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CIVIL

Mullins v. Helgren, 2022 Ark. App. 3 [**quiet title; boundary by acquiescence**] The circuit court entered an order denying the appellant her complaint to quiet title. On appeal, appellant argued that the trial court erred in concluding that she failed to prove boundary by acquiescence. Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line, and in such circumstances, the adjoining landowners and their grantees are precluded from claiming that the boundary so recognized and acquiesced in is not the true one, although it may not be. Boundary by acquiescence requires three key elements: (1) a tacit agreement between the parties, (2) recognition of the boundary for a long period of time, and (3) a fixed line that is definite and certain. Here, appellant argued that the circuit court erred in requiring her to provide a survey or to use a metes and bounds description of the asserted boundary. Appellant conceded that her camper was on appellee's property and claimed that she was seeking to acquire about twenty to thirty feet of the appellee's property. However, appellant testified that she was just "guesstimating" and that she would need to go out there and measure it to be sure. A trial court's order must describe a boundary with sufficient specificity that it can be identified solely by reference to the decree.

The circuit court accurately pointed out that appellant could not show by way of either a survey or a metes and bounds description the exact area that she was claiming. The only way appellant described the property was by reference to moveable objects like a camper or shed that had only been there a few years. Additionally, appellant was unable to prove that there had been a tacit agreement between the parties, a claim that appellee disputed. The circuit court did not err in finding that appellant failed to establish boundary by acquiescence. (Hearnsberger, M.; 26CV-18-523;1-12-22; Virden, B.)

Allen v. Sargent, 2022 Ark. App. 14 [**breach of contract; damages**] The trial court entered a default judgment on appellee's breach-of-contract claim and awarded damages. On appeal, appellant argued that the trial court erred in awarding damages for lost profits and conversion. [**lost profits damages**] The proof of lost profits must be shown by evidence that makes it "reasonably certain" what the plaintiff would have made. The plaintiff must produce a reasonably complete set of figures and not leave the factfinder to speculate as to whether there would have been any profits. The proof must be sufficient to remove the question of profits from the realm of speculation and conjecture. Here, the parties entered into an agreement that appellee would help them get a contract from a major retailer to sell produce for a third of the profits. The trial court used the distributions from appellants' LLC to determine the damages. It was an error to use the distributions of the LLC as a measure of damages because the LLC had ventures besides the contract at issue, lost money on the contract at issue, and operated at a loss during the year in question. The evidence here was not sufficient to establish proof of lost profits. [**damages for conversion**] Conversion is a common-law tort action for the wrongful possession or disposition of another's property. The proper measure of damages for the conversion of a personal item is its fair market value at the time and place of the conversion. Evidence based on purchase, replacement, or rental prices is improper. Fair market value is defined as the price the item would bring between a willing seller and a willing buyer in the open market after negotiations. Here, appellee testified that he left his harvester and planter with appellants. The only evidence of the values of the harvester and planter was through appellee's testimony, which offered no evidence of the value of the equipment's fair market value. While appellee argued that the equipment was unique and that the circumstances of this case required a standard different than the market value, the appellate court did not believe the equipment was so unique as to escape a fair market valuation. A fair market value could have been established and the award for damages on the converted property was unsupported. Thus, the trial court erred by departing from the standard. (Duncan, X.; 04CV-19-1165; 1-12-22; Murphy, M.)

Jackson v. Downs, 2022 Ark. App. 17 [**easement by prescription**] The circuit court awarded appellee an easement across appellant's property. On appeal, appellant argued that the circuit court erred in finding that appellee had established an easement by prescription. One asserting an easement by prescription must show by a preponderance of the evidence that his or her use has been adverse to the true owner and under a claim of right for the statutory period. Where there is usage of a passageway over land, whether it be by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to his

interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right. A prescriptive easement, once attached, is permanent and irrevocable. The use of wild, unimproved land is presumed permissive until the persons using the land for passage, by their open and notorious conduct, demonstrate to the owner that they are claiming a right of passage. This must come in the form of some overt activity that puts the owner on notice that the use is adverse. Here, appellee testified that he had been using a road on appellant's property for over fifty years. Appellant testified that when he bought his property in 1986, he could tell that people had been using the road because it was "wallowed out." At this point, appellant had been put on notice that someone had been using the road and did nothing to stop the use until 1995 when he began posting his property and blocking the road with a cable and barrels. Appellee however ignored the signs, cable, and barrels; continued to use the road; and continued to have his lessees use the road for a period of twenty years. Considering these facts, appellant knew or should have known that appellee's use was adverse. Therefore, the appellee was entitled to the easement by prescription. (Mitchell, C.; 48CV-19-114; 1-12-22; Tuck, A.)

Sledge v. City of Pine Bluff, 2022 Ark. App. 23 **[summary judgment]** The circuit court granted summary judgment against appellant on his claims of negligence. On appeal, appellant, individually and as the special administrator of the estate of the deceased, argued that the circuit court erred by granting summary judgment to the defendants on the basis of qualified immunity and that Arkansas courts have not interpreted Ark. Code Ann. § 21-9-301 to grant immunity to municipalities from suit or damages where sufficient facts are alleged to establish conduct constituting gross negligence or conscious disregard for the safety of others. **[qualified immunity]** Appellant first argued that the circuit court erred in granting summary judgment to the appellees on the basis of qualified immunity. In determining whether claims against a defendant are made in his or her individual capacity, the court must examine the "course of proceedings" and look to the complaint as a whole to determine the nature of the action. In the present case, there was no indication that appellant sued any of appellees in their individual capacities. The complaint named three appellees in their official capacities only, and it made no claims of individual conduct, only conduct in the appellees' official capacities. A suit against a public employee in his or her official capacity is merely a suit against the public employer. Qualified immunity is not a defense available to governmental entities, but only to government employers sued in their individual capacity. Because appellant sued the public officials in their official capacities only, qualified immunity was not at issue. **[city employee immunity]** Arkansas Code Annotated § 21-9-301 provides city employees with immunity from civil liability for negligent acts but not for intentional acts. The statute provides immunity from torts for municipalities except to the extent that they may be covered by liability insurance. Here, appellees attached to their motion for summary judgment an affidavit from the mayor that asserted that Pine Bluff did not have liability insurance against negligent actions at the time of the deceased's death. The affidavit stating that there was no general-liability coverage established a prima facie entitlement to summary judgment. Appellant failed to meet proof with proof to demonstrate the existence of a genuine issue of material fact on

this issue. Therefore, appellees were entitled to municipal immunity, and summary judgment was proper. (Wyatt, R.; 35CV-20-392; 1-19-22; Barrett, S.)

West v. Shelter Mutual Insurance Company, 2022 Ark. App. 38 [**motion for summary judgment; insurance policy**] The circuit court granted summary judgment in favor of appellee, Shelter Mutual Insurance Company. On appeal, appellant argued that the circuit court erred in granting summary judgment to appellee because appellee rescinded the insurance policy in violation of Ark. Code Ann. § 23-89-303. Arkansas Code Annotated § 23-89-303 states that an insurer shall not be able to rescind bodily injury or property damage liability coverage under an insurance policy for fraud or misrepresentation with respect to any injury to a third party when suffered as a result of the insured's negligent operation of a motor vehicle. Here, the holder of the insurance policy canceled the insurance policy shortly after the accident. Appellee did not rescind the policy but instead canceled the policy as requested by the insured. Because appellee, the insurer, did not rescind the policy, appellant's argument was misplaced. Additionally, Ark. Code Ann. § 23-89-303(d)(1) not only prohibits rescission of liability coverage by the insurer for fraud or misrepresentation, but the statute also requires an insured to have negligently operated the motor vehicle that caused the injury to the third party. While the driver negligently operated the vehicle, under the terms of the policy, the driver here was not an insured. Therefore, even if appellee had rescinded the policy as the appellant contended instead of merely canceling it per the driver's request, appellee's argument would still fail. (Yeargan, C.; 55CV-19-72; 1-26-22; Brown, W.)

Humphrey v. Bailey, 2022 Ark. App. 42 [**timely notice of appeal**] The circuit court entered an order denying the appellants' motion for extension of time to file the notice of appeal. On appeal, the appellants argued that the circuit court did not correctly apply Rule 4(b)(3) of the Arkansas Rules of Appellate Procedure – Civil. A notice of appeal shall be filed within thirty days from the entry of the judgment, decree, or order appealed from. Rule 4(b)(3) represents a narrow exception. There are three requirements for this narrow exception: failure to receive notice, diligence by counsel, and absence of prejudice to either party. Here, appellants conceded that they received notice that the motion was deemed denied by operation of law. Additionally, appellants failed to act with reasonable diligence after counsel untimely filed the notice of appeal. Finally, appellee demonstrated that she would be prejudiced because she reasonably relied on the expiration of time to appeal to her detriment. The circuit court properly denied appellants' motion for extension. (Jackson, S.; 08ECV-18-253; 2-2-22; Abramson, R.)

City of Fort Smith v. Osborne, 2022 Ark. App. 46 [**eminent domain; municipality waterworks**] The trial court entered an order of dismissal in favor of the appellees. On appeal, appellant argued that the trial court erred in finding that they were required to proceed pursuant to the eminent-domain authority under Ark. Code Ann. § 18-15-601 rather than the statutory scheme codified at Ark. Code Ann. § 18-15-301. Arkansas Code Annotated § 18-15-301 provides that the Arkansas General Assembly delegates the power of eminent domain to municipal corporations for a

waterworks system and provides that eminent-domain power for a waterworks system may be exercised as to property located in a different county from the municipal corporation. Municipalities have the right to exercise eminent domain in the operation of waterworks and associated operations granted in subchapters 3, 4, and 6 of title 18, chapter 15 of the Arkansas Code. Here, the trial court erred by finding that Subchapter 6 provided the exclusive authorization for waterworks eminent domain actions by municipalities. (Medlock, M.; 17CV-19-530; 2-2-22; Gladwin, R.)

Arkansas State Police v. Racop, 2022 Ark. 17 [**Freedom of Information Act; undercover police**] The trial court entered an order requiring appellant, Arkansas State Police, to release requested records. On appeal, appellants argued that the trial court erred when it found the documents requested by appellee were not exempt from the Arkansas Freedom of Information Act (FOIA). For a record to be subject to FOIA and available to the public, it must be possessed by an entity covered by the Act, fall within the Act's definition of a public record, and not be exempted by the Act or other statutes. Arkansas Code Annotated § 25-19-105(b)(10)(A) provides that the identities of law enforcement officers currently working undercover with their agencies and identified in the Arkansas Minimum Standards Office as undercover officers shall not be made open to the public. Exemptions from FOIA are to be narrowly construed in favor of openness. Here, the appellee requested photographs for all uniformed, plain-clothed, non-undercover Arkansas State Troopers hired since June 2019. Information is available from public sources that provide names and other identifying information of State employees – including state troopers – that could be compared with a list of non-undercover troopers revealing the identities of the undercover officers. Knowing who is not undercover would reveal that the officers whose photographs were not released are undercover. Therefore, the trial court erred in ordering the disclosure. (Gray, A.; 60CV-20-1674; 2-3-22; Wynne, R.)

Quinn v. The Travelers Indemnity Company, 2022 Ark. App. 67 [**insurance policy; independent contractor**] The circuit court granted summary judgment in favor of appellees, an insurance company. The circuit court found that the commercial insurance policy issued by appellee providing primary coverage to its named insured, a trucking company, did not provide coverage for an independent contractor or its truck driver. On appeal, appellant argued that the independent contractor was covered under the insurance policy because it is liable for the conduct of its truck driver, who was an insured. Insurance terms must be expressed in clear and unambiguous language. If the language of the policy is unambiguous, the courts will give effect to the plain language of the policy without resorting to the rules of construction. If the language is ambiguous, the courts will construe the policy liberally in favor of the insured and strictly against the insurer. Language is ambiguous if there is doubt or uncertainty as to its meaning and it is fairly susceptible to more than one reasonable interpretation. Whether the language of the policy is ambiguous is a question of law to be resolved by the court. Here, the insurance policy provided that an insured included “[a]nyone else while using with your permission a covered ‘auto’ you . . . hire.” The issue was whether the truck involved in the accident was “hired” by the trucking company who bought

the insurance policy. The independent contractor here owned and selected all the trucks and other equipment used to perform the contracted work; the independent contractor hired its own drivers and provided its own insurance, and the independent contractor controlled all operations necessary to complete the work. The trucking company that held the insurance policy had no control or right to control any of the operations. The appellate court held that the logging truck involved in the accident was not a “hired auto” under the insurance policy. Therefore, the circuit court did not err in granting summary judgment based on the unambiguous terms in the insurance contract as applied to the facts. (Ryan, J.; 49CV-19-37; 2-9-22; Hixson, K.)

Mahoney v. Derrick, 2022 Ark. 27 [**judicial immunity**] The circuit court granted summary judgment in favor of the appellee, a district judge. On appeal, appellants argued that the circuit court erred in finding that the Judge was entitled to absolute judicial immunity. Judicial immunity is an established defense that judges may raise when they are defendants in lawsuits concerning their judicial duties. Judicial immunity is an immunity from suit, not just from ultimate assessment of damages. This immunity applies to lawsuits to recover for alleged violations of federal civil rights. A judge may not claim judicial immunity: (1) when they act outside their judicial capacity and (2) when their actions, though judicial in nature, are taken in complete absence of jurisdiction. An allegation of bad faith or malice alone, however, is insufficient to defeat judicial immunity. Whether a judge acts in his judicial capacity depends on whether the challenged action is a function normally performed by a judge, and to the expectations of the parties. If a particular act relates to a general function a judge typically performs, then the act is in his judicial capacity. Judicial immunity does not bar purely prospective, declaratory relief. A declaratory judgment is meant to define the rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act. If a plaintiff seeks a declaration of a past liability against a judge, declaratory relief is unavailable. Here, appellants sued appellee, in his official capacity, challenging the constitutionality and legality of various practices concerning bond, the appointment of counsel, and the imposition and payment of fines. All of the challenged actions were done in the Judge’s judicial capacity. Appellants’ claim for declaratory relief asks for a declaration of the constitutionality of the Judge’s past actions. It is not enough that appellants claim that the Judge’s actions will “continue to cause irreparable harm” or continue to cause economic loss. Appellants’ allegations concerned the constitutionality of past convictions, past fines, and past sentences. Retrospective declaratory relief is insufficient to overcome judicial immunity. Therefore, the circuit court properly granted the Judge’s motion for summary judgment. (Laser, D.; 73CV-18-874; 2-10-22; Womack, S.)

Bayer Cropscience v. Hooks, 2022 Ark. 29 [**motion to intervene**] The circuit court denied appellant’s motion to intervene in a lawsuit challenging a rule adopted by the Arkansas State Plant Board (Plant Board). On appeal, appellant argued that the circuit court erred in denying its motion to intervene as a matter of right because it satisfied all the requirements stated in Rule 24 of the Arkansas Rules of Civil Procedure. Appellant asserted that the motion was timely; it had protectable interests in the enforcement of the agency rule at issue and in defending the federal

registration and label for its product; resolution of appellees' claims could impair appellant's interests, and none of the parties adequately represented appellant's interests. Timeliness may be judged by: (1) how far the proceedings progressed; (2) whether there been any prejudice to other parties caused by the delay; and (3) the reason for the delay. Here, appellant filed their motion to intervene just twenty days after the appellees filed their complaint, showing no appreciable delay, and no prejudice was indicated because the circuit court entered a temporary restraining order before appellant's filing. Appellant also has a sufficient interest in the suit because it may affect the amount of their product to be sold and impose reputational injury. Finally, none of the parties adequately represented appellant's interests because appellees complaint directly challenged their position, and the Plant Board did not share the same interest as appellant, who is a business. The trial court erred in denying appellant's motion to intervene. (Welch, M.; 2-10-22; 60CV-21-2843; Webb, B.)

Thurston v. The League of Women Voters of Arkansas, 2022 Ark. 32 [**sovereign immunity**] The circuit court denied Appellant's motion to dismiss the suit against him in his official capacity as the Secretary of State based on sovereign immunity. On appeal, appellant argued that he is entitled to sovereign immunity. In *Martin v. Haas*, 2018 Ark. 283, 556 S.W.3d 509, a voter filed a declaratory action seeking a declaration that an act relating to voter registration be declared unconstitutional and enjoin enforcement of the act. The supreme court held that because the voter asserted that the act violated qualified voters' constitutional right to vote and sought declaratory and injunctive relief, not money damages, the action was not subject to the sovereign immunity defense. Here, appellees filed their complaint and amended complaint for injunctive and declaratory relief alleging that four acts passed by the Arkansas General Assembly violated various provisions of the Arkansas Constitution. Appellees alleged that the specific acts violated the constitution and the relief sought by the appellees was for declaratory and injunctive relief, which was the same relief sought by *Haas*. Accordingly, appellant was not entitled to sovereign immunity. The circuit court correctly denied the appellant's motion to dismiss based on sovereign immunity. (Griffen, W.; 60CV-21-3138; 2-17-22; Baker, K.)

Robinson Nursing and Rehabilitation Center LLC v. Briley, 2022 Ark. App. 85 [**motion to compel arbitration**] The circuit court denied appellant's motion to compel arbitration on claims filed by appellee, as special administrator of the estate of the deceased, and on behalf of the wrongful death beneficiaries. On appeal, appellant argued that the circuit court erroneously denied its motion because res judicata bars reconsideration of the arbitration agreement's validity and enforceability. Issue preclusion is limited to those matters previously at issue that were directly and necessarily adjudicated. The matter must be actually litigated for estoppel to apply. For an issue to be actually litigated, the parties must have had a full and fair opportunity to make adversary presentations on the question, and the court must decide it. "Actually litigated" in the context of collateral estoppel means that the issue was raised, that the defendant had a full and fair opportunity to be heard, and that a decision was rendered on the issue. Here, the validity of the arbitration agreement had been an issue in a previous case on appeal. The appellee had a full and fair opportunity to raise any

objections but failed to do so. The validity and enforceability of the arbitration agreement had been determined by the Supreme Court, and the determination was essential to that decision. The claim brought by appellee for negligence was within the scope of the arbitration agreement. Therefore, appellee was collaterally estopped from arguing that the agreement was invalid in this case. **[right to arbitration waiver]** The three factors to consider when determining whether a party has waived its right to arbitration are (1) the length of the litigation; (2) the party availing itself of the opportunity to litigate; and (3) the prejudice to the opposing party. A party substantially invokes the litigation machinery when it files a lawsuit on arbitrable claims, engages in extensive discovery, or fails to move to compel arbitration and stay litigation in a timely manner. Here, appellant initially asserted its right to compel arbitration in its answer to appellee's complaint and asserted the right again in its response to appellee's motion to compel discovery. The circuit court erred in denying appellant's motion to compel arbitration based upon its waiver of its right. (Fox, T.; 60CV-17-6616; 2-23-22; Gladwin, R.)

KBX, Inc. v. Zero Grade Farms, 2022 Ark. 42 **[motion for directed verdict]** The circuit court entered an order reflecting a jury verdict awarding compensatory and punitive damages, jointly and severally against Appellants. On appeal, appellants argued that substantial evidence did not support the jury's verdict on appellees' five claims of conversion, deceit, constructive fraud, conspiracy, and unjust enrichment. A motion for a directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. The same standard holds true for a motion for judgment notwithstanding the verdict. A circuit court may enter a judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict and the moving party is entitled to judgment as a matter of law. **[conversion]** To establish liability for the tort of conversion, a plaintiff must prove the defendant wrongfully committed a distinct act of dominion over the property of another, which is a denial of or is inconsistent with, the owner's rights. If the defendant exercised control over the goods in exclusion or defiance of the owner's rights, it is a conversion, whether it is for the defendant's own use or another's use. Here, the evidence at trial revealed back-to-back transactions—that the appellees contracted with a separate defendant, for the purchase of their rice, and that defendant, in turn, contracted with appellants for the purchase of the same rice. The record is devoid of proof that appellants wrongfully committed a distinct act of dominion over the rice, particularly when the farmers themselves delivered the rice. Moreover, the record reveals that the appellants had not converted the money. The record shows that appellants purchased the rice from the separate defendant but that the defendant failed to pay appellees. **[deceit]** Under Arkansas law, the tort of deceit consists of five elements: (1) a false representation of material fact; (2) knowledge the representation was false or that there was insufficient evidence upon which to make the representation; (3) intention to induce action or inaction by the plaintiff in reliance upon the representation; (4) that the plaintiff justifiably relied on the representation; and (5) that the plaintiff suffered damage as a result of the false representation. Here, appellees failed to prove the first element of deceit that appellants made a false representation of a material fact. In appellees testimony, they stated that they had no contact with appellants before entering into their contract with the separate defendant. **[constructive fraud]** Constructive fraud is a breach of a legal or

equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others. Here, the appellees testified that they did not have a relationship with appellants and did not contract with appellants. Thus, there was not substantial evidence to support the jury's verdict on constructive fraud. **[conspiracy]** A civil conspiracy is an intentional tort that requires a specific intent to accomplish the contemplated wrong. Here, there was not substantial evidence to support the appellee's claims of constructive fraud. Thus, in the absence of an agreement to commit an underlying intentional tort, substantial evidence did not support the jury's verdict on the farmers' conspiracy claim. **[unjust enrichment]** Unjust enrichment is an equitable doctrine. The existence of a contractual relationship between the parties that addresses the subject in dispute generally precludes recovery on a theory of unjust enrichment. Here, the existence of the appellees' contracts with the separate defendant precluded the claim for unjust enrichment against appellants. Therefore, the circuit court erred in denying appellants' motion for directed verdict. (Huckabee, S.; 43CV-14-410; 2-24-22; Kemp, J.)

St. Joseph's Utility Operating Company, LLC v. Alexander Municipal Property Owners' Multipurpose Improvement District No. 43, 2022 Ark. App. 108 **[summary judgment; improvements]** The trial court entered an order granting summary judgment after both parties filed cross motions for summary judgment claiming ownership of sewer improvements within the subdivision. On appeal, appellant argued that the circuit court erred in granting appellees' motion. Arkansas Code Annotated § 14-94-110 does not contain wording that conveys or grants ownership of improvements to an improvement district on the sole basis that the district contributed a portion of the installation cost of the improvements. The statute provides authority for the districts to purchase improvements and to sell and lease improvements that they own. An easement or right-of-way is an interest in land and must be conveyed by deed in the same manner as land is conveyed. Improvement districts are authorized by statute to make contracts. Here, a dispute arose when appellees sought to connect the sewer improvements within their districts in a subdivision to the Little Rock Water Reclamation Authority. Appellant, a utility company, filed a declaratory-judgment action seeking a declaration that it was the owner of the sewer system serving the subdivision, including the sewer improvements within appellee's improvement districts. Appellees did not offer evidence that they held easements or deeds or assignments for the improvements and did not establish or allege that they held prescriptive easements to the improvements. Therefore, the circuit court erred in finding that as a matter of law the districts owned the sewer improvements. (Phillips, G.; 63CV-18-1217; 3-2-22; Vaught, L.)

Blakely v. Arkansas Children's Hospital, 2022 Ark. App. 116 **[appellate mandate; mootness; Freedom of Information Act]** The circuit court entered an order finding that the issue remanded to the court was moot. On appeal, appellant argued that the circuit court erred by ignoring the mandate of the appellate court, and the circuit court erred by finding the issue was moot. When an appellate court remands a case with specific instructions, those instructions must be followed. A trial court is bound to follow both the letter and spirit of the opinion and mandate. The mandate rule is a subset of the law-of-the-case doctrine, and that doctrine does not apply if there is a material

change in the facts. This case was previously remanded with broad instructions to clarify the order regarding a Freedom of Information Act request. However, while the case was pending on appeal, appellee produced the documents and mooted the point of contention. Thus, the circuit court did not violate the mandate due to a material change in fact because the documents were produced. **[mootness]** A case is moot when any judgment rendered would not have any practical legal effect upon a then existing legal controversy. In other words, a moot case presents no justiciable issue for determination by the court. An exception to the mootness doctrine is when the matter is capable of repetition but likely to evade review. Another exception to the mootness doctrine is when the issue is of substantial public interest and addressing the issue would prevent future litigation. Here, neither exception to the mootness doctrine was applicable. There was no reason to believe the issues raised by appellant will escape review in the future. Additionally, this was not a substantial-public interest issue because appellant wanted “records related to the receipt and expenditure of County tax funds by ACH” for calendar years 2011–2016. Resolution of whether those records should have been produced would not have prevented future litigation. The issue here was fact-specific, and the documents were already released. Therefore, the circuit did not err in finding the issue was moot. (Fox, T.; 60CV-17-2148; 2-9-22; Gladwin, R.)

Johnson v. Wright, 2022 Ark. 57 **[statutory interpretation]** The circuit court denied appellants’ motion for an emergency injunction that sought the removal of three members of the Eureka Springs City Advertising and Promotion Commission (CAPC). On appeal, appellants argued that the circuit court erred when it determined that appellees were qualified to serve as CAPC commissioners despite being sitting council members at the time of their appointments. Appellees were appointed to the CAPC pursuant to Ark. Code Ann. § 26-75-605(a)(2), which provides that two members of the commission shall be members of the governing body of the municipality and selected by the governing body and shall serve at the will of the governing body. Arkansas Code Annotated § 14-42-107(a)(2), provides that a council member shall not be appointed to any municipal office, except in cases provided for in the statute, during the time for which he or she may have been elected. When statutes seemingly conflict, statutory construction should give effect to the specific statute over the general. Likewise, if two legislative acts relating to the same subject matter conflict with each other, the later act would control. Here, the appellants filed an emergency injunction in which they asserted that the appellees had been illegally appointed to the CAPC and requested that the circuit court order their removal. Arkansas Code Annotated § 14-42-107(a)(2) was amended in 2017, making it more recent than the last amendment to Ark. Code Ann. § 26-75-605(a)(2). However, the modifications made in 2017 were not substantive in nature. If the General Assembly had wanted to prohibit sitting city council members from serving on an advertising and promotion commission, it could have repealed Ark. Code Ann. § 26-75-605(a)(2). Because Ark. Code Ann. § 26-75-605(a)(2) is a more recent enactment than any substantive rule found in Ark. Code Ann. 14-42-107(a)(2), the appellees were not disqualified from being appointed to the CAPC. Therefore, the circuit court did not err in denying appellants’ motion for emergency injunctive relief. (Jackson, C.; 08WCV-21-19; 2-10-22; Hudson, C.)

Hutchinson v. Armstrong, 2022 Ark. 59 [**mootness; pandemic unemployment**] The trial court granted a preliminary injunction in favor of appellees. On appeal, appellants argued the preliminary injunction was moot. A case is moot when any judgment rendered would not have any practical legal effect upon a then-existing legal controversy. Changes in the law may render claims moot. There are two exceptions to mootness—matters capable of repetition yet evading review and matters of substantial public interest that are likely to be litigated in the future. Here, the State of Arkansas entered into an agreement with the United States Department of Labor (“DOL”) to administer CARES Act pandemic unemployment programs in 2020. The agreement provided that either party could terminate the agreement on thirty days' written notice. The State gave the DOL notice of its intent to end its participation in these programs in 2021. About a month after the State had terminated its participation in the programs, appellees filed suit against appellants seeking declaratory and injunctive relief. The trial court granted the preliminary injunction, and appellants filed an interlocutory appeal. While the appeal was pending, the General Assembly amended the statute the appellees had based their claim upon. Because of the change in the statute, the grounds on which the trial court entered the preliminary injunction were rendered moot. Additionally, neither exception to mootness applied because appellants' authorization to terminate participation in pandemic-unemployment programs available under the CARES Act would not be a matter capable of repetition, nor is it likely to be litigated in the future because the statute was amended. Therefore, the grounds upon which the circuit court relied in entering the preliminary injunction have become moot. (Wright, H.; 60CV-21-4507; 3-10-22; Wynne, R.)

Wynne v. Liberty Trailer and Death and Permanent Total Disability Trust Fund, 2022 Ark. 65 [**statute of limitations; statutory interpretation**] The Arkansas Workers' Compensation Commission denied appellant's claim for additional medical benefits. On appeal, appellant argued that because he requested the additional benefits within one year of the last payment of compensation, his claim was timely pursuant to Ark. Code Ann. § 11-9-702(b)(1). Workers' compensation statutes are strictly construed. Strict construction is narrow construction and requires that nothing be taken as intended that is not clearly expressed. The doctrine of strict construction requires the court to use the plain meaning of the language employed. Arkansas Code Annotated § 11-9-702(b)(1) provides that if “any compensation” is paid, then a claim for additional compensation must be made “within one (1) year from the date of the last payment of compensation.” The statute of limitations on a request for additional benefits commences when the last payment, whether for disability or medical benefits, is made. Here, the last payment of benefits to appellant was a check for disability issued in January 2019. Therefore, appellant's February 2019 claim for additional medical benefits was timely. The court of appeals extended tolling caselaw to a non-tolling case. In *Kirk v. Cent. States Mfg. Inc.*, 2018 Ark. App. 78, to the extent that it held that the statute of limitations on a claim for additional benefits commenced upon the last payment of the specific type of benefit claimant sought, rather than from the date of the last payment of compensation, the supreme court overruled the case. The present case concerned the commencement of the statute of limitations—not tolling. (NO. G508657; 3-31-22; Kemp, J.)

CRIMINAL

Cooper v. State, 2022 Ark. App. 25 [**Covid-19 pandemic; voir dire; face masks**] Appellant was convicted by a jury of simultaneous possession of drugs and firearms and possession of firearms by certain persons. On appeal, appellant argued that the circuit court abused its discretion when it did not require persons serving on the venire to remove their face masks during voir dire. Specifically, appellant argued that the partially covered faces of the veniremen during voir dire prevented the defendant from observing the veniremen's demeanor and was inadequate voir dire. In a per curiam issued June 11, 2021, the Supreme Court stated that there should be adherence to the Arkansas Department of Health guidelines. Those guidelines included that "everyone in the room us[e] face masks or coverings." Because the Supreme Court mandated that "everyone" in the courtroom use face masks and did not delineate any exceptions, the circuit court did not abuse its discretion in following the mandate. (Green, R.; 04CR-19-2933; 1-19-22; Hixson, K.)

Muntaqim v. Kelly, 2022 Ark. 5 [**judicial review of a disciplinary action**] Appellant filed a petition to proceed in forma pauperis in circuit court alleging that he was entitled to judicial review of a disciplinary action against him, arguing that the Arkansas Department of Correction (ADC) violated his due-process rights. The circuit court denied appellant's petition after finding that he failed to state a colorable cause of action. A colorable cause of action is a legitimate claim that may be reasonably asserted given the facts presented and the current law or a reasonable and logical extension or modification of it. Judicial review of an administrative decision is available to an inmate if the petitioner raises a constitutional question sufficient to assert a liberty interest and alleges a fact-based constitutional violation. After being served with the agency's final decision, the petitioner must file an appeal within thirty days. When a petition is filed outside the thirty-day window, it is untimely, and the petitioner cannot seek relief. Here, the final agency decision was issued on August 17. Appellant testified that he received notice by August 24. Thus, his petition for judicial review was due on September 24. Appellant did not file his petition until October 11, making the filing untimely. Therefore, appellant had no colorable cause of action because the Administrative Procedure Act precluded relief. (Wright, H.; 60CV-18-7123; 60CV-18-7124; 1-20-22; Wood, R.)

State v. Scott, 2022 Ark. 8 [**Sex Offender Registration Act**] Appellee was acquitted by reason of mental disease or defect of one count of theft of property and two counts each of kidnapping and first-degree false imprisonment of minors. On appeal, appellant argued that the trial court erred by failing to require appellee to register as a sex offender pursuant to the Sex Offender Registration Act of 1997 (Act). The Act's registration requirements are essentially regulatory and therefore non-punitive in nature. Sex-offender registration is not a form of punishment and, therefore, not a criminal sentence. Pursuant to Ark. Code Ann. § 12-12-905(a)(3), a person acquitted on the grounds of mental disease or defect of a sex offense is required to register under the Act. The Act defines "sex offense" to include kidnapping and false imprisonment when the victim is a minor and the offender is not the victim's parent. Here, the appellee entered and drove away in a vehicle

occupied by two minors. It was undisputed that appellee was not the parent of the minor victims. Thus, appellee's acquittal by reason of mental disease or defect of two counts each of kidnapping and first-degree false imprisonment of minors who are not his children required him to register as a sex offender. The trial court erred by not requiring appellee to register as a sex offender in its judgment of acquittal. (Compton, C.; 60CR-20-3017; 1-20-22; Womack, S.)

Beard v. State, 2022 Ark. 7 [**motion for continuance**] Appellant was convicted by a jury of rape and second-degree sexual assault. On appeal, appellant argued that the circuit court erred by denying his motion for continuance. Under Rule 27.3 of the Arkansas Rule of Criminal Procedure, a court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, considering not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case. A last-minute change in counsel may occasion, or require, a continuance in order to give the attorney time to prepare. A factor in deciding whether to grant a request to substitute counsel is whether the change in counsel will necessitate a continuance. Once the trial court has permitted a change in counsel, the new counsel must be accorded sufficient time to prepare for trial. Here, appellant's counsel received the State's file ten days before trial, and counsel was familiar with the charges from his prior representation in his first appeal. The State did not call any witnesses who had not testified at the first trial. Appellant's counsel had the previous defense counsel's file and the State's file before the hearing on the motion for continuance. Appellant also did not specify which witnesses he would call or defenses he would present if his counsel had more time to prepare. Additionally, the appellant was unable to show prejudice, and did not specify what his counsel would have done differently if granted more time. Therefore, the circuit court did not err in denying appellant's motion for continuance. (Williams, C.; 30CR-17-190; 10-20-22; Wynne, R.)

Rogers v. Arkansas Department of Correction, 2022 Ark. 19 [**writ of mandamus**] The trial court entered an order granting appellant's mandamus petition wherein he alleged that the Arkansas Department of Correction (ADC) had miscalculated his parole eligibility in connection with his sentence of 180 months imprisonment for the use of a firearm in the commission of a felony offense. The trial court concluded that those sentenced to the fifteen-year firearm enhancement before the statute was amended in 2007 were not entitled to parole and were therefore required to serve 100 percent of the enhanced sentence. Parole eligibility is determined by the law in effect when the offense was committed. The sentencing court has discretion pursuant Ark. Code Ann. § 16-90-120 to impose a sentence enhancement if a felon uses a firearm. Statutory retroactivity is a matter of legislative intent. The court will strictly construe against retroactivity. There is a presumption that the legislature intends statutes or amendments to operate prospectively. Here, appellant committed an aggravated robbery in 2005. Arkansas Code Annotated § 16-90-120 was amended in 2007 to address parole eligibility for sentence enhancement for offenses committed on or after July 2, 2007. The amendment did not allow for parole eligibility until the person sentenced served 70 percent of the term of imprisonment. Act 1047 of 2007, which amended Ark. Code Ann. § 16-90-120 stated that the act was to "restrict eligibility for parole of persons sentenced

to enhanced penalties under certain circumstances.” The Supreme Court held that this language demonstrated that before 2007, persons sentenced to enhanced penalties were eligible for parole as there would be no need to “restrict” parole eligibility for persons sentenced to enhanced penalties. Therefore, the trial court erred in concluding that the legislature intended to deny parole to persons such as appellant before the amendment. (Dennis, J.; 35CV-19-458; 2-3-22; Webb, B.)

Howe v. State, 2022 Ark. App. 56 [**probation revocation**] The circuit court revoked appellant’s probation and sentenced him to six years’ imprisonment. On appeal, appellant argued that the State failed to prove that he had violated the conditions of his probation. A circuit court may revoke a defendant’s probation at any time prior to the expiration of the period of probation if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of the probation. The circuit court in the present case cited two grounds for the appellant’s revocation, first, the appellant had failed to make “consistent payments on his payment ledger,” and failed to attend court-ordered domestic violence classes. [**court ordered classes**] Appellant’s plea agreement and the sentencing order required him to complete domestic violence classes, however, there was no requirement that he complete the program by a specific deadline. While appellant did not complete his first enrollment in domestic-violence treatment due to medical issues, he testified that his former probation officer had agreed that he should drop the class and reenroll later. The appellant had reenrolled in treatment and classes were to start soon. Because there was no deadline for completing the treatment, appellant had until the end of his probation to complete it. [**failure to pay fines and fees**] If the alleged violation involves the failure to pay court-ordered fines and costs, the court may revoke the suspended sentence if it finds the defendant has failed to make a good-faith effort to pay the obligation. Here, appellant was current on his fines and fees. While the appellant made a lump sum payment, as opposed to monthly payments, the evidence did not support a finding that appellant failed to make a good faith effort to make his payments. Therefore, the circuit court erred by revoking appellant’s probation. (Karren, B.; 04CR-17-1855; 2-9-22; Harrison, B.)

Britt v. State, 2022 Ark. App. 58 [**postconviction relief; ineffective assistance of counsel; amended petition; continuance**] The trial court denied appellant’s petition for postconviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure. On appeal, appellant argued that the trial court erred in denying his claims that he received ineffective assistance from trial counsel, denying his request for additional time to file an amended petition, denying his motion for a continuance of the oral argument along with another motion to file an amended petition, and denying his request for an evidentiary hearing. [**motion to amend**] If an appeal is taken of a judgment of conviction, a petition for postconviction relief must be filed within sixty days of the date the mandate is issued by the appellate court. Before the court acts on a Rule 37 petition, the petition may be amended with leave of the court. Here, appellant filed a timely petition for postconviction relief. After being granted a 120-day extension within which to amend his petition, appellant filed another motion to file an amended petition, which was denied. The trial court here entered an order denying the motion expressly finding that “because the time limitations

set forth by Rule 37 are jurisdictional in nature, this Court cannot extend Petitioner’s time to amend his petition.” Pursuant to Arkansas Rule of Criminal Procedure 37.2(e), the trial court had discretion to allow an amendment before the order denying relief was entered. Although the trial court later noted that the matter was discretionary, its revised reasoning for the ruling was not reduced to writing, and the written order was not subsequently modified. Therefore, the trial court erred in not exercising its discretion. **[evidentiary hearing]** Pursuant to Arkansas Rule of Criminal Procedure 37.3, an evidentiary hearing should be held in a postconviction proceeding unless the files and record of the case conclusively show that the prisoner is entitled to no relief. Here, the trial court effectively placed the burden of showing entitlement to relief on appellant because the trial court stated that appellant had not conclusively shown that he was entitled to relief. The trial court erred by applying the wrong standard. The trial court must determine whether the petition and the files and records of the case conclusively show that appellant is entitled to no relief pursuant to Arkansas Rule of Criminal Procedure 37.3(a) before denying a hearing to the petitioner. (Karren, B.; 04CR-16-2178; 2-9-22; Virden, B.)

Black v. State, 2022 Ark. App. 66 **[sentencing order; meritorious good-time credit]** The circuit court entered a sentencing order revoking appellant’s probation, convicting him of third-degree domestic battery, and sentencing him to serve six months in jail “to be served straight” with an additional six months suspended. On appeal, appellant argued that the circuit court erred in ordering him to serve straight jail time without the opportunity to earn meritorious good-time credit. The statutory authority to administer meritorious good time to inmates committed to a county jail lies with the county sheriff and not the circuit court. Here, the circuit court erred in ordering appellant to serve six months in jail “straight”—without the opportunity to earn meritorious good-time credit. (Phillips, G.; 63CR-19-302; 2-9-22; Vaught, L.)

Evans v. State, 2022 Ark. 31 **[postconviction relief; writ of mandamus]** Appellant was convicted by a jury of capital murder and sentenced to life imprisonment without parole. Appellant filed a pro se petition for writ of mandamus for extraordinary writ for expedited consideration and/or for writ to issue relief. The purpose of a writ of mandamus is to enforce an established right or to enforce the performance of a duty. A writ of mandamus will not lie to control or review matters of discretion. Issuance of the writ of mandamus is appropriate only when the duty to be compelled is ministerial and not discretionary. Mandamus will compel a court to act but will not be used to tell a court how to decide a judicial question. Here, the trial court had not acted on a petition filed by appellant in March 2020. A court does have a ministerial duty to timely act on pleadings filed. Because the matter had not been disposed of below, appellant’s request for a writ directing the court to dispose of the matter was granted by the Supreme Court. (60CR-08-5049; 2-17-22; Baker, K.)

Lewondowski v. State, 2022 Ark. 46 **[jury note; conflict of interest]** Appellant was convicted by a jury on three counts of capital murder and felony-firearm enhancement. On appeal, appellant

argued that the lack of a verbatim record regarding the court's handling of a jury note, and the replaying of his interview required reversal. He also asserted that his defense counsel had a conflict of interest due to prior representation of a State's witness. **[jury note]** The record included a note from the jury asking to watch the interview of the appellant after he was initially taken into custody. Although included in the record, initially there was no indication how the circuit court had responded to the note, if at all. There were two hearings held to settle the record, and a supplemental record was filed. Additionally, Ark. Sup. Ct. Admin. Order No. 4, requires a verbatim record of all proceedings in criminal cases, including discussions concerning jury notes and audio contained in videos or other recordings that are presented to the court or the jury, whether in open court or in camera. Here, while the circuit court erred by not having a verbatim record of the discussion between the court and counsel about how to respond to the jury note, the State rebutted the presumption of prejudice. According to the testimony of the court reporter, defense counsel, and the deputy prosecutors, the parties agreed to the procedure for replaying the interview. Replaying evidence that had previously been admitted and made an exhibit during the trial is not an error because there is nothing to indicate that appellant suffered any prejudice when the interview was replayed. **[conflict of interest]** Appellant argued that his attorney, had a conflict of interest because he had previously represented a State witness. At a pretrial hearing, the attorney informed the circuit court that he had represented the witness about ten years earlier and introduced a notarized statement in which the witness waived any conflict of interest stemming from the attorney's representation of appellant. The statement also noted that the attorney could not use or reveal information known to him about the witness unless it was already in the public domain. Here, there was no significant risk that appellant's representation would be materially limited by his attorney's responsibilities to the witness. The attorney represented the witness ten years prior in an entirely unrelated matter. Additionally, appellant stated on the record that he wanted the attorney to remain as his counsel. Therefore, there was not a conflict of interest. (Hearnsberger, M.; 26CR-18-85; 2-24-22; Wynne, R.)

Murphy v. State, 2022 Ark. App. 109 **[post-conviction relief]** The circuit court entered an order dismissing the appellant's petition for postconviction relief filed pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure because the petition exceeded the ten-page limit. On appeal, appellant argued the circuit court abused its discretion in not considering the merits of his petition. Under Arkansas Rule of Criminal Procedure 37.1(b), petitions for postconviction relief shall not exceed ten pages in length. Arkansas Rule of Criminal Procedure 37.1(b) is discretionary and provides only that the court may dismiss a petition that fails to comply. A petitioner may demonstrate that they cannot present their claims to the court in only ten pages and request to file a petition longer than ten pages with the permission of the circuit court. If the petitioner chooses not to receive permission to file an overlength petition, the petitioner must bear the consequences of his decision to submit an overlength petition. Here, the appellant filed a twenty-page petition. Therefore, the circuit court did not err in dismissing the petition when it failed to comply with Rule 37 of the Arkansas Rules of Criminal Procedure. (Thyer, C.; 2-2-22; 47BCR-19-67; Hixson, K.)

PROBATE

In the Matter of the Guardianship of KM, 2022 Ark. App. 112 [**guardianship**] The circuit court entered an order appointing appellees as guardians of appellants' granddaughter. On appeal, the appellants argued the circuit court erred in not giving them statutory preference as the child's relatives and by not considering the wishes of the child's parents. Subject to statutory restrictions, the selection of a guardian is a matter largely committed to the sound discretion of the appointing court. Arkansas Code Annotated § 28-65-204(b) 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 certain factors, including the relationship by blood or marriage to the person for whom guardianship is sought. When the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child. 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 child. Here, the circuit court awarded guardianship to a coworker of the child's mother and her husband, who had been taking care of the child for several months. The circuit court stated that it gave the appellants' relationship with the child "serious consideration" in making its decision and acknowledged the consent documents executed by the child's parents in favor of the appellants. The circuit court did not err in appointing the appellees as the child's guardians. (Huff, M.; 61PR-20-48; 3-9-22; Harrison, B.)

DOMESTIC RELATIONS

Beverly v. Murphy, 2022 Ark. App. 4 [**material change in circumstances**] The circuit court entered an order to change primary custody of appellant's child to appellee. On appeal, appellant argued that there was insufficient evidence to support the circuit court's finding that a material change of circumstances occurred. To change custody, the circuit court must first determine that a material change in circumstances has occurred since the last order of custody. If that threshold requirement is met, it must then determine who should have custody with the sole consideration being the best interest of the children. 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 joint custody. When the parties are unable to cooperate in reaching shared decisions in matters affecting their children, then a material change in circumstances affecting the children's best interest has occurred. Here, the appellant testified that she could not coparent or communicate with the appellee, that she lied about moving to a different state, and that she did nothing to promote the joint-custody arrangement. Contrastingly, the trial court found that, although appellee failed to tell appellant about a dermatological appointment he made the child, he tried to make joint custody work. The circuit court did not err in finding that a material change in circumstances occurred. (Reif, M.; 60DR-16-1543; 1-12-22; Virden, B.)

Wilson v. Wilcox, 2022 Ark. App. 18 [**distribution of marital property; effect of previous marriage; retirement account**] On appeal, the appellant argued the circuit court erred by finding

that the parties' 2002 divorce decree converted by operation of law a retirement account—held in the sole name of appellee but earned during the first marriage—as his sole property so as to render it nonmarital property in the second marriage. A circuit court has broad powers to distribute property in order to achieve an equitable distribution. The overriding purpose of the property-division statute is to enable the court to make a division of property that is fair and equitable under the circumstances. In the present case, the parties were first married in 1978 and were granted an absolute divorce in 2002. Not all property issues were disposed of in the 2002 decree but were reserved for a 2003 hearing. The hearing never occurred because the parties reconciled and remarried in 2004. In 2015 the appellant filed for divorce again and a final divorce hearing was held in 2017. For the purposes of determining the commencement of the marital estate, the circuit court found the date of the parties' current marriage (2004) was controlling. The fact that the parties reconciled after the divorce decree was entered and remarried two years later does not diminish the fact that appellant was granted an absolute divorce from appellee. During the two years they were divorced, neither party attempted to have their legal rights to the undivided property established, nor did they take any steps whatsoever to comply with the 2002 order. Taking into consideration these factors, the circuit court did not err in holding the parties' second marriage date as controlling for purposes of determining the marital estate. Nothing in the record indicated that appellee intended to bring the retirement account back into the marital estate. The appellee kept the retirement account at issue separate and did not contribute into the account after the remarriage unlike other joint retirement accounts held with the appellant. The circuit court distributed the property fairly and equitably. (Foster, H.; 23DR-15-547; 1-19-22; Abramson, R.)

Shipley v. Gardner, 2022 Ark. App. 22 **[back child support; jurisdiction]** The circuit court dismissed without prejudice the appellant's complaint for back child support pursuant to Rule 12(b)(8) of the Arkansas Rules of Civil Procedure. On appeal, appellant argued that the circuit court erred because her action in a probate case in Mississippi County and her action for back child support in Washington County were not identical actions between identical parties. An establishment of paternity is required before child support can be awarded. Venue for a paternity action shall be in the county where the plaintiff resides or, in cases involving a juvenile, in the county where the juvenile resides. Arkansas Code Annotated § 9-10-102(f) provides that the court where the final decree of paternity is rendered shall retain jurisdiction of all matters following the decree but does allow for transfer in certain situations. Here, the appellant sought a determination of paternity in Mississippi County and filed a petition for back child support in Washington County. Although an action to establish paternity is not identical to an action for child support, they are intertwined because child support cannot be awarded unless paternity is established. Appellant chose to establish paternity in Mississippi County, and if paternity is established in the that case, the Mississippi County court would retain jurisdiction of all matters following unless it was transferred. The circuit court correctly dismissed the child support case filed in Washington County. (Bryan, B.; 72DR-20-220; 1-19-22; Gruber, R.)

Perrin-Reed v. Reed, 2022 Ark. App. 24 [**Munchausen syndrome by proxy; material change in circumstances**] The circuit court entered an order granting primary custody of the child to the father and awarded the appellant with expanded visitation. On appeal, the appellant argued that the trial court erred in abandoning the “material change in circumstances” analysis required in change-of-custody proceedings, and that the trial court impermissibly placed her mental condition into controversy without good cause shown, erroneously ordered her to produce her therapist’s records, and improperly required her to submit to a psychological evaluation. Appellee cross-appealed, arguing that the trial court erred in failing to award child support. [**psychological evaluation**] Appellant argued that the trial court erred in granting appellee’s motion for a psychological evaluation, asserting that the trial court’s order was not authorized by Rule 35 of the Arkansas Rules of Civil Procedure because her mental condition was not in controversy and good cause was not shown. Here, the circuit court heard evidence that the child had numerous visits to the pediatrician while in appellant’s custody and that multiple unsubstantiated allegations of physical and sexual abuse of the child by appellee had been lodged. In addition, the child made comments to his therapist suggesting that appellant had coached him in making the allegations. The appellant’s mental condition was at issue here. Additionally, the appellant failed to timely object to the trial court’s requirement that she submit to a psychological evaluation. [**change in child custody**] In order to change child custody, the trial court must first determine that a material change of circumstances has occurred since the last order of custody; if that threshold requirement is met, the court must then determine who should have custody with the sole consideration being the best interest of the child. The circuit court found that appellant’s continued pattern of alienating behavior since the divorce and the negative effect of that alienating behavior on the child created the need for a change in custody. While the court did not make a specific and express finding of a material change in circumstances, there was an absence of a showing to the contrary. [**child support**] Arkansas Code Annotated § 9-12-312 states that a trial court “shall” enter an order on the care of the children, including child support, when a decree is entered. Here, the appellee specifically pled for an award of child support upon a change in custody, and although the issue of child support was raised, the trial court made no finding. The determination of the amount of child support, if any, was remanded to the trial court. (Alexander, T.; 16JDR-12-1052; 1-19-22; Whiteaker, P.)

Yepez v. Yepez, 2022 Ark. App. 31 [**alimony provision; contract language**] This appeal concerned the construction of an alimony provision in a divorce property settlement agreement. On appeal, appellant argued the circuit court erred in their order requiring him to pay monthly alimony payments to his ex-wife. A separate and independent property-settlement agreement that has been incorporated into a divorce decree leaves a circuit court without authority to modify the agreement; rather, the issue of whether alimony should be terminated requires an analysis of the contract language. Questions relating to the construction, operation, and effect of independent property-settlement agreements are governed, in general, by the rules and provisions applicable to other contracts generally. If a contract is ambiguous, meaning more than one reasonable interpretation can be made from the terms of the contract, then other rules of construction apply. Ambiguities in a written contract are construed strictly against the drafter. Here, the parties had

entered into a “Property Settlement and Separation Agreement” to divide their marital property and resolve all the issues related to their divorce. The agreement included the following provision on alimony: “Husband shall pay Wife ... in support alimony ... until remarriage or death of Wife or Husband.” The appellant remarried and ceased paying alimony. Because the wording of the alimony provision was susceptible to two reasonable interpretations the provision was ambiguous. The record showed the appellant’s attorney drafted the agreement and that appellee was not represented by counsel. Therefore, the agreement could be strictly construed against the appellant. The alimony provision did not cease at appellant’s remarriage. (Blatt, S.; 66FDR-10-517; 1-26-22; Klappenbach, N.)

Self v. Dittmer, 2022 Ark. App. 48 [**modification in child custody**] The circuit modified the parties’ custody arrangement from joint custody to primary custody to appellee, the children’s mother. On appeal, appellant argued that the circuit court erred in finding it was in the best interest of the children to grant primary custody to appellee. The best interest of the children is the polestar in every child-custody case; all other considerations are secondary. A child’s preference is not binding and is simply a factor to be considered by the circuit court. Here, the circuit court stated in its written order that it had taken into consideration the testimony of the children and their expressed wishes to live at their father’s house, as well as every word of testimony and every detail of each document entered into evidence. The circuit court had the benefit of witnessing this family, seeing the parties’ inability to communicate and foster a positive environment in spite of its orders, and evaluated its effect on the children. Child-custody determinations are fact specific, and each case ultimately must rest on its own facts. The circuit court did not err in its determination to modify custody. (Taylor, J.; 72DR-19-1398; 2-2-22; Gruber, R.)

Haskins v. Howe, 2022 Ark. App. 49 [**spousal support; marital property**] The circuit court determined that funds the appellee withdrew from the parties’ joint checking account were marital funds and that the funds were received in lieu of temporary spousal support. On appeal, the appellant argued that the circuit court erred in allowing appellee to keep the funds because it was part of an inheritance appellant received from the sale of his late father’s house and therefore was appellant’s separate property. Arkansas law creates a presumption that property placed in both spouses’ names is held in tenancy by the entirety and is marital property. Here, the appellant placed the funds from his inheritance check that bore both parties’ names into their joint checking account, and both appellant and appellee made deposits and withdraws to that account. The circuit court specifically found that appellant had failed to present clear and convincing evidence to rebut the presumption that the funds were marital. The appellate court could not find that the circuit court’s finding was clearly erroneous. (Landers, M.; 57DR-18-93; 2-2-22; Barrett, S.)

Maxwell v. Maxwell, 2022 Ark. App. 51 [**appellate court mandate; child support**] On appeal, appellant argued that the trial court’s failure to include in its order a judgment against appellee for appellate costs constitutes reversible error. A circuit court has no authority to negate or modify an

award of appellate costs or fees. Here, while the appellate court's mandate awarded costs to appellant, it required no further action by the circuit court. So, while the circuit court did not include the appellate costs in its order on remand, appellee remains obligated, pursuant to the appellate court's mandate, to pay appellant the appellate costs assessed. **[considering additional evidence]** Second, appellant argued that the trial court erred by awarding appellee offsets against the amount she owed in back child support based on evidence and facts that were not developed at the original hearing. A trial court cannot vary the appellate court's mandate; examine it for any other purpose than execution; give any other relief; review for error any matter decided on appeal; or meddle with it, other than to settle what has been remanded. However, a few exceptions are: (1) the availability of new evidence; (2) an intervening change of controlling law; (3) the need to correct a clear error or prevent manifest injustice. Here, the trial court correctly denied appellant's request that the court calculate back child support (an issue on remand) using appellee's current income (an issue that had not been previously raised). However, the trial court erred by awarding offsets to appellee, which went beyond the scope of the mandate. While the trial court might have been authorized under one of the established exceptions to the mandate rule to reopen the proceedings and address new evidence that was not available at the time of the original hearing, it never stated it was doing so. Therefore, the trial court erred by not allowing both parties an opportunity to present evidence and be heard before issuing its ruling. (Duncan, X.; 04DR-16-720; 2-2-22; Vaught, L.)

Crews v. Crews, 2022 Ark. App. 68 **[order of protection]** The circuit court denied and dismissed appellant's petition for an order of protection filed against her husband. On appeal, appellant argued that she met the burden of proof. At a hearing on a petition filed under the Domestic Abuse Act, upon a finding of domestic abuse, the trial court may provide relief to a petitioner. Domestic abuse means physical harm, bodily injury, assault, or the infliction of fear of imminent harm of physical injury, bodily injury, or assault between family or household members. Here, in the written order being appealed, the trial court denied appellant's petition for an order of protection because it found that appellant did not prove domestic violence by a preponderance of the evidence. As the petitioner, appellant had the burden to prove her allegations of domestic abuse by a preponderance of the evidence, that it was more likely than not that domestic abuse occurred. The appellate court was not left with a definite and firm conviction that a mistake has been made. (Ritchey, D.; 16JDR-21-75; 2-9-22; Hixson, K.)

In the Matter of the Guardianship of Z.S., 2022 Ark. App. 70 **[guardianship; best interest]** The circuit court entered an order granting guardianship to appellee, the child's paternal grandmother. On appeal, appellants, the child's maternal grandparents argued that the circuit court erred by finding it was in the child's best interest to grant appellee guardianship. Arkansas Code Annotated § 28-65-210 provides that before appointing a guardian, the court must be satisfied that (1) the person for whom a guardian is prayed is either a minor or otherwise incapacitated; (2) a guardianship is desirable to protect the interests of the incapacitated person; and (3) the person to be appointed guardian is qualified and suitable to act as such. When the incapacitated person is a

minor, the key factor in determining guardianship is the best interest of the child. Here, the appellee presented evidence concerning the appellants' inattention to the child's health and that the appellants denied the child's mother and maternal grandmother contact with the child. The court also recognized the child's bond to the appellants and awarded them visitation every other weekend. The circuit court did not err by finding that it was in the child's best interest to appoint appellee as his guardian. (Spears, J.; 45PR-19-18; 2-16-22; Abramson, R.)

Sutterfield v. Sutterfield, 2022 Ark. App. 73 [**order of protection; contempt**] The trial court dismissed the appellant's petition for contempt against appellee for violation of an order of protection. On appeal, appellant argued that the circuit court erred in failing to find the appellee in contempt for violating the order of protection. Willful disobedience of a valid order of a court is contemptuous behavior. If contempt is civil in nature, the standard of review is by a preponderance of the evidence. The Domestic Abuse Act provides for contempt proceedings that when a petitioner or any law enforcement officer files an affidavit with a circuit court that has issued an order of protection alleging that the respondent or person restrained has violated the order, the court may issue an order requiring that person to appear and show cause why he or she should not be found in contempt. Here, appellant filed a motion for contempt against the appellee, alleging that he had violated the order of protection by entering her home and causing property damage. The order of dismissal acknowledged that, while the evidence established appellee had pleaded guilty to violation of a protective order, it did not establish he was the person who damaged the property. However, the appellee had plead guilty to violation of a protective order and the conviction was an exhibit in the contempt proceedings. Because the evidence proved appellee had violated the protective order, the circuit court erred in refusing to hold the appellee in contempt. (Webb, G.; 05DR-20-55; 2-16-22; Barrett, S.)

Robinson v. Robinson, 2022 Ark. App. 80 [**custody change; parental alienation**] The circuit court changed custody of the children to appellee based on a finding of parental alienation. On appeal, the appellant argued that the circuit court erred in finding a material change in circumstances based on parental alienation. A judicial award of custody will not be modified unless there are changed conditions demonstrating 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, or not known by, the trial court when the original custody order was entered. Generally, courts impose more stringent standards for modifications of custody than they do for initial determinations of custody. The party seeking modification has the burden of showing a material change in circumstances. Whether one parent is alienating a child from the other is an important factor to be considered in change-of-custody cases because a caring relationship with both parents is essential to a healthy upbringing. Here, the circuit court found it concerning that appellee filed for an order of protection and testified at the hearing on the petition that appellee had tried to kidnap the children. The appellant also kept her address from appellee despite numerous requests for it. Additionally, the circuit court did not find appellant's testimony about the circumstances surrounding these events credible. The circuit court did not err in finding a

material change in circumstances occurred that warranted a change in custody. (Duncan, X.; 04DR-16-1346; 2-16-22; Brown, W.)

Morin v. Singel, 2022 Ark. App. 82 [**back child-support; motion in limine**] The parties in this case have been litigating issues of child support, alimony, and contempt for more than twenty years. During the final hearing, the circuit court granted appellee's motion in limine. The adverse ruling against appellant precluded her from asserting her claim for back child support. Once a child-support payment is due, it is vested, and a debt is payable and remains so. Child-support orders generally remain enforceable as final judgments until modified by a subsequent order, though there may be circumstances under which a court (or administrative agency) will decline to permit enforcement. Here, the circuit court had not yet adjudicated appellant's claim that appellee failed to pay the amount owed from 2002 through 2008 before the final hearing, and it did not do so during the final hearing because it mistakenly granted appellee's motion in limine as to that issue. Consequently, the circuit court erred by denying appellant's request for unpaid child support accumulating between 2002 and 2008. (Weaver, S.; 23DR-02-407; 2-23-2022; Harrison, B.)

Evans v. Carpenter, 2022 Ark. App. 83 [**modification of custody**] The circuit court modified child custody and held appellant in contempt. On appeal, appellant challenged both of those rulings. The primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. While it is true that a change in custody cannot be used to punish a non-compliant parent, if the noncompliance with an order also works to bring about a material change in circumstances that affects the welfare of the children, the noncompliance can be a factor supporting the decision to alter custody. Repeated violations of orders that have a negative effect on the children support a change in custody even without a prior order holding a non-compliant parent in contempt. Here, the appellant failed to comply with the parenting plan put in place by the court and failed to provide appellee access to educational and medical information. Moreover, the violations of the orders were not the only evidence of material changes affecting the welfare of the children presented to the circuit court. The children testified about being called liars, waking up to fighting, and an incident when appellant had slammed one of their necks into a bed. This is the sort of discord that contributes to material changes affecting the welfare of children. The circuit court did not err in finding that there had been a material change in custody. [**contempt**] Before one can be in contempt for violating a court's order, the order must be definite in its terms, clear as to what duties it imposes, and expresses in its commands. To establish contempt, there must be willful disobedience of a valid order of a court. Here, the orders in the case were clear that Skype sessions were to be held on fixed days at fixed times, but on nine different occasions, the appellant failed to have the children in a place where the sessions could be conducted. Additionally, the appellant did not provide new medical releases to the appellee and did not pay what he was ordered to pay after the circuit court ordered him to do so. Violations of clear, direct orders are sufficient to support the contempt citation. Therefore, the circuit court did not err in holding the appellant in contempt. (McCormick, D.; 42BDR-11-32; 2-23-22; Abramson, R.)

Parnell v. Arkansas Office of Child Support Enforcement, 2022 Ark. 52 [**child support**] The trial court entered an order setting the appellant’s child-support obligation above the maximum amount indicated by the latest version of Arkansas Supreme Court Administrative Order No. 10 Child Support Chart. On appeal, appellant argued that the circuit court erred in calculating his child-support obligation. The Supreme Court promulgated a revised order concerning child support obligations in 2020. The child-support obligation for incomes above \$30,000.00 per month shall be determined by using the highest amount in the Administrative Order 10 guidelines. The circuit court can also deviate by setting a child-support obligation that exceeds the maximum to meet the needs of the child and the parent’s ability to provide support. However, deviation from the guidelines should be the exception rather than the rule. Here, the parties combined total monthly income was above \$30,000. The trial court upwardly deviated from the Administrative Order No. 10 Guidelines by adding 15% of appellant’s income above \$30,000 to his presumptive child support amount. The trial court listed three factors it relied on: appellee’s own needs, the child’s age of sixteen, and appellant having saved enough money to pay support through the child’s eighteenth birthday. The revised Administrative Order No. 10 does not allow the trial court to simply add 15% of one parent’s income to his or her child-support obligation. Additionally, the factors the trial court listed in support of its decision to upwardly deviated from the child-support chart were not consistent with the language of revised Administrative Order No. 10. Therefore, the trial court erred in its deviation from the child support guidelines. (Wilson, R.; 47BDR-05-312; 3-3-22; Webb, B.)

Olinghouse v. Olinghouse, 2022 Ark. App. 114 [**Administrative Order 10 Child Support Guidelines**] The circuit court entered an order on appellant’s motion for modification of child support. On appeal, the appellant argued that the circuit court erred in not ordering appellee to pay a percentage of his variable income as child support. Arkansas Supreme Court Administrative Order No. 10 contains the child-support guidelines applicable to judicial awards of child support. Pursuant to the child support guidelines, variable income such as commissions, bonuses, overtime pay, military bonuses, and dividends shall be averaged by the court over a reasonable period of time consistent with the circumstances of the case and added to a parent’s fixed salary or wages to determine gross income. When income is received on an irregular, nonrecurring, or one-time basis, the court may, but is not required to, average or prorate the income over a reasonable specified period of time or require the parent to pay as a one-time support amount a percentage of his or her nonrecurring income. The guidelines distinguish variable income that is typically received on a recurring basis—such as “commissions, bonuses, and overtime pay—from income received on a nonrecurring basis—such as an inheritance, gambling or lottery winning, or liquidating a Certificate of Deposit. Here, appellee’s income consisted of a base salary plus variable income, including bonuses, commissions, stock awards, and renewal incentives, which would be akin to commissions. Appellee’s variable income comprised at least half of his compensation, and was not received on an irregular, nonrecurring, or one-time basis. Therefore, the circuit court determined appellee’s monthly gross income by including his variable income and ordering child support paid on that calculated amount. The circuit court did not err. [**deviation from guidelines**]

Additionally, the appellant argued that the circuit court erred in not upwardly deviating based upon expenses for the child, including private school expenses. Here, appellant did not allege, or present any evidence, that she would be unable to pay for the child's expenses absent an upward deviation from the Chart. Accordingly, the circuit court did not abuse its discretion. (Pierce, M.; 60DR-09-1158; 3-9-22; Abramson, R.)

Longoria v. Longoria, 2022 Ark. App. 119 [**award of attorney's fees**] Appellant claimed that Rule 6 of the Arkansas Rules of Civil Procedure mandate that a party has ten days to respond to a motion and that the court here granted appellee's motion for attorney's fees the day it was filed. A circuit court is always free to exercise its inherent authority to grant attorney's fees in domestic-relations cases, and no hearing is required because the judge has presided over the proceedings and is familiar with the case and the quality of services rendered. Rule 6(c) of the Arkansas Rules of Civil Procedure states that any party opposing the motion shall serve a response within 10 days after service of the motion. It does not state specifically that a party is allowed ten days to respond to a motion in all cases. Here, appellee requested attorney's fees in his response to appellant's change-of-venue motion, several months before he submitted his petition requesting fees and before the court awarded them. Rule 6 of the Arkansas Rules of Civil Procedure was not a bar to the circuit court's inherent power to award attorney's fees in this domestic-relations case. Thus, the circuit court did not err in the first award of attorney's fees. [**Rule 11 fees**] Rule 11 of the Arkansas Rules of Civil Procedure requires a motion to be made separately from other motions or requests and not to be filed with the court before 21 days after service of the motion in order to allow time for the challenged paper, claim, defense, contention, allegation, or denial to be withdrawn or appropriately corrected. Although a trial court may impose Rule 11 sanctions on its own initiative, the court must still order an attorney or party to show cause why conduct specifically described in the order has not been violated and afford the attorney or party a reasonable time to respond, but not less than 14 days when the sanction is a monetary sanction imposed against a party. Therefore, the circuit court erred in awarding additional attorney's fees pursuant to the Rule 11 motion. (Weaver, S.; 23DR-18-665; 3-9-22; Gruber, R.)

Rowan v. Rowan, 2022 Ark. App. 143 [**divorce; property settlement agreement; contract**] The circuit court ordered appellant to pay appellee a portion of the sale of the parties' former marital home. Appellant filed a posttrial motion to vacate and amend the final order, and it was deemed denied. On appeal, appellant argued the circuit court erred in awarding appellee one-half of the "proceeds" from the sale of the home when their property-settlement agreement (PSA) provided that appellee would receive one-half of the "profit" from the sale of the home. A separate and independent property-settlement agreement that has been incorporated into a divorce decree leaves a circuit 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 governed, in general, by the rules and provisions applicable to other contracts generally. Here, the appellate court held that the circuit court did not modify the PSA. While the court may have interchanged the terms

“proceeds” and “profit” in its order, appellant’s focus on this misses the point because the circuit court did what appellant asked it to do: deduct the mortgage from the sales price before equally dividing the remaining funds. This was consistent with the plain and ordinary meaning of the term “profit” as stated in the PSA and consistent with the intent of the parties. The circuit court did not err in awarding the proceeds from the sale of the home. (Scott, J.; 04DR-13-1756; 3-30-22; Vaught, L.)