APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

APRIL 2015
VOLUME 22, NO. 8

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

Administrative Plans are to be submitted to the Supreme Court by July 1, 2015.

CRIMINAL

Pedraza v. State, 2015 Ark. App. 205 **[sex-offender registration]** Arkansas Code Annotated § 12-12-903 is plain and unambiguous. Permitting abuse of a minor is listed as a sex offense pursuant to Ark. Code Ann. § 12-12-903(12)(A)(i) and the registration requirement of Ark. Code Ann. § 12-12-901 et seq. unambiguously applies to those persons, like appellant, who are adjudicated guilty of a sex offense on or after August 1, 1997. (Gibson, B.; CR-14-178; 4-1-15; Harrison, B.)

Fronterhouse v. State, 2015 Ark. App. 211 **[sufficiency of the evidence; arson; residential burglary]** There was substantial evidence to support appellant's convictions. **[impeachment of witness]** Criminal impersonation and the use of fictitious tags, the two convictions that the trial court would not allow appellant to use to impeach a witness, involve dishonesty or false statements, which are peculiarly probative of credibility and are always to be admitted pursuant to Rule 609 of the Arkansas Rules of Evidence. Thus, the trial court abused its discretion when it refused to allow appellant to use the convictions to impeach a witness during appellant's trial. **[jury instructions;**

arson] Instructions that do not conform to the model instructions should be given only when the trial judge finds the model instructions do not accurately state the law or do not contain a necessary instruction on the subject. The arson instruction that was given to the jury in appellant's case required the jury to find beyond a reasonable doubt that appellant started a fire with the purpose of destroying or damaging the structure. Under the instruction, the jury necessarily had to exclude natural or accidental causes for the fire, which was consistent with appellant's proffered instructions. Accordingly, the trial court's refusal to give appellant's proffered instructions was not erroneous. (Storey, B.; CR-14-519; 4-1-15; Glover, D.)

Swain v. State, 2015 Ark. 132 **[hearsay; Confrontation Clause]** Out-of-court statements that merely provided context for other admissible statements made by a defendant and his coconspirators that are not offered for their truth is not hearsay. The admission of non-hearsay testimony raises no confrontation-clause concerns. (Storey, B.; CR-14-548; 4-2-15; Wynne, R.)

White v. State, 2015 Ark. 151 **[*error coram nobis*]** A writ of *error coram nobis* is issued only under compelling circumstances to achieve justice and to address errors of the most fundamental nature, and it is available to address only certain errors that are found in one of four categories: (1) insanity at the time of trial, (2) a coerced guilty plea, (3) material evidence withheld by the prosecutor, or (4) a third-party confession to the crime during the time between conviction and appeal. Because appellant's petition seeking a writ of *error coram nobis,* which was based upon a claim of ineffective assistance of counsel, did not state a cognizable claim for relief, the circuit court did not abuse its discretion in denying the petition. (Culpepper, D; CR-14-857; 4-9-15; Wynne, R.)

Bradley v. State, 2015 Ark. 144 **[Rule 37]** Rule 37.1(c) of the Arkansas Rules of Criminal Procedure requires a form of affidavit to be attached to a petition seeking postconviction relief. Rule 37.1(d) of the Arkansas Rules of Criminal Procedure requires that the circuit court or appellate court dismiss any petition that fails to comply with subsection (c) of Rule 37.1. Because appellant's petition failed to comply with the affidavit requirement of Rule 37.1 (c), the appellate court dismissed his appeal. (Sims, B.; CR-13-1122; 4-9-15; Baker, K.)

Martin v. State, 2015 Ark. 147 **[withdrawal of a plea; ineffective assistance of counsel]** Appellant failed to demonstrate that the withdrawal of his plea was necessary to avoid a manifest injustice. Neither in his petition nor his testimony at the hearing did appellant state that he would have insisted on going to trial had his counsel adequately and accurately informed him of the consequences of his plea. Appellant's testimony indicated that he was motivated to accept the plea to avoid the risk of receiving a greater sentence at trial, out of financial concerns, and based upon the best interest of his family. Accordingly, the circuit court did not abuse its discretion when it denied appellant's motion to withdraw his plea of nolo contendere. (Keaton, E.; CR-14-49; 4-9-15; Goodson, C.)

Noble v. State, 2015 Ark. 141 **[*error coram nobis*]** The Supreme Court denied appellant's petition seeking to reinvest jurisdiction with the Jefferson County Circuit Court to hold a hearing on his petition for a writ of *error coram nobis* because the claims raised in the petition, which were based on allegations of ineffective assistance of counsel, did not fall within one of the recognized

categories subject to *coram-nobis* relief. (CR-93-427; 4-9-15; Hannah, J.)

Schneider v. State, 2015 Ark. 152 **[reasonable suspicion]** A discrepancy between the color of a vehicle and the color listed on the car's registration, standing alone, is insufficient to give rise to reasonable suspicion of criminal activity, which is necessary to justify the stop of a vehicle. (Green, R.; CR-14-1104; 4-9-15; Wynne, R.)

Bramlett v. State, 2015 Ark. 146 **[Eighth Amendment; juvenile nonhomicide offender]** In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court of the United States held that the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender. Under Arkansas law, attempted capital murder is not a homicide offense for purposes of *Graham*. (Dennis, J.; CV-12-330; 4-9-15; Baker, K.)

Bolin v. State, 2015 Ark. 149 **[Comprehensive Criminal Record Sealing Act]** The legislature expressly designated that the Comprehensive Criminal Record Sealing Act of 2013 should be retroactive with regard to misdemeanors but chose to exclude that retroactivity with regard to felonies. (Webb, G.; CR-14-508; 4-9-15; Wood, R.)

Fowler v. State, 2015 Ark. App. 232 **[motion to suppress]** The law enforcement official's initial stop of appellant was based upon reasonable suspicion. Specifically, appellant was in a vehicle that matched a description of a vehicle that fled the scene of a crime. Appellant was also found in close proximity to the location of the crime. Once the officer stopped appellant pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure, he was permitted to ask appellant whether he had any weapons without first giving appellant his *Miranda* warnings. Accordingly, law enforcement's interaction with appellant was lawful and the circuit court properly denied appellant's motion to suppress. (Reynolds, D.; CR-13-313; 4-15-15; Harrison, B.)

Williams v. State, 2015 Ark. App. 245 **[admission of evidence]** The circuit court abused its discretion when it concluded that defense counsel "opened the door" to testimony that was previously determined to be inadmissable. (Sims, B.; CR-14-749; 4-15-15; Hoofman, C.)

Smith v. State, 2015 Ark. 165 **[Rule 37]** The trial court properly denied appellant's Rule 37 petition, which alleged that trial counsel was ineffective based on the following actions: (1) refusing to strike a certain juror; (2) failing to execute an affidavit in compliance with Ark. Code Ann. § 16-63-402; and (3) failing to object to a search of appellant's home. (Henry, D.; CR-12-487; 4-16-15; Baker, K.)

Carter v. State, 2015 Ark. 166 **[Rule 37]** Because appellant failed to establish that his attorney was ineffective or that he was prejudiced by trial counsel's alleged deficient performance, the trial court did not err in denying appellant's petition for postconviction relief filed pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure. (Chandler, L.; CR-12-759; 4-16-15; Hart, J.)

Lemaster v. State, 2015 Ark. 167 **[Rule 37]** The decision of appellant's attorney to not play an audio recording of a message left for appellant by the victim was a matter of strategy or trial tactics and was not a valid ground for granting relief under Rule 37 of the Arkansas Rules of Criminal Procedure. Thus, the trial court properly denied appellant's petition. (Elmore, B.; CR-14-465; 4-16-15; Wood, R.)

Williams v. State, 2015 Ark. App. 262 **[jury instruction]** The facts of appellant's case, which involved him killing "an innocent bystander," who had not provoked or threatened appellant, demonstrated that there was no rational basis for giving an extreme-emotional-disturbance manslaughter instruction to the jury. Thus, the trial court did not abuse its discretion in refusing to give the instruction. (Haltom, B.; CR-14-817; 4-22-15; Whiteaker, P.)

Thompson v. State, 2015 Ark. App. 275 **[sufficiency of the evidence; sexual assault; rape]** There was substantial evidence to support appellant's convictions. **[severance]** Because each of the victim's testimony would have been admissible in the trial of the other to show appellant's intent, motive, common scheme, or plan, the trial court did not abuse its discretion in refusing to sever the appellant's cases. **[motion to suppress]** When determining whether a defendant made a voluntary, knowing, and intelligent waiver of his *Miranda* rights, a court may consider the defendant's mental capacity. However, that factor alone is not sufficient to suppress a confession. Based upon the totality of circumstances, the trial court did not err in denying appellant's motion to suppress. **[rape-shield statute]** Whether the victim is a "virgin" is not relevant per se in a rape case and evidence of prior consensual sexual conduct is inadmissible unless such prior sexual conduct took place with the accused and, if admitted, the testimony is allowed only to show that consent may have been given. Because the evidence regarding whether the victim had sex with her boyfriend was irrelevant and unduly prejudicial, the trial court did not abuse its discretion by excluding the testimony. **[quashing of jury panel]** Although there were no black jurors in the jury pool, appellant failed to provide any evidence of a prima facie case of racial discrimination. Accordingly, the trial court did not abuse its discretion in refusing to quash the randomly-selected jury panel. (Storey, W.; CR-14-763; 4-29-15; Harrison, B.)

Leeka v. State, 2015 Ark. 183 **[DWI]** The DWI statute, Ark. Code Ann. §5-65-103, does not contain an express requirement of a culpable mental state. Because the DWI statute is a criminal statute contained within the Arkansas Criminal Code, section 5-2-203 applies to impute a culpable mental state. The plain language of section 5-2-203 is clear and provides that even if a statute defining an offense does not prescribe a culpable mental state, "a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly." The circuit court erred in concluding that the DWI statute did not require a culpable mental state as provided in section 5-2-203. (Storey, W.; CR-14-798; 4/30/15; Goodson, C.)

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

Griffis v. State, 2015 Ark. App. 217 (first-degree murder) CR-13-917; 4-1-15; Brown, W.

Davis v. State, 2015 Ark. App. 234 (burglary) CR-14-859; 4-15-15; Kinard, M.

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:

McDougal v. State, 2015 Ark. App. 212 (suspended sentence) CR-14-652; 4-1-15; Glover, D.

Ta v. State, 2015 Ark. App. 220 (suspended sentence) CR-14-838; 4-8-15; Virden, B.

Lewis v. State, 2015 Ark. App. 222 (suspended sentence) CR-14-756; 4-8-15; Kinard, M.

Peel v. State, 2015 Ark. App. 226 (probation) CR-14-837; 4-8-15; Hixson, K.

Boyland v. State, 2015 Ark. App. 263 (suspended sentence) CR-14-840; 4-22-15; Vaught, L.

Webb v. State, 2015 Ark. App. 257 (probation) CR-14-279; 4-22-15; Gruber, R.

Truitt v. State, 2015 Ark. App. 276 (probation) CR-14-1032; 4-29-15; Harrison, B.

CIVIL

Cason v. Lambert, 2015 Ark. App. 213 **[trespass]** This case involves a dispute over family burial plots and the complaint alleged a trespass action arising over the placement of the headstone and grave. The 3-year limitations period began with the placement of the headstone, and it has run. Arkansas does not recognize the tort theory of continuing trespass for limitations purposes. (Gibson, B.; CV-14-890; 4-1-15; Whiteaker, P.)

Hinchey v. Taylor, 2015 Ark. App. 207 **[county court]** While jurisdiction of a claim against the county for just compensation for a completed taking was vested in the county court, this case is not seeking just compensation; rather, it is a trespass action. The circuit court has subject matter jurisdiction. The "road" in question was not properly dedicated and does not constitute a county road. County judge's actions were properly enjoined. (Epley, A.; CV-14-819; 4-1-15; Kinard, M.)

Florida Oil Investment Group, LLC v. Goodwin and Goodwin, Inc., 2015 Ark. App. 209 **[materialmen's liens]** A materialmen's lien cannot exist unless the lien claimant had a valid contract with the owner, contractor, or their agent. Claimant was never the owner or contractor, or even a legally occupying tenant. (Cox, J.; CV-14-748; 4-1-15; Gruber, R.)

Butler and Cook, Inc. v. Ozark Warehouses, Inc., 2015 Ark. App. 214 **[negligence]** The trial court awarded $12,000 in damages based upon testimony that the roller would have had the value of $12,000–$15,000 if it had been repaired properly. This is not evidence of the fair market value of

the roller either before or after the alleged negligent repair. Plaintiff failed to prove damages, which is an essential element of its claim. (Fitzhugh, M.; CV-14-843; 4-1-15; Vaught, L.)

XTO Energy, Inc. v. Thacker, 2015 Ark. App. 203 **[service]** The circuit court erred in finding the 1984 quiet-title decree was not void because of lack of proper service of the complaint. Tarver was named as a defendant in the caption of the 1984 quiet-title action. As such, it was necessary that the court have personal jurisdiction over him. However, he was dead at the time of the 1984 quiet-title action. The plaintiff failed to properly make constructive service. **[deed]** Handwritten interlineation to the legal description on the 1929 mineral deed could not be given effect. (Maggio, M.; CV-14-645; 4-1-15; Abramson, R.)

Morrison v. Carruth, 2015 Ark. App. 224 **[adverse possession]** Plaintiff failed to establish the common-law elements of adverse possession. The physical encroachments by the storage shed and dog pen were so slight as to be nearly imperceptible, and, as the circuit court found, their "existence certainly does not meet the common-law elements of adverse possession."
(Tabor, S.; CV-14-908; 4-8-15; Whiteaker, P.)

Furnas v.Kimbrell, 2015 Ark. 148 **[schools]** The circuit court correctly followed the mandate and did not have jurisdiction to entertain on remand the following issues: (1) post-remand mandatory injunctive relief sought by the School Districts in the form of ordering the Arkansas Department of Education to release to the School Districts more Uniform Rate of Tax (URT) adjustment funds; and (2) post-remand Act 557 of 2013 impact on the legal obligation of the ADE to release the appropriated funds owed to the School Districts for prior school years. (Fox, T.; CV-14-12; 4-9-15; Hart, J.)

Peavler v. Bryant, 2015 Ark. App. 230 **[adverse possession]** The possession of one claiming under a life tenant is not adverse to the remaindermen until the death of the life tenant. Peavler maintains Mason had only a life estate in the property and her remainder interest in the land did not become possessory until after Mason's death in 2012. The statute of limitations could not have commenced running against Peavler until the death of the life tenant. (Cox, J.; CV-14-697; 4-15-15; Virden, B.)

Travelers v. Cummins Mid-South, LLC. 2015 Ark. App. 229 **[contract]** The lien release is entitled at the top of the document: "SUBCONTRACTOR/MATERIALMAN UNCONDITIONAL WAIVER AND RELEASE UPON FINAL PAYMENT." The language is clear that Cummins releases any bond right it may have against Tycor concerning the Armed Forces Reserve Center job. There is no ambiguity, and therefore no call to look beyond the plain language of the contract. **[waiver]** A unilateral mistake without a showing of fraud on the part of Tycor does not allow Cummins to rescind the release. The circuit court erred in finding that Cummins did not waive its right to recover on the bond. **[unjust enrichment]** Unjust enrichment has no application when an express written contract exists. (Guthrie, D.; CV-14-592; 4-15-15; Virden, B.)

Bingham v. C & L Elect. Coop., 2015 Ark. App. 237 **[prescriptive easement]** The circuit court correctly found that appellee had acquired a prescriptive easement across appellant's property for the purpose of maintaining and operating an electrical-distribution line. (Gibson, B.; CV-13-969; 4-15-15; Gruber, R.)

Wilson v. Arvest Bank, 2015 Ark. App. 268 **[foreclosure]** Appellee provided sufficient prima facie evidence of entitlement to summary judgment, and appellants were required to meet proof with proof to show that there were still issues of material fact in dispute. Although appellants argue that there were issues of material fact, each of their arguments relies on their contention that they could have brought the loan current had it not been for appellee's actions or lack thereof. However, appellants failed to provide specific proof in their affidavit, especially as to their ability to make the necessary payments. (Schrantz, D.; CV-14-1074; 4-22-15; Hoofman, C.)

Farmers Ins. v. Bradford, 2015 Ark. App. 253 **[insurance]** Issue was whether the motor vehicle exclusion applied to a boom lift. The motor-vehicle definition in the policy is ambiguous. It lends itself to more than one reasonable interpretation. Because an ambiguity exists, the policy is interpreted to favor the insured. The motor-vehicle exclusion did not apply to the boom lift. (Weaver, T.; CV-14-1010; 4-22-15; Abramson, R.)

Ivory v. Woodruff Elect. Coop., 2015 Ark. App. 255 **[negligence]** Issued involve duty of electric company to protect transmission lines from damage by animals. While there is no regulation requiring critter guards in these circumstances, the company still is subject to the broader duty of reasonable care. Although a party's compliance with industry or statutory-safety standards is proper evidence on the question of negligence, it is not conclusive because it is not necessarily a complete discharge of the party's duties toward the public. It is the duty of an electric company to use ordinary care to provide and install proper electrical service equipment. Case remanded. (Simes, L.; CV-14-698; 4-22-15; Kinard, M.)

Earls v. Harvest Credit Management, 2015 Ark. 175 **[summons]** Summons stated "answer must be filed within 20 DAYS from the day you were served this summons; OR 30 days if you are a non-resident of this state or a person incarcerated in any jail, penitentiary, or other correctional facility in this state." Summons incorrectly stated that an incarcerated defendant had thirty days, instead of sixty days, to file an answer. The circuit court stated in its order that service upon the Earlses was proper as they were not incarcerated. However, the language of Rule 4(b) requiring that the summons be directed to "the defendant," or in this case, the Earlses, must be read in conjunction with Rule 12(a), which provides for varying response times for in-state, out-of-state, and incarcerated defendants. A summons must comply exactly and not substantially with the requirements of Rule 4(b). The response times for each category of defendant—in-state, out-of-state, and incarcerated defendants—must be correct and exact. Further, the fact that the Earlses had knowledge of the proceedings, notwithstanding the error in the summons, did not validate process. (Simes, L.; CV-14-456; 4-23-15; Hannah, J.)

Certain Underwriters at Lloyds of London v. Bass, 2015 Ark. 178 **[intervention]** The term "Underwriters," along with the policy number, as a reference to the various persons or entities who subscribe to policies as part of a Lloyd's syndicate were not too amorphous to be permitted to intervene. Movants were entitled to intervene to protect their contractual rights and legal interests, and that satisfied requirements of Rule 24. (Arnold, G.; CV-14-788; 4-23-15; Danielson, P.)

McDougal v. Sabine River Land Co., 2015 Ark. App. 281 **[contract/limitations]** Plaintiff had knowledge that two competing leases had been executed and that one of the leases had been assigned and the assignment was of record. This action was brought more than 5 years after the assignment was recorded, and the limitations period had run. (Weaver, T.; CV-14-1087; 4-29-15; Vaught, L.)

DOMESTIC RELATIONS

Barron v. Barron, 2015 Ark. App. 215 **[divorce–marital property]** The appellant husband contended on appeal that the trial court clearly erred in not finding three financial accounts to be his sole nonmarital property or, in the alternative, in not dividing the financial accounts unequally in his favor. In affirming, the Court of Appeals noted that the primary source of the accounts in question was from the appellant's mother or from the proceeds of life insurance policies that he cashed in. However, the money was placed in the accounts during the marriage in the names of both parties, giving rise to the presumption that the funds were a gift from the appellant to the appellee. The presumption may be rebutted by clear and convincing evidence, but the Court found that the appellant "failed to rebut that presumption in any manner and certainly not by clear and convincing evidence." He also failed to establish that the trial court clearly erred in not making an unequal division of the funds. He "simply failed in his burden to present sufficient evidence to divide the marital accounts in any way other than one-half to each party." (Putman, J.; No. CV-14-902; 4-1-15; Hixon, K.)

Williams v. Office of Child Support Enforcement, 2015 Ark. App. 225 **[child support–contempt]** The appellant was found in civil contempt for willful failure to pay a properly-registered, Florida child-support order against him with an accrued arrearage of $45,298.01. When the appellant was called to testify by the appellee, he admitted there was a Florida child-support judgment against him. He said he had tried to appeal the registration of the order in Arkansas but that appeal was dismissed. When asked whether he had made any payments on the Florida judgment, he did not answer, but he said that OCSE had the burden of proving nonpayment. When he did not answer, the attorney for OCSE told the court that he had not made any payments, stating what the judgment was, and stating that "Florida is a state that charges interest so I'm sure it's up to seventy-five grand or more by now." When given an opportunity to present his case, the appellant said that OCSE had failed to state a claim and the case should be dismissed, which the court denied. He was held in contempt and ordered to be jailed until he paid $5,000. In reversing, the Court of Appeals noted that this was civil contempt and indirect contempt, committed outside the presence of the court. The Court noted that OCSE presented no evidence of appellant's noncompliance with the Florida judgment and that the attorney's unsworn statements were neither testimony nor evidence. Evidence is required to prove

indirect contempt, which occurs outside the presence of the court. Here, no evidence was presented, so the order holding the appellant in contempt was against the preponderance of the evidence. Therefore, the order was reversed. (Cook, V.; No. CV-14-959; 4-8-15; Vaught, L.)

White v. Shepard, 2015 Ark. App. 223 **[divorce]** The appellee wife and the appellant husband filed respective complaint and counterclaim for divorce based upon general indignities. The appellee amended her complaint to seek a divorce from bed and board, rather than an absolute divorce. She attached a motion for summary judgment, alleging that the appellant had not complied with their agreement that resulted from mediation regarding their real property. She also alleged that some of the property was her nonmarital property. Appellant opposed the motion for summary judgment, stating that he was unable to comply with the agreement, that the parties had reached a novation, and that he was unable to comply with that agreement, as well. The circuit court granted the appellee summary judgment for a divorce from bed and board and for a division of property based upon the parties' mediation agreement, dismissing the appellant's counterclaim for absolute divorce. In its detailed order, the circuit court found that the parties had lived continuously separate and apart without cohabitation from September 5, 2011 to the date of the order, November 22, 2013, but granted the appellee a divorce from bed and board rather than an absolute divorce because "[she] will be entitled to collect a death benefit upon [appellant's] death, thereby providing her with funds with which she can maintain the mortgage, taxes, and insurance on the home until she is able to sell the home." The Court of Appeals found the circuit court erred in not granting the appellant's counterclaim for an absolute divorce based upon the statutory ground of eighteen months' continuous separation without cohabitation, which when proven, as it was here, the court "shall grant...at the suit of either party." Ark. Code Ann. section 9-12-301(b)(5). The Court also found error in the court's granting summary judgment. It held that disputed issues of material fact remained in this case, specifically the issue of whether the appellant refused to comply with the mediation agreement. Also, there remained competing divorce complaints in the case, making summary judgment improper, and the division of other marital property went beyond the requested specific performance of the mediation agreement. The decision was reversed and remanded for further proceedings consistent with the decision. (Arnold, G.; No. CV-14-157; 4-8-15; Gruber, R.)

Beason v. Parks, 2015 Ark. App. 246 **[order of protection]** The circuit court granted the appellee's petition for an order of protection. The Court of Appeals reversed and dismissed based upon the appellant's argument that the petition was statutorily deficient. Ark. Code Ann. section 9-15-201 provides that a petition for an order of protection shall be, among other things, "verified," and "accompanied by an affidavit made under oath that states the specific facts and circumstances of the domestic abuse and the specific relief sought." In the case before the Court, the petition was verified, but the attached handwritten statement of facts was not made under oath. The appellee had argued that the verified petition and her affidavit should be considered as one document to satisfy both subsections of the statute. But the Court said that under the plain language of the statute, the petition was deficient. The Court reversed and dismissed the circuit court's order granting the order of protection. (Looney, J.; No. CV-14-502; 4-15-15; Hoofman, C.)

Hayes v. Otto, 2015 Ark. App. 228 **[child support]** Ten appellate cases related to this case have been heard by the Court of Appeals. The parties had joint custody of their youngest child and the appellee

mother was ordered to pay child support because she had a greater income than the appellee. One pertinent appeal affirmed an August, 2008 order that set child support based on a deviation from the chart, taking into consideration the appellee's creation of a college fund for the parties' children. Following that Court of Appeals decision, the appellant filed a motion to modify support based upon appellee's alleged increase in income. On appeal from that decision, the Court of Appeals held that the order lacked finality because it did not set forth a specific dollar amount and the appeal was dismissed for lack of a final order. The Court noted in the instant case that the precedential value in the final paragraph of the decision noted that "some of the appellant's statements in his briefs border on contempt." The Court referred to Arkansas Supreme Court and Arkansas Court of Appeals Rule 1-5 (2011) that "No argument, brief, or motion filed or made in the Court shall contain language showing disrespect for the circuit court." The Court struck certain statements from the appellant's brief and warned that if similar statements were made in the future, the Court would "address this problem more harshly." The appellant then filed a motion to amend the child support order, asking the circuit court to state the specific amount of appellee's child support obligation for "finality" for purposes of appeal. A month later, the appellant filed a motion requesting the circuit judge to recuse, noting the statement in the Court of Appeals's opinion about the appellant's statements, the Court's striking of the statements, and the warning about more harsh treatment for similar statements in the future. He complained that the circuit court had not issued an order based upon his motion from the month before. He made many statements about the circuit court from which the Court of Appeals quoted. In a subsequent order, the circuit court amended its order to state that all child-support obligations had been satisfied and that the children had reached majority, and found that the appellant's motion to recuse had been resolved by a previous order of the Court of Appeals. Appellant filed the instant appeal. The Court of Appeals found that the law of the case doctrine governed appellant's issues of deviation from the child-support chart and appellee's income-tax refund. The Court's precedents of not considering arguments that are unsupported by legal authority governed the issues of the use of the appellant's current affidavit of financial means and the control of the college fund. The Court declined to consider the appellant's point on appeal regarding recusal because of the appellant's continued disregard of its previous warning to avoid statements bordering on contempt, as well as the circuit court's patience of that disregard. (Smith, V.; No. CV-14-734; 4-15-15; Gladwin, R.)

Lamb v. Rodriguez, 2015 Ark. App. 248 **[divorce–property-settlement agreement--military retirement]** At the time of divorce, the parties entered into a property-settlement agreement (PSA) that included a provision that "Husband agrees that Wife is entitled to and is to receive one-half (½) of his military retirement pay as marital property." The decree stated that Defendant's net military retirement pay is $1,350 per month and that the Plaintiff was to receive one-half of his disposable military retirement pay as her share of the marital property for the years they were married...or $574 per month. Several years later the appellee filed a motion to enforce the PSA, claiming that the appellant refused to pay her more than $574 per month, and that she had never received any cost-of-living adjustments. She claimed $30,599, plus costs and attorney fees. The appellant raised affirmative defenses and counterclaimed for child support for the time he cared for the child full-time while paying child support. The circuit court ordered that it had jurisdiction to construe, clarify, and enforce the parties' PSA, which was incorporated into the decree. It found that the PSA provided for a specific percentage of his military-retirement pay to be paid to the appellee, and that it should have increased with the appellant's pay increases over the years. The court ordered payment of

$30,599 in past payments, one-half of his military-retirement pay prospectively, and attorney fees of $1,500. The appellant filed a motion for clarification of judgment and requested the court to specifically address his affirmative defenses and his counterclaim. The court filed an order denying his motion, specifically denying to the extent it was filed under Arkansas Rule of Civil Procedure 52(a) and (b). He appealed, contesting only the court's final order. The Court of Appeals affirmed. It said that the circuit court had the power to construe, clarify, and enforce the parties' PSA. The Court said the circuit court did not modify the PSA to a static amount, but simply explained what the appellee was entitled to at the time of divorce. The decree clearly stated, "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant pay to Plaintiff as marital property one-half (½) of his disposable military retirement pay." The Court said the language was plain and unambiguous. The Court also held, with regard to his affirmative defenses, that the appellant appealed "from the July 14, 2014 order and "'abandon[ed] any pending but unresolved claim[s].'" (Hendricks, A.; No. CV-14-967; 4-15-15; Hoofman, C.)

Steele v. Lyon, 2015 Ark. App. 251 **[domestic abuse–order of protection]** The appellant appealed from a two-year order of protection granted to the appellee, contending that the trial court erred in allowing him to testify without being on a witness list and that there was insufficient evidence to support the decision to grant the order. In affirming, the Court of Appeals said that, on the evidentiary issue, the appellant failed to provide citation to authority or convincing argument, so the Court would not consider it. On her second point, the appellant contended that the trial court erred in ruling that the case fell within the scope of the Domestic Abuse Act because this was a case in which other adequate remedies existed to address the appellee's complaint. She based her allegation on the language of the purpose clause in the statute ("...and other injunctive relief for which there is no adequate remedy in current law.") and on the fact that the parties never lived together and only dated for about eight months. The Court of Appeals said the Act's purpose does not indicate that the statute can only be used when there are no other adequate remedies or that the parties must live together. In fact, the statute specifically includes parties who are in a past or present dating relationship, without any requirement that they live together. The appellant also raised some evidentiary issues and a sufficiency of the evidence issue. The Court affirmed the trial court on the evidentiary questions, noting that a trial court's evidentiary rulings will not be reversed absent a manifest abuse of discretion. On the sufficiency of the evidence, the Court noted that, applying the clearly erroneous or clearly against the preponderance of the evidence standard, and giving deference to the trial court in judging the credibility of witnesses, there was sufficient evidence for the court to find that an order of protection should be entered and the circuit court's decision was not clearly erroneous. (Gray, A.; No. CV-14-72; 4-22-15; Abramson, R.)

Bradford v. Isom, 2015 Ark. App. 278 **[divorce–marital property]** At the time of the parties' divorce in 2012, the trial court ordered that an account held as tenants by the entirety, $93,207.09 was marital property but was the separate property of the appellant husband. In the first appeal of this case, the Court of Appeals reversed that decision and remanded for the court to consider whether an equal division of the marital property would be inequitable. If the court found it to be inequitable, "'the court...shall consider the statutory factors found in Arkansas Code Annotated section 9-12-315(a)(1)(A) and shall recite the basis and reasons for the unequal division in its written order, as is required by subsection (a)(1)(B).'" After the remand, the trial court conducted a hearing.

The appellant again sought an unequal division of the account and each side presented its case. The court concluded that the property is a marital asset to be divided equally by the parties. On appeal the appellant husband contends the court failed to follow the mandate to consider whether equal division was inequitable and to consider the statutory factors. The Court of Appeals said that the circuit court did not find an equal division to be inequitable, so the court was not required to consider the factors. The decision was affirmed. (Clawson, C.; No. CV-14-883; 4-29-15; Gruber, R.)

PROBATE

Shepherd v. Jones, 2015 Ark. App. 279 **[wills; testamentary capacity and undue influence]** John H. Jones died in hospice care, two days after executing a power of attorney and his last will and testament. Four days before he died, his aunt died; he had lived with her since he was a teenager and he was a primary beneficiary of her estate. In his will, the decedent left bequests to siblings and half-siblings and a bequest to a church, but the bulk of his sizeable estate was left in equal shares to a half-sister, the appellant Janey Shepherd, and a long-time friend of his aunt's and his, Madge Helm. The testimony set out extensive evidence about the decedent's condition before his death and specifically about the day he executed the will, as well as the roles various people played in the preparation and execution of the will. The evidence also indicated that the decedent was never told and that he never knew that his aunt had predeceased him and that his estate had increased as a result of that. The trial court found that the decedent did not have the testamentary capacity to execute his will and that the will was a product of undue influence, and the court made detailed findings with regard to those two interwoven concepts. The Court of Appeals reviewed the facts and the law, including the burdens of proof in these types of cases. The Court found that, given the evidence, it could not find the trial court's presumption of undue influence and the failure to rebut the presumption clearly erroneous. The decision was affirmed. (Gray, A.; No. CV-14-229; 4-29-15; Glover, D.)

Covenant Presbytery v. First Baptist Church, Osceola, Arkansas v. Sun Trust Bank, As Trustee Under the Will of Stanley D. Carpenter, 2015 Ark. App. 233 **[testamentary trust; charitable trust--*cy pres*]** Stanley Carpenter died testate in 1967. When the will was probated, the court named the National Bank of Commerce of Memphis, Tennessee, as executor and trustee of the estate. From 1967 to 2005, the bank managed farmland near Osceola that Mr. Carpenter owned at his death. Since 2005, the appellee/cross-appellee, Sun Trust Bank, has managed the farmland as National Bank's successor. National Bank distributed annual farm income to four of Mr. Carpenter's family members after the probate case closed, until 2003, by which time some of them had died. After that, the farm income was distributed one-fourth to Carolyn Schabel, one-fourth to Mary Greenway, one-fourth to First Presbyterian Church of Osceola, and one-fourth to First Baptist Church of Osceola. The only surviving family member receiving income now is Carolyn Schabel. The First Presbyterian Church of Osceola was dissolved in 2004 and all assets not sold or distributed were transferred to Covenant Presbytery, the appellant, after which National Bank of Commerce began paying First Presbyterian's share to Covenant Presbytery. Covenant Presbytery and First Baptist became involved in a dispute over whether Covenant Presbytery could succeed to the interest of First Presbyterian Church under the will. Sun Trust, as Trustee, filed a petition against Covenant Presbytery and First Baptist for the circuit court to determine the parties' rights and interests. Sun

Trust also raised the possibility that Mr. Carpenter's will created a charitable trust. After a trial, the court found that the decedent's will created a testamentary trust to benefit two churches in Osceola. Because the First Presbyterian Church no longer existed, the court used the doctrine of *cy pres* to order that any payments, distributions, or property transferred by the trustee of the Carpenter Trust must be paid to the First Baptist Church. In reversing, the Court of Appeals said that in construing a trust, as in construing a will, the settlor's intentions must be determined and the same rules apply as in construing a will. A trust may have a definite beneficiary or may be a charitable trust. Which one it is must be consistent with the settlor's intention to the extent that can be determined. Before *cy pres* can be applied, the court must find that the settlor intended that its sole purpose is charitable, and that some public benefit is achieved. Here, the decedent gave or bequeathed many items that were not charitable in nature, for example, two houses, watches, guns and cash–at least 43 items. Net income from his farmland was divided between four relatives during their lifetimes. The Court said that, although "the trust does contain a measure of charity," a plain reading of the instrument does not show a solely or purely charitable purpose at its creation. Therefore, applying *cy pres* was error, as was ordering Sun Trust to distribute to First Baptist any distribution that otherwise would have been paid to First Presbyterian. The Court held that Covenant Presbytery is the successor in interest to First Presbyterian under Mr. Carpenter's last will and testament. (Philhours, R.; No. CV-14-891; 4-15-15; Harrison, B.)

JUVENILE

Edwards v. Dep't of Human Services, 2015 Ark. 267 **[Custody – Rule 54(b)]**
Appellants appealed the denial of their motion for custody of their granddaughter who was in DHS custody following an adjudication of dependency-neglect. Dismissed without prejudiced for lack of a final appealable order that included specific findings as to why a hardship or injustice would result if an immediate appeal was not permitted. The record is insufficient to cure a Rule 54(b) certification; the factual findings must be included in the court's order. (Huckabee, S.; CV-14-939; 4-22-2015; Hoofman, C.)

Cogburn v. Ark. Dep't of Human Service v. Nelson, 2015 Ark. 271 **[PPH]**
Appellant mom appealed the permanency planning order placing two of her six children with their father. Due deference is given to the trial court to judge the credibility of witnesses. **[hearsay evidence]** The appellate court agreed that the trial court erred when it relied on the counselor's report because it was hearsay. However, it was harmless because there was no showing of prejudice and there was other evidence that confirmed the counselor's report that the children had improved as to their health and behavior while in their father's custody. (McCallum, R.; CV-15-16; 4-29-2015; Gladwin, R.)

Humbert v. Ark. Dep't of Human Services, 2015 Ark. App. 266 **[TPR - sufficiency]**
[best interest] Appellant argues that if there is still a reason to believe there can be a positive, nurturing parent-child relationship the law favors preservation. The circuit court did not err in finding that termination was in the children's best interest where appellant lost his job after testing

positive for methamphetamine and he missed multiple drug screens, including six scheduled prior to the termination hearing. The children's mother also disclosed that she and appellant used drugs together and that appellant allowed his children to have contact with her in direct violation of the court's order. At the time of the termination hearing he was homeless, and had no steady job or vehicle. There was also evidence that the children were highly adoptable. **[other factors]** The trial court did not err in finding the ground of subsequent factors for termination based on the following evidence: appellant's drug use, including avoidance of drug screens and that appellant violated the court's order and subjected his children to their drug-addicted mother almost daily while in his custody. Appellant was not stable; he had no transportation, no steady job or a place to live at the time of the termination. (Zimmerman, S.; CV-14-1079; 4-22-2015; Hixon, K.)

Basham. v. Ark. Dep't of Human Services, 2015 Ark. App. 243 **[TPR –Appointment of Counsel]** Appellant mom, who was incarcerated in Texas and participated in the TPR hearing by phone, argued that the trial court failed to determine if she was indigent and failed to appoint her counsel prior to the termination, despite a written request for counsel prior to the hearing. Failure to determine appellant was indigent and appoint counsel was in violation of Section 9-27-316(h)(1)(D), as a matter of law. Reversed and remanded. Appellant father's No-Merit TPR and the motion to withdraw as counsel was affirmed. (Haltom, B.; CV-14-907; 2-15-2015; Vaught, L.)

Cox v. Ark. Dep't of Human Services, 2015 Ark. App. 202 **[TPR – best interest]** Appellant (father) argued that permanency would not be achieved by adoption since his children would remain with their mother and that was not in his children's best interest to have his rights terminated because he did not pose any credible threat of harm to his children. However, there was evidence that appellant caused his children's half–sister to be hospitalized for alcohol poisoning that was life threatening and resulted in aggravated circumstances finding. Appellant also admitted that he sexually fondled her. There was also expert testimony that there was likelihood that this cycle of abuse could be repeated. The potential harm finding was not clearly erroneous when the evidence indicates that continuing contact could cause his children to suffer potential harm and there were concerns about appellant's ability to satisfy the moral, physical intellectual and developmental needs of his children. (Cook, V.; CV-14-1058; 4-1-2015; Gladwin, R.)

Cases in which the Court of Appeals affirmed No-Merit TPR and Motion to Withdraw Granted:

Taylor v. Ark. Dep't of Human Services, 2015 Ark. App. 284 (Coker, K.; CV-14-1121; 4-29-2015; Brown, W.)

B.M. v. Ark. Dep't of Human Services, 2015 Ark. App. 283 (Branton, W.; CV-14-1113; 4-29-2015; Hoofman, C.)

McDonald v. Ark. Dep't of Human Services, 2015 Ark. App. 277 (Thyer, C.; CV-15-14; 4-29-2015; Harrison, B.)

Zachary v. Ark. Dep't of Human Services, 2015 Ark. App. 256 (Sullivan, T.; CV-14-1112; 4-22-2015; Kinard, M.)

Basham. v. Ark. Dep't of Human Services, 2015 Ark. App. 243 (Haltom, B.; CV-14-907; 2-15-2015; Vaught, L.)
Shannon v. Ark. Dep't of Human Services, 2015 Ark. App. 227 (King, K.; CV-14-1086; 4-8-2015; Brown)

Gritton v. Ark. Dep't of Human Services, 2015 Ark. App. 219 (Coker, K.; CV-14-1085; 4-8-2015; Abramson, R.)

Cooper v. Ark. Dep't of Human Services, 2015 Ark. App. 208 (King, K.; CV-14-1055; 4-1-2015; Kinard, M.)

Z.T. v. State, 2015 Ark App. 282 **[Transfer]** Appellant was charged with aggravated robbery and theft of property three days prior to his 18th birthday. **[jurisdiction]** Appellant argued that the trial court lost jurisdiction because it failed to hold a timely transfer hearing. The Supreme Court has held that 90 day requirement, while mandatory is not jurisdictional. Appellant did not request a hearing or object the court's failure to hold a hearing within 90 days. **[statutory factors]** Remand to reconsider transfer motion because the court's written findings were not supported by the evidence. Three factors (previous juvenile history, juvenile's sophistication/maturity and other written reports or other materials) did not weight against the transfer as found by the court. The court erroneously found that all the relevant factors weighed in favor of prosecuting appellant in the criminal division. (Sims, B.; CV 14-893; 4-29-2015; Hixon, K.)

M.J. v. State, 2015 Ark App. 242 **[Delinquency – accomplice testimony corroboration]** Appellant argued that the state failed to corroborate the testimony of the accomplice. The test for corroborating evidence is if the testimony of the accomplice was eliminated, would the remaining evidence independently establish the crime and tend to connect the accused with the commission. Appellant's admission of proximity to the crime, opportunity, involvement in similar criminal activity with accomplice immediately prior to the crime are all suggestive of joint participation and tend to connect him to the crime. (Smith, T.; CV 14-1012; 4-15-2015; Whiteaker, P.)

DISTRICT

Leeka v. State, 2015 Ark. 183 **[DWI]** The DWI statute, Ark. Code Ann. §5-65-103, does not contain an express requirement of a culpable mental state. Because the DWI statute is a criminal statute contained within the Arkansas Criminal Code, section 5-2-203 applies to impute a culpable mental state. The plain language of section 5-2-203 is clear and provides that even if a statute defining an offense does not prescribe a culpable mental state, "a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly." The circuit court erred in concluding that the DWI statute did not require a culpable mental state as provided in section 5-2-203. (Storey, W.; CR-14-798; 4/30/15; Goodson, C.)

Fiveash v. State, 2015 Ark. App. 187 **[DWI].** Appellant was convicted in district court and appealed to circuit court. The argument on appeal was that there was insufficient evidence to convict on either count, and that the trial court erred in admitting as evidence a copy of appellant's restricted license. Affirmed. (McCorkindale, R.; CR-14-582; 3/18/2015; Gladwin, R.)

U. S. SUPREME COURT

Rodriguez v. U.S. **[search]** A K–9 officer stopped petitioner Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After the officer attended to everything relating to the stop, including, checking the driver's licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, the officer detained him until a second officer arrived. The dog alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time the officer issued the written warning until the dog alerted. Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the ground that the officer prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff. The Magistrate Judge concluded that prolonging the stop by "seven to eight minutes" for the dog sniff was only a de minimis intrusion and denied the motion to suppress. Rodriguez entered a conditional guilty plea and was sentenced to five years in prison. The Eighth Circuit affirmed.

Held:

> Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures. (The determination adopted by the District Court that detention for the dog sniff was not independently supported by individualized suspicion was not reviewed by the Eighth Circuit and that question remains open for consideration on remand.)

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission. (No. 13–9972; April 21, 2015)

Williams-Yulee v. Florida Bar **[judicial elections/campaign funds]** Florida is one of 39 States where voters elect judges at the polls. To promote public confidence in the integrity of the judiciary, the Florida Supreme Court adopted Canon 7C(1) of its Code of Judicial Conduct, which provides that judicial candidates "shall not personally solicit campaign funds . . . but may establish committees of responsible persons" to raise money for election campaigns. Petitioner Williams-Yulee (Yulee) mailed and posted online a letter soliciting financial contributions to her campaign for judicial office.

The Florida Bar disciplined her for violating a Florida Bar Rule requiring candidates to comply with Canon 7C(1), but Yulee contended that the First Amendment protects a judicial candidate's right to personally solicit campaign funds in an election. The Florida Supreme Court upheld the disciplinary sanctions, concluding that Canon 7C(1) is narrowly tailored to serve the State's compelling interest.

> Held: The First Amendment permits the ban on the personal solicitation of campaign funds by judicial candidates.

Florida's interest in preserving public confidence in the integrity of its judiciary is compelling. The State may conclude that judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. Simply put, the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors. (No. 13–1499; April 29, 2015)