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CIVIL

Clarksville School District v. Ace American Insurance Company, 2021 Ark. App. 308 [**motion for summary judgment**] The trial court granted Appellee’s motion for summary judgment. On appeal, Appellant argued that the lower court erred in its decision because there were ambiguities in their insurance policy with Appellee and there are significant issues of material fact. Where policy language is unambiguous, Arkansas law requires that the plain language controls. The mere fact that parties disagree as to how a policy should be interpreted does not make a policy ambiguous as a matter of law. Instead, ambiguity arises only if policy language “is susceptible to more than one reasonable interpretation.” Arkansas courts interpret and enforce claims-made-and-reported policies to require both that claims be first made against the insured and reported to the carrier in the same policy period. Here, the circuit court correctly determined that the single-claim provision in the insurance policy was unambiguous. Because there was no genuine issue as to any material fact in dispute given the parties’ pleadings and the proof of record, and because the appellate court agrees with the circuit court’s decisions as a matter of law, the lower court did not err in granting Appellee’s motion for summary judgment. (Sutterfield, D.; 36CV-18-285; 9-1-21; Abramson, R.)

Franke v. Clinton William Holland Revocable Trust UAD, 2021 Ark. App. 310 [**negligence; duty of care**] The circuit court dismissed the Appellant’s negligence claims. The Appellant alleged negligence based on (1) failure to use ordinary care to maintain the premises in a reasonably safe condition and to protect the patrons from reasonably foreseeable injury at the hands of other patrons, and (2) failure to warn that the venue was not safe. On appeal, the Appellant argued that the lower court erred in finding that Appellees owed him no duty of care as a matter of law. Appellant specifically alleged that the Appellees owed him a duty of ordinary care as an invitee, because the Appellees own and operate a business that rents a warehouse for parties. Here, the appellate court held that Appellees were not liable because they were not in possession of the land on the night in question, the Appellees had leased the property to a third-party and did not owe or assume any duty for the safety of those who attend the lessee’s party. [**foreseeability**] Even if a duty of ordinary care applied in this case, no party owes a duty to guard against unforeseeable criminal conduct of an unknown third-party. One is ordinarily not liable for the acts of another unless a special relationship exists between the two such as master/servant or parent/child. Further, a landowner is not liable for the negligent act of a third-party, when the landowner had no control over the person who committed the act, and the act was not committed on his account. Thus, the circuit correct properly granted summary judgment for the Appellees. (Sutterfield, D.; 58CV-19-75; 8-1-21; Gladwin, R.)

Cauffiel v. Progressive Eldercare Services-Saline, Inc., 2021 Ark. App. 314 [**Resident’s Right Act; double recovery; retroactive application**] At trial, the lower court granted the Appellee’s motion for directed verdict on Appellant’s resident’s rights claim under the Arkansas Protection of Long-Term Care Facility Residents Act. The Resident’s Rights Act codified certain rights for Arkansans living in nursing homes. At the time the Appellant’s claims accrued in 2012 and when the lawsuit was filed in 2013, the Resident’s Rights Act allowed for any resident injured by a deprivation of the rights listed in the statute to bring a cause of action. The circuit court granted the Appellees a directed verdict on Appellant’s resident’s-rights claim because it ruled that allowing Appellant to proceed on both the negligence claim and the resident’s-rights claim would likely confuse the jury and lead to an impermissible double recovery. The Arkansas Supreme Court has recognized that a resident’s right claim is separate and distinct from a negligence or medical-malpractice claim. A 2013 amendment to the Resident’s Right Act eliminated any separate cause of action for violations of the Act. However, this amendment does not apply retroactively to claims that accrued before the amendment. In Appellant’s case, the resident’s-rights claim, and the negligence claim are separate and distinct causes of action that compensate the Appellant for different injuries and allowing both claims to proceed would not have resulted in a double recovery. The current version of the law does not allow a separate cause of action, resident’s-rights violations are only considered “evidence of negligence” as part of a medical malpractice claim. “Rights conferred by statute are determined according to statutes, which were in force when the rights accrued and are not affected by subsequent legislation.” Therefore, the statute must be applied as it operated prior to the 2013 amendment. (Arnold, G.; 63CV-13-355; 9-1-21; Vaught L.)

Little Rock Police Department v. Starks, 2021 Ark. App. 323 [**general order; standard of review**] The Little Rock Chief of Police found that an officer had violated General Order 303.II.E.2 when he moved in the direction of his car and placed himself in the path of the oncoming stolen vehicle. The officer was terminated as a result of his actions. The officer appealed his termination to the Little Rock Civil Service Commission which affirmed the decision to terminate the officer's employment. On review to the circuit court, the trial court affirmed the commission's finding that the officer violated the policy but reversed the commission's decision to terminate the officer's employment. The trial court analyzed the actions of the officer using the reasonableness standard. On appeal, the Court of Appeals noted that this case did not involve a question regarding the reasonableness of deadly force, but rather a question of whether the general order was violated, and that question must be analyzed under the voluntariness of the act, not a reasonableness standard. (Fox, T.; 60CV-19-7042; 9-8-21; Barrett, S.)

SWN Production Company, LLC v. Stobaugh, 2021 Ark. App. 324 [**failure to state sufficient facts**] Appellant appealed its challenge of the assessment by the county assessor to the circuit court. The County argued that because the Appellant's complaint admitted that the assessment was based on guidelines promulgated by Arkansas Assessment Coordination Division (ACD) and that the County followed those guidelines, the complaint failed to state sufficient facts to overturn the assessment. The circuit court dismissed the Appellant's complaint for failure to state sufficient facts and for failure to join indispensable parties. The Supreme Court has held that the guidelines promulgated by the ACD are not mandatory. The assessors may use different approaches (and often more than one approach) to arrive at the current market value of property. In so doing, the assessor must consider all the evidence bearing on the fair market value. After reviewing the facts in the complaint, the appellate court held that the lower court abused its discretion when it dismissed the Appellant's complaint for failure to state sufficient facts. [**failure to join indispensable parties**] The County asserted that the ACD and various school districts located in the county were necessary and indispensable parties. The Supreme Court has held that ACD and its directors were not proper parties because the ACD has no authority to direct how taxes are assessed at the county level. Additionally, local school districts are not necessary parties to every proceeding for the determination of assessed value of taxable property. (McCormick, D.; 15CV-18-16; 9-8-21; Whiteaker, P.)

Arkansas DHS v. Sarepta Therapeutics, Inc., 2021 Ark. App. 330 [**medical necessity**] The Arkansas Department of Human Services refused to provide coverage for a drug approved by the FDA for treatment of the Duchenne Muscular Dystrophy (DMD). Below, the lower court granted Appellee's motion for summary judgment, finding that DHS had "no legal authority" to make a threshold decision that there was a "lack of medical necessity" for a prescription that was a "covered outpatient drug." Congress has designed a "statutory scheme, which sets forth very specific criteria and means by which a state may exclude coverage for specific drugs or use of such drugs." States that opt into outpatient prescription-drug assistance must provide coverage for "covered outpatient drugs"—drugs that may be dispensed only by prescription and that FDA has

approved. States may restrict or exclude coverage of such drugs only in narrow and specified circumstances, primarily if “the prescribed use is not for a medically accepted indication.” Here, the drug was an FDA-approved medication with an indication and medically accepted use to treat certain patients with DMD; Appellee had a signed Medicaid Drug Rebate Agreement in place at all relevant times; and the Social Security Act requires the Arkansas Medicaid program to cover all FDA-approved drugs for FDA-approved indications and medically accepted uses, it was unlawful for DHS to deny coverage. The lower court did not err in its denial of DHS’s motion to dismiss and grant of summary judgment for Appellee. (Fox T.; 60CV-18-8359; 9-15-21; Abramson, R.)

Ford v. Randall, 2021 Ark. App. 360 [**lack of consideration**] The trial court entered findings of fact and conclusions of law ruling that the Appellant breached a lease agreement when it stopped making rental payments for the buildings that the Appellees built for the Appellants. Appellants argued that the option agreement with the Appellees was unenforceable for lack of consideration. Additionally, the Appellants argued that the building lease was limited to the Appellees’ ownership of the improvements to the building over a term, which they say expired in 2007 – at the conclusion of the initial lease term and the first option term. When a written contract refers to another instrument and makes the terms of that instrument a part of the contract, the two are construed together as the agreement of the parties. Here, the option agreement incorporated the building lease by reference twice, and the Appellant continued their rent payments after 2007, as well as sending a “buy out” letter, establishing that they knew of (and agreed to) the additional terms in the option contract. [**ambiguity**] Appellant next argued that the building lease in question was ambiguous. The first rule of interpreting a contract is to give the language the meaning that the parties intended, and courts must consider the sense and meanings of the words used by the parties as they are taken and understood in the plain, ordinary meaning. When the terms of a contract are ambiguous and susceptible to more than one meaning, however, the meaning of the contract becomes a question of fact. The appellate court found no ambiguity in the building lease when the option agreement and building lease were read together. [**theft of corporate opportunity and inherent unfairness**] A party loses its right to avoid a contract for fraud, conflict of interest, or breach of fiduciary duty if, with full knowledge of the alleged wrongdoing, it “accepts the benefits flowing from [the contract] or remains silent or acquiesces in the contract for any considerable length of time after opportunity it afforded to annul or avoid it.” Because the Appellant ratified the building lease and the option agreement, it cannot thereafter assert that the documents were unfair or the products of any breach of fiduciary duty. (Tabor, S.; 66FCV-18-563; 9-29-21; Harrison, B.)

Crain Family Holdings, LLC v. Ford Motor Company, 2021 Ark. App. 361 [**right of first refusal**] Appellant entered into a deal with Penske Automotive Group to buy two auto dealerships. Ford subsequently informed Appellant that it was exercising its right of first refusal and assigned its purchase rights to a third-party. The transaction with the third-party then closed on the same terms as negotiated by Penske and Appellant. Appellant then filed a complaint with the Commission that Ford violated Arkansas Code Annotated §23-112-403(a)(2)(I)(i) when it exercised its right of first

refusal. The circuit court reversed a decision by the Arkansas Motor Vehicle Commission that Ford Motor Company violated an Arkansas statute. The statute makes it unlawful for a manufacturer, notwithstanding the terms of any franchise agreement, to fail to give effect or attempt to prevent any sale or transfer of a dealer, dealership, or franchise or interest therein, or management thereof, absent statutory exceptions. The appellate court held that Ford did not violate the statute because they did not prevent Penske from selling the Ford dealership. In exercising its contractual right of first refusal, Ford merely prevented the Appellant from purchasing the Ford dealership. The lower court properly reversed the decision by the Commission. (Arnold, G.; 63CV-19-1155; 9-29-21; Abramson, R.)

City of Little Rock and Little Rock Police Department v. Starks, 2021 Ark. App. 362 [**contempt**] The circuit court found the City of Little Rock and the Little Rock Police Department in contempt for intentionally and willfully violating its order in the underlying case, *City of Little Rock and Little Rock Police Department v. Starks*, 2021 Ark. App. 323. The order of the lower court required that the Appellee be reinstated with a reduction in pay, receive all accrued benefits and leave time, be reimbursed for transcript costs, and that no additional punishment be applied. To establish civil contempt, there must be willful disobedience of a valid court order. However, before one can be held in contempt for violating the court's order, the order must be definite in its terms and clear as to what duties it imposes. The appellate court held that the officer was not punished additionally by the manner of his reinstatement when the city placed him on paid leave, and did not return his badge, identification, and service weapon. Arkansas Code Annotated § 14-51-301(a)(10) and (11) provide that punishment is related to reduction of salary, reduction of rank, suspension, and discharge; thus, changing Appellee's duty status does not constitute punishment. Therefore, the city did not violate the lower court's directive that there would be no additional penalties against the officer. When, under the circumstances and the legal issues involved, a party does all that is expressly required of him by court order, it is erroneous to hold him in contempt. (Fox, T.; 60CV-19-7042; 9-29-21; Virden, B.)

Carter v. Livingston, 2021 Ark. App. 363 [**defective summons**] The trial court granted summary judgment in favor of Appellee. Appellants argue that it was erroneous for the trial court to rule that the summons served on the Hospital was insufficient, resulting in a dismissal with prejudice in their case. The requirements of Rule 4 regarding summonses "must be strictly construed and compliance with them must be exact." By omitting the name and address of their attorney, the summons was defective and required a dismissal of the Appellant's case. Appellants likewise could not avoid the effect of their defective summons by retroactively applying Rule 4(k)'s new substantial-compliance standard to an order entered more than a year before that rule took effect. [**waiver of insufficiency of process**] The Appellants further argue that the Appellee, by its actions over the course of twelve years of litigation, waived any objections to insufficiency of process. The rules of civil procedure do not necessitate that a defendant move to dismiss on the basis of defective service at the start of the case. The Appellee was only required to preserve the defense under Arkansas Rule of Civil Procedure 12(h) by asserting it in the original responsive pleading.

A party seeks affirmative relief when it takes “more than a defensive action.” Moreover, a party seeks affirmative relief when it asserts claims, such as filing a counterclaim, a crossclaim, or a third-party complaint. The appellate court found that none of the Appellee’s actions, including requests for admission, notices of deposition, a motion for summary judgment, combining a response to motion for protective order with a motion to compel, and a motion to exclude evidence, requested affirmative relief. The Appellee could preserve the defense of insufficiency of process by raising it in the responsive pleading and later moving to dismiss the case. (Erwin, H.; 34CV-05-63; 9-29-21; Gladwin, R.)

Xayprasith-Mays v. Wallace, 2021 Ark. App. 370 [**property law; partition sale**] The circuit court entered a judgment in a partition case filed by the Appellant, regarding a dispute between the parties as to their respective interests in real property. Both parties appeal from the circuit court’s ordered allocation of proceeds resulting from a partition sale. Arkansas Code Annotated § 18-60-419(a)(1) provides, “In all suits in any of the courts of this state for partition of lands when a judgment is rendered for partition in kind, or a sale and a partition of the proceeds, the court rendering the judgment or decree shall allow a reasonable fee to the attorney bringing the suit.” Meaning that an award of attorney’s fees in partition actions is mandatory. Courts are to consider only the services performed by the attorney requesting the fees that are of common benefit to all parties. In this case, the lower court awarded attorney’s fees to the Appellee, although the Appellant filed the partition action. Thus, the Appellant’s counsel is “the attorney bringing the suit” and should be granted a reasonable fee. The award is limited to only those services performed by the Appellant’s counsel that were for the common benefit to all parties. (Green, R.; 04CV-16-1682; 9-29-21; Brown, W.)

Lewis v. Arkansas Department of Human Services, 2021 Ark. App. 317 [**insufficient evidence for finding of adult maltreatment**] The Appellant petitioned for judicial review of Arkansas DHS’s finding that she committed adult maltreatment and its subsequent listing of Appellant on the Adult and Long-term Care Facility Residential Maltreatment Central Registry. Pursuant to Arkansas Code Annotated § 12-12-1703(1)(A), with regard to any long-term-care-facility resident, “abuse” is defined as: (i) Any intentional and unnecessary physical act that inflicts pain on or causes injury to an endangered person or an impaired person, excluding court-ordered medical care or medical care requested by the patient or long-term care facility resident or a person legally authorized to make medical decisions on behalf of the patient or long-term care facility resident; (ii) Any intentional act that a reasonable person would believe subjects an endangered person or an impaired person, regardless of age, ability to comprehend, or disability, to ridicule or psychological injury in a manner likely to provoke fear or alarm, excluding necessary care and treatment provided in accordance with generally recognized professional standards of care; (iii) Any intentional threat that a reasonable person would find credible and nonfrivolous to inflict pain on or cause injury to an endangered person or an impaired except in the course of medical treatment or for justifiable cause; or (iv) Any willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. The appellate court concluded

that after reviewing the record, including the video of the incident, there was sufficient evidence to support a finding that Appellant's intentional use of force was excessive and unnecessary when she pushed down an adult patient. The circuit court correctly affirmed the administrative agency's determination that the Appellant committed adult maltreatment. (Gibson, R.; 06CV-17-115; 9-1-21; Brown, W.)

Paschal Heating and Air Conditioning Co., Inc. v. Zotti, 2021 Ark. App. 372 [**discovery**] The trial court granted a motion for sanctions and struck Appellant's complaint and answer to Appellee's counterclaim after Appellant produced a falsified email during discovery. Appellant appealed the circuit court's imposition of sanctions. To win a reversal for abuse of discretion by striking the pleadings, the Appellant must prove that the circuit court's decision to strike the complaint and its answer to Appellee's counterclaim was done improvidently, thoughtlessly, and without due consideration. During discovery, Appellant produced an email to the Appellee that contained language that was altered from the original email that was sent. After the motion for sanctions was filed, Appellant admitted to the falsified email. The circuit court recited that where an e-mail on a material fact in dispute was altered, then provided in discovery, and never retracted until the motion for sanctions, the striking of the Appellant's complaint and answer to Appellee's counterclaim was necessary given the Appellant's conduct. The appellate court held that given the record, the circuit court did not abuse its discretion by imposing sanctions. (Bryan, B.; 72CV-19-629; 10-6-21; Abramson, R.)

Pennington V. BHP Billiton Petroleum (Fayetteville), LLC, 2021 Ark. 179 [**statute of limitations**] The five-year statute of limitations for breach of contract starts when a plaintiff can first bring the cause of action to a successful conclusion. Here, the contract required monthly oil-and-gas royalty payments. Plaintiffs alleged defendants had been underpaying those royalties for more than five years. The Federal Court certified the following question to the Arkansas Supreme Court: whether Arkansas law prevents plaintiffs from pursuing their breach-of-contract claim when the first breach occurred outside the statute-of-limitations period. The Supreme Court concluded that a separate statute-of-limitations period began as each monthly royalty payment became due. Here, the contracts required defendants to make a monthly royalty payment to plaintiffs. The provisions required defendants to remit payment based on gross proceeds, which is a monthly calculation. Plaintiffs alleged defendants allowed improper deduction of costs. This alleged breach happened during the monthly calculation and payment remittance. The damage element of breach of contract would have been established monthly and, potentially, in a different amount each month. The Supreme Court found that these were separate and singular breaches under Arkansas law. Thus, plaintiffs would have a separate claim for each month that an underpayment occurred, and the clock would begin to run, for statute-of-limitations purposes, each time defendants made an underpayment. The existence of monthly underpayments of royalties outside the limitations period does not bar recovery for underpayments within the limitations period under Arkansas law. (10-14-21; Wood, R.)

PST Tax Inc. v. Tindall, 2021 Ark. App. 388 [**witnesses**] Appellant argued that the circuit court abused its discretion in refusing to allow the Appellee to be called as a witness during Appellant's case-in-chief. Rule 611(a) of the Arkansas Rules of Evidence provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment. Here, the Appellant had many opportunities to provide the Appellee with a witness list and failed to do so. When the Appellant did provide a witness list less than twenty-four hours before the hearing, they did not list Appellee as one of the witnesses to be called. In light of the considerable discretion Rule 611(a) vests in the circuit court to regulate the mode and order of witnesses and presenting evidence, and the circuit court's consideration of the circumstances described by each party's counsel, the appellate court found no abuse of discretion. (Weaver, S.; 23CV-20-274; 10-20-21; Virden, B.)

Epps v. Ouachita County Medical Center, 2021 Ark. App. 389 [**standing**] The circuit court dismissed Appellant's complaint with prejudice. There are two causes of action that arise when a person's death is caused by the negligence of another: (1) a cause of action for the estate under the survival statute, and (2) a cause of action for the statutory beneficiaries under the wrongful-death statute. Here, the Appellant argued that the survival statute does not expressly state that the action must be filed in the name of the executor or administrator, as in the wrongful death-statute. Only an administrator, an executor, or a personal representative can file a survival action. The appellate court held that Appellant's original complaint was a nullity because the "Estate of Melissa Dennis" and the "Estate of Journee Dennis" did not have standing to bring a survival action when Appellant had been appointed special administrator or personal representative. By the time the Appellant attempted to file an "amended" complaint the statute of limitations had expired. [**relation back doctrine**] The Appellant tried to characterize her failure to properly identify the plaintiff in her survival action as a typographical error and claims that she simply left off the magic words "Geraldine Epps, as personal representative of." Where an action is brought in the name of a non-existing plaintiff, an amendment of complaint by substituting the proper party to the action as plaintiff will be regarded as the institution of a new action for purposes of the statute of limitations. Because Appellant's original complaint was a nullity, the amended complaint cannot relate back to its filing date. Before the relation-back doctrine can apply, there must be pleadings to amend. [**nonmedical claims**] Lastly, the Appellant argued that some claims in her complaint should survive dismissal because they are not medical-malpractice claims. Here, the Appellant's claims for negligence in the dispatch of an ambulance and negligent supervision and retention of the doctor would fall within the Medical Malpractice Act and its expansive definition of "medical injury." Each of the Appellees are medical-care providers, and the only injury alleged by the Appellant is a medical injury. Therefore, all of the Appellant's claims were subsumed into a cause of action for medical malpractice within its two-year statute of limitations. (Guthrie, D.; 52CV-19-262; 10-20-21; Virden, B.)

Young v. Shelter Mutual Insurance Company, 2021 Ark. App. 391 [**motion to nonsuit**] The circuit court granted Appellee’s motion for summary judgment and dismissed the Appellant’s complaint against Appellee with prejudice. On appeal, Appellant argued that the circuit court erred by granting summary judgment to Appellee and should have, instead, granted his motion to nonsuit his complaint without prejudice. Appellant was injured in an automobile accident. The Appellant sued Shelter Insurance, which provided the insurance coverage for the car. The right to nonsuit outlined by Rule 41 is absolute and may not be denied by the circuit court so long as the right is asserted before the “final submission” of the case to the jury or the court. A case has not been finally submitted where, even though it has come to a hearing, the argument has not yet closed. If a case is submitted to the circuit court on a motion for summary judgment and an adverse ruling has been announced to the plaintiff, then the case has been “submitted” for purposes of Rule 41. Once submitted, the circuit court has discretion to decide whether to grant a voluntary nonsuit. Here, Shelter filed its summary-judgment motion in March 2018, and in April 2018, the circuit court granted Appellant forty-five additional days for his response. Appellant filed a timely response to Shelter’s motion for summary judgment, and Shelter filed a reply to Appellant’s response. In August 2018, Shelter asked that the court grant its motion for summary judgment. The matter remained pending for well over a year, and no hearing was conducted on this motion. The appellate court rejected Appellant’s contentions that the circuit court acted on the motion for summary judgment before his time to respond had expired and that the court was required to grant his motion to nonsuit, filed one day before entry of summary judgment. The appellate court held that, for purposes of Rule 41, Shelter’s motion for summary judgment had been submitted to the court before Appellant sought to nonsuit. In these circumstances, Appellant did not have an absolute right to nonsuit his complaint without prejudice. (Morledge, C.; 54CV-17-324; 10-20-21; Klappenbach, N.)

Bugg v. Honey, 2021 Ark. App. 393 [**motion for summary judgment**] The trial court granted the Appellees’ motion for summary judgment. The issue on appeal was to determine if summary judgment was appropriate. Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. When there are genuine questions of material fact with regard to a party’s intent, summary judgment is improper. The Appellant alleged that Appellees had committed malicious prosecution in two cases. In the malicious-prosecution counts alleged by Appellant, and in the most general terms, Appellant had to present evidence to support that Appellees started the cases without probable cause, with malice, and resulting in damages. To prove the abuse-of-process claims, Appellant had to present evidence to support that Appellees continued the two cases for improper, coercive purposes, resulting in damages. Here, the Appellant submitted a detailed affidavit to demonstrate that the Appellees had ulterior and improper purposes in filing and pursuing the allegation that Appellant acted in violation of the bankruptcy court’s automatic stay. Appellees presented an affidavit denying those allegations. A credibility determination should not be made at the summary-judgment stage between the opposing parties’ affidavits. The appellate court held that the trial court erred in entering summary judgment to Appellees on both malicious prosecution in the stay case and abuse of process in the

stay case because of the conflicting affidavits. Regarding the malicious prosecution claim and the abuse of process claim in the removed case, the appellate court held that the circuit court did not err in entering judgment for Appellees. After reviewing the record, the appellate court held that the Appellant failed to demonstrate that he suffered any damages in the removed case. Without showing any damages, the Appellant's claim failed as a matter of law, so the circuit court did not err in entering summary judgment. (Williams, L.; 26CV-19-812; 10-20-21; Klappenbach, N.)

Cherokee Nation Businesses, LLC v. Gulfside Casino Partnership 2021 Ark. 183 [**amendment 100**] This appeal stems from ongoing litigation for the sole casino license for Pope County. The trial court granted declaratory judgment requested by Appellee and found that a portion of Rule 2.13(5)(b) of the Casino Gaming Rules was unconstitutional by imposing an additional requirement on applicants not contained in Amendment 100. The unconstitutional portion of Rule 2.13(5)(b) that was ordered to be stricken was the phrase, “shall be dated and signed by the County Judge, Quorum Court members, or Mayor holding office at the time of the submission of an application for a casino gaming license.” Additionally, the trial court found that Arkansas Code Annotated § 27-117-101(b) was unconstitutional. The trial court then denied Appellee its request for injunctive relief against the Arkansas Racing Commission (ARC). The narrow issue on appeal involved reviewing the language of Amendment 100. Pursuant to Amendment 100, the Arkansas Racing Commission adopted rules in support of the Arkansas Casino Amendment of 2018. The letters of support referenced in Amendment 100 must be issued by officials who are in office at the time of the submission of an application for a casino license. The ARC must first promulgate rules and establish an application process and period before an entity can be considered an applicant. The ARC set the application window for May 2019. An entity could not become a “casino applicant” until the ARC opened the application window in May 2019. Once an entity became a casino applicant in May 2019, it had to obtain a letter of support from “the county judge.” Ark. Const. amend. 100, § 4(n). Here, the use of the definite article “the” before “county judge” indicates a specific, definite judge, the current county judge—not a former county judge or retired county judge—because those are not “the” county judge. Accordingly, the Supreme Court held that the plain language of Amendment 100, passed by the people of Arkansas stating “the county judge” means the county judge in office at the time the “casino applicant” submitted its application to the ARC. The Supreme Court held that both Rule 2.13(5)(b) of the Casino Gaming Rules and Arkansas Code Annotated § 27-117-101(b) are consistent with Amendment 100 and do not impose an additional requirement; therefore, they are constitutional. (Fox, T.; 60CV-19-5832; 10-21-21; Baker, K.)

Leavell v. Gentry, 2021 Ark. App. 412 [**property**] The circuit court granted summary judgment in favor of Appellees and voided two deeds procured by the Appellant. On appeal, the Appellant argued that the circuit court erred in finding that the transfer of real property was invalid. The properties at issue were once owned by the parties' common ancestors, who deeded the properties to a revocable living trust to which they were trustees. In 2014, one of the common ancestors deeded a house to Appellant and his wife, reserving a life estate in herself. In 2017, the same

common ancestor deeded a farm parcel to Appellant. The common ancestor executed both deeds in her individual name and not in her capacity as a trustee. The Appellant argued that the trust gave the ancestor the power to remove property from the trust and a trustee's failure to sign a deed as trustee does not invalidate the deed. When the settlor of a trust retains a power to revoke, the settlor may revoke the trust in part, thus allowing withdrawal of some of, rather than all, the property from the trust, if that is all the settlor wishes to do. The ancestor who created the trust, however, did not provide a method by which the settlor could revoke or modify. Arkansas Code Annotated § 28-73-602(c)(2)(B) provides that when the terms of the trust do not provide a method to revoke or amend a revocable trust, the settlor may revoke or amend the trust by any method manifesting clear and convincing evidence of the settlor's intent. The appellate court held that the record did not show clear and convincing evidence of the ancestor's intent to revoke or amend her trust by virtue of her execution. (Coker, K.; 58CV-19-389; 10-27-21; Whiteaker, P.)

Hotels.com v. Pine Bluff Advertising and Promotion Commission, 2021 Ark. 196 [**class-action**] The trial court denied intervention to 159 taxing jurisdictions and denied the Appellants' motion for decertification of any "damages class" in a class-action case. On appeal, the Appellants' argued that the circuit court lacked jurisdiction to award class-wide damages because there has been no exhaustion of mandatory administrative remedies. Here, the appellate court had to determine whether the orders being appealed fell within one of the limited exceptions to the general rule that a judgment or order must be final to be appealable. Despite the Appellants' characterization of the circuit court's actions, there was no class certification at issue in the present appeal. The circuit court denied a motion to intervene and the Appellants' motion to dismiss and motion to decertify, none of which are appealable by the Appellants on an interlocutory basis. Furthermore, the fact that a significant issue may be involved is not sufficient, in itself, for the appellate court to accept jurisdiction of an interlocutory appeal. The Supreme Court held that the orders the Appellants attempted to appeal are not appealable on an interlocutory basis and dismissed the appeal. (Wyatt, R.; 35CV-09-946; 10-28-21; Wynne, R.)

Sutherland v. Edge, 2021 Ark. App. 428 [**property**] The trial court entered a final order quieting title to the property in question to the Appellees and dismissed the Appellants' counterclaim for quiet title. On appeal, the Appellants argued that the Appellees' claim of title to the property in question was barred by res judicata. Res judicata has two facets, one being claim preclusion and the other issue preclusion. The claim-preclusion aspect of res judicata bars relitigation of a subsequent suit when: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. Res judicata bars not only the relitigation of claims that were actually litigated in the first suit, but also those that could have been litigated. Where a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. Here, each of the five elements were met. The Appellees had their day in court and had a full and fair opportunity to litigate the issue of the

ownership of the property in a previous proceeding and lost. The parties fully litigated the same causes of action in the previous proceeding, and the circuit court previously dismissed those causes of action finding that the Appellees had failed to meet their burden of proof. Thus, the claim of title by Appellees to the property in question was barred by *res judicata*. (Meyer, H.; 12CV-15-167; 11-3-21; Hixson, K.)

In the Matter of the Estate of Robert H. Slaughter v. Trice 2021 Ark. 199 [**adverse possession**] The trial court entered a decree quieting and confirming title in 173.5 acres of property in favor of Appellees. On appeal, Appellant argued that the trial court erred in quieting title because Appellees failed to present a *prima facie* case of adverse possession. Title to land by adverse possession does not arise as a right to the one in possession; it arises as a result of statutory limitations on the rights of entry by the one out of possession. Possession alone does not ripen into ownership, but the possession must be adverse. The claimant has the burden of proof to show, by a preponderance of the evidence, possession for seven years. To establish adverse possession, the possession must be actual, open, continuous, hostile, and exclusive and be accompanied by an intent to hold adversely and in derogation of—and not in conformity with—the right of the true owner. Because possession by a cotenant is not ordinarily adverse to other cotenants, a cotenant must give actual notice to other cotenants that his possession is adverse or commit sufficient acts of hostility so their knowledge of an adverse claim may be presumed. The statutory period for an adverse-possession claim does not begin to run until the other cotenants have knowledge. When a cotenancy involves a family relation, stronger evidence of adverse possession is required. Here, the unknown heirs of the deceased were cotenants with the Appellees and were entitled to actual notice of Appellees adverse claim to the property. The previous litigation regarding the property did not put the deceased unknown heirs on notice that Appellees claimed the property through adverse possession. The deceased’s unknown heirs were not expected to check constantly for court records that could have affected their cotenancy. The Appellee had not claimed the property at issue by adverse possession. (Mitchell, C.; 39PR-16-8; 11-4-21; Kemp, J.)

Robbins v. Lemay, 2021 Ark. App. 436 [**conversion; unjust enrichment**] The circuit court dismissed a lawsuit brought by Appellant against his daughter, the Appellee. On appeal, the issue was whether the Appellant pleaded sufficient facts to support a cause of action for either conversion or unjust enrichment. Conversion is a common-law tort action for the wrongful possession or disposition of another’s property. To establish liability for the tort of conversion, a plaintiff must prove that 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 exercises control over the goods in exclusion or defiance of the owner’s rights, it is a conversion. To find unjust enrichment, a party must have received something of value to which he or she is not entitled and which he or she must restore. Here, the Appellant added his daughter’s name to two of his bank accounts so she could help him if he needed assistance with bills and expenses. The Appellee withdrew a large portion of the Appellant’s retirement savings and placed it into her own account. Appellant acknowledged that Appellee had full authority to withdraw money from

the accounts but asserted that Appellee was supposed to assist him with his needs, not take his money and deprive him of it. A joint tenant may not, by withdrawing funds in a joint tenancy, acquire ownership to the exclusion of the other joint tenant. A joint tenant who withdraws funds in excess of his share is liable to the joint tenant for the excess so withdrawn. A court may impose a constructive trust and apportion the proceeds in accordance with intentions of the parties. Courts must look to the substance of a pleading, and it will be interpreted according to its substance rather than its form. Here, the Appellant sought equitable relief for his daughter's conversion of his money or her unjust enrichment by her taking and keeping his money. These alleged facts were sufficiently pled to survive a motion to dismiss. (Batson, B.; 10CV-20-83; 11-10-21; Klappenbach, N.)

Sluyter v. Wood Guys, LLC, 2021 Ark. App. 442 [**preconstruction liens; breach-of-contract**] The trial court entered an order against the Appellants for breach of contract. On appeal, the Appellants challenged the validity of the judgment entered by the trial court, arguing that due to the failure to give preconstruction lien notice, Appellee, is barred from recovering on its breach-of-contract and quantum meruit claims. Pursuant to statute, no lien may be acquired on residential real estate containing four or fewer units unless the owner, the owner's authorized agent, or the owner's registered agent has received the notice. The issue that the court of appeals considered was whether the failure to provide such notice bars Appellee from bringing an action to recover on its breach-of-contract and quantum meruit claims. Arkansas Code Annotated § 18-44-115(a)(3) places a duty on "residential contractors" to provide preconstruction lien notice but does not specifically define "residential contractor." However, "residential building contractor" is defined by the Arkansas Code. The appellate court held that the terms "residential building contractor" and "residential contractor" are not interchangeable. While the Appellee did not fall into the definition of a residential building contractor, the appellate court held that the Appellee was a contractor as defined by statute, and they performed work at Appellant's residence. Consequently, the appellate court held that the Appellees were a residential contractor subject to provide preconstruction lien notice prior to commencement of work. Because Appellees failed to provide the required notice, they were barred pursuant to Arkansas Code Annotated § 18-44-114(a)(4) from bringing an action to recover on their contractual and equitable claims. In 2021, the legislature amended the mechanics'- and materialmen's lien statutes removing the bar against equitable claims, instead providing only that residential contractors may not avail themselves of the benefit of a lien without giving notice before commencement of work. While this legislative amendment came too late to aid Appellees, it now provides a way for residential contractors to seek redress, even when they fail to execute and deliver preconstruction lien notice. (Scott, J.; 04CV-19-1639; 11-10-21; Brown, W.)

Mahadevan v. Board of Trustees of the University of Arkansas System 2021 Ark. 208 [**injunctive relief; termination of employment**] The circuit court denied Appellant's request for injunctive relief preventing the University of Arkansas for Medical Sciences (UAMS) from terminating his employment and dismissed his complaint. Appellant's complaint conceded that he was not entitled

to money damages against UAMS under Arkansas's sovereign-immunity doctrine. Thus, Appellant sought only prospective equitable relief preventing his termination. However, preliminary or permanent injunctive relief was no longer available once the hospital terminated the Appellant. Consequently, the dismissal was appropriate as the remedy Appellant sought was unavailable. Additionally, the 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—were not applicable here. (Fox, T.; 60CV-20-5583; 11-12-21; Wood, R.)

Jenkins v. Mercy Hospital Rogers 2021 Ark. 211 [**wrongful termination; employment discrimination**] The trial court dismissed the Appellant's employment-discrimination complaint against Appellee. On appeal, the Appellant argued that her claim under the Arkansas Civil Rights Act (ACRA) survived either because Appellee did not qualify for the religious-organization exemption or because the exemption was unconstitutional. The Appellant argued in her third claim that she stated a claim under ACRA because the religious-organization exemption did not apply to Appellee. ACRA prohibits employment discrimination on the basis of religion, among other grounds. However, this prohibition does not apply with respect to employment by a religious corporation, association, society, or other religious entity. Appellant argued that while the Appellee is an affiliate of the Catholic Church, it is a secular, not a religious organization, and therefore not entitled to an exemption. The trial court found that Appellant was estopped from alleging that Appellee is not a religious organization. For judicial estoppel to apply, four elements must be present: (1) a party must assume a position clearly inconsistent with a position taken in an earlier case, or with a position taken in the same case; (2) a party must assume the inconsistent position with the intent to manipulate the judicial process to gain an unfair advantage; (3) a party must have successfully maintained the position in an earlier proceeding such that the court relied upon the position taken; and (4) the integrity of the judicial process of at least one court must be impaired or injured by the inconsistent positions taken. Here, the Appellant did take inconsistent positions on the issue of whether Appellee is a religious organization. However, there was no indication that Appellee intended to manipulate the judicial process to gain an unfair advantage or that the inconsistent positions impaired or injured the integrity of the judicial process. The trial court made no findings on these elements, nor did Appellee address them. Therefore, the trial court erred in finding that Appellant was estopped from alleging that Appellee is not a religious organization. (Duncan, X.; 04CV-20-934; 11-12-21; Wynne, R.)

Arkansas Department of Finance and Administration v. Lewis 2021 Ark. 213 [**sovereign immunity**] Appellee filed a complaint in the trial court alleging that Appellants had terminated him in violation of public policy and without a name-clearing hearing. The trial court denied the State's motion to dismiss Appellee's complaint on the grounds of sovereign immunity. Article 5, section 20 of the Arkansas Constitution provides that the State of Arkansas shall never be made a defendant in any of her courts. Sovereign immunity has been extended to state agencies and state employees sued in their official capacities. In determining whether sovereign immunity applies, the decisive issue is whether a judgment for the plaintiff will operate to control the actions of the

State or subject it to liability. Sovereign immunity is not implicated when the State is acting illegally, unconstitutionally, or ultra vires. A plaintiff seeking to surmount sovereign immunity is not exempt from complying with the fact-pleading requirements. Here, the Appellee failed to plead sufficient facts to establish an exception to the sovereign-immunity doctrine. The Appellee argued that he was merely fulfilling his duties, that he was left without direction, and that his supervisor was not terminated for doing the same thing. Although the circuit court found that Appellee was treated differently from his supervisor, he did not make an equal protection claim sufficient to surmount sovereign immunity. Accordingly, construing Appellee's allegations as true, he failed to plead facts which indicated that the Appellant acted illegally, unconstitutionally, or ultra vires. (Martin, D.; 72CV-20-1863; 11-12-21; Webb, B.)

Sutton v. Pickett, 2021 Ark. App. 452 [**unlawful detainer**] The circuit entered an order in favor of the Appellees and dismissed the Appellants' "Second Amended Complaint for Unlawful Detainer and Motion for Restraining Order." On appeal, Appellants argued that (1) the circuit court's holding that an earlier order quieting title in certain individuals was void and rendered any attempted conveyance by the beneficiaries of that order void and (2) there existed no basis for providing the Appellees with a co-tenancy interest for which neither they nor the purported grantors bargained. The beneficiaries of the earlier order deeded two plots of land to Appellees. The Appellants first argued that any conveyances since the 2010 order were now voided because the most recent order voided the 2010 order. In an unlawful detainer proceeding, the title to the premises is not adjudicated but is merely given in evidence to show the right of possession. Here, the Appellants failed to show that the Appellees were not entitled to possession. In this unlawful-detainer action, the circuit court was not called to determine ownership of the property at issue but rather only whether the Appellees, who were in possession of the relevant property, had a right to be in possession. The circuit court did not err in finding that Appellees had a right to possession pursuant to the color of title conveyed to them by the deeds granted by the beneficiaries. (Yeargan, C.; 67CV-19-71; 11-17-21; Gladwin, R.)

PROBATE

In the Matter of the Estate of Shockley; Davis v. Bassett, 2021 Ark. App. 326 [**choice of law**] Under Arkansas law, the statutory beneficiaries of a wrongful-death action include the decedent's sisters. Under Texas law, the statutory heirs do not include siblings. Thus, if Texas wrongful-death law is applied, the recovery of damages would only go to the deceased's estate, which the Appellee is the sole beneficiary. The supreme court has held there are five choice-influencing considerations in deciding the choice-of-law question, which include: "(1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law." After applying these factors to the facts, the appellate court determined that Arkansas law applied to this case. [**wrongful death**] The circuit court denied Appellant's claim for a portion of wrongful-death settlement proceeds obtained by Appellee in their capacity as executor of the estate of the

deceased. The deceased died testate, was unmarried and had no children. His only heirs were his three sisters, the two Appellants and the Appellee. Litigants have used the generic label “wrongful-death actions” to describe all claims made by the decedent’s representative arising out of a motor-vehicle accident. This label is inaccurate and can lead to confusion because there are actually two different causes of action in these scenarios. The first cause of action is a survival action under Arkansas Code Annotated § 16-62-101 (Repl. 2005). The second cause of action is a wrongful-death action under Arkansas Code Annotated § 16-62-102 (Supp. 2019). In the survival action under § 16-62-101, the estate may recover damages for things such as medical bills, conscious pain and suffering, funeral expenses, and loss-of-life damages. Damages recovered under a survival action become an asset of the estate and are distributed under the terms of the decedent’s will if the decedent died testate, as he did here. In the wrongful-death action under Arkansas Code Annotated § 16-62-102(b), the wrongful-death action is brought by, and in the name of, the personal representative of the deceased person on behalf of the statutory beneficiaries. Here, damages recovered in a survival action would go to the deceased’s estate and be distributed solely to the executor (subject to deceased’s creditors) under the terms of the deceased’s will. On the other hand, damages recovered in a wrongful-death action would go to the deceased’s statutory beneficiaries, which here included the two Appellants and the Appellee. (Layton, D.; 05PR-17-178; 9-8-21; Hixson, K.)

Progressive Eldercare Services-Drew, Inc. v. Everett, 2021 Ark. App. 353 [**power of attorney**] The circuit court denied the Appellant’s motion to compel arbitration of a complaint filed by the Appellee. A nursing home resident signed a power of attorney that stated the Appellee was appointed “to act in the place and stead and the with the same authority as Principal to do in the following acts.” This language indicated that specific grants of authority were to follow, and it then listed three specific grants of authority. Because the power of attorney did not include “arbitration” as one of the grants of authority, the Appellee did not have the authority to bind the principal to the arbitration agreement. The nature and extent of the agent’s authority must be ascertained from the power-of-attorney instrument itself. (Gibson, R.; 22CV-19-60; 9-22-21; Vaught, L.)

Pierce v. Whitehill, 2021 Ark. App. 395 [**guardianship**] The circuit court dismissed Appellant’s petition to be appointed guardian of his elderly sister, Appellee. This case is controlled by the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (“UAGPPJA”), which Arkansas enacted via Arkansas Code Annotated sections 28-74-101 et seq. (Repl. 2012). Except in special circumstances that are not applicable here, “a court that has appointed a guardian has exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.” In this case, a Connecticut probate court issued an order in 2018 establishing another party as the person with the authority to make decisions on Appellant’s sister’s behalf that affect her personal care and the administration of her property, so Connecticut has exclusive and continuing jurisdiction over this guardianship matter pursuant to the UAGPPJA. Absent special circumstances, if another state’s court has jurisdiction in a

UAGPPJA case, an Arkansas court must dismiss a petition filed in Arkansas unless the other state's court determines that the Arkansas court is a more appropriate forum. Here the Connecticut court did not determine that Arkansas was the more appropriate forum, so the Arkansas court properly dismissed Appellant's petition. There are other provisions in the Arkansas Code particularly, ACA § 28-74-203, that may give Arkansas may have jurisdiction; however, none of those exceptions were present in this case. (Welch, M.; 53PR-20-31; 10-20-21; Klappenbach, N.)

Arkansas DHS Crimes Against Children Division v. Steven D. Mitchell, 2021 Ark. 187 [administrative judgement review] The trial court reversed the DHS administrative law judge's determination that allegations of child maltreatment made against the Appellee were true and that the Appellee should be listed on the Arkansas Child Maltreatment Central Registry. DHS first argued that the administrative law judge's finding was supported by substantial evidence. Substantial evidence is evidence that is valid, legal, and persuasive and that a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture. Courts must review the entire record and give the evidence its strongest probative force in favor of the agency's decision. The question is not whether the evidence would have supported a contrary finding but whether it would support the finding that was made. After reviewing the record, the Supreme Court held that the evidence was enough that "a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture." The Appellee claims that his criminal case was not fully litigated and that principles of collateral estoppel preclude consideration of his guilty plea by the administrative judge. For estoppel purposes, a guilty plea in a criminal case is not equivalent to a criminal conviction that has been actually litigated. Even in cases of a trial, the common-law rule is that a judgment in a criminal prosecution is not a bar to a subsequent civil proceeding founded on the same facts or proof of anything other than its rendition. The mere fact that the Appellee is not estopped from relitigating the issue of his guilt in a civil proceeding does not mean that his guilty plea may not be considered at all in an administrative hearing. Appellee next argued that A.C.A. § 12-12-917(b)(4)(B) provides immunity for statements made in the sex-offender-assessment process. Although true, that section references A.C.A § 16-43-601 et seq., making clear that the immunity granted is immunity in criminal proceedings, not in a DHS administrative hearing. Therefore, Appellee's statements were properly considered. Taken as a whole, the evidence that the administrative law judge relied on was substantial, valid, and legal. [due process] DHS next argued that Appellee was not deprived of due process because he was given a hearing. Due process requires at a minimum that a person be given notice and a reasonable opportunity for a hearing. Determining what process is due involves the consideration of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Appellee did not challenge the specific procedures that DHS has provided for those who wish to contest a true finding. The Appellee argued that those procedures were not followed, and the fact he was not notified for fourteen years after the true finding was a violation of his due process rights. At the time of the

true finding, the Child Maltreatment Act required that the subject be notified. Although there was no statutory deadline for the State to provide Appellee notification of the true finding, DHS concedes that “fourteen years was objectively late.” Here, although the Appellee was not notified for fourteen years, agency decision on appeal was made after Appellee had notice and an opportunity to be heard. **[prejudice]** Arkansas Code Annotated § 25-15-212(h) provides that a reviewing court may reverse or modify the agency decision if the substantial rights of the petitioner have been prejudiced. Here, the Supreme Court held that Appellee did not suffer prejudice. Appellee’s guilty plea and the statements that he made during his sex-offender assessment had the same evidentiary value in 2018 as they did fourteen years ago. In sum, DHS should have been more diligent in following its own statutory-notice procedures. Its failure to do so violated Appellee’s statutory rights when DHS placed his name on the maltreatment registry in 2004. However, those failures did not vitiate the 2018 agency decision that was on appeal here. (Harrod, M.; 33CV-18-77; 10-21-21; Hudson, C.)

White v. Harper, 2021 Ark. App. 435 **[constructive trusts; wills]** The circuit court granted summary judgment against Appellant in her lawsuit to impose a constructive trust on property that passed to her father’s children from a later marriage. Appellant contended that the circuit court erred by excluding extrinsic evidence to prove a contract to make a will and impress a constructive trust as allowed under Mississippi and Arkansas case law. The Appellant acknowledged the absence of language in the deceased wills stating that there was a contract to not change the wills to alter property distribution. Nonetheless, the Appellant argued that the identical wills indeed created such a contract. The meaning of a will is a question of law whose answer lies between the four corners of the document, and the testator’s intent is to be gathered from those four corners. Extrinsic evidence, including evidence about surrounding circumstances and intent, comes into play only if there is an ambiguity. The determination of an ambiguity is itself a question of law. Wills, unlike contracts, generally are unilaterally revocable and modifiable; a will does not become irrevocable or unalterable simply because it is drafted to “mirror” another testator’s will. Here, it was not disputed that the deceased wills were unambiguous and say nothing about a contract to revoke them. The circuit court did not err in ruling that parol evidence was inadmissible to prove a contract to make a will and impress a constructive trust. (Pierce, M., 60CV-18-7129; 11-10-21; Klappenbach, N.)

CRIMINAL

Quijada v. State, 2021 Ark. App. 321 **[motion for continuance; COVID-19 pandemic]** Below, the circuit court revoked the Appellant’s probation and sentenced him to seven years’ imprisonment. Rule 27.3 of the Arkansas Rules of Criminal Procedure provides that the “court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.” When a motion is based on a lack of time to prepare, the appellate court will consider the totality of the circumstances; prejudice

from denial of the continuance must be shown, and the burden of showing prejudice is on the Appellant. A lack of diligence alone is a sufficient basis to deny a motion for continuance. Here, the Appellant “instructed” his counsel to ask for a continuance based upon the COVID-19 pandemic, stating that he had not been in court for three months and needed more time to prepare. The circuit court denied the motion noting that the Appellant was arraigned in December 2019 and had court dates in February, March, April, and May 2020 and stated that there had been plenty of time to prepare. The Appellant asserted that the circuit court attributed the April and May continuances to him and that the court deliberately and consciously misled the Appellant and counsel that there had been a possibility of going forward with Appellant’s case during those two dates. However, the record suggests that the lower court used those dates to indicate how many previous continuances there had been and how much time there had been to prepare. The Appellant failed to show how he was prejudiced because there was no indication that he was unable to speak to his attorney, and if anything, there was more time to prepare because of the continuances granted by the lower court. (Ramey, J.; 42PCR-18-234; 9-8-21; Gruber, R.)

Tiarks v. State, 2021 Ark. App. 325 [**bolstering expert-witness testimony**] Appellant was convicted of rape, aggravated assault, and second-degree domestic battery, and was sentenced to thirty years’ imprisonment. On appeal, Appellant argued that the lower court abused its discretion by allowing the testimony of an expert witness to bolster the expert-witness testimony of a nurse practitioner. The test for admissibility of expert testimony is whether it will aid the trier of fact in understanding the evidence or in determining a fact in issue. An expert’s or a witness’s testimony opining or directly commenting on the truthfulness of a victim’s statement or testimony is generally inadmissible. Here, the witness’s testimony was clinical in nature, based on her own observations, and did not comment on an expert witness’s findings or credibility, therefore the witness’s testimony was permissible. [**prior allegations of misconduct**] Arkansas Rule of Evidence 405 provides that in cross-examining a defendant’s character witness, it is permissible to inquire into the witness’s knowledge of specific instances of conduct. Here, the Appellant opened the door to the questioning about the prior allegations of misconduct after his mother testified that there had “never been a problem out of [the Appellant] ever” and that he was “a mentor and a healer of people.” By producing a character witness, the Appellant opened the door to evidence that might otherwise have been inadmissible. The evidence of the defendant’s prior allegations of misconduct tested the mother’s knowledge of her son’s character and went to the weight to be given to her opinion. (Green, Robin F.; 04CR-19-75; 9-8-21; Vaught, L.)

Jones v. State, 2021 Ark. App. 329 [**domestic battering**] The circuit court denied the Appellant’s motion to dismiss, which was based upon the State’s failure to introduce substantial evidence that the Appellant purposely caused physical injury to the victim. The Appellant was subsequently convicted of domestic battering in the third degree. Arkansas Code Annotated § 5-26-305(a) provides in part that a person commits domestic battering in the third degree if, with the purpose of causing physical injury to a family or household member, the person causes physical injury to a family or household member; or the person recklessly causes physical injury to a family or

household member. The Appellant argued that he was charged pursuant to Arkansas Code Annotated § 5-26-305(a)(1), which required a showing that he acted with the purpose of causing physical injury. But in making its ruling, the circuit court found that he had acted recklessly in causing injury to the victim. Subsections (a)(1) and (a)(2) are not separate offenses; instead, they are two ways to prove a single offense—domestic battering in the third degree. Thus, the Appellant also could not demonstrate prejudice from any alleged error by the circuit court because he faced the same sentencing range regardless of how the lower court determined he had committed the offense. (Leon, J.; 60CR-19-1512; 9-15-21; Harrison, B.)

Wilson v. State, 2021 Ark. App. 333 [**sentencing; absent defendant**] The Appellant plead guilty to unlawful-discharge and battery charges as well as the firearm and felony enhancements, and then exercised his option to be sentenced by a jury. After the first day of testimony, when the sentencing hearing resumed, the Appellant failed to return to court. After defense counsel tried to contact Appellant and his family members, the parties agreed to delay the proceedings and the trial court issued an arrest warrant for the Appellant. After the delay expired, the circuit court proceeded in absentia with the remainder of the sentencing portion of the trial and the jury returned with an aggregate sentence of seventy-five years. On appeal, the Appellant argued that the circuit court abused its discretion in continuing the second day of his sentencing hearing in his absence. Arkansas Code Annotated § 16-89-103 gives a circuit court the discretion to proceed in a defendant’s absence in certain circumstances: (1) if the indictment is for a felony, the defendant must be present during the trial, (2) if they escape from custody after the trial has commenced or are present at the beginning of the trial and then cause themselves to be unable to appear at trial or if on bail shall absent themselves during the trial, the trial may either be stopped or progress to a verdict at the discretion of the court. If a defendant has notice and an opportunity to be heard in person but they flee or otherwise fail to attend the criminal proceeding, they waive their right to be present, and the circuit court did not err in conducting the proceedings in the defendant’s absence. (Leon, J.; 60CR-17-3152; 9-15-21; Whiteaker, P.)

Burgie v. State, 2021 Ark. 157 [**writ of mandamus**] The lower court denied the Appellant’s petition for a writ mandamus that sought to compel the prosecutor and police department to produce investigative materials connected to the Appellant’s criminal conviction under the Freedom of Information Act (FOIA). Appellant contended that he was entitled to materials from the prosecutor and the police department because the requested material pertained exclusively to the investigation surrounding his conviction for capital murder. Pursuant to FOIA “undisclosed investigations by law enforcement agencies of suspected criminal activities . . . shall not be deemed to be made open to the public.” Moreover, FOIA further prohibits access to any public record to a “person who at the time of the request has pleaded guilty to or been found guilty of a felony and is incarcerated in a correctional facility[.]” Accordingly, the circuit court did not err in its denial of the Appellant’s writ of mandamus. (Wright, J.; 26CR-00-366; 9-16-21; Wynne, R.)

Marshall v. State, 2021 Ark. 158 [**second-degree murder instruction**] Below, the trial court denied the Appellant’s request to instruct the jury on second-degree murder, a lesser-included offense of first-degree murder. The Appellant was subsequently convicted of first-degree murder for fatally shooting his wife. A person commits first-degree murder if, with a purpose of causing the death of another person, the person causes the death of another person. A person commits second-degree murder if the person knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or, with the purpose of causing serious physical injury to another person, the person causes the death of any person. To be entitled to an instruction on the lesser-included offense of second-degree murder, the Appellant must be able to point to evidence in the record that supports a finding that they acted with a “knowing” mental state rather than a “purposeful” mental state or that they acted with the intent of only causing serious physical injury to the victim. Appellant argued several scenarios where he believed that the jury would convict him of second-degree murder: that his purpose was to disable a robot, that he used a gun, that he checked the victim’s pulse before shooting her, that he believed he was shooting blanks at a robot, or that he and the victim may have been fighting. According to the appellate court, none of these scenarios provided a rational basis for the jury to acquit the Appellant of first-degree murder and convict him of second-degree murder. The Appellant had testified that he shot the victim point blank in the eye after confirming that a bullet was in the chamber of his pistol, and that he “took [the victim] out” and “put [the victim] down.” There was no evidence in the record to support a finding that the Appellant acted with a knowing rather than purposeful mental state in shooting the victim or that his purpose was only to cause physical injury. (Weaver, T.; 12CR-17-153; 9-16-21; Wynne, R.)

Bohanan v. State, 2021 Ark. App. 338 [**right to self-representation**] The issue on appeal was whether the Appellant unequivocally invoked his right to self-representation the day before he was tried before a jury. To exercise the right to self-representation, a criminal defendant must negotiate a number of procedural obstacles. One of the procedural obstacles is that the defendant’s request to proceed without counsel must be clear and unequivocal. The Appellant argued there were three instances he clearly invoked his right to self-representation: (1) where he gave his attorney a note requesting to dismiss his attorney and the lower court denied his request; (2) when the Appellant testified in his own defense that he dismissed his counsel earlier that day; and (3) when the Appellant asked, and the lower court granted, his request to make his own closing argument to the jury. Here, the Appellant never said that he would like to represent himself, never asked for a continuance, and never specifically said what he wanted the lower court to do if his attorney was allowed to withdraw. The appellate court held that the Appellant’s statements to the lower court were equivocal on self-representation, so the presumption of counsel applied. The circuit court therefore was not required to independently probe whether the Appellant wanted to represent himself. (Ramey, J.; 15CR-18-22; 9-22-21; Harrison, B.)

Hayes v. State, 2021 Ark. App. 367 [**motion for mistrial**] The circuit court denied the Appellant’s motion for a mistrial after the State referred to the complaining witness as “the victim” while

questioning another witness. The lower court had previously granted a motion in limine prohibiting the parties from referring to the complaining witness as “the victim.” The Appellant argued that the use of that term eroded his fundamental right to be presumed innocent and improperly shifted the State’s burden of proof to him because the jury would be inclined to accept the label “victim” as a proven fact when it is a fact for the State to prove and the jury to determine. A mistrial is an extreme and drastic remedy that will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when the fundamental fairness of the trial has been manifestly affected. An admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. The circuit court did not abuse its discretion when it denied the Appellant’s motion for mistrial because the Appellant failed to show that the State’s one-time reference to complaining witness as “the victim” constituted prejudice sufficient to warrant an extreme and drastic remedy. Even if there was prejudice, the Appellant declined the offer to admonish the jury to cure any prejudice against him. **[late witness disclosure]** The lower court also denied the Appellant’s motions to exclude a late witness’s testimony and alternatively for a continuance based upon the State’s late disclosure of a witness. The circuit court found the late witness’ testimony was limited to a chain-of-custody matter, and there was no evidence related to chain of custody that the Appellant had been prejudiced from receiving a fair trial. The appellate court held that the Appellant failed to show that the witness’ testimony was prejudicial and that could have been prevented by the witness being on the witness list sooner. (Jones, C.; 46CR-16-13; 9-29-21; Vaught, L.)

Brown v. State, 2021 Ark. App. 369 **[waiver to right of counsel]** The circuit court allowed the Appellant to represent himself at trial after he waived his right to counsel. A defendant in a criminal case may invoke his right to defend himself pro se provided that (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. Appellant’s sole argument on appeal is that he did not knowingly and intelligently waive his right to counsel. Here, the facts supported the circuit court’s finding that the Appellant knowingly and intelligently waived his right to counsel. The circuit court pointedly advised the Appellant of the drawbacks of self-representation and informed him he would be held to the same standards as an attorney. The circuit court warned the Appellant of the difficulties of laying down a proper foundation, the consequences of failing to form a proper objection, and the difficulties associated with preparing for trial while in custody. The Appellant acknowledged he understood. The lower court twice warned the Appellant of the seriousness of the charges he was facing and asked him if he wanted a court-appointed attorney. The Appellant declined and acknowledged that he understood. A preponderance of the evidence supports the circuit court’s finding that the Appellant knowingly and intelligently waived his right to counsel. (Wright, H.; 60CR-19-3302; 9-29-21; Murphy, M.)

Turnbo v. State, 2021 Ark. 166 **[jury selection]** The lower court accepted the State’s race-neutral reason for striking a juror. The State said the juror was nonreceptive to their questions. The juror

also noted in her questionnaire that she had a physical impairment that would prevent her from serving, but when questioned about the impairment by the State failed to disclose it. Under *Batson v. Kentucky*, the State cannot use peremptory challenges to strike jurors based on race. Arkansas has adopted a three-step process to address a *Batson* challenge. The party challenging the strikes—here, the defense—has the burden to prove purposeful discrimination. Next, once an initial showing has been made, the other party must give a race-neutral reason for the strike. A race-neutral reason must be more than a simple denial of intent to discriminate. The reason “need not be persuasive or even plausible and . . . may even be silly or superstitious.” The proffered reason by the State that juror’s failure to disclose a physical impairment that would prevent her from serving on the jury is race-neutral on its face. **[rape-shield]** Below, the Appellant sought to admit testimony that the victim’s mother had told a social worker that the victim had made a prior allegation against a third-party but later recanted that allegation. However, at the pretrial hearing, the victim and her mother both denied that the victim had ever recanted the prior allegations. Under Arkansas Rule of Evidence 411(b), “evidence of a victim’s prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true . . . is not admissible by the defendant . . . to attack the credibility of the victim.” However, the circuit court can admit the evidence if: (i) it is relevant and (ii) its probative value outweighs its inflammatory or prejudicial nature. In this case the probative value was slight. The victim and the mother had recanted their testimony at the pretrial hearing, and any contrary testimony would be probative only to impeach the mother’s credibility, not the victim’s. Allowing this type of testimony risks creating “a trial within a trial” on whether the victim had recanted her prior allegation. Requiring a victim to publicly air earlier sexual conduct unrelated to the charged crime with little probative value is what the rape-shield rule is designed to prevent. **[access to victim’s psychiatric records]** Rule of Evidence 503(b) establishes a psychotherapist-patient privilege. State statutes place psychotherapist-patient privilege on par with attorney-client privilege. Patients’ private records of this nature, created within the relationship of their private provider, are not even subject to in camera review because the privilege is absolute. (Johnson, L.; 60CR-18-607; 9-30-21; Wood, R.)

Bragg v. State, 2021 Ark. App. 381 **[jury instructions]** At trial, Appellant was convicted of murder in the first degree while in the presence of a child and while also employing a firearm as a means of committing the murder. On appeal, Appellant argued that the circuit court erred when it did not allow Appellant to present a jury instruction on extreme-emotional-disturbance manslaughter. Extreme-emotional-disturbance manslaughter is a lesser-included offense of first-degree murder. A person commits this formulation of manslaughter if “the person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse.” A jury instruction on extreme-emotional disturbance manslaughter requires evidence that the defendant killed the victim following provocation such as “physical fighting, a threat, or a brandished weapon.” Passion alone will not reduce a homicide from murder to manslaughter. In this case, there was no testimony that Appellant shot the victim following “physical fighting, a threat, or a brandished weapon.” The evidence demonstrated that Appellant was angry with the victim after he found out that she was allegedly cheating on him, and he confronted her about it.

Because there was no rational basis for giving the manslaughter instruction, the circuit court did not err in denying the proffered instruction. (Thyer, C.; CR-21-57; 10-6-21; Hixson, K.)

Willingham v. State, 2021 Ark. 177 [**sentencing order**] The trial court denied Appellant's pro se petition to correct an illegal sentence pursuant to Arkansas Code Annotated § 16-90-111. On appeal, Appellant argued that the sentencing order entered in his case was illegal on its face in that the sentence imposed for theft of property exceeded the statutory maximum for a Class D felony. Appellant pled guilty to one count of aggravated residential burglary, one count of aggravated robbery, one count of kidnapping, and one count of theft of property. Pursuant to the negotiated plea deal, the prosecution agreed to withdraw the habitual-offender charges against Appellant. The plea-hearing transcript further demonstrates that Appellant was advised that he had agreed to plead guilty to two Class Y felonies for aggravated residential burglary and aggravated robbery and two Class B felonies for kidnapping and theft of property. Arkansas Code Annotated § 16-90-111(a) provides authority for a circuit court to correct an illegal sentence at any time. An illegal sentence is one that is illegal on its face. A sentence is illegal on its face when it is void because it is beyond the circuit court's authority to impose and gives rise to a question of subject-matter jurisdiction. Sentencing is entirely a matter of statute in Arkansas. Appellant first alleged in his petition filed in the circuit court and in his argument on appeal that his sentence for theft of property exceeded the maximum for a Class D felony as described in the sentencing order. A circuit court has the power to correct clerical errors nunc pro tunc so that the record speaks the truth. Pursuant to Rule 60(b) of the Arkansas Rules of Civil Procedure, a circuit court may at any time correct clerical mistakes in judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission. A circuit court's power to correct mistakes or errors is to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken. Here, the original and amended sentencing orders that designated Appellant's theft conviction as a violation of section 5-36-103(b)(3)(A) without reference to a violation of section 5-36-103(b)(1)(B) was a clerical error and may be amended nunc pro tunc to conform to the charging information. (Yeargan, C.; 10CR-11-15; 10-14-21; Hudson, C.)

Baugh v. State, 2021 Ark. App. 400 [**restitution**] The circuit court ordered the Appellant to pay restitution after he pleaded guilty to the charge of obstructing governmental operations. On appeal, Appellant argued that the restitution amount was excessive and not consistent with the value of the cattle; the circuit court erred in relying on the testimony of a State witness, because the State failed to offer any proof as to the value of the lost property at the time it was sold; and the appropriate measure of loss was eight cows and one calf, not thirteen cows. A defendant who is found guilty or who enters a guilty plea or nolo contendere to an offense may be ordered to pay restitution. The sentencing authority, whether the circuit court or a jury, shall make the determination of actual economic loss caused to the victim by the offense. Disputed facts and credibility determinations are within the province of the factfinder. Here, the Appellant sold his neighbor's cattle at an auction after they crossed over to his land through a broken fence and remained on his land. The Appellant's neighbor testified that he would not have sold his cattle

when the Appellant sold them at auction because they were young and used for breeding. The circuit court had evidence before it, if determined to be credible, that would support the amount of restitution ordered. Appellant conceded he sold eight cows and one calf and admitted penning four additional cows that were released and whose whereabouts were unknown. There was not a number of cows specified at the plea hearing where Appellant pleaded guilty to obstructing governmental operations. The neighbor testified at the restitution hearing that he was missing a total of thirteen cows. The appellate court held there was evidence before the circuit court that would support the amount of restitution ordered. (Guynn, A.; 40CR-19-18; 10-20-21; Barrett, S.)

Choate v. State, 2021 Ark. App. 402 [**contempt**] The trial court entered two orders: first it entered an order restraining Appellant from being within 1000 feet of her place of employment; and they found her in contempt of court and sentenced her to thirty days in jail, with twenty days suspended, and imposed a \$500 fine. Arkansas law distinguishes criminal and civil contempt. Criminal contempt vindicates the power and dignity of the court and constitutes punishment for disobedience of its orders, while the purpose of civil contempt is to preserve and enforce the rights of private parties to suits and to compel obedience to orders made for the benefit of those parties. Here, the Appellant was found in criminal contempt. Arkansas law also distinguishes between direct and indirect contempt. Direct contempt is a contemptuous act committed within the immediate presence of the court, while indirect contempt is contemptuous behavior committed outside the presence of the court. Because the alleged contempt by Appellant occurred outside the presence of the circuit court, it is indirect contempt. Here, one of the Appellant's employee had been personally summoned by the court's assistant. While waiting outside the courtroom, the Appellant approached the employee and told her to leave if she was not taking the day off. The Appellant then stated that if the employee wanted to keep her job, she better get her "tail" back to the office. The employee told the Appellant that she had been asked to be there by the judge, to which the Appellant responded by saying that the employee better not be "manipulating" her. The appellate court held that there was a lack of substantial evidence supporting the finding that Appellant willfully disobeyed or resisted an order or process of the court. The encounter between the employee and Appellant took place in the hallway of the courthouse, only words were exchanged, no order or process was issued by the court, and no legal proceedings were disrupted as a result of the encounter. The Appellant's behavior did not rise to the level of indirect criminal contempt of court. At best, it was unprofessional, and by multiple accounts, it was aggressive, harsh, and confrontational. (Johnson, K.; 46JV-19-113; 10-20-21; Vaught, L.)

Thompson v. Payne, Director, Arkansas Department of Correction, 2021 Ark. 197 [**signing sentencing order**] The circuit court dismissed the Appellant's pro se petition for writ of habeas corpus filed pursuant to Arkansas Code Annotated § 16-112-101 in the county he is incarcerated. Appellant argued that the habeas petition that his judgment of conviction is void because the trial judge failed to sign the sentencing order in violation of Arkansas Supreme Court Administrative Order No. 8. The circuit court found that the Appellant's sentencing order was electronically signed and filed in compliance with Administrative Order No. 21. In any event, a failure to sign a

commitment order does not implicate the facial validity of either a trial court's judgment or its jurisdiction and instead constitutes an assertion of trial error that is not cognizable in habeas proceedings. (Dennis, J.; 40CV-20-143; 10-28-21; Wynne, R.)

Warner v. State 2021 Ark. 215 [**hearsay exception**] Appellant was convicted of rape and sentenced to an enhanced sentence of life imprisonment without parole. On appeal, the Appellant argued that the circuit court abused its discretion in admitting the juvenile victim's recorded statement. The Appellant contended that this recorded statement was not inconsistent with the victim's testimony at trial and therefore was inadmissible. Appellant further asserted that the circuit court failed to find whether the victim was competent and whether the statement offered a reasonable guarantee of trustworthiness. Rule 803(25) of the Arkansas Rules of Evidence allows for a hearsay exception when the young victim testifies at trial and his or her in-court testimony is inconsistent with an earlier out-of-court statement. Here, because there were inconsistencies between the juvenile victim's recorded statement and his testimony at trial, the supreme court concluded that the circuit court did not abuse its discretion in admitting the recorded interview of the victim. Additionally, the circuit court expressly noted its consideration of the victim's competency in evaluating the "reasonable guarantee of trustworthiness" of the prior recorded statement. The circuit court properly admitted the victim's recorded statement pursuant to Rule 803. (Foster, H.; 71CR-19-187; 11-18-21; Kemp, J.)

Ashby v. State, 2021 Ark. App. 424 [**motion to suppress; exclusionary rule**] Appellant was convicted of possession of methamphetamine or cocaine with intent to deliver, possession of drug paraphernalia, and misdemeanor possession of a controlled substance. The Appellant's sole point on appeal was that the circuit court erred in denying her motion to suppress. Generally, when evidence is obtained in violation of the Fourth Amendment, the exclusionary rule precludes its use in a criminal proceeding. There are, however, good-faith exceptions to the exclusionary rule. The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. Here, the Appellant was a passenger in a car when an officer made a valid traffic stop. The circuit court made no finding that Appellant had consented to the search or that there was a valid search waiver outstanding at the time of the traffic stop. Rather, the circuit court denied Appellant's motion to suppress and her request to exclude the evidence because it determined that the officer had acted in good faith in relying on the information based on a search waiver that was on file for the Appellant. Although the information provided to the officer by dispatch appears to have been incorrect, there was nothing in the record to suggest that the officer acted other than reasonably or that the police department had experienced systemic problems with their dispatch system in the past. Appellant further did not object or alert the officer that his information was incorrect. The circuit court did not err in its denial of Appellant's motion to suppress. (Elmore, B.; 43CR-20-101; 11-3-21; Gruber, R.)

Cox v. State, 2021 Ark. App. 426 [**motion to suppress; curtilage**] Appellant was convicted of murder in the first degree and tampering with physical evidence. On appeal, Appellant argued that the circuit court erred in denying his motion to suppress. Specifically, the Appellant asserted that the front porch of his apartment, where a police officer claimed they saw a speck of blood in plain view, constituted curtilage. Thus, Appellant argued that the officer violated his Fourth Amendment right against unreasonable searches and seizures when he searched the porch. A person's dwelling and curtilage are areas that may be considered free from government intrusion. It is generally not considered reasonable to have an expectation of privacy in driveways and walkways, which are ordinarily used by visitors to approach dwellings. Additionally, what a person knowingly exposes to the public is not protected by the Fourth Amendment. Here, the officer went to the Appellant's apartment to speak with the Appellant or his grandmother. The officer approached the apartment door, stood on the porch, and knocked. When no one answered the door, he turned to leave, and it was then that he noticed a speck of blood near the ground on the porch wall. The officer's conduct in this case was permissible and was included later in an affidavit that was used to obtain a search warrant for the apartment. The circuit court did not err in denying the Appellant's motion to suppress. (Thyer, C.; 47BCR-19-287; 11-3-21; Barrett, S.)

Crockett v. State, 2021 Ark. App. 422 [**authentication; electronic messages**] Appellant was convicted of first-degree murder and first-degree battery. On appeal, the Appellant argued that the circuit court erred by admitting electronic messages because they were not properly authenticated. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. The testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient to authenticate evidence, and also the appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances can be used to authenticate evidence. Here, the electronic messages were sent from the Appellant's SmartJailMail account. An administrator from the detention center where Appellant was located testified that inmates are assigned a unique inmate number that is also their username to sign into their SmartJailMail account. The inmates create their own passwords to sign into their account and their name and inmate number appear at the top of emails sent from the account. Additionally, the Appellant had not reported any unauthorized use of his account. This evidence was sufficient to authenticate the emails. Further, the content of the emails was sufficiently authenticated on the basis of their content when considered in conjunction with the circumstances. The appellate court held that the circuit court did not err in admitting the emails and finding that sufficient circumstantial evidence was presented to corroborate Appellant's identity as the sender. (Wilson, R.; 47BCR-19-107; 11-3-21; Gladwin, R.)

DOMESTIC RELATIONS

Redwine v. Coursey, 2021 Ark. App. 352 [**subject matter jurisdiction of other matters within domestic abuse case**] The circuit court entered a judgment imposing a constructive trust in favor

of the Appellee, based on unjust enrichment. The Appellant initiated the original cause of action against the Appellee by seeking a domestic abuse order of protection. The Appellee subsequently filed pleadings under the domestic-abuse docket number seeking relief on issues that did not pertain to domestic abuse. Both the Domestic Abuse Act and the Arkansas Rules of Civil Procedure prohibit this. Arkansas Code Annotated § 9-15-202(a)(2) prohibits the assertion of a claim or counterclaim for other relief under the Domestic Abuse Act. More pointedly, Arkansas Rule of Civil Procedure 3(d) directs: “No other claim or counterclaim for relief, including without limitation, divorce, annulment, separate maintenance, or paternity, shall be asserted in an action filed under the Domestic Abuse Act, Arkansas Code Annotated § 9-15-101 et seq., but a separate action seeking other relief shall be filed, and the clerk shall assign a new case number and charge a filing fee unless the filing fee is waived pursuant to Rule 72 of these rules.” Here, the Appellee did not file a separate complaint; his complaint was not given a new mandatory, separate docket number; and he did not pay a filing fee or have his filing fee waived. “A circuit court acquires jurisdiction over a cause of action when a complaint is filed with the circuit clerk. The payment of a filing fee, or waiver of that fee pursuant to Rule 72 of the Arkansas Rules of Civil Procedure, is required before a civil action will be filed.” Because the Appellee never paid a filing fee, their case was never “filed,” and the circuit court never acquired jurisdiction. Therefore, the circuit court lacked subject-matter jurisdiction to adjudicate the Appellee’s claims, and the judgments by the circuit court are void. (King, K.; 68DR-16-113; 9-22-21; Whiteaker, P.)

Bonds v. Bonds, 2021 Ark. App. 359 [**lack of creditability as material change in circumstances in child custody**] The circuit court entered an order modifying custody of two children. In its order modifying custody, the circuit court largely concentrated its attention on Appellant’s lack of credibility, pointing out “inconsistencies” in her testimony and detailing the lack of evidence of her allegations. However, the Appellant’s credibility, or lack thereof, alone, does not amount to a material change in circumstances sufficient to warrant a change in child custody. After reviewing the record, the appellate court held that there was insufficient evidence to support a custody modification. (McCain G.; 58DR-14-381; 9-22-21; Brown, W.)

Chism v. Chism, 2021 Ark. App. 373 [**jurisdiction to clarify meaning of decree**] The trial court denied the Appellant’s motion to clarify its earlier orders awarding Appellee a portion of her postal service retirement and other sums. On appeal, the Appellee raised two arguments: (1) that the circuit court had jurisdiction to clarify or correct its prior orders and (2) that the circuit court erred in excluding records from OPM. The circuit court ruled that it did not have jurisdiction to modify the order in question because, unlike both the original divorce decree and the qualified domestic-relations order (QDRO), there was no express reservation of jurisdiction contained in the order in question. After ninety days, without the showing of one of the exceptions listed in Arkansas Rule of Civil Procedure 60, a court has no power to modify or set aside an order. A circuit court, however, has inherent power to enter an order for the purpose of correcting a judgment to ensure that the judgment is truthful and that it accurately reflects the court’s original ruling. The power is not absolute, and the court is limited to correcting the order to reflect the action the court actually

took as demonstrated by the record rather than the action the court should have taken. This being so, a circuit court has the power to correct a decree to accurately reflect its original ruling or to interpret its prior decision. When a divorce decree is ambiguous, the circuit court has jurisdiction to make changes that clarify what the court originally intended. Here, the ambiguity in the order was a latent ambiguity resulting from the existence of collateral facts—the reduction in the amount of the Appellant’s monthly retirement payments—made the order’s meaning uncertain. Both the divorce decree and the QDRO provided that Appellee was to receive one-half of Appellant’s gross retirement benefits, while the order in question calculated A’s share as one-half of a fixed sum (\$1,280). The order is ambiguous because someone reading the order does not know whether the percentage controls or the dollar amount controls. Because the court’s orders are ambiguous in the division of Appellant’s retirement benefits, the court has inherent power to enter an order to correct the judgment. **[hearsay evidence]** Regarding the Appellant’s second point, at issue here is whether the circuit court abused its discretion in sustaining Appellee’s objections and excluding the U.S. Office of Personnel Management (OPM) correspondence on hearsay grounds. The Appellant argued that the correspondence was admissible as a business record. Arkansas Rule of Evidence 803(6) provides that records of a regularly conducted business activity are not excluded from evidence by the hearsay rule. To be admissible under the business-record exception, the offering party must meet seven requirements. The evidence must be (1) a record or other compilation, (2) of acts or events, (3) made at or near the time the act or event occurred, (4) by a person with knowledge, or from information transmitted by a person with knowledge, (5) kept in the course of a regularly conducted business, (6) which has a regular practice of recording such information, (7) as shown by the testimony of the custodian or other qualified witness. The fact that the correspondence was from a federal agency and has the appearance of a business record does not satisfy the explicit requirements of the rule. The Appellant failed to present any admissible testimony whatsoever from the custodian or other qualified witness from OPM as to whether the business-record requirements were met. The circuit court did not err in refusing to admit the correspondence under the business-record exception. (McCormick, D.; 15DR-14-18; 10-6-21; Gladwin, R.)

Johnson v. Johnson, 2021 Ark. App. 376 **[division of assets]** On appeal, Appellant argued that the decree of divorce should be reversed because the Appellee’s military retirement assets were distributed without first ascertaining the value. When a circuit court does not compare the amount of debt and assets from which the non-receiving spouse was relieved to the amount and duration of retirement benefits of which she was deprived, reversal is required. Here, the trial court awarded the Appellee the full amount of his military retirement benefits because the Appellant cashed out her retirement benefits, and the Appellee did not receive any benefit from the distribution, as well as other reasons. The trial court erred in not placing a value on Appellee’s military retirement benefits before distributing the retirement assets. (Pierce, M.; CV-20-507; 10-6-21; Barrett, S.)

House v. House, 2021 Ark. App. 380 **[finding of facts]** The trial court entered an order granting the Appellee custody of the couple’s daughter. On appeal, the Appellant argued that the trial court

did not make necessary findings of fact and conclusions of law following his written requests for such findings. Rule 52(a)(1) of the Arkansas Rules of Civil Procedure states: If requested by a party at any time prior to entry of judgment, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusion of law thereon, and the judgment shall be entered pursuant to Rule 58; . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), and due regard shall be given the opportunity of the circuit court to judge the credibility of the witnesses. On its face, Rule 52(a)(1) does not require a motion; it says that the court must issue such findings “if requested.” The Appellee argued that the motion requirement found in Rule 7(b)(1) of the Arkansas Rules of Civil Procedure mandates that any request pursuant to Rule 52(a)(1) must be in the form of a motion. Rule 7(b)(1) is applicable only to a party’s application “for an order,” which is not the relief the Appellant was seeking. If findings under Rule 52(a) are timely requested, the trial court is required to make specific findings of fact and conclusions of law and to file the same with the clerk of the trial court so that such findings may be made part of the record. For findings is made, the court is obligated under Rule 52(a)(1) to specially set out its findings of fact and conclusions of law. The trial court could have responded to Appellant’s request by referencing the findings it had previously made in its letter opinion. The court effectively cut off Appellant’s ability to use the process outlined in Rule 52 to challenge the sufficiency of the court’s reasoning and seek amended or additional findings if he deemed the court’s explanation inadequate. (Guthrie, D.; CV-20-533; 10-6-21; Vaught, L.)

Mckamie (Now Sharp) v. Mckamie, 2021 Ark. App. 385 [**allocation of assets and debts**] On appeal, Appellant argued the circuit court erred in its allocation of marital property and debt and the amount of alimony awarded to her. A.C.A. § 9-12-315 (Repl. 2020) governs the distribution of marital property. As a general rule, the court should distribute all marital property one-half to each party unless the court finds such a division to be inequitable. The courts shall make some other division that the court deems equitable, taking into consideration a list of nine factors: the length of the marriage; age, health, and station of life of the parties; occupation of the parties; amount and sources of income; vocational skills; employability; estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and the federal income tax consequences of the court’s division of property. The circuit court also has authority to consider the allocation of debt in the context of the distribution of all of the parties’ property. 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. The Appellant argued that generally the circuit court’s division of property was inequitable but pinpoints that the trial court did not divide or mention the Appellee’s pension. Here, this limited issue should have been addressed by the trial court, therefore, it was remanded on that issue. Appellant also argued that the circuit court erred in giving Appellee credit for a loan taken from his 401(k). The loan was taken out to cover a debt that was incurred when the Appellant bought clothes and other items for resale without the Appellee’s knowledge. The circuit court did not err in allocating this debt to Appellant. [**alimony**] The appropriateness of an alimony award is

determined in light of the facts in each case. The primary factors to be considered in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. The secondary factors that should also be considered are: (1) the financial circumstances of both parties; (2) the couple's past standard of living; (3) the value of jointly owned property; (4) the amount and nature of the parties' income, both current and anticipated; (5) the extent and nature of the resources and assets of each of the parties; (6) the amount of income of each that is spendable; (7) the earning ability and capacity of each party; (8) the property awarded or given to one of the parties, either by the court or the other party; (9) the disposition made of the homestead or jointly owned property; (10) the condition of health and medical needs of both husband and wife; (11) the duration of the marriage; and (12) the amount of child support. Here, the Appellee stated in his testimony that it would be fair and reasonable if he paid 20 percent of his take-home pay as alimony; however, the circuit court awarded the Appellant less than 20 percent in alimony. The appellate court held that the circuit court was not bound by any percentage that the Appellee mentioned in his testimony, and given the evidence before the circuit court, the appellate court held that the circuit court did not abuse its discretion in the alimony award. (Singleton, H.; 14DR-19-152; 10-20-21; Harrison, B.)

Vaughn v. Vaughn, 2021 Ark. App. 394 [**division of property and alimony award**] The circuit court entered a divorce decree. Appellant appealed the following findings: (1) the amount she was entitled to receive as her portion of Appellee's IRA, (2) the valuation of the two vehicles she was awarded, and (3) the denial of alimony. First, the Appellant argued that the circuit court erred in awarding the entire value of Appellee's IRA. Each party would be entitled to one half; however, Appellee had paid off an amount equaling the IRA in marital debt during the marriage, and Appellant owed Appellee her half of the marital debt. For this reason, the circuit court awarded Appellee the IRA to provide an even distribution. The circuit court's finding that Appellant's half of the IRA's value was offset by what she owed as her half of the marital debt is an equitable distribution and not clearly erroneous. Secondly, Appellant argued that the circuit court erred in its valuation of the two marital vehicles she was awarded. The circuit court assessed one of the vehicles to be worth \$8,000, and the Appellant believed that the vehicle was only worth \$1,200, which is what she received when she sold it. The property-division statute does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. In this case, the circuit court did not have to accept Appellant's opinion that the truck was worth only \$1,200. Marital property cannot always be divided exactly equally and in kind. It is worth noting, too, that dissipation by one party can be considered by a circuit judge in making an unequal distribution of marital property. Finally, Appellant argued that the circuit court abused their discretion by not awarding her alimony. The Appellant has the ability to pay alimony, and this was a marriage that lasted almost eighteen years. The real issue was whether the circuit court abused its discretion in finding that Appellant could work and was not entitled to receive alimony. The circuit court found that the Appellant has the ability to perform a sedentary job. This was not clearly erroneous. There was evidence at trial to support that the Appellant was able to fish, camp, handle a boat, travel, and gamble, all for extensive periods of time. Alimony and property divisions are complementary devices that a circuit court employs to make the

dissolution of a marriage as equitable as possible. The appellate court held that the Appellant failed to demonstrate an abuse of discretion. (Cooper, T.; 55DR-19-46; 10-20-21; Klappenbach, N.)

Hardisty v. Hardisty, 2021 Ark. App. 396 [**child custody**] The circuit court entered a divorce decree granting Appellee custody of the couple's three children. The decree granted Appellant standard visitation periods but did not permit the children to stay overnight. The primary consideration in child-custody cases is the welfare and best interest of the child, with all other considerations being secondary. Although the legislature has established that joint custody is favored in Arkansas, joint custody is not mandatory. The statutory preference for joint custody does not override the ultimate guiding principle that the best interest of the child is the polestar for a custody determination. When in the child's best interest, custody should be awarded in such a way as to ensure the frequent and continuing contact of the child with both parents. The fact that one parent is the primary caretaker of the child during the marriage is not in and of itself determinative, although it is relevant and worthy of consideration. Each child custody determination ultimately must rest on its own facts. Here, the Appellant's girlfriend's much-older children had a history of chaotic and destructive behavior and recent episodes in their house. The Appellant's girlfriend had her own mental health concerns and a history of reportedly abusive behavior as well. After reviewing the evidence in this case, the Appellant court held that the circuit court did not err in not granting joint custody and instead deciding to grant custody to Appellee. The circuit court had "significant concerns about the children staying overnight in the Appellant's girlfriend's home." Furthermore, the circuit court's decree provided Appellant with frequent and ongoing contact with his children, in keeping with Arkansas law. The circuit court did not err in finding that the children's best interest was served by granting Appellant weekly, alternating-weekend, and major-holiday visitation but without overnight stays. (Bailey, A.; 03DR-19-69; 10-20-21; Klappenbach, N.)

Priesmeyer (Now Ramos) v. Huggins, 2021 Ark. App. 410 [**child custody**] The trial court entered an order granting custody to Appellee, who is not the child's biological parent. On appeal, Appellant challenged the court's award of custody on the ground that, under Arkansas law, a biological parent who has not been declared unfit has a preference over a person who stands in loco parentis to the child, as well as the awards of child support and attorney's fees and costs. The trial court held that the Appellant is the biological mother; Appellee is not the biological father but stands in loco parentis to the child; and found neither party to be unfit. The trial court further found that it was a relocation case, applied the "relocation factors" and awarded the Appellee primary custody. There is a preference for biological parents in custody matters which provides that the preference must prevail unless it is established that the natural parent is unfit. There must be a finding of parental unfitness before the custody rights of a biological parent are abrogated. Therefore, the trial court erred in awarding custody to Appellee, over the fit biological parent. (Schrantz, D.; 04DR-19-1096; 10-27-21; Gruber, R.)

Matthews v. Matthews, 2021 Ark. App. 411 [**statute of limitations in decree enforcement**] The trial court ordered the Appellant to return his two life insurance policies to their original amounts at the time of the divorce, to rename his children as his beneficiaries to his life insurance policies and to rename his ex-wife, Appellee, as a survivor beneficiary to his civil service retirement plan, and to assist in providing Appellee one-half of his military retirement benefits that she was awarded in their divorce decree and returning to her the past-due amounts. Appellant and Appellee divorced in 1999. In 2006, the Appellant elected to reduce his court ordered insurance by 75 percent, removed his two children as beneficiaries, added his new wife to his life insurance policy, and changed the survivor beneficiary on his military retirement to his current wife. In 2019, the Appellee filed a motion for contempt. The circuit court did not find the Appellant in contempt, but he was ordered to comply with the parties' original divorce decree. On appeal, the Appellant argued that the circuit court erred by failing to apply the applicable statute of limitations and by failing to properly consider his affirmative defense of laches. The requirements in the original divorce decree did not expire; thus, the circuit court did not err in failing to apply the ten-year statute of limitations to Appellee's claims. (Blatt, S.; 66FDR-99-1028; 10-27-21; Barrett, S.)

Morris (Eversoll) v. Morris, 2021 Ark. App. 415 [**material change to modify custody**] The circuit court entered an order changing custody of the Appellant's children to Appellee. On appeal, the Appellant argued that the circuit court erred by (1) finding that a material change existed such that a change in custody was warranted, (2) finding that it was in the children's best interest to change custody to Appellee, and (3) setting and calculating her child-support obligation. The party seeking modification of the custody order has the burden of showing a material change in circumstances. In order 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. Determining whether there has been a change of circumstances requires a full consideration of the circumstances that existed when the last custody order was entered in comparison to the circumstances when the change of custody is considered. While the circuit court did not make a specific finding that a material change in circumstances occurred since the last custody order, the appellate court held that there was sufficient evidence which the circuit court could have found a change in circumstances. Here, there was evidence that Appellant's youngest child was not receiving the quality of care in Appellant's custody that he required. While in the Appellee's temporary custody he took the child to get his eyes checked, arranged for him to see an orthopedist, and the child graduated from a feeding tube to eating by mouth. The Appellant also had learned about abuse allegations against her new husband toward the children, yet she continued to allow him in the home and to be around the children despite a temporary agreed order that provided that these were serious allegations that needed to be addressed. [**best interest**] There is no exhaustive list of factors that a court must consider when analyzing the best interest of the child. The primary consideration in child-custody cases is the welfare and best interest of the children. For the same reasons as above, the appellate court held that the change of custody was in the children's best interest. [**child support**] In determining a reasonable amount of support—either initially or on review—to be paid by the noncustodial parent or parents, circuit courts are required

to refer to the most recent revision of the family support chart. That chart is found in Administrative Order No. 10, which was revised in 2020. Here, the circuit court did not abuse their discretion when they used the child-support guidelines that were in effect at the time of hearing on the matter. (Pierce, M.; 60DR-09-2862; 10-27-21; Murphy, M.)

Nalley v. Adams, 2021 Ark. 191 [**adjustment of parenting time**] On appeal, the Appellant argued that the trial court erred in finding that the Appellee’s change in employment and move to Little Rock from Jonesboro constituted a material change in circumstances that warranted modification of child custody to grant the Appellee equal time with their daughter. Based on the specific facts of this case, the narrow issue is an adjustment of parenting time previously ordered by the circuit court. The Supreme Court concluded that after reviewing the record, the material-change-in-circumstances analysis was not triggered in this case as neither party sought an actual change in custody. The original order from the circuit court awarded joint custody to Appellant and Appellee. The circuit court recognized that it was impossible at that point to split time equally between the parties because the Appellee lived in Jonesboro. Because the Appellee had relocated to Little Rock and based on its previous award of joint custody in the original order, the circuit court ordered that the parties share equal time with their daughter. Although the circuit court used the phrase “modification of the custody and visitation schedule,” a review of the record demonstrates that the circuit court simply adjusted the parenting time schedules of the respective parties because Appellee had moved to Little Rock. The circuit court did not err in enforcing its original order through the adjustment of parenting time. (Smith, V.; 60DR-18-3721; 10-28-21; Baker, K.)

Jolliff v. Wilson, 2021 Ark. App. 430 [**order of protection**] The circuit court entered a six-month order of protection against the Appellant. The order of protection prevented the Appellant from contacting the Appellee and the parties’ daughter for the duration of the protection order. On appeal, the Appellant argued that the circuit court erred in concluding he was guilty of domestic abuse. Domestic abuse is defined as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members. Here, Appellee’s testimony was enough to establish that she and her child suffered domestic abuse at Appellant’s hands. The Appellee testified that Appellant shoved her child to the floor, covered her in blankets, and placed his leg on top of her to hold her down, while he yelled at her to shut up and beat the wall above her head. Additionally, the Appellant grabbed the Appellee by the shoulders and pushed her out of his house. This caused the Appellee to suffer bruises in several areas of her body, pictures which were admitted without objection. The appellate court held that the evidence was sufficient to support the circuit court’s finding of domestic abuse. (Davis, B.; 47BDR-18-145; 11-3-21; Brown, W.)

Morales v. Garcia, 2021 Ark. App. 438 [**order of protection extended to cover children**] On appeal, the Appellant argued that while there was sufficient evidence to support the extension of the order of protection as to, Appellee, there was insufficient evidence to warrant the extension as

to his children. When a petition for an order of protection is filed under the Domestic Abuse Act, the circuit court may provide relief to the petitioner upon a finding of domestic abuse. Domestic abuse is defined as physical harm, bodily injury, assault, or the infliction of imminent physical harm, bodily injury, or assault between family or household members. The petitioner carries the burden of proving domestic abuse. Here, Appellee filed a petition seeking a protection order on behalf of the children, but her petition did not allege that Appellant had committed acts of domestic abuse against the children. The Appellee alleged specifically that the children witnessed domestic abuse against her. While witnessing these acts can have a detrimental impact on the children, the Appellee did not state or allege that Appellant engaged in acts of physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault on the children. In the absence of evidence that Appellant engaged in acts of domestic violence against the children, the trial court erred in granting the order of protection as to the children. The circuit court did not err in granting an order of protection for Appellee. (Foster, H.G.; 23DR-20-895; 11-10-21; Whiteaker, P.)

In the Matter of Adoption of AP, 2021 Ark. App. 440 [**adoption; consent; best interest of child**]

The circuit court entered a final decree granting a stepparent adoption petition. On appeal, Appellant argued that the circuit court erred by finding that his consent to the adoption of his child was not necessary, and the adoption was in the child's best interest. Generally, consent to an adoption is required by the father of the minor child to be adopted. However, the consent of the father may not be required under certain circumstances. Relevant here, consent to an adoption is not required of (1) a parent who has abandoned a child or (2) a parent of a child in the custody of another if the parent for a period of at least one year has failed significantly without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree. Here, it is undisputed that Appellant failed to pay any child support in 2018 and 2019 until after the initial petition for adoption was filed. It is important to note that the one-year period required under the statute may be any one-year period, not merely the one-year period preceding the filing of the petition for adoption. Although Appellant gave sporadic gifts to the child to use when they visited his father's home, it is not required that a parent fail totally in these obligations in order to fail significantly within the meaning of the statutes. Even if a parent has forfeited the right to have his consent to an adoption required does not mean that the adoption must be granted. The court must further find by clear and convincing evidence that the adoption is in the best interest of the child. In this case, Appellant essentially had no relationship with his son, and the child's mother testified that she wanted to maintain the child's relationship with his paternal grandparents. Further, the circuit court found that the child deserved a stable and dependable parental relationship. Taken as a whole, the circuit court did not err in granting the adoption petition. (Wright, J.; 26PR-19-671; 11-10-21; Hixson, K.)

Tapp v. Luper, 2021 Ark. App. 444 [**guardianship – felon relative as guardian**] The trial court denied Appellants' petition to terminate the guardianship over two minor children. After the guardianship over the children was established, Appellant was adopted by her friends. The adult

adoption injects a statutory wrinkle into the case: The Appellee is a convicted and unpardoned felon. Felons who are unpardoned cannot generally guard minors under Arkansas law. However, there is an exception for a relative of the child. The issue is whether the Appellee is a relative to the children after Appellant's adult adoption. Under guardianship law, a guardian can be a ward's "relative" by blood or adoption. But under adoption law, one has a single line of relatives. Adoption statutes have been interpreted to mean that an adoption fully terminates "all legal relationships between the adopted individual and his or her biological relatives. Consequently, the appellate court held that an adoption severs all familial ties, including any "relative" status that might otherwise exist under. Here, after the Appellant's adult adoption, Appellee is no longer a relative to the children as Arkansas law defines the term in this case's context. Because Appellee's rights as a grandparent derive from Appellant's parental rights, Appellee and her biological grandchildren are now legal strangers, too, given Appellant's adoption. However, in this case Appellee's husband is able to remain the guardian because Appellants have not challenged the qualifications of his guardianship. (Bryan, B. 72PR-20-193; 11-17-21; Harrison, B.)

Borland v. Borland, 2021 Ark. App. 448 **[order of protection]** The district court entered an order of protection in favor of Appellee for the term of one year. Protective orders may be referred to a state district court judge under Administrative Order 18. On appeal, Appellant argued that the district court lacked subject-matter jurisdiction to issue an order of protection, the lower court erred in finding there was proof of imminent harm; and the court abused its discretion in rejecting the parties' settlement agreement. First, Appellant argued that because the parties' divorce case was pending in the Circuit Court when Appellee filed her petition for an order of protection, the district court was divested of subject-matter jurisdiction over the order-of-protection case. A petition for an order of protection may be filed regardless of whether there is any pending litigation between the parties. In the case at bar, the district court's order of protection did not overlap or conflict with any issues in the divorce case. Appellant also argued that Appellee did not prove "imminent harm in the future." Appellant misstated the applicable statute, as he was appealing the final order of protection. Even if the Appellant appealed the temporary order of protection, there was a sufficient basis. Appellee's sworn statement that Appellant physically assaulted her and restrained her, prevented her from leaving the house to get help, attempted to cast a demon out of her, and told her that he intended to perform an exorcism on her easily satisfies the requirement. Further, Appellee's testimony of Appellant's conduct amounted to domestic abuse within the meaning of Arkansas Code Annotated section 9-15-103(4), and Appellant had violated the ex parte order of protection. Therefore, the district court had a sufficient basis for entering the final order of protection. Appellant's final argument on appeal is that the district court abused its discretion by rejecting the parties' settlement agreement and entering a final order of protection instead. While the parties are bound by an oral stipulation, the court is not bound by a stipulation entered into by the parties; rather, it is within the sound discretion of the court to approve, disapprove, or modify the agreement. Here, the court was well within its discretion to reject the settlement between the parties. (Hill, R.; 10DR-20-101; 10-17-21; Abramson, R.)

JUVENILE

Burks v. Ark. Dep't of Human Servs., 2021 Ark. App. 309 [**TPR—paternity not established**] Father appeals termination of his rights to two children on the ground that he was not found to be a “parent” as to one child and there was insufficient evidence to support termination on the aggravated circumstances ground for both children. At adjudication, the court found that Burks had established paternity as to the older child in a prior dependency-neglect case but that he had not established paternity as to the younger child and he was therefore ordered to submit to DNA testing. Burks did not submit to DNA testing prior to the termination hearing, nevertheless, an order terminating his rights as to both children was entered on the grounds of aggravated circumstances, finding that there was little likelihood of successful reunification. On appeal, Burks argued that the circuit court made no finding that he was the parent of the youngest child and that proof that he is the parent is required to terminate parental rights. The appellate court agreed, noting that the requirement that a party is found to be a parent is a “common sense element” for termination and the circuit court made nothing that could even be construed as a finding, thus warranting reversal and remand on the issue of whether Burks is a parent. The aggravated circumstances argument was rejected because the appellate court found no clear error on that point. (Halsey, B.; 28JV-20-79; September 1, 2021; Virden, B.)

A.M. v. State, 2021 Ark. App. 418 [**fitness to proceed**] Twelve-year-old A.M. was adjudicated delinquent with an EJJ designation for capital murder in the shooting death of a young woman working at a convenience store. Under A.C.A. § 9-27-502, juveniles younger than 13 at the time of the alleged offense are presumed unfit to proceed; the statute requires the court to order an evaluation on fitness to proceed to be conducted by a psychiatrist or clinical psychologist “specifically qualified by training and experience in the evaluation of juveniles.” Two experts gave conflicting testimony, specifically on the point of whether the youth suffered delusions that would support a diagnosis of schizophrenia. The trial court relied on one expert’s report and testimony to find that the state proved fitness by a preponderance. The Court of Appeals held that a clearly erroneous standard of review should apply to juvenile fitness to proceed determinations. Giving deference to the trial court’s decisions weighing evidence and assessing witness credibility, the Court of Appeals held that the trial court did not clearly err. [**expert qualifications**] The statute does not define what “training and experience in the evaluation of juveniles” an evaluator must have. The trial court heard evidence on the evaluator’s licensing, the number of FTP and juvenile FTP evaluations he had performed, and advanced training on working with juvenile offenders that he received through a fellowship. The Court of Appeals held that, given the evidence before the trial court, it was not clear error to find the evaluator qualified under the statute. [**sufficiency of evidence**] A.M. stole electronic cigarettes and an energy drink; he left the store. He returned and shot the young woman before leaving the store again. Within ten minutes, he returned to steal additional items. The defense moved for a directed verdict on aggravated robbery and felony murder with aggravated robbery as the underlying felony. The defense argued that there was insufficient evidence to compel a conclusion without speculation that the murder was committed in the course of or to prevent apprehension following the robbery. The Court of Appeals relied on Supreme Court of Arkansas precedent holding that the sequence of events in aggravated robbery

is not important when the time, place, and continuity of action indicate a close connection between the robbery and killing such that it comprises a single and continuous event. Circumstantial evidence can support a conviction when it is consistent with the defendant's guilt and not consistent with any other reasonable conclusion. Substantial evidence supported the jury's finding that the killing occurred "in the course of and in furtherance of" the robbery. (Johnson, K.; CR-20-635; November 3, 2021; Harrison, B.)