

APPELLATE UPDATE

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
SEPTEMBER, 2010 VOLUME 18, NO. 1

CRIMINAL

Sanders v. State: [**revocation**] Evidence supported revocation of probation based on failing to report to probation officer and committing another offense. (Fogleman, J.; CA 09-1330; 9-1-10; Kinard)

Suggs v. State: [**sufficiency of evidence**] Evidence supported convictions for theft by receiving and forgery. (Wilson, R.; CA 09-1388; 9-1-10; Brown)

Thornton v. State: [**circumstantial evidence**] Evidence supported conviction for aggravated residential burglary. (Wright, H.; CA 09-1271; 9-1-10; Henry)

Solomon v. State: [**Rule 404(b)**] Evidence was properly admitted in trial court's discretion as evidence of *modus operandi* in committing sexual assaults. (Smith, K.; CA 08-1374; 9-1-10; Gladwin)

Pyles v. State: [**revocation**] Evidence was sufficient to show violation of conditions of suspended sentence to support revocation. (Tabor, S.; CACR 10-114; 9-8-10; Pittman)

Hillard v. State: [**pre-arrest delay/due process**] There was not a violation of due process due to the period of time between when the warrant was issued and the arrest was made. Defendant failed to establish that he was prejudiced by the delay nor was there a showing that the delay was intentional to gain any tactical advantage. (Proctor, W.; CACR 09-1386; 9-8-10; Brown)

Dunlap v. State: [**evidence**] Evidence was sufficient to support the verdicts of guilt and the accomplice's testimony was sufficiently corroborated. (Herzfeld, R.; CACR 10-139; 9-8-10; Henry)

Stewart v. State: **[sufficiency of evidence]** Evidence supported conviction for DWI. (Shirron, P.; CACR 09-1357; 9-15-10; Vaught)

Colburn v. State: **[sufficiency of evidence]** Evidence supported conviction for rape. (Clinger, D.; CACR 09-794; 9-15-10; Hart)

Williamson v. State: **[sufficiency of evidence]** Evidence supported convictions for robbery and kidnaping. (Tabor, S.; CACR 09-1213; 9-15-10; Gruber)

McKnight v. State: **[sufficiency of evidence]** Evidence supported convictions for child endangerment and battery. (Gibson, B.; CACR 10-182; 9-15-10; Glover)

Alston v. State: **[revocation]** Evidence supported revocation of probation for failure to make payments required by judgment. Exclusionary rule does not apply in a revocation hearing unless the defendant demonstrates that the officers conducted the search in bad faith. (Fitzhugh, M.; CACR 10-119; 9-15-10; Robbins)

Dooley v. State: **[revocation]** Evidence supported revocation of probation for commission of subsequent offense. (Fitzhugh, M.; CACR 09-1007; 9-15-10; Robbins)

White v. State: **[prior statement]** Prior unsworn statement cannot be introduced as substantive evidence in a criminal case and a prior inconsistent statement is not admissible for impeachment purposes because witness admitted making the statement. However, error in admitting statement was not prejudicial. (Piazza, C.; CACR 09-1384; 9-15-10; Hart)

Barrow v. State: **[jury trial waiver]** Express declaration in writing is sufficient to waive a jury trial; waiver is not required to be made in open court. (Reynolds, D.; CACR 09-868; 9-15-10; Gladwin)

Strickland v. State: **[jurisdiction]** Before State is required to put on evidence to prove jurisdiction, there must be some positive evidence that the offense occurred outside the court's jurisdiction. (Clinger, D.; CACR 09-1286; 9-15-10; Abramson)

Coleman v. State: **[voir dire]** Prosecutor's question during voir dire was to determine if any jurors would require scientific evidence and did not commit the jurors to a decision in advance. (Philhours, R.; CACR 09-1244; 9-15-10; Glover)

Washington v. State: **[rebuttal]** Court properly denied defendant's request for a rebuttal witness because the request came during the defense's case in chief and the defendant had not complied with discovery rules to disclose his witnesses. (Hearnsberger, M.; CACR 10-30; 9-15-10; Gruber)

Fuson v. State: [**suppression**] Evidence seized from vehicle was admissible even though defendant was not in the vehicle at the time of the arrest. The search was proper as incident to the arrest and the evidence would also have been discovered when the vehicle was impounded. (Medlock, M.; CACR 09-1188; 9-15-10; Kinard)

Block v. State: [**speedy trial**] The time for the mental health exam was excludable to the date that the report shows that it was submitted because no report was filed with the court. Taking into account all excludable periods for other continuances, the speedy trial rule was not violated. (Wright, R.; CACR 09-1373; 9-15-10; Baker)

Johnson v. State: [**juvenile record**] There was no error in admission of defendant's juvenile record at the sentencing hearing because a defense character witness opened the door. (Keith, T.; CACR 09-175; 9-15-10; Brown)

Heydenrich v. State: [**404(b)**] There was sufficient evidence to support conviction of drug possession. Court properly admitted testimony that defendant was seen buying drugs from a person at casino, which was not a crime at issue in this trial. The evidence was admitted as evidence of motive or intent. (Tabor, S.; CACR 09-1348; 9-22-10; Gladwin)

Draper v. State: [**evidence**] Evidence supported conviction of drug possession. (Cox, J.; CACR 10-209; 9-22-10; Baker)

Henington v. State: [**pedophile exception**] Evidence of defendant's proclivity to molest young girls was properly admitted and requirements of pedophile exception were met. (Clinger, D.; CACR 10-6; 9-22-10; Kinard)

Moss v. State: [**suppression**] Defendant failed to prove that the police acted in bad faith in obtaining warrant – affidavit contained information of defendant's prior conviction and allegations made by an informant. (Fitzhugh, M.; CACR 09-1146; 9-22-10; Hart)

Travis v. State: [**Rule 37**] The circuit court need not hold a hearing on a petition when the record is clear that the petitioner is not entitled to any relief. (Hill, V.; SCCR 08-1320; 9-23-10; per curiam)

Clemons v. State: [**suppression/statement**] Defendant argued that the state did not timely provide him with a usable copy of a DVD with his statement on it; however, he waived that argument when he refused the opportunity for a continuance to allow time for a review of the DVD. (Singleton, H.; SCCR 09-182; 9-23-10; Hannah)

Thomas v. State: [**revocation**] Evidence supported revocation and established at least constructive possession of drug paraphernalia. (Fitzugh, M.; CACR 09-1389; 9-29-10; Brown)

Lewis v. State: [**evidence**] Evidence supported convictions for possessing cocaine with intent to deliver and possessing marijuana with intent to deliver. Defendant failed to rebut the presumption based upon the amount of cocaine that he intended to deliver it. On the marijuana charge, in addition to the amount of the substance, evidence that defendant was standing in an area of high drug traffic and the manner in which it was packaged established intent to deliver. (Henry, D.; CACR 09-893; 9-29-10; Gruber)

Newman v. State: [**sex offender revocation**] Defendant, a registered sex offender, had his probation revoked because he performed carpentry work at a day-care center. This work did not violate the terms of his probation. The conditions of probation nor the applicable statute prohibited defendant from being around children. (Jones, B.; CACR 10-16; 9-29-10; Glover)

Burford v. State: [**penalty phase evidence**] Trial court did not err in denying admission in the penalty phase of evidence that the victim had a prior conviction of delivery of cocaine and a felony information charging him with attempted murder. (Hill, V.; CACR 10-157; 9-29-10; Robbins)

Vance v. State: [**dwi/subsequent arrest**] Trial court did not err in admitting evidence of a subsequent DWI arrest during the sentencing phase of defendant's trial for first-offense DWI. The evidence was relevant as to defendant's character and propensity to continue criminal activity. (Medlock, M.; CACR 09-1176; 9-29-10; Abramson)

Talley v. State: [**dna request/request for counsel**] Defendant had invoked his right to counsel and his right to remain silent. Thereafter, the police requested a DNA sample. This did not constitute continuing the interrogation in violation of the Fifth Amendment. A DNA swab is a demonstrative physical test that does not implicate the Fifth Amendment. [**excited utterance**] What the victim told the police after her attack constituted an excited utterance and was not inadmissible hearsay. (Johnson, K.; SC CR09-833; 9-30-10; Sheffield)

Barker v. State: [**coram nobis**] Alleged fundamental error of fact extrinsic to the record argued by the defendant was that a person with whom the victim talked was having a sexual relationship with the victim and encouraged her to pursue charges against the defendant. However, this evidence is not exculpatory. It has no impact on defendant's actions or subsequent plea. Defendant failed to meet his burden. (Putnam, J.; SCCR 09-405; 9-30-10; Corbin)

CIVIL

Valley v. Helena National Bank: [**limitations**] Limitations period on promissory note is five years and part payment before the bar attaches forms a new point from which the period will run. (Proctor, R.; CA 10-90; 9-1-10; Gladwin)

Miller v. Neil: [**deed reformation**] Trial court erred in reforming deed to include portion of a lot based on its findings that the boundary line was changed by an oral agreement and that a mutual mistake of fact had occurred. Evidence did not support such findings. There is no basis to reform the deed with respect to an ownership interest when only an easement was at issue in the documents that gave rise to dispute. (Martin, D.; CA10-210; 9-1-10; Vaught)

McCourt v. Triplett: [**priority/secured transaction**] In enforcing judgment, a creditor garnished bank account. A secured creditor claimed that it had a superior lien because funds in the account were proceeds of collateral that were deposited in bank account. Secured creditor had burden to trace and identify the funds which were proceeds from the sale of secured collateral and in which it had a security interest. The secured creditor failed to meet this burden, and the judgment creditor was entitled to satisfy its judgment from the funds in the account. (Fitzhugh, M.; CA 09-1142; 9-1-10; Glover)

Passmore v. Hinchey, County Judge: [**jurisdiction**] Complaint alleged action in trespass and other civil claims rather than an action to locate a county road. County judge was not immune from suit that alleged he used plaintiff's property as a road. There is no immunity for intentional acts of this nature. (Plegge, J.; CA 10-148; 9-8-10; Gruber)

Henry v. QHG of Springdale: [**attorney's fees**] Court failed to make findings consistent with the statutory requirements in awarding attorney's fees. Court found an absence of a justiciable issue, and under the applicable statute, it was necessary for the court to make findings related to bad faith. (Duncan, X.; CA10-167; 9-15-10; Baker).

City of Pine Bluff v. Pine Bluff/Jefferson County Library: [**unlawful detainer**] Landlord was entitled to damages for tenant failing to vacate property after lease expired; however, damages should not have been trebled. In order to treble the damages, statute requires that property be used for commercial purposes and the rented space at issue in this case was not used for any commercial purpose. (Fox, T.; SC09-1098; 9-16-10; Hannah)

Crenshaw v. Ark. Warehouse, Inc.: [**business invitee**] Owner had no duty to warn roofer who was hired to repair roof and fell through a skylight. Roofer knew of the existence of skylights; therefore, danger was obvious and owner had no duty to warn. (Medlock, M.; CA 09-1001; 9-22-10; Pittman)

Reed v. Arvis Harper Bail Bonds: [**administrative appeal**] Board's decision was supported by the record and the law. (Proctor, W.; SC09-1269; 9-23-10; Danielson)

Monticello Healthcare Center v. Goodman

Monticello Healthcare Center v. Forrest

[injunction] Court erred in issuing injunction regarding payment of attorney's fees because there was no showing of irreparable harm or a likelihood of success on the merits. (Gibson, B.; SC 10-649 and 656; 9-23-10; Danielson/Wills)

Warford v. Union Bank of Benton: **[laches]** Laches is an equitable defense and does not apply in a case seeking legal relief. **[presumption of payment]** Delay in presenting certificate of deposit for payment was less than 20 years and therefore a fact question is presented concerning application of the doctrine. (Langston, J.; CA 09-1301; 9-29-10; Vaught)

Hunt v. Entergy Arkansas: **[adverse possession]** Property owners thought their property extended into property now in dispute, but they failed to show that they possessed the disputed tract. (Cook, V.; CA 09-633; 9-29-10; Brown)

Rogers v. Sargent: **[medical malpractice]** Although fact that doctor left a sponge in the patient negated the need for expert testimony, it does not establish liability on the part of the surgeon as a matter of law. (Patterson, J.; CA 09-1124; 9-29-10; Kinard)

Simmons First Bank v. Middleton: **[foreclosure sale]** Bank holding mortgage on property was late for the foreclosure sale and property was sold to relative of the owner/debtor. Bank argued that court abused its discretion in confirming the sale. Court did not err in finding that price was fair and not greatly inadequate. (Maggio, M.; CA 10-191; 9-29-10; Robbins)

Baptist Health v. Murphy: **[res judicata]** Baptist waived defense of res judicata by tacitly consenting to simultaneous actions in state and federal courts. **[jury trial]** Baptist's claims were equitable in nature and it was not entitled to a jury trial. **[tortious interference]** Claim for tortious interference was supported by the evidence and Baptist was enjoined from denying doctors professional privileges because of doctors' affiliation with another hospital. **[ADTPA]** Because plaintiffs were not seeking money damages, they were not entitled to relief under the Deceptive Practices Act. The Act does not provide for a private action seeking injunctive relief. (Kilgore, C.; SC 09-1070; 9-30-10; Sheffield)

Repking v. Lokey: Plaintiff estate sued police after decedent had been killed by an abusive spouse alleging that officers failed to provide adequate protection to her. **[1983 claim]** Officer's failure to arrest the spouse cannot be the basis for liability. Officer was under no affirmative duty to protect victim from a private act of violence under the Due Process Clause. **Ark. Civil rights Act]** Officer had immunity under the Civil Rights Act for negligent acts as opposed to intentional acts. (Cox, J.; SC 09-1024; 9-30-10; Brown)

DOMESTIC RELATIONS

Duncan v. Duncan: [**property division–pension account**] Previously undecided in Arkansas: Absent express language stating otherwise or some inequitable conduct by one party causing a protracted delay, a settlement agreement dividing a pension plan implicitly contemplates that both parties will share all of the rewards and risks associated with an investment plan. Both the parties' agreement and the QDRO awarded the appellee wife a percentage of appellant's retirement account, not a fixed sum. Therefore, the circuit court erred in awarding appellee a fixed sum of appellant's retirement account. [**motion for reconsideration**] Appellant timely filed a motion for reconsideration which, under Ark.R.App.P.–Civil 4(b)(1), the circuit court had thirty days to decide and to enter its decision of record. The circuit court entered its order deciding the motion beyond the deadline. Therefore, the order was void because the court lost jurisdiction to act on the motion after the expiration of thirty days. Since the motion for a new trial was deemed denied, the rulings in the original judgment stand without alteration. [**parol evidence**] Parol evidence is inadmissible except when a written agreement is ambiguous or when necessary to bring out a latent ambiguity. Here, the court found the agreement unambiguous, yet considered extrinsic evidence as to the parties' intent. (Harkey, A.; No. CA 10-13; 9-1-10; Robbins).

Donato v. Walker: [**paternity--child custody**] Appellee filed a petition for an order of protection, then later filed a petition to establish paternity and for custody of the parties' five-year-old daughter, S.W. Paternity was established and custody was granted to the appellee father of the child. One error the appellant alleged was that the trial court should not have awarded custody to the father in a paternity action without finding a material change in circumstances, in addition to the statutory criteria set out in Ark. Code Ann. § 9-10-113(c), in conformity with *Norwood v. Robinson*, 315 Ark. 255, 866 W.W.2d 398 (1993). The Court of Appeals noted that it has distinguished *Norwood* in cases when the father requested custody at the time paternity was established, when no initial custody determination had been made. Here, there had never been an order awarding custody of S.W. to either party. They had always lived together as a family until the petitions in the instant case were filed. Therefore, the appellee was not required to show a material change in circumstances in order to gain custody of S.W. The appellant also contended the trial court erred in awarding custody to appellee, resulting in the separation of S.W. and her half-sibling, the appellant's other daughter, without a showing of exceptional circumstances. The court said that, although that may be a factor in determining the best interest of the child, it does not apply with equal force to half-siblings, and the most important consideration is the best interest of the child in question. (Cooper, T.; No. CA 10-136; 9-1-10; Gruber).

Hopkins v. Hopkins: [**child support**] Appellant contended on appeal of a modification of appellee-father's child support that the court erred in reducing monthly support from \$486 to \$381. She argued specifically that the court relied on matters in the record that were not made available to her. The Court of Appeals noted evidence that the trial court had requested at a hearing on May 22, 2008, that the appellee submit an Affidavit of Financial means, which the appellee submitted seven days later. Over the next year, according to the record, the trial court wrote to the attorneys seeking clarification of appellee's take-home pay and asking the parties' attorneys if they wanted to have a hearing set. The court gave the parties a figure of \$842, asking them if they agreed with that calculation of support. Finally, the court sent the attorneys a letter asking them to inform the court whether they wanted the remaining issues decided on the record as it then-existed, or to have an additional

evidentiary hearing. The appellant's attorney responded that his client wanted the court to make a finding based upon the record on May 22, 2008, alone, and not to consider evidence after the hearing as it was not of record. The trial court used the affidavit of financial means submitted in response to the court's request at the May 22, 2008 hearing, and set child support at \$381 a month. The appellant did not object or make a post-trial motion for a new trial. She contended on appeal that she never saw the affidavit until after the judge's order was entered August 17, 2009. In affirming, the Court of Appeals noted that Administrative Order No. 10 requires that an affidavit of financial means be used in all support matters and, in this case, it was. The court found that the trial court's child support figure was not clearly erroneous, based upon the record before the court at that time. (Putman, J.; No. CA 09-1393; 9-8-10; Robbins).

Rhodes v. Rhodes: [**division of property–nonmarital property**] The trial court awarded appellee husband items of personal property that the parties agreed the appellant had acquired before the marriage. Although it may be permissible for a trial court to award nonmarital property to one of the parties, in such circumstances, the trial court must state its reason for such a decision. The Court of Appeals reversed and remanded for the trial court to order the return of the premarital property to appellant or to set out the court's reasons for awarding the property to the appellee. (McGowan, M.; No. CA 09-1110; 9-8-10; Hart).

Erwin v. Erwin: [**visitation; child support**] Appeal from a postjudgment order concerning visitation, which was denied to the appellant mother, and the calculation of bills for the children's medical needs and necessities that appellee owed the appellant. The Court of Appeals reversed and remanded the denial of visitation, finding no showing was made of a material change in circumstances warranting a change in visitation. The court affirmed the calculation of the reimbursement the appellee owed the appellant for medical bills and necessities. (Putnam, J.; No. CA 10-74; 9-15-10; Pittman).

Rees v. McLaughlin, et al.: [**appellate jurisdiction; Ark.R.Civ.P. 54**] The Court of Appeals had no jurisdiction to hear the appeal in this case because the Rule 54(b) certification failed to meet the Rule's requirements. It did not contain an express determination, supported by specific factual findings, that there is no just reason for delay of an appeal. In addition, the trial judge's signature is not on the certificate. The appeal was dismissed. (Rogers, R.; No. CA 09-1034; 9-22-10; Gladwin).

PROBATE DIVISION

X.T. v. M.M. and J.M.: [**adoption–consent–termination of parental rights**] The Court of Appeals affirmed the circuit court's finding that appellant putative father's consent to adoption was not required for the adoption because he failed to establish a significant custodial, personal, or financial relationship with the child before the adoption petition was filed, pursuant to Ark. Code Ann. § 9-9-207(a)(11). The circuit court further found that, even if appellant's consent was required, he was unreasonably withholding that consent contrary to the child's best interest. Ark. Code Ann. § 9-9-220(c)(3). The trial court's decisions terminating appellant's parental rights and granting the adoption were affirmed. (Scott, J.; No. CA 09-1225; 9-1-10; Pittman).

Foster v. Foster: [**will and restatement of trust–validity; testamentary capacity**] The appellee filed an action to declare the validity of her will and restatement of her trust. The circuit court, after hearing the evidence and viewing a video recording of the execution of the will and restatement of trust, upheld the validity of those documents and her granddaughter, the appellant, appealed. The Court of Appeals affirmed the circuit court’s finding that the documents were valid and that the appellee had testamentary capacity on the day they were executed. (McGowan, M.; No. CA 09-1310; 9-15-10; Kinard).

Estate of Helen Virginia Coan v. Gaughan: [**attorney fees**] The Court of Appeals affirmed the award of attorney fees to appellee, who is a former co-administrator of the appellant estate. The appellee petitioned for fees for an attorney who assisted him in filing two accountings for the time he served as co-administrator of the estate and for representing him in filing an answer to a third-party complaint filed by his surety in a global lawsuit filed on behalf of the estate by two other co-administrators. The Court of Appeals found that the trial court did not abuse its discretion in awarding attorney fees for both preparing and successfully defending the two accountings, and said the “award of fees in this regard rests on sound authority.” With respect to the award of fees for defending against the surety’s third-party complaint against the appellee on the bond issued by it, the court said the value of services rendered to an estate is a factual determination for the trial court, and that the court’s finding here was not clearly erroneous. The court said that an action on an administrator’s bond is part of the administration of the estate pursuant to statute, Ark. Code Ann. § 28-48-208, and as such, attorney fees are authorized by Ark. Code Ann. § 28-48-108(d)(1). (Landers, M.; No. CA 09-704; 9-22-10; Gladwin).

JUVENILE

K.L v. State [**Delinquency Adjudication**] Affirmed. Appellant was charged with rape and challenged the sufficiency of the evidence, but failed to renew his motion to dismiss at the close of all the evidence; therefore, waiving his sufficiency argument. The juvenile’s statements to the principal were deemed to be voluntary and admissible. The principal had a duty to question the appellant due to his status as a student, not as a suspect. The fact that he could not leave the office was not determinative of whether this was a custodial interrogation that required Miranda warnings. A school principal who questions a student about a possible school violation or law, absent other circumstance, does not act as a law enforcement or agent of the state with law enforcement authority. Appellant was not prejudiced by the court’s refusal to allow the introduction of evidence of the victim’s character for truthfulness and honesty because this type of evidence was introduced through other testimony. (French,T.; 09-86; 9-29-2010; Glover)

Hudgens v. Arkansas Dept. of Human Servs. [**Dependency-Neglect Adjudication**] Reversed and Remanded. The court erred in denying a continuance prior to the expiration of the 20 days as required by Rule 12(a)(1) of the Arkansas Rules of Civil Procedure. The dependency-neglect petition was filed under A.C.A. 9-27-310 and under Rule 12(a)(1) of the Arkansas Rules of Civil Procedure, defendants have 20 days to answer a petition. (Lineberger, J.;10-155; 9-29-2010; Henry)

Grant v. Arkansas Dept. of Human Servs. [TPR - Best Interest] Reversed and Remanded. The court agreed with appellant's challenge that there was no credible evidence of the likelihood that the child would be adopted as to the best interest finding. The court stated: "Adoptability is merely a consideration and not a requirement, it is true, but it is a consideration that bears strongly on a child's best interest, especially in a case like this where the child is attached to a loving mother who has never volitionally subjected him to harm." (Whitaker, P.; 10-303; 9-29-2010; Pittman)

Davis- Lewallen v. Clegg. [Adoption & Guardianship] Affirmed. Appellant, maternal grandparent, sought guardianship and intervention to the foster parent's petition to adopt. The court consolidated the two petitions and held a two-day hearing resulting in denying appellant's guardianship and granting the adoption. The court's best interest finding was upheld. The circuit court found that the foster parent had the ability, resources, and stability to provide for the child's best interest. The court further found that a move from the home would be detrimental to the child who had lived with the foster parents for the last 16 months and, although suffered from attachment disorder, had made great progress in their care. Appellant's argument that placement in her care should be granted so that siblings could be placed together is one factor to be taken into consideration. The circuit court also noted that the appellant had a criminal history, mental health issues, and a prior substance abuse issue as well as concerns about her current health, and financial situation. Appellant argued that the court erred in finding that DHS unreasonably withheld its consent to adopt by the appellees. A.C.A. 9-27-207(a)(8) provides the circuit court with the authority to determine if DHS is the guardian and if it unreasonably withheld its consent. Appellant argued that DHS withheld consent because guardianship was a form of permanency. However, the circuit court did not err in determining that adoption was the preferred disposition. DHS also based its decision on A.C.A. 9-27-355(c)(1) citing relative preference. The circuit court was correct in finding that appellant was no longer a "relative" following the termination of parental rights. The appellate court further noted that this statute concerns initial placement, but does not have bearing on placement decisions following termination of parental rights. (Thyer, C.; 10-184; 9-22-2010; Henry)

Gilmore v. Arkansas Dept. of Human Servs. [TPR - ADA] Affirmed. Appellant argued that trial court erred because she was not provided with meaningful reunification services given her long standing psychological impairment under ADA. However, Appellant failed to raise or establish that she was entitled to ADA protection with the circuit court. Failure to address this issue with the trial court does not preserve the argument for appeal. (Branton, W.; 10-316, 9-22-2010; Hart)

Casarreal v. Arkansas Dept. of Human Servs. [TPR - Evidence] Affirmed. Appellant argued that trial court erred in admitting into evidence at the TPR hearing a transcript of appellant's child's testimony from the adjudication where she and her husband were not represented and had not properly waived counsel. Appellant failed to appeal the adjudication order and the appellate court cannot consider any argument about errors from that hearing. Appellant does not attack the trial court's alternative ground's which did not depend on the child's testimony.

When appellant fails to attack the circuit court's independent alternative basis for its ruling, we will not reverse. Further, appellant signed a voluntary consent to terminate. (Hewett, M.; 10-322, 9-22-2010; Gruber)

Allen v. Arkansas Dept. of Human Servs. [TPR - ICWA] Affirmed. Appellant argued that the circuit court did not comply with ICWA in finding proof beyond a reasonable doubt that continued custody of their child by appellant was likely to result in serious emotional or physical damage. There was substantial evidence that return home is likely to result in serious emotional or physical damage to the child including that appellant had abused drugs since she was 12, failed to comply with the case plan until she was incarcerated, a few months prior to the termination hearing, and had a totally inappropriate home to live in upon her release. (Hewett, M.; 10-304; 9-15-2010; Brown)

Lauman and Brown v. Arkansas Dept. of Human Servs. [TPR - ICWA Notice] Affirmed. Appellants' sole argument is that DHS failed to comply with the notice requirement in ICWA. Even if appellants raised the issue below, their argument fails because ICWA only applies to an "Indian child," not parents. The trial court ordered DHS to notify the Cherokee Nation pursuant to ICWA when the court was on notice at the Probable Cause Hearing that a parent might have Indian heritage. The Cherokee Nation replied that it did not consider the children to be "Indian children." ICWA did not apply and no further notice was required. (Spears, J.; 10-137; 9-1-2010; Kinard)

M.F.1. , M.F.2 and Arkansas Dept. of Human Servs. v. Foster [TPR] Affirmed. Appellant argued that trial court erred in finding that termination was not in the children's best interest. The appellate court stated that there was evidence that the children were adoptable and that the foster parents were willing to adopt and that appellant had convictions for battery, three felonies, and a no-contact order that demonstrated that the return to his care at this time posed significant harm. Appellant argued that the court erred in ordering reunification services to the father after the children had been in foster care for more than 15th months. Appellee argued that DHS had not provided reasonable efforts to reunify and had provided all services to the mother. The appellate court agrees that the trial court had the authority to extend reunification services and that they were justified. Appellant further argued that there were other grounds on which to terminate. The appellate court stated, "Even if there existed a basis upon which the trial court could have terminated Foster's parental rights in February 2010, we cannot say that the trial court clearly erred in denying the termination petition at that time. At the conclusion of the hearing, the trial court made clear that it gave Foster only until August 2010 to rehabilitate himself and that if he failed to accomplish that goal by then, it would proceed toward termination of parental rights." (Brown, E.; 10-403, 9-22-2010; Robbins)

Lunon v. Arkansas Dept. of Human Servs. [TPR] Affirmed. Appellant argued the court erred in its best interest and statutory grounds findings that the children had been out of the home for more than a year and the appellant had not corrected the conditions that caused removal. Appellant had only recently acknowledged that she physically abused her child and the "eleventh hour admission of the confession was too little too late." (Branton, W.; 10-407, 9-29-2010; Abramson)

Butler v. Arkansas Dept. of Human Servs. [TPR - Continuance] Affirmed. Appellant argued that trial court erred in denying her request for a continuance. This was appellant's third request for a continuance and in granting the second request the court stated there would be no further continuances. Although appellant was not present at the TPR she was represented by counsel at the hearing and no evidence or testimony was offered to demonstrated the likelihood of appellant's attendance in the event of another postponement. Appellant failed to file an affidavit stating what her proposed testimony would prove and how denial of the continuance resulted in prejudice. (Gilbert, M.; 10-253, 9-1-2010; Baker)

Cases in which the Court of Appeals affirmed No-Merit TPR:

Sites v. Arkansas Dept. of Human Servs. This case open for almost four years and included issues related to child malnutrition and continued failure to maintain stable or suitable housing for children. (Sullivan, T.; 10-490; 9-29-2010; Gruber)

Ivy v. Arkansas Dept. of Human Servs., The appellate court noted that appellant failed to provide stable and hazzard free housing for children and comply with orders to attend counseling and obtain employment. (Coker, K.; 10-497; 9-29-2010; Glover)

Materson- Heard and Heard v. Arkansas Dept. of Human Servs. This case had continuing court involvement including a prior termination on 2 year old sibling upheld in 2009. The appellate court noted issues of inability to obtain appropriate housing and follow recommendations concerning counseling and medication management. (Isbell, G.; 10-389; 9-2-2010; Glover)

Lenoard v. Arkansas Dept. of Human Servs. Drugs and failure to provide for children's needs despite appropriate services were noted by the appellate court. (Branton, W.; 10-396; 9-15-2010; Baker)

Jackson v. Arkansas Dept. of Human Servs. The court noted the history of this case in that resulted in an increasing unsafe and dangerous home despite intensive family services for almost two years. Other grounds also existed for termination. (Thyer, C.; 10-357; 9-15-2010; Gladwin)

Collins and Simmons v. Arkansas Dept. of Human Servs. Home instability, mental health issues, and inability to parent despite appropriate services inability to benefit from services were at issue in this case. (Branton, W.; 10-282; 9-1-2010; Robbins)

EIGHTH CIRCUIT

Ray v. American Airlines, Inc. [**torts**] District court did not err in granting defendant's motion for summary judgment on plaintiff's false imprisonment claims as plaintiff could not establish the elements of the tort. District court did not err in granting American summary judgment on plaintiff's negligence claims as the claim was precluded by the "conditions of carriage," a contract controlling the company's duties to plaintiff. (W.D. Ark.; No: 09-2317 and No: 09-2357; 07/02/2010)

Kuelbs v. Hill: [**real party**] Plaintiff has been declared incompetent and under Arkansas law she was not the real party in interest and could not bring this action. Trust was not the real party in interest because neither the tort claims nor the proceeds of the tort claims are assignable under Arkansas law. Since neither plaintiff was the real part in interest, the court did not err in dismissing the action. (W.D. Ark.; No: 09-2697; 07/30/2010)

Boudwin v. Hastings Bay Marina, Inc.: [**respondeat superior**] No reasonable jury could find in favor of plaintiff on a theory of respondeat superior as its employee's action were not within the scope of his employment. Defendant was not vicariously liable for the employee's negligence as he did not have actual or apparent authority to take the actions which led to plaintiff's injury. (E.D. Ark.; No: 09-2393; 08/03/2010)

Fanning v. Potter: [**settlement agreement**] Emails among defendant's employees concerning the possibility of plaintiff's return to work did not amount to a challenge to OWCP claim and did not constitute a breach of a settlement agreement. Defendant did not breach the agreement by administratively separating plaintiff. Late payment of several health benefit refunds did not amount to a breach of the agreement. Claims of retaliation for engaging in protected EEO activity rejected. District court did not err in finding plaintiff had failed to properly plead a claim of discrimination based on race, color, sex or disability.(E.D. Ark.; No: 09-1687; 08/06/2010)

Csiszer v. Wren: [**torts**] While the district court did clearly err in limiting the presentation of evidence related to damages based on Arkansas Code Sec. 16-55-212(b) (declared unconstitutional by the Supreme Court of Arkansas since the completion of the trial in this case), the error did not affect the plaintiffs' substantial rights because there is no reasonable probability, based on the extensive record in the case, that the jury's verdict on liability would have been different but for the defendants's statements in closing argument that plaintiffs had not met their burden of proof on the amount of damages. Arkansas Code Sec. 16-114-207(3) does not violate the plaintiffs' constitutional rights to a fair trial and to cross-examine witnesses. Given the relatively narrow scope of the statute, the court concludes it is more likely that the Supreme Court of Arkansas would reject a separation-of-powers challenge to the statute. Any error in applying the statute was harmless as plaintiff had an opportunity to cross-examine defendant Dr. Wren on the standard of care. No error in prohibiting plaintiffs' expert from offering opinion testimony concerning institutional negligence on the part of the hospital as the witness had repudiated the conclusions contained in a written report

on the issue or, at a minimum, had not developed her conclusions to the point where she could provide a qualified expert opinion.(W.D. Ark.; No: 09-2010; 08/06/2010)

Simpson v. City of Fort Smith: **[civil rights]** The district court did not err in granting the defendant police officer and the City summary judgment on plaintiff's claims that the officer had violated plaintiff's decedent's civil rights when she was shot by a stray bullet in a shoot out and that the city had not properly trained the officer. The officer's action in shooting at a fleeing armed suspect who had pointed a shotgun at bystanders and shot at the officer was not undertaken with an intent to harm the victim. Even if the shooting was to be judged under a deliberate indifference standard, plaintiff had failed to show that the officer knew the victim was in the line of fire and that he intentionally or wrongfully disregarded that danger. A bystander is not seized for Fourth Amendment purposes when struck by errant bullet in a shootout.(W.D. Ark.; No: 09-2617; 08/10/2010)

Curtis Lumber Company, Inc. v. Louisiana Pacific Corporation: **[fraud/deceptive trade/others]** Curtis had standing and was the real party in interest in dispute over rebates to be paid to purchasers of defendant's siding products. With respect to Curtis's fraud claims, it failed to establish scienter and no reasonable finder of fact could conclude defendant falsely represented the terms of the rebate promotion with knowledge of such falsity. Nor did Curtis establish the elements of the tort of constructive fraud. Section 4-88-107(a)(1) and 4-88-108(2) of the Arkansas Deceptive Trade Practices Act do not require proof of intentional or knowing deception, and the district court erred in granting defendant summary judgment on Curtis's claim under these sections of the Act. The court also erred in granting defendant summary judgment on Curtis's promissory estoppel claims. Curtis may seek damages for lost profits for cancelled sales. An analysis of Arkansas case law leads the court to believe that duress may have existed in this case and that Curtis may be able to recover damages for payments it made under duress. District court did not err in dismissing claims for punitive damages as no jury could find defendant acted with malice or intent to harm Curtis. (E.D. Ark.; No: 09-2602; 08/24/2010)

First National Bank & Trust Co v. Minnesota Life Ins. Co.:**[insurance]** In a case where a husband killed his insured wife, the husband, who was disqualified from receiving the proceeds, was not the sole possessor of an interest in the policy, as the deceased had contributed to payments of the policy premiums. As a result, the district court did not err in finding her estate had an interest and was entitled to receive the proceeds. District court did not err in awarding the estate attorneys' fees, but the matter must be remanded for a determination as to what portion of the fees the estate would have incurred even if insurer had not contested payment.(E.D. Ark.; No: 09-2563; 08/30/2010)

Chism v. Curtner: **[employment discrimination]** Plaintiff failed to make a prima facie case of discrimination as he failed to show that similarly situated employees outside the protected class were treated differently. Even if he had made a prima facie case, plaintiff's case still failed because he failed to show that the legitimate, non-discriminatory ground for his discharge (repeated arrests) was a pretext for racial discrimination Due process claims were properly rejected as plaintiff did not have a property interest in his position and he cannot show that defendants acted arbitrarily and

capriciously or in a conscience-shocking way. Equal protection claim fails in absence of evidence plaintiff was treated differently than other similarly situated individuals. Promissory estoppel claim fails as the Mayor's promise regarding continued employment was not an authorized act. (E.D. Ark.; No: 09-2632; 08/31/2010)

Conseco Life v. Williams: **[Insurance]** In interpleader action to determine the rights to the proceeds of a life insurance policy, the district court did not err in granting summary judgment to the decedent's sister based on the witness affidavits, the record and the holding of *Primerica Life Ins. Co. v. Watson*, 207 S.W. 3d 443 (Ark. 2005). (E.D. Ark.; No: 09-2869; 09/3/2010)

Campbell v. Davol, Inc.: **[torts]** Court would not consider argument that an exception applied to general rule that successors do not assume liability as this particular argument was not raised before the district court, and the district court did not err in finding that Bard/Davol succeeded to the liabilities of Surgical Sense. District court did not err in granting Bard/Davol summary judgment on plaintiff's post-sale failure to warn claim as there was no contractual relationship to provide services to customers who purchased the Kugel Hernia Patch from Surgical Sense. No error in finding plaintiff's claims against SSI/WCO were barred by Texas law. (W.D. Ark.; No: 09-3166; 09/3/2010)

Georgia-Pacific v. Myers Supply: **[trademarks]** The district court did not err evaluating and weighing the testimony before it, and it did not clearly err in finding that the trademark on a paper towel dispenser did not indicate the source of the paper towels inside and that defendant's sale of a paper towel to be placed inside plaintiff's dispenser did not create a likelihood of confusion and infringe plaintiff's trademark. District court did not err in finding plaintiff could not establish the elements of intentional interference with contract. (W.D. Ark.; No: 09-2980; 9-15-10)

Landers Auto Group Number One v. Continental Western Insurance: **[insurance]** Underlying complaint against Landers did not state a Truth in Lending Act claim, and Continental did not have any obligation to defend the suit under that provision of Landers' insurance policy. Incident was not covered by the garage policy or by the commercial liability policy issued by Continental. (E.D. Ark.; # 09-2783; 9-17-10)

Shelton v. Kennedy Funding: **[contracts]** Enforcement of the promises in the parties' Estoppel Certificate did not violate the Arkansas Statute of Frauds as the agreement fell outside the surety and real estate prongs of the Statute. Concerning plaintiff's breach of contract claim, there was sufficient evidence of legal consideration, mutual agreement, and definiteness, and the jury's finding that defendant breached the contract is affirmed. However, the evidence was not sufficient to support the jury's finding of fraud as the misrepresentations plaintiff relied on are insufficient under Arkansas law to support the claim; nor did the evidence establish constructive fraud on defendant's part. Since the fraud verdict must be set aside, the jury's award of punitive damages must be vacated. (E.D. Ark.; # 09-1670; 9-24-10)