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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

Administrative Judges are to be selected on or before February 1, 2015, and the Supreme Court is to be notified of the selection. (Admin. Order No. 14 (2)(a)).

With the adoption of amendments to Rules 9, 49, and 52, Ark. R. Civ. P., effective January 1, 2015, the Civil Jury Committee prepared two new instructions: AMI 307, Issues-Nonparty Fault, and AMI 307A, Illustrative Interrogatories – Multiple Defendants-Nonparties Involved. These instructions appear in the 2015 edition of the Arkansas Model Jury Instructions and can be found under Publications on the court's web site.

CRIMINAL

Heard v. State, 2014 Ark. App. 674 [**order; nunc pro tunc**] Although not marked on the sentencing order, appellant was sentenced as a habitual offender. The circuit court has the authority to “make the record speak the truth” by entering a new sentencing order nunc pro tunc indicating appellant's status as a habitual offender at any time. (Singleton, H.; CR-14-328; 12-3-14; Gladwin, R.)

Lee v. State, 2014 Ark. App. 691 [**motion to suppress**] At the time that appellant's vehicle was stopped, the information that was received from an anonymous tip had been sufficiently corroborated

to give law enforcement officials reasonable suspicion. Thus, the stop was lawful and the trial court did not err when it denied appellant's motion to suppress. (Green, R.; CR-14-635; 12-3-14; Brown, W.)

Hajek-McClure v. State, 2014 Ark. App. 690 [**admission of testimony; expert**] The trial court did not err when it permitted the State's expert to testify regarding whether a personality disorder is a mental disease or defect. [**rebuttal evidence**] The State properly introduced rebuttal evidence in response to evidence that was submitted to the jury through a report introduced by the appellant. (Cottrell, G.; CR-14-267; 12-3-14; Brown, W.)

Cody v. State, 2014 Ark. App. 686 [**jury instructions; manslaughter**] For purposes of receiving the extreme-emotional-disturbance-manslaughter instruction, mere threats or menaces, are insufficient provocation when the person killed was not armed and was not committing acts of violence against the defendant. [**new trial**] The trial court did not abuse its discretion when it denied appellant's motion for a new trial which was based upon the prosecutor "rolling her eyes" and making faces during the questioning of defense witnesses. (Pearson, W.; CR-14-66; 12-3-14; Whiteaker, P.)

Batchelor v. State, 2014 Ark. App. 682 [**motion to suppress**] Although the officer who stopped appellant on Interstate 540 was a city police officer, he had authority to conduct the traffic stop based upon his commission as a deputy county sheriff. Accordingly, the stop was lawful and the trial court did not err when it denied appellant's motion to suppress. (Green, R.; CR-14-627; 12-3-14; Gruber, R.)

Airsmann v. State, 2014 Ark. 500 [**sufficiency of the evidence; first-degree murder**] There was substantial evidence to support appellant's conviction. [**motion to suppress**] Although appellant invoked his right to counsel, he thereafter initiated contact with law enforcement. Thus, his custodial statements were properly admitted at trial. [**motion in limine; photographs**] Because certain challenged photographs corroborated the medical examiner's testimony regarding the location of the victim's wounds and gave the jury a different perspective of the victim's wounds from those relayed in the medical report, the circuit court did not abuse its discretion in admitting the photographs. (Wright, R.; CR-13-872; 12-4-14; Danielson, P.)

Bogard v. State, 2014 Ark. App. 700 [**restitution**] The trial court erred in ordering appellant to pay restitution in connection with an offense for which appellant was acquitted. It was not sufficient that appellant was convicted of other offenses in the same proceeding. To be valid, the order to pay restitution must be specifically linked to the offense for which appellant was convicted. (Wright, H.; CR-14-473; 12-10-14; Glover, D.)

Morrow v. State, 2014 Ark. 510 [**sex-offender registration**] Failure to comply with registration and reporting requirements required by Ark. Code Ann. § 12-12-904 are strict-liability offenses. Thus, a violation of the statutory requirements do not require a mental-culpability level. The Supreme

Court originally made that determination in *Adkins v. State*, 371 Ark. 159 (2007) and declined appellant's suggestion to overrule *Adkins* in the present case. (Kemp, J.; CR-14-412; 12-11-14; Baker, K.)

Standridge v. State, 2014 Ark. 515 [**violation of an order of protection; jurisdiction**] The circuit court lacked jurisdiction to try appellant on criminal charges associated with Ark. Code Ann. § 9-15-207 because that statutory provision does not provide for a criminal offense. The criminal offense for a violation of an order of protection and the elements of the crime are found in Ark. Code Ann. § 5-53-134. (McCorkindale, R.; CR-13-15; 12-11-14; Hart, J.)

Hurst v. State, 2014 Ark. App. 710 [**sentencing**] The trial court did not abuse its discretion when it considered a misdemeanor conviction, which was on appeal from the district court to the circuit court, when sentencing appellant in a separate circuit-court case. (Henry, D.; CR-14-490; 12-17-14; Harrison, B.)

Adams v. State, 2014 Ark. App. 718 [**sentencing**] Following a revocation, a circuit court is authorized to modify the original order and impose any sentence that the defendant originally could have been given. (Sims, B.; CR-14-245; 12-17-14; Whiteaker, P.)

Lewis v. State, 2014 Ark. App. 730 [**justification defense**] There was substantial evidence from which the jury could have found that appellant was not justified in his use of deadly force. [**sentencing**] The trial judge's commentary demonstrated that he exercised his discretion when ordering appellant's sentences to run consecutively and appellant failed to demonstrate that the trial judge abused that discretion. (Kemp, J.; CR-14-222; 12-17-14; Hixson, K.)

Pickle v. State, 2014 Ark. App. 726 [**search and seizure; hunting-compliance check**] Game wardens are subject to the same constitutional restrictions as traditional law-enforcement officers. Thus, game wardens must have a reasonable suspicion before conducting routine hunting-compliance checks. In the absence of reasonable suspicion, law enforcement activity must be governed by a plan of explicit, neutral limitations that prevent the game wardens from exercising unbridled discretion. (Thyer, C.; CR-14-210; 12-17-14; Vaught, L.)

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

Henson v. State, 2014 Ark. App. 703 (theft of property) CR-14-403; 12-10-14; Vaught, L.

Thomas v. State, 2014 Ark. App. 721 (possession of a controlled substance; possession of drug paraphernalia) CR-14-644; 12-17-14; Whiteaker, P.

Ingram v. State, 2014 Ark. App. 707 (filing a false report with a law-enforcement agency) CR-14-459; 12-17-14; Gladwin, R.

McClellan v. State, 2014 Ark. App. 725 (theft by deception) CR-14-127; 12-17-14; Vaught, L.

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:

Hutchinson v. State, 2014 Ark. App. 670 (suspended sentence) CR-14-446; 12-3-14; Harrison, B.

Leal v. State, 2014 Ark. App. 673 (probation) CR-13-557; 12-3-14; Gladwin, R.

CIVIL

Anderson v. Citimortgage, Inc., 2014 Ark. App. 683 [**statutory foreclosure**] The "show-me-the-note" argument, that CitiMortgage cannot foreclose on the home because it did not produce the original note has no application to this statutory foreclosure. Furthermore, there is no merit in the argument that an assignment of the mortgage is not of record. These arguments are based on case law relating to judicial-foreclosure actions. Because CitiMortgage presented evidence in the form of an affidavit that it was in possession of the note, it was incumbent on the owners to meet proof with proof in order to create a genuine issue of material fact. [**summary judgment/findings of fact**] The court's ruling dismissing this case was made pursuant to Ark. R. Civ. P. 56. A court grants a motion for summary judgment when it determines that there are no genuine issues of material fact to be litigated and, therefore, that the party is entitled to judgment as a matter of law. By definition, the action was never "tried upon the facts" to either a jury or the court. The object of a summary judgment proceeding is not to try the issues, but to determine if there are any issues to be tried. Thus, Rule 52 is inapplicable to a court's decision pursuant to Rule 56. Furthermore, Rule 52 specifically provides that findings of fact and conclusions of law are unnecessary on decisions of motions under these rules. (Moody, J.; CV-14-348; 12-3-14; Gruber, R.)

Obigbo v. State Bd. Nursing, 2014 Ark. App. 675 [**nursing license**] Revocation of nursing license was supported by substantial evidence. Board's decision was based on the entirety of the investigation, including testimony and exhibits presented at the hearing. The Board was not required to believe nurse's explanations about the various discrepancies that were discovered subsequent to the complaint. Giving the evidence its strongest probative force in favor of the Board's findings, the Board's decision is supported by substantial evidence and is not arbitrary or capricious or characterized by an abuse of discretion. (Piazza, C.; CV-14-305; 12-3-14; Gladwin, R.)

Steward v. Kuettel, 2014 Ark. 499 [**service**] In this case, the circuit court granted a motion for alternative service pursuant to Rule 4(e)(5), permitting Kuettel to serve Steward with the summons and complaint in this action via email to the email address listed for Steward on the internet. Alternative methods of service directed by the court must comport with due-process requirements. To meet this requirement, the method of service crafted by the court must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The means employed must be such as one desirous

of actually informing the absentee might reasonably adopt to accomplish it. Assuming, without deciding, that service of process by email may be allowed under Rule 4(e)(5), under the facts of this case, the alternative method of service crafted by the circuit court was not reasonably calculated to give actual notice of the lawsuit. Here, the circuit court ruled that when Kuettel received a confirmation via tracking pixel that the email giving notice of this lawsuit had been opened, sufficient service of process on Steward would have occurred. The alternative service of process in this case was insufficient because it was not reasonably calculated to give actual notice to the defendant. (Duncan, X.; CV-14-189; 12-4-14; Hannah, J.)

Baptist Memorial Hospital v. Kalyan, 2014 Ark. App. 699 [**contract**] The evidence is uncontradicted that Dr. Kalyan received \$228,350.74 in draws pursuant to the Physician Agreement. Dr. Kalyan's only argument that he was not required to repay that amount was that BMH was estopped to enforce the contract. Although he alleged set-off in his answer, he failed to present evidence of set-off. And his counterclaim alleging negligent-recruitment and misrepresentation was dismissed. Substantial evidence does not support the jury's award to the doctor. (Philhours, R.; CV-14-450; 12-10-14; Gruber, R.)

Washington v. Kingridge Enterprises, Inc., 2014 Ark. App. 705 [**contract**] The material breach was Washington's failure to provide competent workmanship in a timely fashion that complied with city codes and the renovation plans. Kingridge was compensated for the cost to complete the contract after Washington's breach. Washington was compensated for the reasonable value of labor provided before termination of the contract. (Piazza, C.; CV-14-179; 12-10-14; Hixson, K.)

Barnett v. Sanders, 2014 Ark. App. 706 [**easement**] Because the easement is described by metes and bounds, the "lines of reasonable enjoyment" theory does not apply; however, all easements, regardless of specificity, are still governed by certain general principles. Because the trial court made no findings as to what constituted reasonable use/restriction of the easement by Barnett as the servient tenement, case is remanded court for findings on the reasonableness/restriction issue. (Martin, D.; CV-14-441; 12-10-14; Glover, D.)

English v. Robbins, 2014 Ark. 511 [**Act 1116**] Act 1116 cannot be applied retroactively because it creates a new, substantive right of allocation of fault. [**new trial**] Based upon the cumulative errors, including the late-filed third-party complaints, the erroneous instruction on the burden of proof and the placement of a settling/third party defendant on the jury's verdict form, the circuit court did not abuse its discretion in granting a new trial. (Cook, V.; CV-13-891; 12-11-14; Goodson, C.)

Entergy Ark., Inc. v. Pope County Circuit Court, 2014 Ark. 506 [**workers comp**] The circuit court acted wholly without jurisdiction in deciding whether an employer-employee relationship existed between Walters, Entergy, and DP. Here, the employer-employee relationship between the parties raises numerous factual questions surrounding what Entergy calls Walters's "unconventional" employment with Entergy and DP. Potential factual questions arising from the case may include, but are not limited to, the terms of the parties' employment contracts, insurance coverage, training, and control of Walters's time and manner of work. Those determinations lie exclusively with the

Commission, as the facts presented below are not so one-sided that the issues of employer status and immunity can be determined as a matter of law. The circuit court lacked jurisdiction to determine the applicability of the Act in the first instance and to delve into the merits of Entergy's and DP's arguments regarding their employer status, their potential immunity defenses, and any co-employee liability raised by DP. Where encroachment on the jurisdiction of the Workers' Compensation Commission is clear, a writ of prohibition is clearly warranted. (Writ of prohibition; CV-14-400; -402; 12-11-14; Hannah, J.; Danielson, P.)

Dickinson v. Suntrust National Mortgage, Inc., 2014 Ark. 511 [**certified question answered**]

Whether the Federal National Mortgage Association satisfies the Statutory Foreclosure Act's authorized-to-do-business requirement, Ark. Code Ann. § 18-50-117, under 12 U.S.C. § 1716 et seq., or other federal laws, or must the Federal National Mortgage Association satisfy Ark. Code Ann. § 18-50-117 by obtaining a certificate of authority in Arkansas prior to statutorily foreclosing on property in Arkansas?

Section 18-50-117 does not require an entity to be licensed and Fannie Mae is authorized to do business in this state. The Dickinsons argue that the Federal National Mortgage Association Charter Act, 12 U.S.C. §§ 1716 et seq., does not provide Fannie Mae with enumerated or implied powers to conduct statutory foreclosures. The issue is not whether the charter grants Fannie Mae explicit powers to foreclose but whether it authorizes Fannie Mae to do business in this state, which it unquestionably does. According to the charter, Fannie Mae has the power to "purchase, service, sell, or otherwise deal in any mortgages" 12 U.S.C. § 1717. Additionally, the charter states that Fannie Mae is authorized to "conduct its business without regard to any qualification or similar statute in any State." 12 U.S.C. § 1723(a). The charter clearly contemplates that Fannie Mae will engage in the business of dealing in mortgages in any state. Such authorization is sufficient to satisfy the requirements of section 18-50-117. Thus, Fannie Mae satisfies the Statutory Foreclosure Act's authorized-to-do-business requirement contained in section 18-50-117. (Dist. Ct., E.D. Ark.; CV-14-173; 12-11-14; Goodson, C.)

United Food and Commercial Workers International Union v. Wal-Mart Stores, Inc., 2014 Ark. 517 [**preliminary injunction**] In opposing the union's motion to dissolve the injunction, Wal-Mart raised multiple reasons why the motion should be denied. Most prominent was its argument that the union's motion to dissolve was barred by judicial estoppel, although Wal-Mart also challenged the merits of the union's preemption argument. In the written order, the circuit court stated only that it was persuaded by the arguments advanced by Wal-Mart and denied the motion to dissolve. On appeal, there were at least two bases for affirming the circuit court –judicial-estoppel argument and preemption argument. The union addressed only the preemption argument on appeal. When a circuit court bases its decision on more than one independent ground, and the appellant challenges fewer than all those grounds on appeal, the appellate court will affirm without addressing any of the grounds. (Scott, J.; CV-14-7; 12-11-14; Hart, J.)

Hoosier v. Interinsurance Exch., 2014 Ark. 524 [**conflicts of law/insurance contract**] The circuit court concluded that the rights and liabilities of the parties to an insurance contract should be determined by the law of the state where the contract was made. The circuit court found that

California law applied to the underinsured motorist-coverage provision and that the insured's move to Texas and the change of residence did not change this finding. Applying California law, the court granted summary judgment in favor of the insurer. Reversing, the supreme court applied the significant-relationship analysis rather than *lex loci contractus*. In instances where an insurance policy does not contain an effective choice-of-law provision, as in this case, the court has applied the significant-relationship analysis to determine which state's law applied to the policy. Because there are no disputed facts, in considering the factors *de novo*, Texas law applies. At the time of the accident, the place of performance, the location of the subject matter of the contract, and the residence of the Hoosiers were all in Texas. Considering these factors and evaluating the factors according to their relative importance with respect to this issue, Texas had a more significant relationship to the transaction and the parties than did California. The insurer argues that under the significant-relationship analysis, California law applies because the insureds moved back to California. The policy, however, indicates that the definition of an underinsured motor vehicle is determined "at the time of the accident." (Hearnberger, M.; CV-14-219; 12-11-14; Hart, J.)

Rylwell v. Mens Holding 2 LLC, 2014 Ark. 522 [**tax sale notice**] The circuit court properly granted Men Holdings' summary-judgment motion because Men Holdings had received inadequate notice and the lack of notice violated Men Holdings' due-process rights. The State was required to take additional reasonable steps to verify whether Men Holdings had an interest in the property before depriving it of its ownership. (McGowan, M.; CV-14-97; 12-11-14; Hart, J.)

Smith v. Daniel, 2014 Ark. 519 [**sovereign immunity**] The suit under the Arkansas Whistle-Blower Act against Smith in his official capacity as chief executive officer of the Arkansas State Hospital was in effect a suit against a public employer. Sovereign immunity is waived under the act. The factual allegations made by Daniel suggests that racial and gender animus may exist at the Arkansas State Hospital. However, the Arkansas Civil Rights Act claims against Mains are directed against her in her individual capacity. Nowhere in Daniel's complaint are specific factual allegations against Mains that assert that she personally acted with malice. Accordingly, the circuit court erred when it denied the appellant's summary-judgment motion to dismiss the individual-capacity claims (Fox, T.; CV-14-10; 12-11-14; Hart, J.)

Collins v. Hall, 2014 Ark. App. 731 [**quashing writ of garnishment**] In garnishing municipality, it may be sued directly, and judgment creditor was required to name the city and properly serve the city. Service on individual aldermen was not effective service on the city. The city's chief executive officer must be served. (Wyatt, R.; CV-14-554; 12-17-14; Hixson, K.)

Teague v. Canfield, 2014 Ark. App. 712 [**boundary line**] Party did not tacitly agree that the boundary line between the families' property was the fence that was built in 1986. An express acceptance of the boundary is unnecessary. Circuit court found that family never accepted fence line as a visible evidence of their dividing line and continued to use the property as owners, even though they were required to cross a fence to reach it. There was no adverse possession because exclusive control over the property was not established. Prescriptive easement was not established. (Martin, D.; CV-14-280; 12-17-14; Harrison, B.)

Outdoor Cap Co. v. Benton County Treasurer, 2014 Ark. 536 [**ad valorem tax**] The manufacturer's exemption according to Ark. Code Ann. § 26-26-1102 means that the property does not attain a tax situs in Arkansas. The property at issue here is not exempt but rather, the property does not attain a tax situs in Arkansas. Outdoor Cap failed to identify the property at issue as property that was "in transit" or eligible for the manufacturer's exemption and therefore overvalued its property. The property was not erroneously assessed or misclassified by the Benton County tax assessor and the failure to properly classify the property as in transit rested with the taxpayer. Outdoor Cap voluntarily paid its taxes for the years 2008 and 2009, and did not claim a manufacturer's exemption for those years. It is presumed to have known the law and its rights under the law. (Scott, J.; CV-14-40; 12-18-14; Baker, K.)

GGNSC Holdings, LLC v. Chappel, 2014 Ark. 545 [**arbitration**] Trial court failed to expressly rule on the threshold issue of whether there was a valid agreement to arbitrate. Case remanded. (Guthrie, D.; CV-14-138; 12-22-14; Danielson, P.)

DOMESTIC RELATIONS

Harter v. Szykowny, 2014 Ark. App. 701 [**registration and enforcement of foreign decree--sua sponte dismissal; UIFSA; UCCJEA**] The appellant appealed the circuit court's sua sponte dismissal of her petition for registration and enforcement of a judgment awarding her a divorce and other ancillary matters from the State of Kansas. The Court of Appeals said that her petition did not seek to change custody under the UCCJEA but merely to register and enforce the parties' existing Kansas decree. The circuit court should have registered the Kansas decree in Arkansas. The Court reversed and remanded for further proceedings consistent with its opinion. (Crow, G.; No. CV-14-185; 12-10-14; Glover, D.)

Colley II v. Colley, 2014 Ark. App. 698 [**child support calculation**] The primary issue on appeal is the procedure to be used for determining the amount of income for purposes of child support. The circuit court found the appellant's monthly net income to be \$6,000 and set child support at \$900 a month. The Court of Appeals found that the circuit court did not completely perform the analysis required for determining income under the "net-worth" method as set out in Administrative Order No. 10, and reversed and remanded for the court to do so. (Hendricks, A.; No. CV-14-448; 12-10-14; Gruber, R.)

Webb v. Webb, 2014 Ark. App. 697 [**divorce; alimony; marital property division; attorney's fee**] On the issue of the adequacy of the permanent alimony award, the Court of Appeals held that with the appellant wife being paid permanent alimony and receiving half of the marital property, the award of permanent alimony was reasonable. On the issue of the division of marital property, the Court of Appeals held that under the particular facts and circumstances of this case, the circuit court's division of the marital property was not clear error. On the issue of the appellant's attorney's fee, the Court of Appeals held that it was equitable and within the circuit court's broad discretion to order each party to pay his or her own attorney's fee. The decision was affirmed in its entirety. (Easley, E.; No. CV-14-233; 12-10-14; Gladwin, R.)

Lowder, et al. v. Gregory, 2014 Ark. App. 704 [**child custody**] The appellants are husband and wife. The appellant wife is the former wife of the appellee. Two children were born of the marriage and the divorce decree so recited, even though subsequent DNA testing revealed that her current husband, the other appellant, is the biological father. In the divorce, the appellant mother was awarded custody and the appellee was awarded visitation and ordered to pay child support. Six months after the divorce, the appellee sought custody and the appellant husband sought to intervene based upon his status as the biological father. The appellants asked the court to alter the divorce decree to declare the appellant's paternity. The court subsequently allowed the intervention and established paternity, vacating the divorce decree's finding that the children were born of appellant mother's and appellee's marriage. The court also found the appellee to be in loco parentis to the children and continued the visitation and child support. The children lived with appellants until the appellee moved again for custody based upon changed circumstances, alleging that the children lived in deplorable conditions and were physically and verbally abused. Custody was changed temporarily to the appellee with the appellant mother having visitation and her husband having supervised visitation. After a final hearing, the circuit court granted custody to the appellee, ruled that it had continuing jurisdiction under the UCCJEA, despite the fact that the appellants and the children had lived in Oklahoma for a number of years, and found that the paternity order naming the appellant husband as the children's father should be set aside. Finally, the court ordered the parties each to pay one-half of the attorney ad litem's fee. The Court of Appeals affirmed the court's voiding of the paternity order because the court had made independent, alternative rulings, each dispositive of the issue, but the appellant attacked only one of those rulings, so the case was affirmed without addressing either ruling. The Court also affirmed the court's ruling that it had continuing jurisdiction under the UCCJEA. The Court affirmed the award of custody to the appellee. Finally, the Court affirmed the court's order that the parties pay a portion of the attorney ad litem's fee. The evidence was that the AOC paid \$1,250 of the fee and that appellee paid a portion, as well. To the argument that the court should have transmitted the order to the AOC rather than relying on the attorney ad litem to do that, the Court of Appeals said that while it was not clear exactly how the AOC received the order, it obviously did receive it and made payment on it. The circuit court's order was affirmed in its entirety. (Medlock, M.; No. CV-14-207; 12-10-14; Vaught, L.)

Simmering v. Simmering, 2014 Ark. App. 722 [**change of custody—emergency and permanent**] After two hearings on an emergency change of custody, the circuit court found that an emergency did not exist and dissolved the previous emergency order entered by the court. The court also dismissed the entire change-of-custody motion over the appellant's objection, finding that a material change in circumstance had not occurred after a previous visitation order had been entered. The Court of Appeals reversed and remanded because the trial court had dismissed the motion for change in custody summarily, without a full hearing, when she had sought a permanent change in custody as an alternative request. The Court also noted that the date of the last custody order rather than the last visitation order must be used to determine whether a material change in circumstances has occurred to support a modification. (Herzfeld, R.; No. CV-14-424; 12-17-14; Whiteaker, P.)

Walls v. Walls, 2014 Ark. App. 478 [**Marital Dissolution Agreement; division of property**] In 2009, the appellant husband had filed for divorce. The parties entered into a Marital Dissolution

Agreement (MDA) in anticipation of the divorce, which provided for distribution of their assets. The MDA has the style and case number of the Tennessee divorce case. Nine months after the divorce filing, the parties reconciled and lived together until they separated again two years later. The appellant nonsuited the Tennessee case the following year after separation. The appellee filed for separate maintenance in Arkansas and the appellant counterclaimed for divorce. The appellant argued that the MDA was still a valid and binding contract, alleging that he had continued to follow it since the parties entered into it, and he said it should control the distribution of assets in the Arkansas divorce. The trial court found that the contract was entered into in anticipation of the Tennessee divorce and that it became a nullity when the parties reconciled. The court divided the parties' assets, finding only one of the parties' bank accounts to be marital property and two bank accounts to be nonmarital and the sole property of the appellee. The Court of Appeals affirmed the decision of the circuit court. The case includes a good discussion of property settlement agreements, noting that it was well within the court's discretion to reject the MDA due to changed circumstances. (Hill, V.; No. CV-14-478; 12-17-14; Vaught, L.)

Olson v. Olson, 2014 Ark. 537 [**divorce**] In this case of first impression, the appellant wife filed for divorce on the ground of general indignities, then amended her complaint to assert that the parties had entered into a covenant marriage and that her ground for divorce was adultery. After a temporary hearing, the court entered an order regarding temporary possession of the marital home, the parties' bills, and spousal support. The appellee husband subsequently filed a counterclaim for divorce based on the ground of general indignities. The appellant failed to appear at the final hearing. When the court asked if the appellee wanted to pursue his counterclaim for divorce, his counsel answered that it would be necessary to amend the counterclaim to allege a covenant marriage and "specific grounds." In his testimony, the appellee admitted that he had committed adultery. The court inquired whether he was moving forward on his counterclaim or admitting the appellant's ground for divorce. His counsel moved orally to amend the counterclaim to reflect the ground of adultery because of the covenant marriage, which motion was granted. A witness for the appellee testified "that she had engaged in 'a sexual relationship with Mr. Olson subsequent to him being married to Mrs. Olson.'" The court granted the appellee's amended counterclaim for divorce on the ground of adultery and made orders regarding personal property. After the hearing, the appellee filed Motions under Rules 59 and 60 to modify the court's oral decision by awarding the divorce to the appellant on her amended complaint and her ground of adultery rather than granting him the divorce. He noted that he had presented evidence both proving and corroborating her grounds for divorce and he presented as additional evidence an affidavit in which the affiant stated that he told her that within the last fifteen months he had a sexual relationship with a named individual. The circuit court granted the motion and awarded the appellant wife a divorce on the ground of adultery. The Supreme Court reversed and remanded. The Court said the court erred in granting the appellant a divorce based solely on the testimony offered by the appellee to prove and to corroborate appellant's ground of adultery. In effect, the Court found, appellee procured a divorce based upon appellant's amended complaint when he did not have grounds for divorce, either in his original counterclaim or in his orally amended counterclaim alleging the ground of his own adultery. The Court also reversed the division of marital property and debts, which could not stand without the valid granting of a divorce. (McCain, G.; No. CV-14-115; 12-18-14; Goodson, C.)

Kelly v. Kelly, 2014 Ark. 543 [**divorce**] In this second appeal of a divorce case, the appellant husband makes four allegations of error in the circuit court's order. Initially, he argues that the doctrine of law of the case barred the appellee from arguing for an unequal distribution of TRM stock because she did not make that argument until remand. However, because the circuit court ruled originally that the TRM stock was nonmarital in her favor, she had no basis for arguing at that time for an unequal distribution of marital property. Only after remand, when the court ruled that the property was marital property and the court was faced with distributing the stock, did that argument arise. Secondly, he argues that the circuit court failed to distribute the stock equally. However, the circuit court has broad powers in distributing both marital and nonmarital property to achieve an equitable division. The appellant himself had previously received an unequal division of the parties' real and personal property to provide for him. Third, the appellant contends that the remand from the first appeal was limited to the stock issue, and that the issue of the marital-home deficiency was left in "appellate limbo." The Court said that he was mistaken, and that the division of property necessarily entails consideration of both the assets and the debts. Here, the circuit court did not reapportion the liability of the parties relating to the deficiency, but did direct that both parties had thirty days to pay any sums owed to the other party for alimony or in satisfaction of any deficiency. He said the circuit court should have considered his ability to pay the amount due before directing that payment. He cited no authority. The Court held that "the mandate in *Kelly I* did not preclude the circuit court from addressing the deficiency on the marital home; therefore, we find no merit to John's argument relating to the deficiency." Finally, the appellant claimed the circuit court abused its discretion in allowing the appellee to deposit alimony payments she owed into the registry of the court. However, he failed to cite authority in support of the proposition, so the Court affirmed on this point, as well. The decision was affirmed in its entirety. (Pierce, M.; No. CV-13-919; 12-22-14; Danielson, P.)

PROBATE

Maxey v. Gray, 2014 Ark. App. 689 [**will; statute of limitations**] The appellant and appellee are the grandson and granddaughter, respectively, of Lela Branch, who died on November 29, 2006, at the age of 96. In June 2010, the appellee granddaughter filed a petition for probate of a 1995 will, in which she was the primary beneficiary. In February 2012, she petitioned to close the estate and to permit final distribution. An order filed June 15, 2012, set a hearing on the petition to close and required notice to be given to the other seven heirs at law, including the appellant grandson. On June 12, 2012, he filed an objection, claiming to possess a 2006 will, which revoked the 1995 will. Under the 2006 will, he and another grandson were primary beneficiaries. The circuit court found that appellant's attempt to probate the 2006 will was barred by Ark. Code Ann. 28-40-113(b)(1), requiring that an objection was required to be filed before the final distribution and within five years of the decedent's death. On appeal, the appellant conceded that an attempted probate of the 2006 will would be time-barred under the statute of limitations. However, he claimed that the 2006 will revoked the 1995 will, so that the statute of limitations never commenced. As a result, he argued, his grandmother died intestate, and the circuit court should have so ruled. The Court of Appeals held that the trial court did not err in finding that the statute of limitations in the Probate Code clearly

applied to these facts and that the will contest was barred. The decision was affirmed. (Guthrie, D.; No. CV-14-505; 12-3-14; Hixson, K.)

Autry v. Beckham, et al., 2014 Ark. App. 692 [**guardianship**] The Court of Appeals found that the circuit court erred in proceeding with a guardianship hearing without the required mental examination of the ward prescribed in Ark. Code Ann. Section 28-65-212. The Court said that, without the required professional evaluation, the circuit court did not have sufficient evidence to find that a guardian needed to be appointed for the ward, and the failure to obtain a professional evaluation was clearly erroneous. The decision was reversed. (Feland, W.; No. CV-14-511; 12-3-14; Brown, W.)

JUVENILE

Russell v. Ark. Dep't of Human Services, 2014 Ark. 734 [**TPR - jurisdiction**]

Appellant argued that the circuit court lacked jurisdiction to reopen a prior dependency-neglect case that resulted in termination. The court had subject matter jurisdiction and the authority to hear the termination petition. The facts indicated there was a subsequent dependency-neglect proceeding after a previous case was closed. This was not a custody issue following a closed dependency-neglect case as in *Young*. [**voluntary consent**] The circuit court was affirmed in refusing appellant's request to execute consent to termination. Appellant was not present at the hearing to voice her intent to consent and there was testimony that appellant's consent was not genuine. The circuit court also made findings as to the circumstances of the case and appellant's credibility. (Spears, J.; CV-14-722; 12-17-14; Brown, W.)

Wright v. Ark. Dep't of Human Services, 2014 Ark. App. 659 [**TPR – appellant not father**]

The circuit court was reversed when it terminated parental rights on appellant, when it was undisputed that he was not the parent. DHS argued that appellant was the presumptive legal father. The appellate court found that the circuit court did not treat him in any manner by which he could conceivably be construed as a party, let alone a parent, and he was not a proper party to proceed against with a termination of parental rights action. When the circuit court determined that appellant was not the father of the children, appellant should have been removed from the case. (Cook, V.; CV-14-516; 12-3-14; Gladwin, R.)

Thompson v. Ark. Dep't of Human Services, 2014 Ark. App. 724 [**DN adjudication –due process**]

Appellant was improperly denied the opportunity to present evidence at the dependency-neglect adjudication hearing in violation of his due process, where he attempted to call witnesses at the first available opportunity provided to him by the trial court. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Reversed and remanded for further evidentiary consideration. (Spears J.; CV-14-691; 12-17-14; Whiteaker, P.)

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

Jones v. Ark. Dep't of Human Services, 2014 Ark. App. 735 (Williams Warren, J.; CV-14-724; 12-17-2014; Brown, W.)

Jones v. Ark. Dep't of Human Services, 2014 Ark. App. 717 (Spears, J.; CV-14-729; 12-17-2014; Glover, D.)

Kilmer v. Ark. Dep't of Human Services, 2014 Ark. App. 665 (Cook, V.; CV-14-655; 12-3-2014; Brown, W.)

Murphree v. Ark. Dep't of Human Services, 2014 Ark. App. 677 (Hewett, M.; CV-14-680; 12-3-2014; Gladwin, R.)

DISTRICT COURT

Schneider v. State, 2014 Ark. App. 711 [**motion to suppress evidence**] An investigatory stop based solely on a color inconsistency between the vehicle and the car-registration information is reasonable. This opinion noted that different courts in different states have reached different conclusions on the issue presented in this case. However, the Court of Appeals held that a color discrepancy like the one presented in this case permits an officer to reasonably suspect that, for example, the tags are fictitious or that the car may be stolen – both of which justify an investigatory stop. (Green, R.; CR-14-626; 12-17-14; Harrison, B.)

U.S. SUPREME COURT

Heien v. North Carolina [**search**] Following a suspicious vehicle, police officer noticed that only one of the vehicle's brake lights was working and pulled the driver over. While issuing a warning ticket for the broken brake light, officer became suspicious of the actions of the two occupants and their answers to his questions. Petitioner Heien, the car's owner, gave officer consent to search the vehicle. Officer found cocaine, and Heien was arrested and charged with attempted trafficking. The trial court denied Heien's motion to suppress the seized evidence, concluding that the vehicle's faulty brake light gave officer reasonable suspicion to initiate the stop. The North Carolina Court of Appeals reversed, holding that the relevant code provision, which requires that a car be "equipped with a stop lamp," requires only a single lamp—which Heien's vehicle had—and therefore the justification for the stop was objectively unreasonable. Reversing in turn, the State Supreme Court held that, even assuming no violation of the state law had occurred, officer's mistaken understanding of the law was reasonable, and thus the stop was valid.

Held: Because officer's mistake of law was reasonable, there was reasonable suspicion justifying the stop under the Fourth Amendment.

There is little difficulty in concluding that officer's error of law was reasonable. The North Carolina vehicle code that requires "a stop lamp" also provides that the lamp "may be incorporated into a unit with one or more other rear lamps," and that "all originally equipped rear lamps" must be "in good working order." Although the State Court of Appeals held that "rear lamps" do not include brake lights, the word "other," coupled with the lack of state-court precedent interpreting the provision, made it objectively reasonable to think that a faulty brake light constituted a violation. (No. 13-604; December 15, 2014)