

APPELLATE UPDATE

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

ANNOUNCEMENTS

On April 10th, the Supreme Court published proposed changes to:

the **Model Rules of Professional Conduct** with the comment period expiring June 1, 2014, and

Rules and Regulations of the Court Reporter Board with the comment period expiring June 9, 2014.

The two per curiams were included in the weekly mailout.

CRIMINAL

Guana-Lopez v. State, 2014 Ark. App. 204 [**waiver of jury trial**] Because the trial court did not obtain a specific acknowledgment from appellant that he understood the right which was being waived, and because the court did not attempt to ensure that appellant knowingly, intelligently, and voluntarily waived his right, it was error for the circuit court to waive appellant's right to a jury trial at the request of appellant's attorney. (Cooper, T.; CR-13-675; 4-2-14; Walmsley, B.)

Summerford v. State, 2014 Ark. App. 209 [**felon in possession of a firearm**] For purposes of Ark. Code Ann. § 5-73-103, a determination by a jury or a court that a person committed a felony constitutes a conviction even though the court suspended imposition of sentence or placed the defendant on probation. (Chandler, L.; CR-13-648; 4-2-14; Whiteaker, P.)

Holcomb v. State, 2014 Ark. 141 [**sufficiency of the evidence; internet stalking of a child**] The trial court erred in denying appellant's motion for directed verdict because the State failed to put forth sufficient evidence to establish that appellant acted "in an effort to arrange a meeting" with an undercover detective, whom appellant believed to be a fifteen-year-old girl. (Medlock, M.; CR-13-690; 4-3-14; Baker, K.)

Bowerman v. State, 2014 Ark. App. 221 [**chain of custody**] When establishing a chain of custody, a moment-by-moment account of evidence retrieved from the crime lab and transported to trial is not necessary. (Ramey, J.; CR-13-431; 4-9-14; Walmsley, B.)

Thornton v. State, 2014 Ark. 157 [**sufficiency of the evidence; capital murder**] Appellant's conviction was not supported by substantial evidence. (Jones, B.; CR-13-807; 4-10-14; Corbin, D.)

Brown v. State, 2014 Ark. App. 236 [**administrative review; Sex Offender Assessment Committee**] There was substantial evidence to support the Sex Offender Assessment Committee's classification of appellant. (Sutterfield, C.; CV-13-876; 4-16-14; Vaught, L.)

Wright v. State, 2014 Ark. App. 231 [**Confrontation Clause**] Because appellant did not have an opportunity to confront and cross-examine the victim, the trial court abused its discretion when it permitted a police officer to testify about statements made to him by the victim. However, because appellant failed to show how the officer's testimony could have contributed to the jury's verdict, appellant did not establish that he was prejudiced, and the appellate court concluded that the trial court's error was harmless beyond a reasonable doubt. (Sims, B.; CR-13-696; 4-16-14; Gladwin, R.)

Bowden v. State, 2014 Ark. 168 [**motion in limine**] The trial court did not abuse its discretion when it excluded testimony from a psychiatrist, who had examined appellant. The challenged testimony would not have provided appellant with an affirmative defense and did not establish that appellant suffered from an extreme emotional disturbance at the time of the murder. (Pearson, W.; CR-13-757; 4-17-14; Danielson, P.)

Conley v. State, 2014 Ark. 172 [**Rule 37**] The trial court erred in finding that appellant did not receive ineffective assistance of counsel when his trial attorney neglected to make proper motions for directed verdict. (Storey, W.; CR-13-21; 4-17-14; Goodson, C.)

Paschall v. State, 2014 Ark. App. 246 [**right to counsel; waiver**] An indigent defendant does not have a right to appointed counsel in a misdemeanor case unless there is a sentence to

imprisonment. Thus, where appellant did not receive a sentence to imprisonment for his misdemeanor shoplifting offense, the trial court did not err in allowing appellant to discharge his attorneys and proceed pro se without first conducting a thorough inquiry into whether he properly waived his right to counsel. (Storey, W.; CR-13-970; 4-23-14; Gruber, R.)

Croxford v. State, 2014 Ark. App. 252 [**motion to suppress; right to remain silent**] Appellant did not invoke his right to remain silent. Thus, the circuit court's decision to deny appellant's motion to exclude testimony about his confession was not clearly against the preponderance of the evidence. Additionally, because there is no requirement that law enforcement officials record interrogations, it was not erroneous for the circuit court to allow law enforcement officials to testify about appellant's confession even though the recording that was made during appellant's interrogation was lost. (Dennis, J.; CR-13-796; 4-23-14; Wood, R.)

McCarty v. State, 2014 Ark. App. 242 [**closing argument**] Where an attorney's comment during closing arguments is directly reflected or inferred from trial testimony, there is no error in allowing the comment. (Storey, W.; CR-13-564; 4-23-14; Harrison, B.)

Stiggers v. State, 2014 Ark. 184 [**Rule 37**] Appellant did not provide support for his conclusory claims that counsel was ineffective and made no showing that counsel committed any specific error that prejudiced appellant. Thus, the trial court did not err when it denied appellant's Rule 37 petition. (Griffen, W.; CR-13-223; 4-24-14; Baker, K.)

McDaniels v. State, 2014 Ark. 181 [**Rule 37**] The circuit court did not clearly err in rejecting, without a hearing, appellant's claims that his trial counsel was ineffective for : (1) failing to object to defective language in the charging document and the jury instructions; and (2) failing to adequately investigate and utilize certain evidence. (Wright, H.; CR-13-301; 4-24-14; Hannah, J.)

Steele v. State, 2014 Ark. App. 257 [**sufficiency of the evidence; distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child**] There was substantial evidence to support appellant's convictions. [**404 (b)**] The trial court did not abuse its discretion when it permitted reference to appellant's possession of other pornographic images for which he was not charged because the evidence was relevant to show appellant's knowledge, intent, and absence of mistake or accident. [**consecutive sentences**] Ordering sentences to run consecutively is not cruel or unusual punishment. [**alternative-sentencing instruction**] Where the jury recommended and the court accepted a sentence that was much greater than the minimum punishment, it was not error for the circuit judge to have refused to give the alternative sentencing instruction on probation, which would have been rejected. (Williams, C.; CR-13-960; 4-30-14; Walmsley, B.)

Hudson v. State, 2014 Ark. App. 253 [**continuance**] The trial court abused its discretion when it granted the State's motion for a continuance, which did not comply with Ark. Code Ann. § 16-

63-402, and which failed to establish that the State used due diligence in securing the attendance of a witness. (Clawson, C.; CR-13-568; 4-30-14; Gladwin, R.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Fleming v. State, 2014 Ark. App. 235 (failure to comply with sex-offender registration and reporting requirement) CR-13-473; 4-16-14; Whiteaker, P.

Collier v. State, 2014 Ark. App. 244 (possession of drug paraphernalia) CR-13-772; 4-23-14; Wynne, R.

Horton v. State, 2014 Ark. App. 250 (aggravated-residential burglary) CR-13-864; 4-23-14; Vaught, L.

Lopez-Deleon v. State, 2014 Ark. App. 274 (residential burglary; second-degree sexual assault) CR-13-622; 4-30-14; Brown, W.

Harris v. State, 2014 Ark. App. 264 (second-degree sexual assault) CR-13-754; 4-30-14; Whiteaker, P.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Cole v. State, 2014 Ark. App. 215 (probation) CR-13-206; 4-9-14; Gladwin, R.

Bedford v. State, 2014 Ark. App. 239 (suspended sentence) CR-13-879; 4-23-14; Pittman, J.

CIVIL

Logan Centers, Inc. v. Walker, 2014 Ark. App. 203 [**pleading**] A motion to extend time to file an answer is not a substitute for filing an answer and does not automatically extend the time for filing an answer. The issue here is whether the trial court erred in applying the Rule 6(b)(2) standard that requires a showing of facts constituting mistake, inadvertence, surprise, or excusable neglect, instead of the "show cause" standard of Rule 6(b)(1) that "normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." The Rule 6(b)(1) standard is applicable here, and the court on remand should apply the correct standard. (Simes, L.; CV-13-849; 4-2-14; Pittman, J.)

Phifer v. Seeco, Inc. 2014 Ark. App. 211 [**venue**] Venue was proper in both White and Pulaski Counties. Venue was proper in Pulaski because a constitutional due process claim was raised

against a state agency. Venue is not determined based upon the ultimate merits of the claim but rather the assertion of the claim. (Fox, T.; CV-13-1-25; 4-2-14; Hixson, K.)

Brooks v. Terry Abstract Co., 2014 Ark. App. 212 [**limitations/implied contract**] An implied contract has a three-year statute of limitation, and the claim arises at the time the document is delivered. (Honeycutt, P.; CV-13-590; 4-2-14; Brown, W.)

Bannings v. LNV Corp., 2014 Ark. App. 207 [**summary judgment**] Absent an abuse of discretion, the appellate court will not reverse the trial court's exercise of discretion that Rule 56(f) allows when additional time is requested for discovery. It has not been demonstrated how their requested discovery would have changed the outcome of the case or established a different entity as servicer. They have shown no prejudice, and the circuit court did not abuse its discretion by not granting additional discovery before it entered the order of summary judgment.

[**foreclosure**] Appellants argue that the right to seek foreclosure accrued during the original action and, under Ark. R. Civ. P. 13(d), was a mandatory counterclaim in the first litigation between the parties. LNV's cause of action to foreclose did not mature until after the issues had been joined, and it was not required under Rule 13(d) to bring its claim in the first lawsuit. Furthermore, the circuit court correctly found that LNV's claim to foreclose did not arise out of the same transaction or occurrence that gave rise to the claims asserted by the Bannings in the prior lawsuit. Although the relationship of mortgagor and mortgagee existed between LNV and the Bannings at the time of their first lawsuit, that lawsuit centered on their request to quiet title and whether who was legally the service agent. (Williams, L.; CV-13-786; 4-2-14; Gruber, R.)

Hopkins v. City of Brinkley, 2014 Ark. 139 [**foia**] City and municipal utility were required to disclose a municipal-utility ratepayer's home address under the Arkansas Freedom of Information Act. (Simes, L.; CV-13-733; 4-3-14; Hannah, J.)

Bryant v. Osbourn, 2014 Ark. 143 [**probate/small estates**] The notice required by the probate code for the collection of a small estate is specific for such proceedings. While the respective requirements of notice contain some overlapping information, the statutory requirements are different than that for other probate proceedings. The party did not satisfy the statutory procedures for collection of a small estate. The failure to act in substantial compliance with the probate code renders the deed executed by the administrator void. (Smith, P.; CV-13-939; 4-3-14; Hart, J.)

Holbrook v. Healthport, Inc., 2014 Ark. 146 [**sales tax/medical records**] The gross-receipts tax does apply to a patient's attempt to obtain copies of his own medical information and the Arkansas Access to Medical Records Act does not exempt a patient's attempt to obtain a patient's medical information from any otherwise applicable tax or charge. Provider's transfer of the paper copies of medical records for money was a sale of tangible personal property and subject to sales tax. (Coker, K.; CV-13-828; 4-3-14; Hoofman, C.)

GSS, LLC v. Centerpoint Energy, 2014 Ark. 144 [**condemnation**] Circuit court did not abuse its discretion in excluding evidence of value of a contiguous parcel of land. Ark. Code Ann. Section 18-15-1206 has not been preempted by federal law; therefore the proceedings under state law were proper. (Williams, L.; CV-12-1011; 4-3-14; Hoofman, C.)

Flippen v. Jones, 2014 Ark. App. 220 [**contempt**] Although appellant filed a report with the trial court concerning his limited efforts to comply with the order of specific performance, he neither sought nor obtained the trial court's permission to terminate his efforts to comply with the court's order and appellate court's mandate before willfully rendering himself incapable of doing so by purchasing a different house. Under these circumstances, the trial court did not clearly err in finding appellant to be in contempt. (Tabor, S.; CV-13-875; 4-9-14; Pittman, J.)

McNeill v. Robbins, 2014 Ark. App. 222 [**trust**] The circuit court found that Robbins had no intention of transferring present legal title or a beneficial interest to her son when she transferred the properties from her sole name to a joint tenancy, as evidenced by the parties' treatment of the properties over the next seven years. A resulting trust was created, that McNeill's only interest in the property was as a trustee, and that he had violated his duties as trustee by pursuing the partition action. (Hearnsberger, M.; CV-13-447 4-9-14; Harrison, B.)

Roeder v. U.S. 2014 Ark. 156 [**certified question answered**] "Malicious" conduct, under Arkansas Code Annotated section 18-11-307(1) (Repl. 2003), includes conduct in reckless disregard of the consequences from which malice may be inferred. (CV-13-955; 4-10-14; Hannah, J.)

Dickinson v. Sun Trust Mortgage, Inc., 2014 Ark. 161 [**certified question accepted**] Whether the Federal National Mortgage Association satisfies the Statutory Foreclosure Act's authorized-to-do-business requirement, Ark. Code Ann. § 18-50-1 17, under 12 U.S.C. S 1716 et seq., or other federal laws, or must the Federal National Mortgage Association satisfy Ark. Code Ann. § 18-50-1 17 by obtaining a certificate of authority in Arkansas prior to statutorily foreclosing on property in Arkansas? (CV-14-173; 4-10-14; per curiam)

Fureigh v. Horn, 2014 Ark. App. 234 [**summary judgment**] Summary judgment in favor of the defendant was proper on both the causes of action for defamation and intentional interference with contractual relationship. The alleged defamatory letters were not actionable and contained privileged statements. He had no business expectancy. (Piazza, C.; CV-13-1072; 4-16-14; Gruber, R.)

State v. West, 2014 Ark. 174 [**forfeiture/jurisdiction**] The state was required to obtain personal service on Ms. West since she was listed as a defendant in the forfeiture complaint, and had an interest in the property sought to be forfeited. Failing to obtain service, the complaint should be dismissed. (Fogleman, J.; CV-13-931; 4-17-14; Goodson, C.)

Giles v. Ozark Mtn. Reg. Public Water Auth., 2014 Ark. 171 [**condemnation/attorney's fees**] The statutory condemnation procedure that was employed did not provide for the award of attorney's fees; therefore, they are not available. (Webb, G.; CV-13-1050; 4-17-14; Baker, K.)

Berryhill v. Synatzske, 2014 Ark. 169 [**pleading/john doe/estate**] Arkansas Code Ann. Section 16-56-125 provides for actions against unknown tortfeasors, which is used when the identity of the tortfeasor is unknown to the plaintiff. In this case, the tortfeasors are Synatzske and Synatzske's estate. At the time the original complaint was filed, it was unknown to the plaintiff that Synatzske had died. Likewise, it was unknown whether an estate may have existed or whether a personal administrator of the estate had been appointed. However, although the plaintiff was not aware of Synatzske's death, the complaint also named Synatzske's estate as a John Doe defendant. The circuit court erred by finding that the tortfeasor was not unknown pursuant to Ark. Code Ann. § 16-56-125. The identity of the tortfeasor, Synatzske's estate, was unknown to Berryhill. Accordingly, Ark. Code Ann. § 16-56-125 is applicable and tolled the statute of limitations. (Williams, C.; CV-13-847; 4-17-14; Baker, K.)

Sluyter v. Toney, 2014 Ark. App. 247 [**attorney's fees**] Party prevailed on some of the claims and is a prevailing party. The failure to award damages on party's counterclaim does not prevent her from being a prevailing party. (Scott, J.; CV-13-1036; 4-23-14; Gruber, R.)

Atkinson v. Ledbetter, 2014 Ark. App. 243 [**attorney's fees**] Party served motion for attorney's fees on opposing counsel but not personally on the party. This was proper because the provision of Rule 5(b)(1) requiring service on the party if the action is one in which a judgment is final and the court has continuing jurisdiction is not applicable here. The court did not have continuing jurisdiction. (Williams, L.; CV-13-1102; 4-23-14; Wynne, R.)

King v. City of Harrisburg, 2014 Ark. 183 [**ordinance**] At issue is whether an ordinance operated to combine the offices of city clerk and treasurer. The circuit court properly found that the ordinance was not designed to join the offices of city clerk and treasurer, but merely set salaries. (Philhours, R.; CV-13-674; 4-24-14; Danielson, P.)

Progressive Eldercare, Inc. v. Krauss, 2014 Ark. App. 265 [**charitable immunity**] Trial court did not err in finding that defendant was entitled to charitable immunity defense. Court's weighing of *Masterson v. Stambuck's* factors was not clearly erroneous. (Phillips, G.; CV-13-608; 4-30-14; Whitaker, P.)

Brantley v. NW Ark. Hosp., 2014 Ark. App. 262 [**directed verdict**] Negligence action was brought by patient who fell being moved from operating table to a gurney. Directed verdict was granted to a doctor even though a nurse testified that the doctor pushed the patient causing the fall. There was substantial evidence to support a finding that Dr. Smith was negligent and the court erred in directing the verdict based on his credibility determination. This was for the jury to decide. (Scott, J.; CV-13-466; 4-30-14; Brown, W.)

McClard v. Smith, 2014 Ark. App. 272 [**Evid. R. 605**] The judge made this disclosure about a testifying witness: “Dr. Shewmake and I happened to be in the same boy scout troop some 40 years ago and we were both Eagle Scouts.” This statement did not violate Rule 605 regarding testimony by a judge. The point was to disclose to the parties that he knew the witness. This was an attempt to clear up any appearance of impropriety. As such, the judge never testified for the purposes of Rule 605. (Williams, L.; CV-13-911; 4-30-14; Wood, R.)

Johnson v. De Kros, 2014 Ark. App. 254 [**easement**] The circuit court did not err in granting an injunction prohibiting persons from utilizing a wildlife-management “pond” constructed and paid for with taxpayer funds. The easement deed’s language specifically reserved to Riverbend the sole right to prevent trespass and to control access. Also, the easement area does not include a navigable waterway. An owner of part of the bed of a nonnavigable stream has ownership and control of that part of the surface of the stream that lies above the portion of the bed of the stream owned by them. (Piazza, C.; CV-13-785; 4-30-14; Gladwin, R.)

DOMESTIC RELATIONS

Brave v. Brave, 2014 Ark. 175 [**divorce–property–goodwill**] This case was heard originally by the Court of Appeals, which reversed the circuit court and remanded the case. The Supreme Court granted review. Appellant Peter Brave contended on appeal that (1) the circuit court erred in dividing the goodwill in Brave New Restaurant, despite testimony that the goodwill was personal to him, and that (2) the circuit court erred by “double dipping” into the same stream of his future income when it divided the goodwill of Brave New Restaurant and gave the appellee Marie Brave alimony. The Supreme Court found that the circuit court did not err in finding that the goodwill in question was corporate goodwill under these particular facts. Goodwill is characterized as corporate goodwill and marital property, subject to division, if the evidence establishes the salability or marketability of the goodwill as a business asset. On the issue of “double dipping” when dividing the goodwill of the restaurant in awarding the appellee alimony, the court said the argument was flawed because it is premised on the fact that the goodwill was personal goodwill. However, the circuit court found that the goodwill was corporate goodwill. In addition, the circuit court had reduced the monthly alimony, specifically stating that it did so based upon taking into consideration the argument regarding “double dipping.” (Brantley, E.; No. CV-13-936; 4-17-14; Hoofman, C.)

Baker v. Murray, 2014 Ark. App. 243 [**change of custody**] The appellant father of the child appealed from the circuit court’s denial of a change-of-custody motion, arguing on appeal that the court had misapplied the law and had made clearly erroneous findings of fact. The parents of the eight-year-old child divorced when she was less than three months old, and they clearly had an acrimonious relationship that led to difficulty in the child’s going between their two houses. The court ordered the parties and the child to see a counselor, which they began in 2011, and he testified at the hearing. The Court of Appeals divided the appellant’s arguments into “issues of law” and “issues of fact.” On the issue of law, he argued that the circuit court’s order was not

clear with respect to whether a material change in circumstances had occurred, but the Court of Appeals said that it found that the plain language of the order indicated that a material change in circumstances had not occurred. First, custody was not changed from the mother to the father. Second, the order stated that he “failed to sustain his burden.” He did not request specific factual and legal findings that he wanted the court to make, which he could have done. He also argued that the court failed to properly analyze the two-prong change-of-custody test, but the Court of Appeals did not agree. On the numerous issues of fact which the appellant alleged were clearly erroneous and clearly against the preponderance of the evidence, the Court of Appeals found no error. The decision was affirmed in its entirety. (Smith, V.; No. CV-13-896; 4-23-14; Harrison, B.)

Chitwood v. Chitwood, 2014 Ark. 182 [**child support arrearage**] The appellant is the adult daughter of the appellee. She attempted to collect an alleged child support arrearage that had been previously litigated by her mother, who was equitably estopped from collecting the support from the appellee in the previous lawsuit. The Supreme Court found that, on the appellants’s allegation that the circuit court had erred in finding that no arrearage existed because of the previous equitable estoppel finding against her mother, that a previous case was dispositive of this issue, *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 47 S.W.3d 227 (2001). Under *Clemmons*, there is only a singular obligation for child support., which may be pursued by different people at different times. Once a child reaches majority, whoever files the collection action first is allowed the right and ability to collect. Therefore, when a custodial parent files suit to collect an arrearage for the support of a minor child, that child may not also sue for the same arrearage once he or she reaches majority. To allow the appellant to maintain a second suit to collect the same arrearage would be inconsistent with the singular nature of the child-support obligation. Her claim for support is not a different one from the one her mother pursued that was barred. On the appellant’s second allegation, that the circuit court’s finding that her needs were met by funds available to her mother during the five-year period that appellee did not pay child support, the court said that no material facts were in dispute, and that the claim was barred as a matter of law. If the claim was barred as a matter of law, whether appellant’s needs were met for the challenged period is of no effect. The circuit court’s granting summary judgment in favor of the appellee was affirmed. (Duncan, X.; No. CV-13-963; 4-24-14; Corbin, D.)

Yancy v. Yancy, 2014 Ark. App. 256 [**divorce–alimony; attorney fees**] The appellant husband claimed on appeal that the circuit court erred in awarding the appellee \$500 per month alimony. The appellee wife argued on cross-appeal that the trial court erred in not awarding her attorney’s fees request of \$21,602.95. The Court of Appeals reviewed the needs of the appellee for alimony and the ability of the appellant to pay and held that the circuit court did not clearly err in the alimony award. On the issue of attorney’s fees, the court found no error in the circuit court’s granting her fees of \$6,250, rather than her requested amount. The trial court has discretion in the award of attorney’s fees in a domestic relations case, and there is no fixed formula for determining what constitutes a reasonable amount. The trial court is in the best position to evaluate the quality of service rendered. (Benton, W.; No. CV-13-306; 4-30-14; Pittman, J.)

Bamburg v. Bamburg, 2014 Ark. App. 269 [**modification of custody and visitation; unmarried cohabitation provision**] This is the second appeal from a divorce granted in 2010. Two

children were born of the marriage. The daughter has now reached majority. The 17-year-old son suffers from significant disabling non-verbal autism. The parties originally were awarded joint custody with the appellee mother being the primary custodian and the appellant father having liberal visitation. The decree provided that when the minor children were present, neither party was to have overnight guests with whom he or she had a romantic relationship, including taking vacations or trips. While the first appeal was pending, the parties litigated numerous matters and filed a number of motions for contempt, each accusing the other of being noncompliant with any number of issues. The appellant sought to have the appellee held in contempt for violating the “overnight guest” provision by having her romantic partner accompany her and the children on various overnight trips out of state. After a hearing, the judge found the appellee in contempt for violating that provision of the decree. The judge clarified its order and attempted to establish a “clear bright line rule.” Appellee later filed a motion to modify the summer vacation and travel restrictions, which the appellant moved to dismiss contending it was barred by res judicata and collateral estoppel, also seeking a change of custody to him. After a hearing, the court modified appellant’s six-week summer-visitation schedule, refused to remove the “no overnight guest” provision or to permit unmarried cohabitation. The court did modify the travel restriction by permitting the appellee mother to have her romantic partner accompany her on trips in her son’s presence, but only if the women had separate accommodations. The change was based upon extensive testimony that the partner was the child’s caregiver on a daily basis, helping him with dressing, meals and snacks, transportation to and from school, and playtime. The order noted that the daughter had left home to attend college out of state. The Court of Appeals disposed of the appellant’s procedural-bar arguments, noting that neither res judicata nor collateral estoppel is strictly applicable to child-custody matters, but that requiring a showing of materially-changed circumstances supports a more flexible approach in custody and visitation cases. On the modification of summer visitation, the court said that appellee established material changes in her son’s educational and emotional needs. The court noted that appellant was not deprived of any visitation, but that the time was simply reallocated, and that appellant seemed agreeable to the change at the end of the hearing. On the removal of the “no traveling” provision, the court said that the trial court did not lift the prohibition against unmarried cohabitation or against the partner being an overnight guest. Rather, because the women’s relationship was not illegal or illicit, the partner could go on vacations with the appellee and her family, so long as she slept in separate accommodations. The court said that it could not determine that the circuit court’s decision was clearly erroneous or that the modification was not in the child’s best interest. The decision was affirmed in its entirety. (Smith, V.; No. CV-13-501; 4-30-14; Hixson, K.)

Ward v. Ward (Tutton), 2014 Ark. App. 261 [**contempt**] In this post-divorce-decree contempt case, the circuit court found that appellant had failed to pay the second mortgage on commercial property, causing the mortgage to be in default, past due, or “slow paid” since entry of the order. The court found that he had the ability to pay and that his failure was willful and intentional contempt of the court’s orders. The court also found that appellant had failed to comply with prior orders by failing to return property to appellee, returning property to appellee in a damaged condition, thwarting efforts to auction property, and failing to pay real estate taxes on the marital home. On appeal, appellant claimed that the court’s sanctions imposed as a result of the contempt were erroneous, as well as the finding of contempt itself. The Court of Appeals noted that the court previously had ordered that appellant be jailed, and it had imposed a \$5,000 bond, but that

did not stop his contemptuous behavior. Therefore the court fashioned a remedy, which it has wide discretion to do. It did not abuse its discretion in fashioning the remedy it did. The appellant also argued that appellee failed to reserve the issue of attorney's fees, but an order of August 10, 2011, expressly reserved that issue. The case was affirmed in its entirety. (Pierce, M.; No. CV-12-1084; 4-30-14; Wynne, R.)

PROBATE

Ducharme v. Gregory, 2014 Ark. App. 268 [**adoption; consent to adopt**] The child in question is fifteen years old. In 2005, the appellant mother executed and delivered a document to the appellee husband and wife consenting to their right to care for the child, giving them physical custody, authority for medical care, and discretion over her education. Over the next several year, the appellees cared for the child when the appellant mother was hospitalized, incarcerated, or in treatment for issues resulting from her addiction to alcohol. In 2011, the appellees filed a petition to adopt the child, who also filed a consent to the adoption and to the change of her last name to that of the appellees. Numerous witnesses, including the child and the appellees, testified at adoption hearings the history of the appellees' care of the child over the years and of the appellant mother's years of struggle with alcohol addiction. Various witnesses also testified about the mother's physical and emotional abuse of the child. Many gave eye-witness accounts of physical abuse. They also testified about the mother leaving the child unattended for days at a time, and one testified about the mother having "scary" male visitors in the apartment. There was testimony that the child was mentally healthy and did not require therapy, and about her making good grades when she was living in a good environment, where she is glad to be and wants to remain. A licensed social worker and home-study specialist reported that she is healthy and content in her present surroundings and that the stability should be maintained. The trial court agreed, granted the adoption, and ordering a new birth certificate for the child with the surname of Gregory. On appeal, the appellant mother argues that the trial court erred in allowing the adoption without her consent. The Court of Appeals affirmed the adoption, but for a different reason than the circuit court's. Whereas the circuit court found that the mother had failed to support the child for a one-year period, the Court of Appeals said the one-year period must be any one year period that accrues preceding the filing of the adoption petition, not "any one-year period." The appellate court affirmed based solely on the ground that the child had suffered irremediable abuse and neglect and that the adoption is in her best interest. (Lindsay, M.; No. CV-13-827; 4-30-14; Vaught, L.)

JUVENILE

Ford v. Ark. Dep't of Human Servs., 2014 Ark. App. 226. [**TPR – best interest and grounds**] Appellant appealed the termination of his parental rights to his four-year-old daughter who had a severe medical condition. On appeal, appellant argued that TPR was not in the child's best interest and that the circuit court's finding that the other-factors ground was clearly erroneous because appellant wanted to bring his daughter home from the nursing facility where she was housed. The court of appeals held that appellant's incapacity to understand the level of his

daughter's medical needs and his failure to prepare for her needs meant that his parental rights had to give way to the child's need for permanency and safety. (Sullivan, T.; CV-13-1081; 4-9-14; Hixson, K.)

Henson v. Ark. Dep't of Human Servs., 2014 Ark. App. 225. [TPR - sufficiency]

Appellants appealed the order terminating the parental rights to their two children. The mother argued that the circuit court's finding of aggravated circumstances was not proven by clear and convincing evidence and DHS argued that the appellants were procedurally barred from raising this issue. The court of appeals held that appellants' arguments were not procedurally barred because there was no final order from which appellants could have appealed a no-reunification-services issue. Yet, the court of appeals affirmed the circuit court's finding due to the mother's lack of credibility and the family's long history with DHS. The father contended that the circuit court erred in terminating his rights because DHS allegedly made no effort to assist him in reunification. The circuit court properly terminated parental rights because the father had been incarcerated and failed to present evidence or testimony that he would be in a position to care for the children. (James, P.; CV-13-1076; 4-9-14; Whiteaker, P.)

Skaggs v. Ark. Dep't of Human Servs., 2014 Ark. App. 229. [TPR – best interest]

Appellant argued the circuit court erred in finding that it was in the child's best interest to terminate his parental rights. Appellant missed visits, failed to submit to drug screens, failed to pay child support, and tested positive for methamphetamines and amphetamines. The court of appeals affirmed, holding that the circuit court made sufficient findings in regard to the child's adoptability and that appellant's marriage to the mother was detrimental to the child and created a significant risk of harm. (Zimmerman, S.; CV-13-1056; 4-9-14; Wood, R.)

Fogerson v. Ark. Dep't of Human Servs., 2014 Ark. App. 232. [D-N - PPH]

At the permanency-planning hearing, the circuit court awarded custody of the child to the biological father. Appellant argued that the finding was contrary to the evidence. The court of appeals affirmed the circuit court's ruling, holding that the circuit court properly ruled that it was in the child's best interest to remain in the biological father's custody rather than to be returned to appellant who habitually used methamphetamine and other drugs, had problems with relationships and used poor judgment. (Zimmerman, S.; CV-13-420; 4-16-14; Pittman, J.)

J.J. v. State, 2014 Ark. App. 267. [Delinquency]

The circuit court adjudicated appellant delinquent and found that he had committed the offense of accomplice to theft of property of a cell phone and was placed on six months' supervised probation. On appeal, appellant argued that there was insufficient evidence supporting his adjudication and that the circuit court abused its discretion in denying his motion in limine to exclude testimony about witnesses' observations of a surveillance video. The court of appeals reversed and dismissed, holding that, because reasonable hypotheses existed and appellant's innocence could not be ruled out as a possibility, the circuit court could not have found beyond a reasonable doubt that appellant had taken the cell phone, particularly when the video evidence was insufficient. (Smith, T.; CV-13-821; 4-30-14; Vaught, L.)

Case in which the Court of Appeals Affirmed No-Merit TPR and Motion to Withdraw Granted:
Criswell v. Ark. Dep't of Human Servs., 2014 Ark. App. 255 (Branton, W.; CV-13-1068; 4-30-14;
Gladwin, R.)

U.S. SUPREME COURT

Navarette v. California [**search/seizure**] California Highway Patrol officer stopped the pickup truck occupied by petitioners because it matched the description of a vehicle that a 911 caller had recently reported as having run her off the road. As he and a second officer approached the truck, they smelled marijuana. They searched the truck's bed, found 30 pounds of marijuana, and arrested petitioners. Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment. Their motion was denied, and they pleaded guilty to transporting marijuana. The California Court of Appeal affirmed, concluding that the officer had reasonable suspicion to conduct an investigative stop.

Held: The traffic stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the truck's driver was intoxicated.

Not only was the tip here reliable, but it also created reasonable suspicion of drunk driving. Running another car off the road suggests the sort of impairment that characterizes drunk driving. While that conduct might be explained by another cause such as driver distraction, reasonable suspicion need not rule out the possibility of innocent conduct. Finally, the officer's failure to observe additional suspicious conduct during the short period that he followed the truck did not dispel the reasonable suspicion of drunk driving, and the officer was not required to surveil the truck for a longer period. (U.S. Sup. Ct.; No. 12-9490; April 22, 2014)