also contended that the circuit court erred in finding that he was not an invitee on the property. There are two types of invitees: a public invitee and a business invitee. A public invitee is a person who is invited to enter or remain on the property as a member of the public for a purpose for which

the property is held open to the public. Business invitees, on the other hand, are those who enter for a purpose connected with the business of the possessor. Here, the appellate court held that the appellant, who was a pizza driver, was not a public invitee nor business invitee. The appellees are entities with a purpose of providing multifamily low-income housing; their property was not held open for the purpose of food delivery. Any benefit the appellees received from tenants who had things delivered to their apartments, if any, was merely incidental. Additionally, appellant failed to allege that he was invited onto the property by either appellee directly, and failed to cite any case law that provides that an invitee of a tenant becomes an invitee of its landlord. Therefore, the circuit court did not err in finding that the apartment complex and its management company did not owe appellant a duty and that appellant was not an invitee. (James, P.; 60CV-20-3660; 6-1-22; Whiteaker, P.)

*Action, Inc. v. McQueeney Group, Inc.*, 2022 Ark. App. 297 [**implied indemnity**] The circuit court rejected the appellant's claim for implied indemnity against appellee, after a jury found appellant negligent. On appeal, appellant argued that its negligence did not bar its claim. The Restatement Second of Torts sets out the general rule of indemnity as follows: if two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability. The basis for indemnity when there is no express contract of indemnity is liability based on an implied or quasi-contract. Arkansas courts have applied the doctrine of implied indemnity only in limited situations where there is no express-indemnity contract, such as imputed or vicarious liability or product liability where a supplier seeks indemnity against the product manufacturer. Arkansas cases make clear that the right of indemnity cannot exist when the party seeking indemnity has proximately caused the harm. This is because the justification for indemnity disappears when the indemnitee has proximately caused the harm. Here, this was not a case involving vicarious liability. A third party sued appellant for negligence in installing an HVAC system, and it did not sue appellee, or the other entities involved in the installation. Thus, appellant did not discharge appellee's liability to the third party. Additionally, this was not a product-liability case. The jury's finding that appellant was negligent and that its negligence proximately caused its damage renders the problem one of contribution, not of indemnity. Contribution refers to an order distributing loss among tortfeasors by requiring each to pay a proportionate share, while indemnity shifts the entire loss from the party found liable to a party who should bear the entire loss. The circuit court did not err in entering judgment in favor of appellee on the basis of its determination that appellant's own negligence barred its claim for indemnity. (Pierce, M.; 60CV-16-251; 6-1-22; Brown, W.)

*Palade v. Board of Trustees of the University of Arkansas System*, 2022 Ark. 119 [**unripe and nonjusticiable claims**] The circuit court dismissed the appellants claims without prejudice. On appeal, the appellants argued that the circuit court erred by determining that they lacked standing and that their claims were unripe and nonjusticiable. The following elements must be established to obtain declaratory relief: (1) a justiciable controversy; that is to say, a controversy in which a

claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination. Here, the harm alleged by appellants was uncertain, hypothetical, and speculative. In their complaint, appellants alleged that the Board might, in the future, apply a revised policy to unspecified conduct that would not have been the subject of disciplinary action under the prior version of the policy. Appellants did not claim that they had engaged in a specific type of conduct that would be included in the revised definition of cause; nor did they claim that they intended to engage in such conduct. Thus, the circuit court did not err by determining that appellants' contract claims were nonjusticiable. **[free communication clause]** Similarly, appellants' claim pursuant to the Free Communication Clause of the Arkansas Constitution also failed to meet the required elements for a declaratory judgment. Appellants argued that they could establish standing based on the doctrine of overbreadth, which they contended allows them to challenge the revised policy even though they had not yet been threatened with discipline or termination based upon their speech. A plaintiff making an overbreadth claim still must establish standing and an actual or impending injury. Here, while appellants claim that their speech has been chilled, they failed to include any factual allegations as to what speech they have refrained from making or provided any examples of speech that they have made in the past that they believe is not allowed under the revised policy. Appellants made only vague, speculative, and hypothetical allegations with regard to how their constitutional rights were violated by the Revised Policy and failed to plead facts sufficient to establish an actual, present controversy. Accordingly, the circuit court correctly dismissed appellants' free-speech claim based on a lack of a justiciable controversy. (Pierce, M.; 60CV-20-3218; 6-2-22; Hudson, C.)

*Arkansas Department of Finance and Administration v. Carroll County Holdings, Inc.*, 2022 Ark. 128 **[subject-matter jurisdiction]** Appellee sought temporary and permanent injunctive relief restraining and enjoining the State from issuing replacement dispensary facility licenses. The circuit court denied the appellant's motion to dismiss on the grounds of sovereign immunity. Subject-matter jurisdiction is a court's authority to hear a particular type of case. It cannot be waived and can be questioned for the first time on appeal. Subject-matter jurisdiction is determined from the pleadings and not the proof. Two issues were considered to determine where there was subject-matter jurisdiction: whether there was an appeal of an agency's administrative adjudication or if this case was seeking a declaratory judgment on the validity or applicability of the Arkansas Medical Marijuana Commission's (MMC) rules. **[administrative adjudication]** Only "quasi-judicial" agency functions support further judicial review. Quasi-judicial functions generally include hearing testimony, making findings of fact, rendering legal conclusions, and recording the proceedings. The Administrative Procedure Act subjects only some, not all, agency decisions to circuit court review. Courts do not generally have jurisdiction to examine administrative decisions of state agencies. Here, there was no quasi-judicial action of an agency on appeal. There was no hearing held by the MMC, no testimony taken, and no findings of fact or final orders which resulted from a hearing. The record of the proceedings before the Commission were not included

in the appeal to the circuit court. If there is no agency adjudication, then there is no action for a court to review. **[validity or applicability of rules]** The next challenge which would invoke our subject-matter jurisdiction is a declaratory judgment on the validity or applicability of the MMC's rules. The validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property. Arkansas Code Annotated § 25-15-207 is limited to declarations concerning the rule—that the rule is either null and void, in the case of a validity challenge, or whether the rule should be applied to a particular person or situation, in the case of an applicability challenge. Here, appellee challenges in the case at bar were that the MMC violated its own rule and failed to follow the APA's model-rules requirement. Neither challenge, as pleaded, went to whether the rule was null and void nor if it was applicable to appellee. Therefore, the circuit court did not have subject-matter jurisdiction over the appellee's complaint. (Fox, T.; 60CV-20-3658; 6-2-22; Webb, B.)

*Arkansas Department of Finance and Administration v. 2600 Holdings, LLC*, 2022 Ark. 140 **[sovereign immunity]** The circuit court denied the appellant's motion to dismiss on the basis of sovereign immunity. On appeal, appellants argue that the circuit court erred in its ruling. **[writ of mandamus]** Arkansas's doctrine of sovereign immunity originates in article 5, section 20 of the Arkansas Constitution, which provides that the State of Arkansas shall never be made defendant in any of her courts. The general provision regarding sovereign immunity must yield to a specific express constitutional provision to the contrary. Writs of mandamus are provided for in Arkansas Constitution amendment 80, sections 2(E) and 10. The sovereign-immunity defense does not preclude writs of mandamus. And consequently, the circuit court did not err in denying the motion to dismiss the writ of mandamus on the basis of sovereign immunity. **[declaratory judgment]** A lawsuit against the State seeking declaratory relief may survive a sovereign immunity challenge only if the complaint alleges that the State acted illegally, unconstitutionally, or ultra vires. Here, the appellee also sought a declaratory judgment. The appellate court held that appellee's complaint failed to allege that the appellant's actions were illegal or unconstitutional. Therefore, the circuit court erred in denying the state's motion to dismiss. (Wright, H.; 60CV-21-582; 6-2-22; Webb, B.)

*Travelers Indemnity Company v. Board of Trustees of the University of Arkansas*, 2022 Ark. 146 **[pro hac vice admission]** The circuit court disqualified an appellant from further participation as the other appellant's counsel in a suit filed by appellee. On appeal, appellants argued that the circuit court erred by revoking appellant's pro hac vice admission. Disqualification of an attorney is a drastic measure that should be imposed only when clearly required by the circumstances. While the Arkansas Rules of Professional Conduct are applicable in disqualification proceedings, a violation of the rules does not automatically compel disqualification; rather, such matters involve the exercise of judicial discretion. Regarding the revocation of a nonresident attorney's pro hac vice admission, Rule XIV(g) of the Rules Governing Admission to the Bar states that if the non-resident attorney engages in professional misconduct as that term is defined by the Arkansas

Supreme Court Rules of Professional Conduct, the court may revoke the non-resident attorney's permission to participate in the Arkansas proceedings and may cite the nonresident attorney for contempt. Here, the circuit court ruled that appellant's pro hac vice admission was revoked because several of the exhibits filed in support of appellant company's motion contained external hyperlinks to websites in violation of Arkansas Supreme Court Administrative Order No. 21, Section 9. The circuit court did not find that appellant had committed any violation of the Arkansas Rules of Professional Conduct. The Supreme Court held that this was a drastic measure that did not comport with the provisions in the Rules Governing Admission to the Bar regarding revocation of a nonresident attorney's admission. The circuit court erred in disqualifying appellant. (Fox, T.; 60CV-20-4834; 6-23-22; Hudson, C.)

## CRIMINAL

*Colen v. State*, 2022 Ark. App. 148 [**motion to suppress; warrantless searches**] Appellant was convicted of possession of a controlled substance with the purpose to deliver and possession of drug paraphernalia. On appeal, appellant argued that the circuit court erred by denying his motion to suppress. Arkansas Rule of Criminal Procedure 14.1(a)(i) allows for a warrantless search of a readily movable vehicle that an officer has reasonable cause to believe contains evidence subject to seizure where the vehicle is in an area open to the public. Because a vehicle is readily movable by any person, not just the suspect, exigent circumstances allow the vehicle to be searched at the scene. The foregoing justification still applies even if the vehicle is immobilized. Additionally, the odor of marijuana coming from a vehicle is sufficient to arouse suspicion and provide probable cause for the search of that vehicle. In the present case, the officers testified that the car's engine was running and that it smelled of marijuana. Given the circumstances, the circuit court did not err in denying appellant's motion to suppress. (Clawson, C.; 23CR-17-1178; 4-6-22; Abramson, R.)

*Still v. State*, 2022 Ark. App. 156 [**simultaneous possession; statutory defense**] Appellant was convicted of simultaneous possession of drugs and firearms, possession of more than fourteen grams of marijuana with intent to deliver, and possession of drug paraphernalia. On appeal, appellant argued that the trial court erred in disallowing a statutory defense. A person commits the offense of simultaneous possession of drugs and firearms if he commits a felony drug violation while in possession of a firearm. Arkansas Code Annotated § 5-74-106(d) provides a statutory defense when a defendant is in his/her home and the firearm is not readily accessible for use. This affirmative defense has been interpreted to mean that it is available only when the defendant is inside his or her home when the firearm is discovered. Here, appellant had exited his house through a window and was not in the house when it was searched or when the contraband was discovered. Therefore, the trial court did not err in finding that the defense was not available to the appellant. (Tabor, S.; 66FCR-20-40; 4-6-22; Hixson, K.)

*Aikens v. State*, 2022 Ark. App. 161 [**guilty plea withdraw**] The circuit court denied appellant's motions to withdraw his guilty pleas. On appeal, appellant argued that the circuit court erred in denying his motions. When a motion to withdraw a plea of guilty or nolo contendere is filed after a circuit court's acceptance of the plea but before the entry of judgment, the circuit court has the discretion to grant the motion to correct a manifest injustice. Appellant sought to withdraw his plea because he alleged that his counsel was ineffective. Claims of ineffective assistance of counsel made pursuant to Rule 26.1 of the Arkansas Rules of Criminal Procedure are governed by a two-part test. Under this test, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. To demonstrate prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial. Here, appellant did not state in his petition that he would have insisted on going to trial had his counsel adequately and accurately informed him of the consequences of his plea. Appellant's only assertion was that his counsel misled or bribed him into pleading guilty by telling him that the judge would not sentence him to more than twenty years. The appellant's written pleas statements contradicted any alleged misleading information. Therefore, appellant failed to demonstrate that the withdrawal of his pleas were necessary to avoid a manifest injustice. The circuit court did not err in denying appellant's motions to withdraw his guilty pleas. (Johnson, L.; 60CR-10-300; 4-13-22; Klappenbach, N.)

*Truax v. State*, 2022 Ark. App. 164 [**amending charging information**] Appellant was convicted of first-degree terroristic threatening. On appeal, appellant argued the trial court erred in allowing the State to amend the charging information at the close of evidence. The State is entitled to amend an information at any time before the case is submitted to the jury so long as the amendment does not change the nature or degree of the offense charged or create unfair surprise. An appellant must show he was prejudiced by the amendment to prevail, and the prejudice will not be presumed when a defendant fails to move for a continuance. Here, the State moved to amend an aggravated-assault charge to first-degree terroristic threatening. The amendment did not change the nature of the offense charged. The facts, the witnesses, and the evidence for the new charge of first-degree terroristic threatening were identical to the original charge of aggravated assault. Additionally, the amendment change did not change the degree of the offense charged, as both crimes were Class D felonies. Further, the amendment did not create an unfair surprise, as appellant's defense never changed. The appellant also did not argue insufficient time to prepare an adequate defense due to the amendment; nor did he seek a continuance. Thus, appellant could not show prejudice from the court's decision to allow the amendment. The circuit court did err in allowing the State to amend the charging information at the close of evidence. (Carroll, R.; 52CR-20-37; 5-13-22; Whiteaker, P.)

*Mackrell v. State*, 2022 Ark. 93 [**criminal jury instructions**] Appellant was convicted by a jury of capital murder, kidnapping, aggravated robbery, and theft of property. On appeal, appellant

argued that the circuit court should have granted his proposed jury instructions regarding lack of criminal responsibility. Appellant argued that the circuit court abused its discretion in refusing to allow proffered jury instructions AMI Crim. 2d 609 and 610, regarding lack of criminal responsibility. A circuit court's ruling on whether to submit a jury instruction will not be reversed absent an abuse of discretion. In reviewing the propriety of giving a jury instruction, the issue is not one of sufficiency; rather, the issue is whether the slightest evidence supports the instruction. Lack of criminal responsibility means that due to a mental disease or defect a defendant lacked the capacity at the time of the alleged offense to either: appreciate the criminality of their conduct; or conform their conduct to the requirements of the law. At trial, a forensic psychologist and a psychiatrist testified about appellant's conduct-disorder diagnosis and drug-use disorders. Both testified that appellant did not have a mental disease or defect. Based on the doctors' testimony and the fact that appellant failed to provide alternative evidence establishing a mental disease or defect, the circuit court did not abuse its discretion in refusing to give the instructions. (Braswell, T.; 23CR-18-930; 4-21-22; Baker, K.)

*Haynes v. State*, 2022 Ark. App. 191 [**jury instructions; entrapment**] Appellant was convicted of possession of methamphetamine with the purpose to deliver. On appeal, appellant argued that the circuit court abused its discretion by refusing to instruct the jury on entrapment. Entrapment is an affirmative defense that occurs when a law enforcement officer or any person acting in cooperation with a law enforcement officer induces the commission of an offense by using persuasion or other means likely to cause a normally law-abiding person to commit the offense. Conduct merely giving a person an opportunity to commit an offense does not constitute entrapment. Here, an informant testified that he contacted appellant for assistance with a court case, and appellant agreed to exchange methamphetamine for legal services. Appellant's testimony about the informant's actions was not enough to raise a factual question as to entrapment— given appellant's admission that he had used drugs, that he had accepted drugs for legal fees previously, and that he had planned to exchange the methamphetamine for money. The appellant failed to present evidence to indicate that he was induced by governmental conduct of a character likely to cause a normally law-abiding person to commit the offense. Thus, the circuit court did not err by refusing to instruct the jury on entrapment. (Dunham, J.; 24OCR-18-210; 5-4-22; Abramson, R.)

*Smith v. State*, 2022 Ark. 95 [**capital murder; committed as a juvenile**] Appellant was convicted of capital murder, kidnapping, aggravated robbery, and theft of property. On appeal, one of appellant's arguments was that his sentence of life imprisonment without the possibility of parole for his capital-murder conviction was illegal. Arkansas Code Annotated § 5-10-101(c)(1)(B) provides that if a defendant was younger than eighteen years of age at the time he or she committed the capital murder, it is punishable by life imprisonment with the possibility of parole after serving a minimum of thirty years' imprisonment. The State contended that the life-without-parole notation on appellant's sentencing order appeared to be a clerical error because all parties below agreed that appellant would be eligible for parole on his capital-murder conviction after thirty years. When there is a discrepancy between the sentencing order and the pronouncement of

sentence, the sentencing order controls. But clerical errors do not prevent enforcement of a judgment, and a circuit court can enter an order nunc pro tunc at any time to correct clerical errors in a judgment. Here, appellant was sixteen years old at the time of the capital murder. Thus, he was ineligible for a sentence of life without the possibility of parole. The circuit court should correct the sentencing order so that it reflects that appellant was sentenced to “Life” for capital murder, which in his case meant that he would be eligible for parole after thirty years. (Braswell, T.; 23CR-18-929; 5-5-22; Kemp, J.)

*Stuebinger v. State*, 2022 Ark. App. 218 [**suspended probation; revocation hearing required**] Appellant was convicted of delivery of methamphetamine and aggravated assault, and was sentenced to a term of six years’ probation. On appeal, appellant argued that it was reversible error for the court to revoke his probation without holding a hearing. Arkansas Code Annotated § 16-93-307(b)(1) states that a suspension or probation shall not be revoked except after a revocation hearing. Here, the circuit court did not docket a hearing in this case and held a hearing concerning only the companion case, not at issue in this appeal. Therefore, the circuit erred by revoking the appellant’s probation without a hearing. (Putman, J.; 45CR-17-112; 5-11-22; Vaught, L.)

*Hall v. State*, 2022 Ark. App. 232 [**sex offender registration act; social media reporting; search and seizure of cell phone**] Appellant was convicted on one count of failure to comply with sex offender registration, a Class C felony, in violation of Ark. Code Ann. § 12-12-904, for failure to report a social-media application and as a habitual offender pursuant to Ark. Code Ann. § 5-4-501(b)(1). On appeal, appellant argued that: (1) the Sex Offender Registration Act of 1997 only requires a lifetime sex offender or a sexually dangerous sex offender to submit to the social media-reporting rules; (2) those same sections of the Act lack sufficient definiteness to provide notice and, therefore, are void for vagueness; and (3) the circuit court erred when it denied Hall’s motion to suppress evidence based on an illegal search and seizure of his cell phone. [**reporting social media**] A person who has been adjudicated guilty of a sex offense must register as a sex offender using a registration form prepared by the Arkansas Crime Information Center. A sex offender who fails to register or verify registration as required under this subchapter is guilty of a Class C felony. Any offender required to register as a sex offender, regardless of whether the offender is subject to lifetime registration, must register the information listed in Ark. Code Ann. § 12-12-908 to the appropriate agency. Arkansas Code Annotated § 12-12-908(b)(22) requires every sex offender to register the offender’s “social media account information” at the time of registration. Every six months, the offender is then required to “verify” his/her registration information including any social media accounts. Here, appellant had not registered his Tinder account on either his initial sex offender acknowledgement form or the ones submitted subsequently. The appellant acknowledged he was a convicted sex offender, he was required to register and verify his status, and the Tinder account in question belonged to him. Thus, because appellant was subject to registration requirements, he was required to register his social media-account information at the time of registration and, subsequently, to verify the information every six months. Therefore, the circuit court did not err in finding that appellant violated Ark. Code Ann. § 12-12-904. [**void-for-**



**vagueness]** A statute will pass constitutional scrutiny if the language conveys sufficient warning when measured by common understanding and practice. The constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the facts at issue. Here, appellant signed a sex-offender-acknowledgment form, which listed reporting and verification requirements for sex offenders, and three similar forms thereafter. The form stated in the relevant part that "Pursuant to § 12-12-906, Arkansas state law requires the offender to report any changes in residence, mailing address, temporary domicile, employment, email, social network information in person to the local law enforcement agency having jurisdiction at the time of the change." Appellant registered and verified one of his social-media accounts, Facebook, but did not register or verify his Tinder social-media account. Appellant failed to meet the requisite burden of proof regarding his constitutional void-for-vagueness challenge to the sex-offender social-media-registration statutes. Therefore, the circuit court did not err on this issue. **[motion to suppress]** Appellant also argued that the circuit court committed clear error when it denied his motion to suppress the evidence obtained through the illegal search and seizure of his cell phone. Parolees can be subject to suspicionless, warrantless searches at any time without violating the Fourth Amendment. A parolee has a diminished expectation of privacy, as legally he is still in custody of the penal institution from which he was released. The special needs of the parole process call for intensive supervision of the parolee, making the warrant requirement impractical. A warrantless search conducted with valid consent does not violate the Fourth Amendment. Here, appellant's motion to suppress was based on the warrantless search of his cell phone by his probation officer. Appellant specifically and voluntarily consented to the officer's search of his cell phone to find the text-message reminder and unlocked the phone for her without restriction. While searching for the message, pursuant to appellant's consent, she noticed evidence of possible parole violations that gave rise to additional investigation that led to the charge and ultimate conviction. Because a warrantless search made with consent does not violate the Fourth Amendment, the circuit court did not err by denying appellant's motion to suppress. (Karren, B.; 04CR-19-2323; 5-18-22; Gladwin, R.)

*Warren v. State*, 2022 Ark. App. 236 **[juror misconduct; alternate juror]** Appellant was convicted by a jury on multiple offenses including rape and sexual assault. On appeal, appellant argued that the circuit court erred in refusing to grant his request for mistrial after he claims an alternate juror engaged in juror misconduct. A mistrial is an extreme and drastic remedy that will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fundamental fairness of the trial has been manifestly affected. The decision to grant a mistrial is within the sound discretion of the circuit court and will not be reversed absent a showing of abuse or manifest prejudice to the appellant. Following allegations of juror misconduct, the moving party has the burden of proving both juror misconduct and a reasonable probability of resulting prejudice. Jurors are presumed unbiased and qualified to serve, and it is the appellant's burden to show otherwise. When a juror violates the circuit court's admonition to refrain from discussing the case, there is no prejudice when that juror is excused and there is no evidence of misconduct by the remaining jurors. Here, the alternate juror's father texted the county sheriff to inquire if there was a possibility that she could be removed from serving

as an alternate juror because she could not be impartial. The alternate juror was excused, and the jurors were asked if anyone had approached them to talk about the case or if they had talked about the case to anyone, to which they all shook their heads no. There was no evidence that the alternate juror had spoken with anyone on the jury about the case—just allegations she had spoken to her father after the first day of trial. The alternate juror who had improperly talked to her father was excused as an alternate juror and did not participate in appellant’s trial. Appellant failed to show how he was prejudiced by the alternate juror’s misconduct. Therefore, the circuit court did not abuse its discretion in denying appellant’s motion for mistrial. (Putman, J.; 05CR-20-98; 5-18-22; Barrett, S.)

*Wright v. State*, 2022 Ark. 103 [**habitual offender; felony involving violence**] Appellant was convicted of aggravated robbery and theft of property, and was sentenced as a habitual offender. On appeal, the appellant argued that the circuit court erred by concluding that his earlier Kansas conviction was comparable for sentencing purposes to an Arkansas serious felony involving violence. The determination of whether a felony conviction from another jurisdiction is comparable to an enumerated felony involving violence under Arkansas criminal law lies within the discretion of the circuit court at the time of sentencing. In the present case, appellant pleaded guilty to three counts of burglary in Kansas in 1989. The Kansas statute in effect at the time defined burglary as knowingly and without authority entering into or remaining within any building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property, with intent to commit a felony or theft therein. At the time of appellant’s offense, a person committed residential burglary in Arkansas if they enter or remain unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment. A residential occupiable structure means a vehicle, building, or other structure: in which a person lives; or that is customarily used for overnight accommodation of a person whether or not a person is actually present. The Kansas charging information stated that the appellant did unlawfully, feloniously, willfully, knowingly and without authority, enter into or remain within the residence of the victim . . . with the intent to commit a felony or theft therein. In light of the information’s factual description of the offense and appellant’s guilty plea to the charge, the circuit court did not err in determining that his 1989 offense was comparable to an Arkansas residential burglary. (Karren, B.; 04CR-18-2394; 5-19-22; Hudson, C.)

*McArty v. McLaurin*, 2022 Ark. 104 [**writ of mandamus; crime lab records**] The circuit court dismissed appellant’s writ of mandamus wherein he sought an order directing the counsel and representative of the Arkansas crime lab, to forward copies of his victim’s autopsy photographs directly to him. The purpose of a writ of mandamus is to enforce an established right or to enforce the performance of a duty. It is an appropriate remedy when a public officer is called upon to do a plain and specific duty that is required by law and that requires no exercise of discretion or official judgment. Crime lab records are generally confidential, although they may be released in certain circumstances. Arkansas Code Annotated § 12-12-312 requires the crime lab to provide a

defendant access to his or her own crime lab records. It does not prescribe the process that the crime lab must follow in fulfilling its duty to provide access to incarcerated individuals. The statute provides for a right of “access,” but not a right of “possession.” An inmate retains certain fundamental constitutional rights while incarcerated; those rights are limited, however, by the fact of incarceration and valid penological objectives, such as deterrence of crime, rehabilitation of prisoners, and institutional security. A prison may prohibit incoming material contained in mail delivered to a prison unit and deemed by prison officials to be detrimental to the security, good order, or discipline of the institution. Here, the basis of the appellant’s writ is that he claims an established legal right to the receipt of any material forwarded to him by the crime lab without intervention of the ADC. The material the crime lab forwarded to appellant was reviewed by the Arkansas Department of Corrections (ADC) and the autopsy photographs were withheld as contraband in accordance with their policy. It was ADC officials who were withholding the autopsy photos, not the appellee. The appellant did not join the ADC officials as necessary parties to the mandamus petition. Therefore, appellant’s petition failed to state sufficient facts to establish that he had a clear and certain right to possess materials that are deemed contraband by ADC officials or that appellee was required to take any further or specific actions to provide him access to the entire crime lab file. The circuit court did not abuse its discretion. (Gray, A.; 60CV-19-6676; 5-19-22; Hudson, C.)

*Williams v. State*, 2022 Ark. 106 [**capital murder; committed as a juvenile**] The circuit court entered a sentencing order imposing a life sentence following appellant’s resentencing hearing for a capital murder that he committed as a juvenile. On appeal, appellant argued that the circuit court erred in imposing the maximum sentence after weighing the factors to be considered pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012). The Miller factors include age and immaturity, family home environment, the circumstances of the offense (including the role and influence of peer pressure), the incapacities of youth that may have placed them at a disadvantage in dealing with the justice system, and the potential for rehabilitation of the defendant. Here, the circuit court sentenced appellant to life, which means life with the possibility of parole after thirty years. The circuit court’s statements from the bench and the sentencing addendum show that they considered all the evidence in determining that life with the possibility of parole was the appropriate sentence. Therefore, the circuit court did not abuse its discretion. (Culpepper, D.; 50CR-04-92; 5-19-22; Wynne, R.)

*Bartlett v. State*, 2022 Ark. App. 285 [**Arkansas Hot Check Law; pre-existing debts**] Appellant was convicted by a jury of a violation of the Arkansas Hot Check Law (AHCL). On appeal, appellant argued that the AHCL does not apply to preexisting debts. A motion for directed verdict should be denied when there is a conflict in the evidence or when the evidence is such that fair-minded people might reach a different conclusion. The AHCL does not include preexisting debt. Here, appellant’s business would buy grain from local farmers and sell it to a third-party major grain buyer. On April 30, 2014, appellant began loading trucks with appellee’s grain, and continued until June 6, 2014. A June 16 settlement statement indicated that appellant’s business

owed appellee for the grain. Appellee's wife picked up a check from appellant and deposited it on August 15, and the check was returned August 18 for insufficient funds. The appellate court held that the check at issue was for a preexisting debt and, therefore, did not fall under the AHCL. It was undisputed at the trial that the check at issue was for the medium grain rice that appellant's grain brokering business purchased from appellee. Nothing of value was either given or received, and the parties remained in exactly the same position as they were before the exchange. Therefore, the circuit court erred in denying appellant's motion for directed verdict. (Mitchell, C.; 48CR-17-71; 6-1-22; Barrett, S.)

*Bennion v. State*, 2022 Ark. App. 290 [**sentencing order; probation revocation; no contact**] The circuit court revoked appellant's probation. In Arkansas, sentencing is entirely a matter of statute. A sentence is void or illegal when the circuit court lacks the authority to impose it. Here, the circuit court's sentencing order states, "Additional Info: . . . 2) No contact with 'J.A.'. 3) No contact with any minors." Although Ark. Code Ann. § 5-4-106 permits a circuit court to extend a postconviction no-contact order under the procedures described in the statute where a defendant is convicted of domestic battering in the second degree, appellant in this case was convicted of possession of drug paraphernalia and two counts of failure to appear. As such, absent any other statutory authority, the circuit court lacked the authority to include the no-contact provisions for these convictions in the sentencing order. (Green, R.; 04CR-16-1944; 6-1-22; Hixson, K.)

*Dumond v. State*, 2022 Ark. App. 292 [**motion to suppress; traffic stop; reasonable suspicion**] Appellant was convicted of possession of drug paraphernalia. On appeal, appellant argued that the circuit court erred in denying her motion to suppress the evidence. Once the purpose of the traffic stop is completed, the officer may not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention. The use of a drug dog during a traffic stop does not constitute an illegal search under the federal constitution. If police have a reasonable suspicion to detain a vehicle, no separate suspicion is required to conduct a canine sniff. The police may not extend the traffic stop to do so. Additionally, a law-enforcement officer may not extend the time for completion of the purpose of the traffic stop by retaining paperwork. Without reasonable suspicion, an officer may not detain a citizen. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. Here, when the officer finished writing the ticket and had no other business pertaining to the traffic stop itself, the traffic stop was concluded, and reasonable suspicion was required to continue detaining appellant. The Arkansas Rules of Criminal Procedure state that the reasonable suspicion must be tied to the commission of a felony or a misdemeanor involving forcible injury to persons or property. Reasonable suspicion is a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion: that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion. Whether there is reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific,

particularized, and articulable reasons indicating the person may be involved in criminal activity. A non-exhaustive list of factors to be considered when determining whether an officer has grounds to reasonably suspect a person may be found in Ark. Code Ann. § 16-81-203. Here, an officer pulled over the appellant's vehicle for speeding. The officer wrote a traffic ticket while waiting on dispatch to give information back on appellant. Dispatch returned that appellant had prior drug related criminal activity. After finishing writing the ticket, rather than give the ticket to appellant, the officer decided that he wanted to question them and run his K-9 around the car for a free-air sniff. The officer testified that the only reason he continued detaining appellant was because of the report from dispatch that she had prior drug offenses. Prior criminal history, standing alone, is not sufficient to establish reasonable suspicion. Accordingly, the appellate court held that reasonable suspicion is required to continue a traffic stop once the purpose of the stop is concluded. The stop in the present case was concluded before the officer deployed his K-9, and the officer did not have reasonable suspicion to continue the stop upon its conclusion. Therefore, the circuit court erred in denying appellant's motion to suppress. (Williams, C.; 27CR-19-104; 6-1-22; Murphy, M.)

*O'Neal v. Payne*, 2022 Ark. 118 [**habeas corpus; sentencing order; habitual offender**] The circuit court entered an order denying appellant's petition for writ of habeas corpus. On appeal, appellant argued that the circuit court erred by not finding that the trial court's impermissible stacking of two statutes resulted in a double-penalty enhancement. The Supreme Court has held that it is impermissible to sentence a defendant under the specific provision of § 5-26-305(b), which enhances the offense to a Class D felony, and to also sentence him/her under the general habitual-offender statute. When the law does not authorize the particular sentence pronounced by a trial court, that sentence is unauthorized and illegal. Here, the circuit court denied relief because it was not readily apparent from the face of appellant's sentencing order to which version of third-degree domestic battering he had pled guilty, and as a result, he failed to show on the face of the commitment order that an illegal sentence had been imposed. It appeared that appellant was convicted of third-degree domestic battering, a Class D felony. However, the sentencing order failed to specify the subsection of Ark. Code Ann. § 5-26-305 to which appellant pleaded guilty. Because the trial court did not enter a complete sentencing order, the circuit court's decision regarding the facial validity of the sentencing order was made in error, and the trial court erred in denying appellant's habeas petition. (Shirron, S.; 30CV-21-60; 6-2-22; Hudson, C.)

*Strawhacker v. State*, 2022 Ark. 134 [**writ of error coram nobis**] The circuit court denied appellant's petition seeking a writ of error coram nobis and his petition seeking a writ of habeas corpus. On appeal, appellant argued that the circuit court abused its discretion in denying coram nobis relief. The function of the writ of error coram nobis is to secure relief from a judgment rendered while there existed some fact that would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of the judgment. The petitioner has the burden of demonstrating a fundamental error of fact extrinsic to the record. A writ of error coram nobis is available for addressing certain errors that are found in one of four categories: (1) insanity at the time of trial,

(2) a coerced guilty plea, (3) material evidence withheld by the prosecutor, or (4) a third-party confession to the crime during the time between conviction and appeal. The writ is available to fill a gap in the legal system—to provide relief that was not available at trial because a fact exists that was not known at that time, and relief is not available on appeal because it is not in the record. The supreme court has previously expanded the writ of error coram nobis to include the rare circumstance of repudiated scientific testimony presented by an expert on behalf of the government. In considering a writ of error coram nobis, the supreme court has utilized the “rule of reason” in the narrow circumstances where (1) the State presented expert scientific opinion at trial; (2) the expert was an agent of the government; and (3) that same government later repudiates the expert’s scientific opinion. In the present case, (1) the State presented an expert witness’s scientific testimony on hair evidence at trial; (2) the expert witness, an FBI supervisory special agent, acted as a governmental agent and was admitted as an expert in the field of hair and fibers; and (3) the Department later repudiated the entirety of the expert witness’s testimony. However, the circuit court found that even without the expert witness’s testimony, there was enough evidence to support appellant’s conviction. Additionally, the circuit court found that appellant failed to demonstrate that the outcome of the trial would have been different and that the repudiation of the evidence would have prevented the rendition of the judgment in this case, that being a guilty verdict. The Supreme Court held that the circuit court did not err in denying appellant’s error coram nobis petition. (Lindsay, M.; 72CR-89-760; 6-16-22; Kemp, J.)

## **PROBATE**

*McCann v. Cross*, 2022 Ark. App. 172 [**quiet title; interpretation of wills**] In the interpretation of wills, the paramount principle is that the intent of the testator governs. This intent is to be determined from viewing the four corners of the instrument, considering the language used, and giving meaning to all of its provisions, whenever possible. The words and sentences used in a will or trust will be construed in their ordinary sense to arrive at the testator’s true intention. Consideration must be given to every part of the will. Here, the will stated in the relevant part “to William Pitcock, for his lifetime, the right to live in the house and the following described property, to-wit: ... with remainder to Newton E. Pitcock and upon his death, then to Eva McCann, Lola May Covell, and Irene Mendes, to be held by them as their own and absolute property, in equal shares and share alike.” The trial court construed the will to give Newton a “remainder,” meaning fee-simple title, with the remaining language having no effect. There was no specific wording required to create a life estate, and “for his life” has the same meaning as “and upon his death.” The deceased intended to create successive life estates. Pursuant to the intent of the testator, the will granted Newton a life estate and the remainder fee-simple title to appellants. Newton conveyed the property via warranty deed to his nephew, who conveyed the property via warranty deed to appellees. Accordingly, the nephew lacked marketable title at the time of his conveyance to the appellees. (Phillips, G.; 63CV-18-406; 4-20-22; Klappenbach, N.)

*Gill v. Sullivan*, 2022 Ark. App. 243 **[adult guardianship]** The circuit court entered an order awarding guardianship of appellant’s husband to appellee. On appeal, appellant argued the circuit court erred in awarding guardianship to appellee and in awarding her only four hours of visitation a week with her husband. **[appointment of guardian]** Arkansas Code Annotated § 28-65-204 provides that the circuit court shall appoint as guardian of an incapacitated person the one most suitable who is willing to serve, having due regard for requests contained in a will or other written instrument, requests for the appointment of a person as their guardian made by a minor fourteen years of age or over, requests for the appointment of a person made by the spouse of the incapacitated person, and the relationship by blood or marriage to the person for whom guardianship is sought. The statute does not make an ironclad order of priority, rather it leaves to the circuit court’s sound discretion the appointment of a guardian who would forward the best interest of the ward. Here, appellee is married to the ward’s niece and petitioned to be appointed as his emergency guardian. The appellee amended his petition to ask that he be appointed temporary guardian for the ward and explained that marriage license for appellant and the ward had been filed on the same day that appellee had filed for the emergency guardianship. The circuit court indicated that it considered the ward’s preference of guardian and appellant’s status as his wife, but ultimately found that appellee should be appointed guardian. The circuit court did not abuse its discretion in appointing appellee as the ward’s guardian. **[visitation]** The appellate court held that the circuit court did not err in setting visitation at four hours a week. The circuit court explained the reasoning behind its ruling and left the door open to increasing visitation if the visits were successful. (McSpadden, D.; 69PR-21-10; 5-25-22; Harrison, B.)

*Baker v. Baker*, 2022 Ark. App. 260 **[trusts; summary judgment]** In construing a trust, courts apply the same rules applicable to the construction of wills. The intention of the settlor must be ascertained when construing a trust. The intention should be determined by viewing the four corners of the instrument, considering the language used, and giving meaning to all of its provisions, whenever possible. When the terms of a trust are unambiguous, it is the court’s duty to construe the written instrument according to the plain meaning of the language employed. A trust agreement that sets out by its own terms the method by which it may be revoked can be revoked only in the manner provided. However, the settlor of a trust may revoke or amend a revocable trust by substantial compliance with a method provided by the terms of the trust. Here, appellant admitted that the earlier trust set forth four conditions for an effective amendment; it had to be signed, dated, written, and titled “The Charles F. Baker Living Trust Amendment.” The later trust complied with three of the four conditions; it was signed, dated, and written. The document was titled as the “The Charles F. Baker Living Trust,” lacking the word “Amendment.” Additionally, the later trust document did not reference any prior document and the settlor had previously amended the trust before. Based upon this record, the appellate court held that the failure of the later trust document to comply with the method for amendment set out in the earlier trust was fatal. Therefore, the circuit court did not err in granting summary judgment to the appellees. (Williams, C.; 30CV-20-64; 5-25-22; Whiteaker, P.)

*Estate of Matlock v. Noel*, 2022 Ark. App. 295 [**pro se complaint; personal representative of estate**] The circuit court dismissed a wrongful-death action that appellant brought on behalf of the estate of the deceased because appellant, as a nonlawyer, was not authorized under Arkansas law to file a pro se complaint on behalf of the estate. A person who is not a licensed attorney and is acting as an administrator cannot practice law in matters relating to his or her trusteeship on the theory that they are practicing for themselves. In bringing a suit for wrongful death, a personal representative acts only as a “trustee of conduit,” and any proceeds recovered are held in trust for the benefit of the beneficiaries and not the estate. A complaint in such a situation is a nullity. The circuit court did not err in dismissing the claim. (Ohm, R.; 26CV-21-155; 6-1-22; Murphy, M.)

## DOMESTIC RELATIONS

*Baggett v. Baggett*, 2022 Ark. App. 153 [**modification of visitation; custody**] The circuit court denied appellant’s petition to modify visitation and awarded the appellee attorney’s fees. On appeal, appellant argued that the circuit court erred in requiring the same proof of a material change in circumstances for a modification of visitation as is required for a modification of custody. A party seeking a change in visitation has the burden to demonstrate a material change in circumstances that warrants such a change. The requisite burden of proof is the same for both a modification of custody and a modification of visitation. A custodial parent’s change in attitude is not necessarily sufficient to constitute a material change. Here, the circuit court recognized that the parties co-parenting skills had improved. However, the changes did not equate to a material change in circumstances warranting modification of custody or visitation. The circuit court did not err in finding there was not a material change in circumstances. (Parker, J; 43DR-13-627; 4-6-22; Gruber, R.)

*Haerber v. Day*, 2022 Ark. App. 171 [**custody; visitation; attorney’s fees**] A circuit court has the inherent power to award attorney’s fees in domestic-relations proceedings. In determining a fee award, the relative financial ability of each party is a consideration, but it is not determinative. There is no requirement that a party prevail in order to be awarded fees. In the present case, the circuit court awarded attorney’s fees to the appellee. The circuit court was familiar with the parties’ financial abilities, having considered their affidavits of financial means. Additionally, appellee prevailed on appellee’s motion to change custody. Therefore, the circuit court did not err. (Herzfeld, R.; 63DR-14-404; 4-20-22; Gladwin, R.)

*Morales v. Arias*, 2022 Ark. App. 174 [**attorney testimony; rules of professional conduct**] The circuit court entered an order disqualifying appellant’s attorney from representing her in a lawsuit to establish the appellee’s paternity, custody, child support, and visitation. The disqualification of an attorney is a necessary measure to protect and preserve the integrity of the attorney-client relationship, yet it is a drastic measure to be imposed only when it is clearly required by the



circumstances. The Arkansas Rules of Professional Conduct are applicable in disqualification proceedings, although a violation of the rules does not automatically compel disqualification. Rule 3.7 of the Arkansas Rules of Professional Conduct applies to a situation in which the opposing party seeks to call counsel as a witness. A three-part test analyzes whether disqualification is proper under those circumstances. The opposing party must determine that: (1) the attorney's testimony is material to the determination of the issues being litigated; (2) that the evidence is unobtainable elsewhere; and (3) that the testimony is or may be prejudicial to the testifying attorney's client. Here, appellee filed a motion requesting disqualification of counsel and his intent to call appellant's attorney as a witness. The appellant's attorney had admitted to providing false information regarding domestic abuse on the part of one parent to a medical provider that was recorded in the child's medical records. This was material in this case involving the appellee's right to visitation. Only the attorney knew the identity of other medical-care providers or other potential witnesses to whom she disseminated false information, which means the evidence could not be obtained from another source. Finally, the fact that the appellant's attorney communicated false information to the child's doctor that could negatively impact the child's evaluations and treatment recommendations by future medical providers would have been prejudicial to the appellant's case. All three disqualification factors were met in the present case. Therefore, the circuit court did not err in disqualifying the appellant's attorney. (Tucker, C.; 60DR-19-4210; 4-20-22; Barrett, S.)

*David v. David*, 2022 Ark. App. 177 [**revised administrative order 10**] The trial court entered an order modifying child support. On appeal, appellant argued that the trial court erred by not applying the presumptive amount of child support under the revised Arkansas Supreme Court Administrative Order No. 10. Pursuant to the Revised Administrative Order No. 10, all orders granting or modifying child support shall contain the court's determination of the payor's income, payee's income, recite the amount of support required under these Guidelines, and state whether the court deviated from the presumptive child-support calculation. If the circuit court finds that the presumptive amount of child support calculated by using the new guidelines is unjust or inappropriate, then the court must explain in writing the reasons for its deviation and should consider the factors set forth in the Revised Administrative Order No. 10. Some of the factors to be considered are the payment of child-care expenses and healthcare expenses and, in the case of joint custody, an adjustment for actual days spent with each parent. Here, the circuit court did not fully comply with the administrative order because it based the child support amount on methodology from the parties' property, child-custody, and support agreement. If the circuit court finds that the presumptive amount of child support calculated by using the new guidelines is unjust or inappropriate, then the court must explain in writing the reasons for its deviation and should consider the factors set forth in the Revised Administrative Order No. 10. (Threet, J.; 72DR-19-730; 4-20-22; Hixson, K.)

*Drummond v. Drummond*, 2022 Ark. App. 184 [**martial-property division; business valuation**] On appeal, appellant argued that the circuit court erred in its martial-property division, specifically

its valuation of the parties' business. Arkansas law requires the use of the "fair market value" standard for valuing businesses in a marital-property context. There are several possible approaches to business valuation, including income, asset, and market. Here, the circuit court considered appellee's testimony based on his personal knowledge, experience in the trucking industry, and the parties' income tax returns from the past three years to determine the fair market value of the business. Based upon this evidence, the circuit court did not err in its valuation of the business. (Sutterfield, D.; 24ODR-19-11; 4-27-22; Virden, B.)

*Clark v. Clark*, 2022 Ark. App. 208 [**property-settlement agreement; contract; contempt**] The circuit court denied appellant's motion to hold appellee in contempt after he refused to sign documents that the appellant asserted were necessary to secure her interest in the appellee's property until he paid his financial obligation in full. On appeal, appellant argued that the parties' property-settlement agreement (PSA) provided her with the right to have a security interest in appellee's real property and business entities. A separate and independent property-settlement agreement that has been incorporated into a divorce decree leaves a trial court without authority to modify the agreement; rather, the issue of how to interpret the agreement is based on an analysis of the contract language. Questions relating to the construction, operation, and effect of independent property-settlement agreements are ordinarily governed by the rules and provisions applicable to other contracts generally. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. Here, the parties' PSA provided that appellee's payment of his financial obligation "shall be secured" by appellee's interest in real properties and business entities that he received as his separate property. The relevant PSA subsection stated that appellant shall retain her one-half interest in the business entities taken by appellee as his separate property until such time as she has been paid, in full, on this financial obligation. The next subsection provided that appellant shall further be named as sole beneficiary of appellee's current life insurance policies up to the outstanding balance owed, until the final payment is received. In other words, appellee will not be able to sell, or otherwise enjoy certain "separate" property because appellant will retain one-half interest in that "separate" property until appellee satisfies the financial obligation as set forth in the PSA. Additionally, appellant is the sole beneficiary of appellee's life-insurance policies up to the amount of his obligation. Therefore, the circuit court did not err in finding that appellee's financial obligation to appellant was secured through the PSA's provisions and that appellee was not in contempt for refusing to sign mortgages and financing statement that were not contemplated by the PSA. (Hendricks, A.; 66FDR-19-705; 5-11-22; Virden, B.)

*Cordell v. Hylle*, 2022 Ark. App. 209 [**joint custody; minor surname change**] The circuit court granted a petition for joint custody of the parties' daughter and changed the child's name to the appellee's last name. On appeal, appellant argued that the circuit court's recital of law regarding joint custody was erroneous as a matter of law and that it failed to consider the child's best interest, and it failed to consider the appropriate factors in changing the child's name. [**joint custody**] The

primary consideration in child-custody cases is the welfare and best interest of the child; all other considerations are secondary. At the time of the circuit court's award of joint custody in 2020, the law stated that an award of joint custody was favored. In 2021, the statute was amended to add a rebuttable presumption that joint custody is in the best interest of the child. Once paternity has been established, the circuit court is to follow the same guidelines, procedures, and requirements as if it were a case involving a child born of a marriage in awarding custody and visitation. 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. Here, there were issues initially with sharing information, and there had been arguments regarding visitation exchanges. However, both parties testified that they had been able to effectively communicate at times. Additionally, the circuit court noted that while parties did not get along very well, it also found they were not very critical of each other and that the child was thriving with both of them. The appellate court held that based upon the record and in light of the statutory preference for joint custody, the circuit court did not err in determining that joint custody was in the child's best interest. **[name change]** In order to successfully petition to change a minor child's surname, the moving party has the burden of demonstrating that such a change is in the best interest of the child. In determining the child's best interest, the circuit court should consider at least the following factors: (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (6) the existence of any parental misconduct or neglect. The circuit court could only weigh the factors for which the parties provided evidence or that were relevant under the circumstances. Here, the child had the last name since she was born, which was one year before the hearing. She was too young to have a preference in her last name, there was no evidence that either parent neglected the child, appellee testified that his family had a great reputation in the community, and there were no allegations of difficulties with the child's present or proposed surname. Evidence also did not show that changing the child's surname would have great effect on her relationship with each parent. The appellate court held that there was sufficient evidence for the circuit court to consider and that it did not err in its finding. (Proctor, R.; 19DR-19-181; 5-11-22; Klappenbach, N.)

*Joheim v. Joheim*, 2022 Ark. App. 210 **[divorce; property division; alimony]** On appeal, appellant argued that the circuit court erred by awarding appellee (1) one-half of appellant's nonmarital and nonvested retirement accounts, and (2) \$3,500 a month in alimony. **[property division]** The circuit court is given broad powers to distribute both marital and nonmarital property to achieve an equitable division, and the overriding purpose of the property-division statute is to enable the court to make a division that is fair and equitable. The property-division statute does not require mathematical precision in property division but only requires that property be distributed equitably. Here, the appellate court found that after reviewing the record, they were not left with a distinct and firm conviction that a mistake was made. **[alimony]** The circuit court may enter an order concerning alimony that is reasonable from the circumstances of the parties and the

nature of the case. The purpose of alimony is to rectify the economic imbalance in earning power and standard of living in light of the particular facts in each case, and the primary factors to be considered in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. The court should also consider the following secondary factors: (1) the financial circumstances of both parties; (2) the amount and nature of the income, both current and anticipated, of both parties; (3) the extent and nature of the resources and assets of each of the parties; and (4) the earning ability and capacity of both parties. Here, the circuit court enumerated all the appropriate factors to take into consideration, it acknowledged that the date of the marriage was when the parties married in Arkansas and not that of their Vermont civil union, and it expressed clearly that there was a great disparity in the parties' incomes. Additionally, the circuit court considered the length of the marriage, the appellee being a stay-at-home parent, and appellee's opportunities for advancement in her new position. The circuit court also stated that the alimony issue might have to be revisited should appellant's employment income or disability income change. The circuit court's award of alimony did not demonstrate an abuse of discretion. (Compton, C.; 60DR-18-3438; 5-11-22; Klappenbach, N.)

*Schnick v. Russell*, 2022 Ark. App. 212 [**relocation; primary custody; joint custody**] The circuit court denied appellant's request to relocate with the parties' minor children, and awarded appellee, primary custody of the children. There is a presumption in favor of relocation for custodial parents with sole or primary custody, with the noncustodial parent having the burden to rebut this presumption. The presumption does not apply when the parents share joint custody of a child. The presumption should be applied only when the parent seeking to relocate is not just labeled the primary custodian in the initial custody order but also spends significantly more time with the child than the other parent. Joint custody does not necessarily involve a precise 50/50 division of time. Parental influence, commitment, and involvement in the child's activities and responsibility for making decisions on behalf of the child are also important factors for the circuit court to consider in a relocation request. The proper analysis for a change-in-custody request due to the relocation of one parent in a joint-custody situation is the same as that when relocation is not involved; the court must first determine whether a material change in circumstances has transpired since the initial custody order and then whether the change in custody is in the best interest of the child. Here, the circuit court held that the parties had shared joint custody since the divorce, and the evidence supported the holding that the parties roughly shared equal time with the children since their divorce, ranging from a 60/40 to 50/50 split throughout the years. Therefore, the circuit court correctly did not apply the presumption in favor of relocation. Additionally, the circuit court was correct in determining that a material change in circumstances had occurred, and relocation was not in the best interest of the children. The appellant's move was a significant factor in the circuit court's decision along with the parties' inability to cooperate in their parenting, which appeared to stem from the appellant's move. The circuit court also made several specific factual findings to support its decision and noted that the very marginal benefit of appellant's move did not outweigh the cost to the relationships between the parents and children if the children were permitted to move. The circuit court did not err in denying the motion for relocation and awarding primary custody to appellee. (Thyer, C.; 16JDR-12-102; 5-11-22; Barrett, S.)

*Bell v. Bell*, 2022 Ark. App. 279 [**child custody; divorce decree; property settlement agreement**] The circuit court entered an order modifying the parties divorce decree. On appeal, appellant argued that the circuit court erred in: (1) finding that a material change of circumstances warranted a modification of custody; (2) finding that a modification of physical and legal custody was in the children’s best interest; (3) adding a “springing” joint physical-custody provision that would automatically convert appellant’s primary physical custody of the parties’ children to joint physical custody if appellee moves within twenty miles of the children’s school; and (4) modifying the division of certain child-related expenses. [**material change in circumstances**] Courts impose more stringent standards for modifications in custody than they do for initial determinations of custody to promote stability and continuity in the life of the child and to discourage repeated litigation of the same issues. In order to change custody, the trial court must first determine that a material change of circumstances has occurred since the last order of custody, and if that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the child. Here, the circuit court found that there was a material change of circumstances. The evidence before the court indicated that appellant’s unilateral decisions were detrimentally impacting appellee’s visitation and parenting time with the children, and appellant had alienated appellee from the children by micromanaging the parenting. The appellate court held that the circuit court did not clearly err in finding that appellee met his burden to prove that there had been a material change of circumstances warranting a modification of the visitation and custody provisions. [**best interest**] The primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. A judicial award of custody will not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree will be in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the circuit court or were not known by the circuit court at the time the original custody order was entered. Here, the circuit court the trial court relied on a showing of facts affecting the best interest of the children that were not known by it when the original custody provisions were entered as part of the divorce decree. This included clarifying what the parties and circuit court agreed were ambiguities in the original decree; providing more opportunities for the children to benefit in having appellee’s input in their lives through additional parenting time; having more time with subsequently born half siblings and extended family on both sides; and the need for the children to be able to establish a more significant bond with their father. The circuit court did not err in their best interest finding. [**“springing” joint physical custody provision**] In the context of child-custody modification, an appellant cannot use the circumstances he or she created as grounds to modify custody. Relocation alone is not a change in circumstances warranting a change in custody nor are circumstances created by the party seeking the modification. Arkansas uses a present-based analysis when analyzing custody issues, and trial courts must examine the changes and best interest of the children presented as evidence to the court at the time of the final hearing, not changes that may occur weeks, months, or years down the road. Here, in the circuit court’s final order it included a provision ordering physical custody to automatically convert to joint custody upon appellee relocating closer to the children’s school. Because an automatic change-of-custody provision does not allow the trial court to determine the children’s best interest at some point in the future when the provision is triggered, the appellate court held that the provision was unenforceable.

**[modification of the child related expenses]** Appellant also argued that the trial court erred in modifying the parties' property settlement agreement (PSA) to read that appellee did not have to pay for tuition or extracurricular-activity fees unless he agreed. The parties PSA stated that the parties would split the cost of the children's private schooling and other extracurricular activities and did not state appellee had to first agree with such activities. The trial court erred in modifying that provision. (Johnson, A.; 60DR-16-2184; 6-1-22; Gladwin, R.)

*Thakar v. Thakar*, 2022 Ark. App. 284 **[division of marital property]** On appeal, appellant argued the circuit court erred in its division of the marital estate, specifically by including marital property appellant transferred to India, and that there was insufficient evidence to support the circuit court's valuation of the parties' home in India. Parties in a divorce action are not required to account for every sum spent in a marriage. However, a spouse may recover his or her interest in marital property that the other spouse has transferred if the latter made the transfer for the purpose of defrauding the former of his or her interest in the property. Courts should consider the "wrongful disposition" of property by one spouse in ordering the division of marital property. Here, appellee introduced documentary evidence that appellant had transferred \$280,060.12 to an account in India. The documents indicated that the deposits made by appellant were only in appellant's name. Appellee also testified that she discovered after the parties separated that appellant had been giving money without her knowledge or consent to various members of his extended family including his brother, his sisters, his mother, his aunt, and his uncle totaling \$133,141.48. The circuit court was required, as the trier of fact, to determine the credibility of witnesses and resolve conflicting testimony. The circuit court did not err in its finding that it was appellant's intention to place them in his total control without her knowledge and that it was his intent to profit from his scheme of deceit. **[valuation of home]** Appellant also argued that there was insufficient evidence to support the circuit court's valuation of the parties' home in India. The owner of property, because of their relationship as owner, is competent to give opinion testimony on an issue of the value of the property regardless of the owner's knowledge of property values, and it is not necessary to show that the owner is an expert or is acquainted with the market value of local real estate. The consideration recited in a deed is not always equal to the value of the property conveyed. Often a nominal sum is named, and even love and affection may constitute sufficient consideration for a conveyance of land. Appellant chose to purchase the home in India, to brag about its value to his wife and brother-in-law, and to present to the court very limited evidence regarding its ownership and market value. It was this scheme of deceit that created the confusion regarding the home in India. The appellate court held that the value of the home involved issues of weight and credibility for the circuit court, which observed the witnesses firsthand. The circuit court did not err in its valuation of the parties' home in India. (Wright, R.; 29DR-19-69; 6-1-22; Gruber, R.)

## JUVENILE

*Campos v. Ark. Dep't of Human Servs.*, 2022 Ark. App. 221 [**TPR—paternity not established**] Father, Campos, appeals termination of his rights to two children who were three years old and newborn when removed from the home of their mother and Campos, who were never married. Campos was identified as the “putative” father throughout the proceedings. In the permanency planning order, the court noted that “a Default Judgment of paternity on Miguel Campos was admitted and entered into evidence” and the Default Judgment of paternity was later referenced in the petition for termination of rights filed by DHS. Campos testified that he is the father of the two children, however, no documentation was introduced as evidence of paternity at any point in the proceedings and the court never made a specific finding as to paternity. Ultimately, Campos parental rights were terminated on two statutory grounds each of which require proof that the actor is a parent. On appeal, Campos argued that the order terminating his rights must be reversed because there was no finding that he was a parent. The appellate court agreed, finding that the trial court clearly erred by terminating Campos parental rights without resolving his legal status and specifically entering a finding that he is a parent. (Hess, K.; JV-20-27; May 11, 2021; Hixson, K.)

*Ussery v. Ark. Dep't of Human Servs.*, 2022 Ark. App. 250 [**adjudication; aggravated circumstances finding must be supported by evidence as to each individual child**] The instant case and its companion case handed down at the same time involve a total of eight children, six of whom have the same mother, Sheila Ussery, and two of whom are the stepchildren of Sheila Ussery. Sheila has two children, HU and SU, with Geraldo Quintone Ussery, and has four children, SW1, SW2, SW3, and BW, with Benjamin Williams. The two remaining children are AU and IU, whose parents are Tiffany Strickland and Geraldo Quintone Ussery. One of those children, eight-year-old IU, is the victim of most of the abuse allegations at issue. At the adjudication hearing, DHS introduced three videos depicting Sheila kicking and hitting IU. The Family Service Worker testified that the removal of the children was also based on interviews with fourteen-year-old BW who described a history of abuse to himself and other children in the family. One issue raised on appeal involved the right to counsel. The mother, Sheila, was appointed counsel prior to the probable cause hearing and later hired her own private counsel. Sheila’s attorney failed to appear at the adjudication hearing until the hearing was already underway. The hearing was scheduled to begin at 3:00p.m. and the court began the hearing at about 3:52p.m. but Sheila’s attorney was not present no one had heard from her. Sheila indicated that she had hired an attorney and stated that “I think my attorney is supposed to be here, but I don’t know.” However, Sheila did not specifically object to holding the hearing without her attorney present and did not request a continuance. Moreover, when Sheila’s attorney showed up later after the hearing was underway, the attorney did not object or make any motion concerning right to counsel or due process. On appeal, Sheila argued that proceeding with the adjudication hearing without her attorney present violated her due process rights and her right to counsel. However, because the argument was not raised below and the trial court allowed Sheila and her counsel a full and fair opportunity to object and cure any perceived defects, the error did not constitute reversible error. The other issues raised on appeal involved whether the evidence was sufficient to support the findings as to the siblings other than IU. The appellate court explained that abuse inflicted upon one sibling is sufficient to find all siblings dependent-neglected. The court pointed out that under

the statutory definition, a sibling of an abused child is by definition a “dependent-neglected juvenile.” In contrast, however, the definition of “aggravated circumstances” refers specifically to a child and not a sibling, except when a child or a sibling’s life is endangered, which was not alleged here. Thus, proof of aggravated circumstances must be provided for each individual child in order to support an aggravated circumstances finding. Pointing to the statutes referencing aggravated circumstances in the contexts of no reunification services and termination of rights, the parents argued on appeal that an aggravated circumstances must be supported by clear and convincing evidence. The appellate court rejected that argument, holding that the general burden of proof requiring a preponderance of the evidence in dependency-neglect hearings applies to aggravated circumstances findings in adjudication hearings as in the instant case. In this case, because proof of aggravated circumstances was lacking as to the children other than IU, the aggravated circumstances finding for the other children must be reversed. (Warren, D.; JV-21-446; May 25, 2022; Gladwin, R.)