

APPELLATE UPDATE

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

ANNOUNCEMENTS

On November 20th, the Supreme Court revised Rule VII of the Rules Governing Admission to the Bar to address the payment of annual license fees.

CRIMINAL

Moody v. State, 2014 Ark. App. 618 [**motion to suppress**] At the point that the law enforcement official observed methamphetamine in appellant's vehicle, reasonable cause existed to believe that appellant had committed a felony. Accordingly, the warrantless arrest was justified, and the circuit court did not err in refusing to suppress the evidence seized as a result of the arrest. (Wright, H.; CR-14-118; 11-5-14; Whiteaker, P.)

Blair v. State, 2014 Ark. App. 623 [**motion to suppress**] Appellant's consistently aggressive demeanor and his questioning of whether the officer intended to shoot him, constituted objective evidence to establish that appellant posed a potential threat to the law enforcement official. Thus, the trial court did clearly err in deeming the safety-frisk, which was performed by the officer and led to the discovery of contraband, a constitutionally valid act. [**Batson challenge**] The trial court correctly concluded that the striking of two African-American jurors, alone, does

not establish a pattern or process designated to discriminate for purposes of meeting the prima facie requirement for a *Batson* challenge. (Sims, B.; CR-13-774; 11-5-14; Hixson, K.)

Bennett v. State, 2014 Ark. App. 624 [**jury instruction**] Based upon appellant's testimony that he reached under his car seat, chambered a round in the gun, and intentionally fired the weapon directly at the victim's chest, there was no rational basis for giving the lesser-included jury instruction for the offense of negligent homicide. Additionally, where the evidence established that the second victim, who sustained a gunshot wound to the neck and was bleeding from each side of his neck, incurred a "serious physical injury," there was no rational basis for giving the jury the third-degree- battery instruction. (Wright, J.; CR-14-154; 11-5-14; Hixson, K.)

Glenn v. State, 2014 Ark. App. 642 [**mistrial**] Because appellant failed to demonstrate manifest prejudice, the trial court did not abuse its discretion by denying appellant's motion for a mistrial, which was based upon a question asked by a prospective juror in open court during voir dire. (Glover, D.; CR-14-376; 11-12-14; Vaught, L.)

Jones v. State, 2014 Ark. App. 649 [**motion to suppress**] The law enforcement officials were lawfully in an area of the curtilage of appellant's home wherein he had no reasonable expectation of privacy when they saw in plain-view items that was readily apparent to them as evidence of the criminal conduct they were investigating. Based upon the foregoing facts, the trial court did err in denying appellant's motion to suppress the items obtained during the searches that resulted from the lawful discovery of the contraband. (McCallister, B.; CR-14-317; 11-12-14; Brown, W.)

Holland v. State, 2014 Ark. App. 644 [**Rule 404 (b); pedophile exception**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b) of the Arkansas Rules of Evidence, it permitted the State to enter into evidence the details of two 1989 convictions for committing sexually abusive acts on two teenage boys in California; the testimony of one of those victims explaining the factual basis of those convictions; and the testimony of three other victims about appellant having sexually abused them. [**rape-shield statute**] The Arkansas rape-shield statute prohibits the admission of evidence of a victim's sexual history for the purpose of attacking the credibility of the victim or establishing a defense. [**Rule 503; psychotherapist/patient privilege**] A witness, particularly a sexual abuse or rape victim, does not waive his Arkansas Rule of Evidence 503 patient privilege by testifying in a criminal proceeding; the party in such a proceeding is the State, not the victim. Thus, the trial court did not abuse its discretion in refusing to require the State to produce the victim's records from a behavioral health service center where he was admitted for treatment. (Sims, B.; CR-14-146; 11-12-14; Hixson, K.)

Affordable Bail Bonds v. State, 2014 Ark. App. 657 [**bond forfeiture**] The defendant failed to appear for his trial and the surety was served with notice of the defendant's actions and a summons/show cause order the next day. The timing of the notice complied with the requirements of Ark. Code Ann. § 16-84-207. The fact that the defendant had previously failed

to appear for a hearing did not trigger the application of the “immediate notice” requirement of Ark. Code Ann. § 16-84-207 because the first failure-to-appear charge was nolle prossed by the State and the State did not consider appellant a fugitive until after he failed to appear at the second court date. (Pearson, W.; CV-13-1138; 11-19-14; Wynne, R.)

Rodriguez v. State, 2014 Ark. App. 660 [**sufficiency of the evidence; first-degree terroristic threatening**] There was substantial evidence to support appellant’s conviction. [**admission of evidence; Rule 801(d)(2)**] The trial court did not abuse its discretion when pursuant to Rule 801(d)(2) of the Arkansas Rule of Evidence, it admitted into evidence a text message from appellant to the victim in which the appellant threatened to: (1) kill the victim; (2) shoot bullets at the victim’s parent’s house; and (3) knock out the victim’s teeth. The foregoing statements in the text message constituted an admission by a party opponent. [**mistrial**] The trial court did not err when it denied appellant’s motion for a mistrial, which was based upon a juror witnessing the appellant being escorted into the courthouse by sheriff’s deputies. [**double jeopardy**] Even though appellant’s crimes occurred in a single criminal episode, his actions within the criminal episode were separate and distinct acts resulting from separate impulses. Thus, appellant’s double-jeopardy rights were not violated when he was tried on several separate offenses for his actions within the criminal episode. (Arnold, G.; CR-14-160; 11-19-14; Glover, D.)

Friar v. Erwin 2014 Ark. 487 [**writ of certiorari**] Because the defendant did not file a notice of intent to raise the defense of not guilty for reason of mental disease or defect, the circuit court acted without jurisdiction when it ordered the defendant to submit to a criminal-responsibility examination. The defendant’s challenge to imposition of the death penalty based upon his possible mental retardation was not equivalent to raising the defense of not guilty for reason of mental disease or defect. (Erwin, H.; CR-14-380; 11-20-14; Baker, K.)

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

Smith v. State, 2014 Ark. App. 625 (rape) CR-14-156; 11-5-14; Wood, R.

Satterfield v. State, 2014 Ark. App. 633 (second-degree murder) CR-14-324; Pittman, J.

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:

Brown v. State, 2014 Ark. App. 612 (suspended sentence) CR-14-191; 11-5-14; Gruber, R.

Johnson v. State, 2014 Ark. App. 606 (probation) CR-14-86; 11-5-14; Walmsley, B.

Banks v. State, 2014 Ark. App. 639 (probation) CR-14-313; 11-12-14; Glover, D.

Ford v. State, 2014 Ark. App. 641 (probation) CR-14-340 11-12-14; Whiteaker, P.

Frasure v. State, 2014 Ark. App. 647 (probation) CR-14-381; 11-12-14; Wood, R.

CIVIL

Cozart v. Logue, 2014 Ark. App. 626 [**breach/contract**] There was substantial evidence to support verdict finding breach of contract. (Pierce, M.; CV-14-266; 11-5-14; Wood, R.)

Sanson v. Allinson, 2014 Ark. App. 619 [**bicycle accident**] Proffered instruction stating that bicyclist must continuously signal for 100 feet was not supported by the law. Statute dealing with 100 feet requirement applied to vehicles and a bicycle was not included in the statutory definition. (Arnold, G.; CV-14-126; 11-5-14; Whiteaker, P.)

Southern v. Highline Tech. Innovations, Inc., 2014 Ark. App. 613 [**hearsay**] Spreadsheet lacked proper authentication. There was no proffer of the purported email in which the spreadsheet was sent, and no foundation was laid regarding who prepared the document or establishing it as a statement attributable to either party. Thus, there was no basis for contention that it was an admission by a party opponent. There was no evidence that the spreadsheet was genuine and had not been tampered with as is required for authentication. (Taylor, J.; CV-14-75; 11-5-14; Gruber, R.)

Infinity Headwear Apparel, LLC v. Coughlin, 2014 Ark. App. 609 [**hacking**] Arkansas law does not recognize an independent breach of loyalty claim. Federal statute protecting against computer hacking or electronic trespass was not violated because person was authorized to access the computer. (Duncan, X.; CV-13-1033; 11-5-14; Harrison, B.)

Sheppard v. Alcoholic Beverage Control Board, 2014 Ark. App. 604 [**permit**] Board was authorized to grant a conditional permit to operate a retail liquor store and was further authorized to cancel the permit when retailer failed to open business within 12 months which was a condition for the permit. (Fox, T.; CV-14-80; 11-5-14; Pittman, J.)

Hotfoot Logistics, Inc. v. Shipping Point Marketing, Inc., 2014 Ark. 460 [**personal jurisdiction**] The contacts between Hotfoot and SPM are sufficient to warrant personal jurisdiction. SPM should not have been surprised to be haled into court in Arkansas because it entered into a contract and conducted business with residents of Arkansas. Where a defendant has deliberately engaged in significant activities within a state or has created continuing obligations between himself and residents of the forum, he has manifestly availed himself of the privilege of conducting business there. Under such circumstances, the assertion of personal jurisdiction is to be anticipated. (Fox, T.; CV-14-291; 11-6-14; Baker, K.)

Hurt-Hoover Investment, LLC v. Fulmer, 2014 Ark. 461 [**venue**] Section 16-55-213(a) did not repeal section 16-60-111(a) by implication. Section 16-60-111(a) applies to debts and notes and states

that such an action “may” be brought in the county where the defendant resided at the time the cause of action arose. Section 16-55-213(a) provides that all civil actions “must” be brought in either one of three counties: (1) the county in which a substantial part of the events or omissions giving rise to the claim occurred; (2) the county in which an individual defendant resided, or if the defendant is an entity other than an individual, the county where the defendant had its principal office at the time of the accrual of the cause of action; or (3) the county in which the plaintiff resided, or if the plaintiff is an entity other than an individual, the county where the plaintiff had its principal office at the time of the accrual of the cause of action. As is evident, both statutes speak in the past tense and thus fix venue at the time of the events giving rise to the claim. Also, both statutes permit the filing of an action on a note to be filed in the county where the defendant resided. The only difference is that section 16-55-213 allows a plaintiff a choice among three options, but this choice does not place the statutes in irreconcilable conflict. Statutes covering the same subject matter can stand together when they are cumulative. **[parol evidence]** When admissible, parol evidence must relate to an understanding that was common to both parties, as parol evidence is not permitted to show the uncommunicated subjective interpretation that one party placed on the language of the agreement. Although the circuit court found that the language of the contract was ambiguous, witness’ proposed testimony related only to his and Hurt-Hoover’s construction of the indemnity provision. As such, the testimony was not admissible as parol evidence, and the circuit court did not abuse its discretion by not allowing the introduction of the testimony (Weaver, T.; CV-14-311; 11-614; Goodson, C.)

United Systems v. Beason and Nalley, Inc., 2014 Ark. App. 650 **[contract damages]** There is no more natural and direct result of the failure to perform under a contract than the reasonable cost of obtaining substituted performance. Damages that seek to compensate a plaintiff for the value of the performance promised are direct rather than consequential. **[indemnity]** Given the requirement of unmistakable terms, and the absence of any language in the present contract specifically focusing attention on the indemnitor’s assumption of liability for the indemnitee’s own negligence, the contract does not provide in the requisite “unmistakable terms” that United Systems agreed to indemnify Beason & Nalley for Beason & Nalley’s own negligence. (Kilgore, C.; CV-13-1057; 11-12-14; Pittman, J.)

Valley Estates, Ltd. v. Pangle, 2014 Ark. App. 646 **[nuisance]** The trial court erred in finding that the negligently constructed apartment complex constituted a temporary nuisance, as opposed to a permanent nuisance. The pivotal issue in this case is whether the nuisance was permanent, in which case the limitations period expired, or temporary, in which case the plaintiffs have a right to successive actions for each injury and are not barred from recovery by the statute of limitations. Here, the nuisance complained of is permanent because it is expected to continue to cause drainage damage to the driveway. (Putman, J.; CV-14-333; 11-12-14; Hixson, K.)

Keith Capps Landscaping, Inc. v. Van Horn Constr. Inc., 2014 Ark. App. 638 **[contract]** The measure of damages in this case is the amount Van Horn incurred to complete the work less the amount it would have paid Capps if no breach had occurred. There was no evidence

demonstrating that these expenses were excessive. (Sutterfield, D.; CV-14-309; 11-12-14; Gruber, R.)

Millsap, Administrator v. Williams, 2014 Ark. 469 [**med-mal instructions**] The disputed jury-instruction issue centers on the giving of model instructions on a theory of informed consent and the rejection of a proffered instruction based on Arkansas statutes governing consent to treatment. Despite the notice to the jury that Millsap was alleging a claim for failure to obtain consent, there were no further instructions given that explained when a doctor must obtain consent, how consent may be given, or who may give consent. There was no model jury instruction regarding consent to treatment, and the instructions related to informed consent were not applicable to the case before the jury. While the model instructions are to be used as a rule, a nonmodel instruction may be used when an AMI instruction cannot be modified. Because there was no applicable model instruction, Millsap proffered an instruction based on the consent-to-treatment statutes, but the circuit court rejected it. The model instructions on informed consent that were given had absolutely nothing to do with the allegation that the doctor placed the NG tube without any consent by the patient. Informed consent presupposes that a patient consented to the procedure but may have done so without all information necessary to make a reasoned decision. (McGowan, M.; CV-13-986; 11-13-14; Danielson, P.)

Progressive Eldercare Services v. Long 2014 Ark. App. 661 [**third party beneficiary**] There are two elements that are necessary in order to apply the third-party-beneficiary doctrine under Arkansas law: 1) there must be an underlying valid agreement between two parties, and 2) there must be evidence of a clear intention to benefit a third party. The doctrine does not apply here because there is not a valid underlying agreement between two parties. The document was signed in a representative capacity, and she was not authorized to sign the documents as the person's representative. (Glover, D.; CV-14-401; 11-19-14; Glover, D.)

Burks v. Liberty Bank, 2014 Ark. App. 672 [**guardian**] Absent allegations of fraud or lack of jurisdiction, a judgment entered by a circuit court bears presumptive verity and may not be questioned by collateral attack. Although the Burkses assert that the guardianship court's order was void, they never actually filed pleadings seeking to challenge the guardianship court's order. There is no proof that the guardianship court's order was void; therefore, the action of the guardian in dealing with real property was valid and enforceable. (Hearnsberger, M.; CV-13-967; 11-19-14; Brown, W.)

Carter v. Cox, 2014 Ark. App. 654 [**estate by the entirety**] The circuit court determined that surviving spouse became the fee-simple owner of the property as the surviving tenant by the entirety upon husband's death. The power-of-attorney deed executed by husband to his sister did not destroy the tenancy by the entirety. The spouse's right of survivorship ripened into sole ownership upon husband's death. (McCormick, D.; CV-14-247; 11-19-14; Harrison, B.)

Poff v. Elkins, 2014 Ark. App. 663 [**med-mal**] Judge's various discovery rulings were not abuses of discretion. A trial court may exclude relevant evidence under Arkansas Rule of

Evidence 403 if its probative value is substantially outweighed by the danger of unfair prejudice. The issue of licensing was a peripheral issue that was also complex and could have caused jury confusion. Weighing the probative value of this evidence against the prejudicial effect of it, the circuit court did not abuse its discretion in excluding the evidence regarding whether Dr. Elkins had a license to conduct surgery. The circuit court did not abuse its discretion in refusing to allow demonstrative exhibits in opening statements because the ruling served to ensure that no inadmissible evidence was produced in opening statements. (Scott, J.; CV-13-924; 11-19-14; Whiteaker, P.)

Roberson v. Phillips County Election Comm., 2014 Ark. 480 [**elections**] Candidate sought to run for reelection as justice of peace and to run for city treasurer in same election. Arkansas Code Annotated section 7-5-111 states that “[a] person shall not run for election for more than one (1) state, county, or municipal office if the elections are to be held on the same date.” Here, the phrase, “more than one” means two or more, and “state, county, or municipal” are adjectives modifying the word “office.” The plain language of section 7-5-111 dictates that Roberson was prohibited from running for two offices—in this instance, Justice of the Peace, a county office, and Helena-West Helena City Treasurer, a city office—when elections for both offices were held on November 4, 2014. Roberson testified that he received compensation for only one office, but he failed to prove, under section 7-5-111, how he could hold both offices simultaneously when elections for both offices were held on November 4, 2014. Therefore, under these specific circumstances, the circuit court properly ruled that Roberson was disqualified from the position of Helena-West Helena City Treasurer. The circuit court did not err when it denied his motion to retroactively withdraw from the Justice of the Peace election in order to run for the Helena-West Helena City Treasurer position. This argument is moot because the election for Justice of the Peace had already occurred. (Storey, B.; CV-14-942; 11-12-14; Corbin, D.)

Travelers Casualty Co. v. Sweet’s Contracting, Inc., 2014 Ark. 484 [**aff. def**] The circuit court correctly ruled that the pay-if-paid clause was not an affirmative defense that must be specifically pled under Rule 8(c). The basic rule as developed under the common law is that any issue raised by the plaintiff in the complaint may be countered by a general denial in the answer, but any issue raised in the answer for the first time constitutes a new matter that must be specifically set out by the defendant as an affirmative defense. An affirmative defense must be pled when a defendant admits the material allegations of the complaint but seeks to avoid the effect of such admittance by an affirmative allegation of new matter avoiding plaintiff’s case. In this case, SCI asserted in its complaint that BCC had breached the subcontract by failing to do what the subcontract required it to do. BCC answered and denied that it had breached the subcontract and denied that it had failed to do what the subcontract required it to do. BCC never admitted the material allegations of the complaint—that it breached the subcontract—so it was not required to plead an affirmative defense. [**surety**] Travelers, the surety, was liable in like manner as BCC, the principal. Because BCC was not liable, then it follows that Travelers was not liable. (Weaver, T.; CV-13-779; 11-20-14; Hannah, J.)

Fort Smith School District v. Deer School District, 2014 Ark. 486 [**intervene**] The objective of our rules of procedure is the orderly and efficient resolution of disputes. Trial courts are accorded discretion, within reasonable limits, to require timely action and to deny efforts which would frustrate the achievement of those goals. Given the facts and circumstances of this case, the circuit court did not abuse its discretion in denying the motion for intervention as untimely. (Piazza, C.; CV-14-576; 11-20-14; Danielson, P.)

DOMESTIC RELATIONS

Farrell v. Farrell, 2014 Ark. App. 601 [**divorce--marital property--equal division; alimony**] This is the second appeal of this case. In the first, the Court of Appeals reversed and remanded for the circuit court to value some of the marital assets in the divorce decree. It noted in the first opinion that the statute requires all marital property to be distributed one-half to each party unless the court finds that division inequitable. The court may make some other division it deems equitable, but it must recite its basis and reasons for an unequal division in the order. The court also said in that opinion that the division does not have to be made with “mathematical precision. The critical inquiry is how the total assets are divided.” On remand, the circuit court considered the business property and the alimony. In the second decree, the appellee husband was awarded approximately 90% of the sizeable estate while the appellant wife was awarded approximately 10%, without the explanation required by Ark. Code Ann. § 9-12-315(a)(1)(A)(ix). The Court of Appeals again reversed and remanded so the circuit court could follow Ark. Code Ann. § 9-12-315(a)(1)(A)(ix) by explaining whether it intended the alimony award to be “traditional” alimony or, instead, an equitable reimbursement to allow the husband to make installment payments to the appellant wife to satisfy his equitable-distribution debt to the wife. The Court of Appeals said that if the court intends for the payments to the wife to be for her share of the marital property, it should explain why the appellee should not have to borrow the funds to pay her. The court can also reconsider whether the wife should receive traditional, need-based alimony. (Spears, J.; No. CV-13-990; 11-5-14; Gladwin, R.)

Jones v. Jones, 2014 Ark. App. 614 [**alimony**] When the parties were divorced, the circuit court ordered the appellant husband to pay temporary child support of \$1129 a month for three children and took the issues of permanent child support and alimony under advisement to get more information about the husband’s income. After a second hearing, the court set child support for two children (the oldest had reached eighteen), decreasing when the second son turned eighteen and then ceasing when the youngest child turned eighteen. The court also set alimony, ordering that it would increase proportionally each time the child support abated. The appellant husband appealed the issue of the increases and also argued that the court was ordering him to pay alimony for punitive purposes. The Court of Appeals noted that an award of alimony is in the sound discretion of the trial court. The amount of child support is one factor to be considered when considering an amount of alimony. Here, the appellee wife was using her high-school education to the best of her ability in a \$13 per hour job, which did not enable her to meet all of her monthly expenses. Each reduction in child support would mean less money for her to use for monthly expenses. The appellant’s income was sufficient for him to pay the alimony she needed. The court noted that either party could petition the court in the future for an increase or decrease depending on changed circumstances.

The court also said there was no indication that the award of alimony was punitive in nature. He made substantially more money than she and her monthly expenses exceeded her income. The primary factor to be considering in awarding alimony is the need of one spouse and the ability of the other to pay. The court did not abuse its discretion to award alimony based upon the parties' particular circumstances. (Taylor, J.; No. CV-13-1078; 11-5-14; Glover, D.)

Taku v. Hausman, 2014 Ark. App. 615 [**child support**] The parties were never married but had three children together. Paternity, visitation and child support were determined for the first two children in 2009. Their third child was born in 2011 and a subsequent paternity hearing was in 2012. The appellant father argues on appeal that the trial court erred in ordering retroactive child support to the time of the parties' third child's birth based upon his income which increased after the child's birth but before the hearing. However, the appellant did not present this evidence at the hearing. He stipulated to the amount, and he refused numerous times at his motion hearing to request that the evidence be re-opened. Therefore, the trial court did not clearly err in relying on the parties' stipulation of appellant's income or in applying that information retroactively to the date of the third child's birth. For his second point, the appellant contends that the trial court erred in failing to admit additional evidence after the hearing at a subsequent hearing. However, he stated on several occasions that he did not want to re-open the evidence, so he did not provide the court with any proof that he had made additional payments. The Court of Appeals said that trial courts have inherent power to enter orders to correct judgments and to make them speak the truth, but "[t]his power...is confined to correction of the record to the extent of making it conform to the action which was in reality taken at the time. It does not permit the change of a record to provide something that in retrospect should have been done but was not done." The appellant could have introduced additional evidence, but he did not do so, and he specifically declined to request re-opening the evidence at a subsequent hearing. The decision was affirmed. (Davis, B.; No. CV-14-147; 11-5-14; Glover, D.)

Catt v. Catt, 2014 Ark. App. 616 [**alimony–contempt**] The appellant failed to pay court-ordered alimony to the appellee after their divorce and failed to take the necessary steps to have their 2010 and 2011 tax returns prepared and filed, as ordered by the court after a previous contempt hearing. The circuit court found him in willful contempt and sentenced him to 120 days in jail, sixty days to start immediately, with his having the ability to be released as soon as he paid appellee the arrearage of \$13,796.94. Once he was released, he had thirty days to file the parties' tax returns and if he did not do so, he was to serve the remaining sixty days of jail time. On appeal, he argued that he should not have been found in willful contempt and, in the alternative, that the sentence of 120 days was far too severe. He claims it was not willful because he does not have the financial ability to pay the alimony, which the circuit court found not credible. The appellant testified that he had been held in contempt previously for failure to pay the alimony and to have the tax returns filed. He claimed that he lost everything in the divorce; that he had no way to pay; that his father lets him live in the marital home rent-free and provides him with a vehicle; that he has no disability that prevents him from working; that he has not farmed since 2010; that his father owned all of the farmland; and that during the marriage he farmed for his father. The purpose of civil contempt is to coerce compliance with the court's order. He also claimed that the first hearing was held six days before his response time ran and that the hearing was premature. A summons in the contempt hearing was served on him while he was in jail and

he said the summons provided that he had 60 days to answer if incarcerated. However, he appeared pro se at the hearing and asked for a continuance. He did not object based upon the 60-day provision in the summons at the hearing. The court said that he waived his arguments by his pro se appearances and his failure to object timely. The decision was affirmed. (Davis, B.; No. CV-14-301; 11-5-14; Glover, D.)

Bohannon v. Robinson, 2014 Ark. 458 [**order of protection**] The Supreme Court reversed and remanded a final order of protection against the appellant, finding insufficient evidence to support the order. The appellee father of appellant's three-month-old child filed a petition for an order of protection for the child, alleging that the appellant was being released from incarceration within thirty days which would create "an immediate and present danger of domestic abuse." He alleged that the appellant had committed previous acts of domestic violence by driving under the influence of drugs with the baby and three other children in the car, hitting a pole and almost hitting a gas pump. "She was arrested and charged with four counts of child endangerment." An ex parte order of protection was entered and a hearing set, and the appellant was served with the petition and the order of protection while in jail. She failed to appear at the hearing. The appellee appeared pro se and was granted a final order of protection for two years. The appellant filed a motion for new trial, or alternatively, for relief from the order of protection, or alternatively, to set aside the default judgment. At the hearing on appellant's posttrial motion, she argued that, although properly served with the ex parte order, she could not attend the hearing on the final order because she was incarcerated. She said she was denied due process because she had no opportunity to be heard and that insufficient evidence supported the finding of domestic abuse. The court first considered whether the appellant's sufficiency argument was preserved for review, based upon the court's previous holding in *Wills v. Lacefield*, 2011 Ark. 262. The court overruled *Wills* to the extent it is inconsistent with case law that a party in a civil bench trial may challenge the sufficiency of the evidence for the first time on appeal. On the merits of the evidence, the Court said that the circuit court based its finding of domestic abuse on the allegations in the petition. The appellee said at the hearing that he did not know whether she had been charged with four counts of child endangerment but that she had a pending trial date and he did not know if they were going to charge her. He presented no proof that she was under the influence of drugs when the accident occurred. He had also alleged that she was in an accident with the other three children in the car (her children but not his) but he did not allege that she was under the influence at that time. He said she was arrested and taken to jail, but he did not say why, nor did he present any evidence on that issue. The court said, "a car accident in and of itself does not rise to the level of domestic abuse." (Pierce, M.; No. CV-14-264; 11-6-14; Hannah, J.)

Calaway v. Crotty, 2014 Ark. App. 636 [**order of protection—modification**] The appellant appealed from the circuit court's denial of his motion to modify an order of protection the appellee had obtained against him. The parties had a past dating relationship and the order of protection entered November 2, 2012, ordered the appellant to stay away from the appellee, her two children, and other members of her family, and was effective for three years. The order indicates that appellant possessed a firearm and had a history of extreme violence. Neither party appealed from the order. Appellant's motion to modify the order sought to remove language from the order including "that the victims were in immediate and present danger of domestic abuse and that he had a history of extreme violence." He also sought to limit the order to six

months and to include a provision allowing him to have firearms and to hunt. The appellant's actions toward the appellee, her children, and other family members were set out in detail in the opinion. The appellant argues it was undisputed that he had never harmed or threatened to harm appellant or her children, and that "harassment, once per month over six months, does not constitute 'domestic abuse.'" The Court of Appeals said that the evidence supports that appellee continued to fear that appellant would harm her or her children. The trial court had found her testimony credible that he had a temper and was known to seek revenge, and it could conclude reasonably that he still posed a threat to her. The court held that the trial court did not clearly err in refusing to modify the order of protection, and it affirmed the decision. (Landers, M.; No. CV-14-406; 11-12-14; Walmsley, B.)

McCoy v. Kincade, 2014 Ark. App. 664 [**child custody–modification**] The Court of Appeals affirmed the circuit court's finding that a change of circumstances had occurred to justify changing the parties' joint custody arrangement, in place since 2004, to custody with the appellee father and visitation with the appellant mother. The mother moved to Fayetteville from Mountain Home about a month after the divorce decree was entered. The decree incorporated the parties' very specific child-custody and property-settlement agreement. The parties were able to make the agreement work, despite the mother's move, by agreeing upon certain modifications without court involvement. The father filed a petition for modification in 2013 based upon changed circumstances, specifically that the children were older and involved in many activities with school and friends, and that their mother was unwilling to facilitate their involvement in the activities, which he alleged were integral to the children's development. The trial court found that, at the time of the custody hearing, the mother's move to Fayetteville was having an adverse impact on the children, thereby creating a change in circumstances. The Court of Appeals said that determination was not clearly erroneous (Webb, G.; No. CV-14-91; 11-19-14; Whiteaker, P.)

PROBATE

Sharp v. Sharp, 2014 Ark. App. 645 [**will; no-contest clause; testamentary capacity; undue influence; procurement of will**] This will dispute between two brothers stemmed from the appellee brother's getting substantially more assets from their father's estate than the appellant brother received. The appellant alleged that the 2010 will should be declared invalid because the father did not have testamentary capacity and that the appellee exerted undue influence and procured the will. After a trial, the circuit court ruled that the will was valid and that the no-contest provision in it was enforceable. On appeal, appellant contended the trial court erred by finding that appellant's will contest was without "good faith" and thus was not exempted from the will's no-contest clause, and by using the wrong burden of proof regarding the will's validity. The Court of Appeals affirmed "because Arkansas law does not provide for a 'good faith' exception to a valid will's no-contest clause in this factual situation and because the trial court did not commit reversible error in its application of the burden of proof to the evidence." (Cooper, T.; No. CV-14-100; 11-12-14; Hixson, K.)

Torres, et al. v. Jones, 2014 Ark. App. 634 [**guardianship**] The appellants appeal from a denial of their petition to terminate a 2006 order that granted guardianship of their child to the appellee. The appellants and the appellee's husband, brother of one of the appellants, are Mexican citizens who reside illegally in the United States. The appellee is an American citizen who works as a translator. Appellants and the appellee developed a close relationship when the former arrived in the U.S. in 2000. They were being sheltered in the appellee's home when the child who is the subject of the guardianship, C.R., was born in late 2000. He moved in with the appellee when he was four and has lived there ever since, and she has made all decisions regarding his care with the consent of the appellants. A formal guardianship was entered into in 2006 with the stated purpose that it was to provide proper care for C.R. because he parents did not speak English, and that its duration would be until he reached eighteen. The parties had a falling out in 2013 and appellants filed the petition to terminate the guardianship. In the seven years that he has lived with her, C.R. and the appellee developed a parent-child relationship. His parents maintained contact with him, but their relationship was familial, not parental. In contrast, the appellants' have a parental relationship with their younger son, E.R., who has been raised in their own home, communicating in Spanish. C.R. has lived in another town with appellee and does not speak Spanish. The appellants made several "collateral attacks" on the 2006 guardianship order, not properly before the court, according to the Court of Appeals, since the court issuing the guardianship had jurisdiction to enter the order and the order is not void on the face of the record. Appellants also made several constitutional arguments for the first time on appeal, which the court did not consider. The court said that the appellant's arguments are without merit because they are based on the false premise that the trial court ignored the presumption that fit parents are entitled to the care, control, and custody of their children, and that the court placed upon them the burden of showing that termination was in the child's best interest. The court said that the trial court clearly did not do so. Finally, appellants argued that the trial court erred in finding that the reason for the guardianship still existed and that they had abandoned their parental roles with respect to C.R. The court found no clear error. The stated reason for the guardianship in 2006 was that the parents were unable to speak English, which is still the case. The problem is exacerbated because appellants failed to ensure that C.R. learned Spanish, so they cannot communicate with him in the home. The court also said it could not say the trial court erred in finding that the appellants abandoned their parental roles with respect to C.R. They are unable to communicate with him; and they allowed parental bonds of affection to develop between him and the appellee, and for appellee to take on the role of parent. The court said "[t]his has long been recognized to be a crucial factor in dissipating the presumption in favor of care, control, and custody by a parent..." The decision was affirmed (Capeheart, T.; No. CV-14-141; 11-12-14; Pittman, J.)

Norris v. Davis, 2014 Ark. App. 632 [**wills and estates—order of distribution; paternity**] The Court of Appeals affirmed the circuit court's application of res judicata and its dismissal of the appellant's motion to vacate an order of distribution in the estate of her deceased son, John Earl Patterson. That distribution was made under the terms of a family-settlement agreement (FSA), under which K.P., which the parties agreed is the natural child of the decedent, would receive one-fourth of the balance of the John Earl Patterson Estate. In her Motion to Set Aside Order Approving Settlement and Objection to Distribution, the appellant claimed that she signed the

FSA based upon the appellee's false representations to her that her child, K.P. was Joseph Earl Patterson's son, but that in truth a DNA test showed that another man was the father and he was ordered to pay child support. The appellant found out about this after the parties had entered into the FSA. She alleged fraud and misrepresentation by the child's mother to justify vacating the order and FSA under Rule of Civil Procedure 60(c)(4). The Court of Appeals found that res judicata barred the appellant from relief. The issue of the paternity of the child could not be relitigated because the issue of K.P.'s paternity and heirship was established by the FSA and order of distribution. (McCallister, B.; No. CV-13-794; 11-12-14; Gladwin, R.)

JUVENILE

Ingle v. Ark. Dep't of Human Services, 2014 Ark. 471 [**DN permanent custody – Supreme Court Mandate**] Appellant argued that the circuit court violated the mandate of the Supreme Court in failing to return her child to her immediately and in conducting a hearing based on DHS's petition. A lower court is vested with jurisdiction by the appellate court's mandate. If an appellate court remands with specific instructions those instructions are to be followed exactly. In its order the Supreme Court issued a qualified instruction for the court to return custody of appellant's child and if any party had a serious concern about the return, they could file a petition requesting the court to address those concerns. DHS filed such a petition based on events that transpired during the appeal and the court found that the circuit court followed both the letter and spirit of the mandate on remand. [**proceeding – new petition**] Appellant argued that since the mandate required that her child be returned to her, the only way that DHS could remove her child was to initiate a new case by filing an emergency petition and establishing probable cause that her child was dependency-neglected and in immediate danger. This argument was constructed on appellant's first argument that the mandate was limited to returning her child to her, which the Court rejected. The Court also found that appellant did not raise this issue below and as such it would not be addressed. [**sufficiency**] Appellant finally argued that there was insufficient evidence to support the circuit court's decision to leave her child with his father. The Supreme Court found that it could not say the court was clearly erroneous where there was evidence of multiple arrests, including two since the last order that resulted in the removal of another child from appellant. Appellants faced multiple criminal charges and had asserted the defense of mental disease or defect. Also, by appellant's own admission, she had only visited her child a handful of times during the last 18 months, and there was testimony that her child was doing well in his current placement and was bonding with his siblings. (Zimmerman, S.; CV-14-612; 11-13-14; Goodson, C.)

In Re Adoption of J.J. and J.S. v. Ark. Dep't of Human Services, 2014 Ark. App. 659 [**adoption best interest**] The biological grandmother appealed the circuit court's denial of her petition to adopt her two grandchildren. The circuit court denied the petition on the basis: that the Department of Human Services (DHS) was not withholding its consent unreasonably, and that it was not in the children's best interest that she adopt them. She challenged only the court's finding that it was not in the children's best interest that she adopt them, but she failed to challenge the court's finding that DHS was not unreasonably withholding consent to the adoption. Because consent was required, the Arkansas Court of Appeals did not address any

argument regarding best interest, and the decision was affirmed. (Zimmerman, S.; No. CV-14-361; 11-19-14; Gruber, R.)

Turner v. Ark. Dep't of Human Services, 2014 Ark. App. 655 [**DN adjudication – sufficiency**] Appellant argued that there was insufficient evidence to support the finding of abuse. While there was evidence that only one child had signs of physical abuse, a juvenile can be at risk of serious harm and dependent-neglected based on an act of abuse inflicted on the juvenile's sibling. (Brown, E.; CV-14-637; 11-19-14; Harrison, B.)

Fox v. Ark. Dep't of Human Services, 2014 Ark. App. 666 [**TPR – best interest/potential harm**] Appellant only challenged the sufficiency of the evidence as to the best interest finding, specifically as to the potential harm if her child was returned to her custody. The appellate court found that the trial court correctly found that appellant's child would be subject to potential harm if returned based on the following evidence. Dr. Farst testified that two of appellant's children had sustained injuries at the time of their deaths (by appellant's husband) that were not injuries one would expect to find in non-ambulatory infants and would be noticeable to a caretaker, demonstrating appellant's lack of insight that put her child at risk. The trial court also found appellant unstable and as evidenced by Dr. Faitak's testimony that appellant had been diagnosed with borderline personality disorder, was unstable and it would be dangerous for appellant to have children with her. Finally, the court found appellant continued to engage in dangerous behavior as evidenced by her ongoing issues of domestic violence, not engaging in therapy to address issues to help her address a safe home for her child, and failing to acknowledge her role in the death of her children. A parent has the duty to protect a child and must take affirmative steps to protect her children from harm. (Smith, T.; CV-14-622; 11-19-2014; Whiteaker, P.)

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

Young v. Ark. Dep't of Human Services, 2014 Ark. App. 602 (Brown, E.; CV-14-394; 11-5-2014; Gladwin, R.)

McPherson v. Ark. Dep't of Human Services, 2014 Ark. App. 621 (Thyer, C.; CV-14-609; 11-5-2014; Vaught, L.)

Windom v. Ark. Dep't of Human Services, 2014 Ark. App. 629 (Branton, W.; CV-14-563; 11-5-2014; Brown, W.)

Owen v. Ark. Dep't of Human Services, 2014 Ark. App. 648 (Hewett, M.; CV-14-632; 11-12-2014; Wood, R.)

Spencer v. Ark. Dep't of Human Services, 2014 Ark. App. 670 (James, P.; CV-14-647; 11-19-2014; Hixson, K.)

J.J. v. State, 2014 Ark App. 611 [**Delinquency/Revocation of Probation**] Appellant argued there was insufficient evidence to support the court's decision to revoke his probation. As a term

of probation appellant was required to enter treatment at a residential facility and comply with the program. Appellant was terminated from his treatment program as a result of his defiance, aggressive behavior and theft from staff and other patients. Appellant argued that he was doing well until his medication was changed and he began to digress. There was sufficient evidence that appellant violated the terms of probation by failing to comply with his treatment program. Appellant failed to provide any evidence linking his change in medication to his deterioration in treatment and ultimate termination from the program. (Fergus, L.; CV 14-423; 11-5-2014; Wynne, R.)

H.V. v. State, 2014 Ark App. 607 [**Delinquency**] Appellant appealed her delinquency adjudication for the offense of accomplice to theft of property. Appellant argued that even if she had actual knowledge of the theft it is not sufficient to make her an accomplice because the security camera did not show her taking any action in furtherance of the theft. When two or more persons assist in the commission of a crime each is an accomplice and criminally liable for the conduct of both and one cannot disclaim accomplice liability because he did not take part in every act that made up the crime as a whole. Factors in determining a connection of an accomplice to a crime include: the presence of the accused in the proximity of the crime; the opportunity to commit the crime; and an association with a person involved in a manner suggestive of joint participation. The appellate court held there was sufficient evidence that appellant aided in the commission of the theft where she shielded the theft and then looked around, and she admitted to knowing about the theft. (Smith, T.; CV 14-365; 11-5-2014; Walmsley, B.)

A.D. v. State, 2014 Ark App. 608 [**Delinquency**] Supplemental addendum ordered where appellate brief stipulated an exhibit, DVD of the store surveillance that was listed in the addendum's table of contents but was not included in the addendum. Arkansas Supreme Court Rule 4-2(a)(8)(A)(i)(2013) requires the addendum to include all items that are essential for the appellate court to understand the case and to decide the issue on appeal, including exhibits such as CDs and DVDs. (Smith, T.; CV 14-420; 11-5-2014; Harrison, B.)

DISTRICT COURT

Fewell v. State, 2014 Ark. App. 631 [**District Court Appeal; A.R.Cr.P. 36(c)**] In taking an appeal from a decision of a district court, Rule 36(c) requires that the defendant shall serve a copy of his written request for a certified copy of the record on the prosecuting attorney for the judicial district and shall file a certificate of such service with the district court. Appellant failed to do so but says this was not his fault, but was the fault of the district court for not requesting or requiring him to file the written request. Appellant acknowledged he failed to comply with Rule 36(c) and asks to be held to a lesser standard as a pro se litigant. The supreme court has consistently held that pro se litigants are held to the same procedural standard as licensed attorneys. A litigant proceeding pro se has the duty of perfecting his appeal under rule 36(c) not the clerk. The circuit court did not err in dismissing the appeal. (Sims, J.; CR-14-413; 11/12/2014; Gladwin, R.)