

# 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](http://courts.arkansas.gov/opinions/sc_opinions_list.cfm) or Court of Appeals - [http://courts.arkansas.gov/opinions/coa\\_opinions\\_list.cfm](http://courts.arkansas.gov/opinions/coa_opinions_list.cfm)). **ANNOUNCEMENTS**

On August 7<sup>th</sup>, the Supreme Court adopted amendments to Rules of Civil Procedure 9, 49, and 52 and Rules of Appellate Procedure-Civil 8. These amendments are effective January 1, 2015.

## CRIMINAL

*Turner v. State*, 2014 Ark. App. 428 [**admission of evidence**] The trial court did not abuse its discretion when it admitted into evidence a portion of a 911 dispatch log. The evidence was relevant, corroborated the victims' testimony, and was more probative than prejudicial. (Philhours, R.; CR-13-925; 8-27-14; Gruber, R.)

*Tiller v. State*, 2014 Ark. App. 431 [**motion to suppress**] Because appellant's arrest was supported by probable cause, it was lawful, and consent for the field sobriety tests was not required. Accordingly, the trial court did not err in denying appellant's motion to suppress the results of the field sobriety tests. [**DWI**] The Arkansas implied-consent law is an exception to the warrant requirement. Thus, no warrant was required prior to obtaining a chemical test from appellant when she was arrested on suspicion of driving while intoxicated. [**DWI**] A defendant's refusal to take a breath test is independently relevant on the issue of intoxication and therefore is properly admitted

as circumstantial evidence showing a consciousness of guilt. (Storey, W.; CR-14-16; 8-27-14; Vaught, L.)

*Harris v. State*, 2014 Ark. App. 448 [**sufficiency of the evidence; possession of methylphenidate with intent to deliver**] There was substantial evidence to support appellant's conviction. [**Ark. R. Evid. 616**] The trial court did not err when it characterized two individuals, who appellant had threatened with a gun during the armed robbery of their place of employment, as "victims" pursuant to Rule 616 of the Arkansas Rules of Evidence and permitted them to remain in the courtroom during the trial that resulted from the armed-robbery. (Chandler, L.; CR-13-1139; 9-3-14; Wood, R.)

*Belair v. State*, 2014 Ark. App. 453 [**confrontation clause**] Any error associated with the trial court's denial of appellant's confrontation-clause challenge was harmless because the trial court did not consider the challenged testimony when it revoked appellant's probation. (Goodson, D.; CR-13-1092; 9-10-14; Walmsley, B.)

*Davis v. State*, 2014 Ark. App. 452 [**continuance**] The trial court did not abuse its discretion when it denied appellant's last-minute request for a continuance, which was based upon appellant's desire to investigate an alleged newspaper story about the crime for which appellant was charged. (Singleton, H.; CR-13-932; 9-10-14; Pittman, J.)

*Bell v. State*, 2014 Ark. App. 458 [**jury instructions**] Based upon the discretion granted to the trial court in deciding whether to instruct on alternative sentencing, the nonbinding character of any such recommendation, and the trial judge's stated intent not to impose a suspended sentence even if it had been recommended because of the state of the evidence, the trial court did not abuse its discretion when it refused to instruct the jury to consider a suspended sentence as an alternative sentence. (McCallum, R.; CR-13-1079; 9-10-14; Hixson, K.)

*State v. Thomas*, 2014 Ark. 362 [**fitness to proceed**] The trial court erred by dismissing the charges against Thomas before his fitness to proceed was restored. (James, W.; CR-14-94; 9-11-14; Hart, J.)

*Brown v. State*, 2014 Ark. App. 474 [**sufficiency of the evidence; manufacturing marijuana; judicial notice**] It was not necessary for the State to offer evidence to establish that marijuana was listed by the Health Department as a Schedule VI controlled substance. The circuit court correctly took judicial notice of that fact. [**admission of evidence**] The trial court did not abuse its discretion when it admitted into evidence a crime laboratory analyst's report because the report was relevant to the issue of the weight of the marijuana, which was an element of the offense for which appellant was charged. (Clawson, C.; CR-13-1121; 9-17-14; Whiteaker, P.)

*Hood v. State*, 2014 Ark. App. 463 [**probation revocation**] If an individual is arrested for a violation of a condition of his probation, a revocation hearing must be held within sixty days.

When the accused is incarcerated on other charges, the sixty-day requirement is inapplicable. (Maggio, M.; CR-13-1099; 9-17-14; Pittman, J.)

*Pierce v. State*, 2014 Ark. App. 470 [**mistrial**] Appellant was convicted of driving while intoxicated. During his trial, testimony was introduced that appellant's blood-alcohol content was .099. Appellant requested a mistrial based upon the admission of the blood-alcohol-content testimony. Appellant's motion was denied. On appeal, the Court of Appeals determined that the trial court did not abuse its discretion when it denied appellant's motion because appellant failed to demonstrate that the testimony was so prejudicial that justice could not be served by continuing the trial or that the fundamental fairness of the trial was affected. In particular, the appeals court noted that additional testimony, which was not challenged by appellant, had been admitted to establish that appellant was intoxicated. (Cox, J.; CR-13-1113; 9-17-14; Gruber, R.)

*Detherow v. State*, 2014 Ark. App. 478 [**admission of evidence**] Because the evidence assisted in the establishment of the facts and circumstances surrounding the commission of the crime for which appellant was charged, the trial court did not abuse its discretion when it admitted into evidence testimony about injuries suffered by appellant's girlfriend. (Johnson, L.; CR-13-1118; 9-17-14; Hixson, K.)

*Holmes v. State*, 2014 Ark. App. 502 [**withdrawal guilty plea**] A denial of a motion in limine during sentencing does not provide a basis to withdraw a guilty plea. [**admission of evidence**] The trial court did not abuse its discretion when it admitted physical evidence, crime scene photographs, and a police interview into evidence during appellant's sentencing hearing because the evidence provided a factual basis for establishing that the crimes, to which appellant pled guilty, occurred. (Arnold, G.; CR-13-816; 9-24-14; Wood, R.)

*Thomas v. State*, 2014 Ark. App. 492 [**sufficiency of the evidence; first-degree murder; attempted first-degree murder**] There was substantial evidence to support appellant's convictions. [**Sixth Amendment right to counsel**] Appellant's Sixth Amendment right to counsel of his choice may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice. (Dennis, J.; CR-13-783; 9-24-14; Gruber, R.)

*Harmon v. State*, 2014 Ark. 391 [**motion in limine**] The circuit court abused its discretion when it granted the State's motion in limine to exclude testimony that established that there was DNA from more than one individual on several pieces of evidence introduced by the State. The wrongfully excluded testimony challenged the credibility of the evidence introduced by the State to connect appellant to the murder and corroborated appellant's testimony that a particular third party was responsible for the crimes. (Johnson, L.; CR-14-145; 9-25-14; Hoofman, C.)

*Sales v. State*, 2014 Ark. 384 [**Rule 37**] Because appellant failed to establish that the errors committed by his attorney were so serious that they deprived him of a fair trial, he was unable to satisfy both prongs of the *Strickland* test and he was not entitled to relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. (Gibson, B.; CR-10-53; 9-25-14; Corbin, D.)

*Decay v. State*, 2014 Ark. 387 [**Rule 37**] Appellant failed to establish that his trial counsel's performance was deficient. Thus, the circuit court did not err when it denied appellant's request for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.5. (Storey, W.; CR-13-992; 9-25-14; Danielson, P.)

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

*Cosey v. State*, 2014 Ark. App. 441 (robbery) CR-13-1053; 9-3-14; Gruber, R.

*Singleton-Harris v. State*, 2014 Ark. App. 436 (rape; kidnapping) CR-13-722; 9-3-14; Pittman, J.

*Fowler v. State*, 2014 Ark. App. 460 (negligent homicide) CR-13-868; 9-10-14; Brown, W.

*Piper v. State*, 2014 Ark. App. 472 (breaking or entering) CR-13-654; 9-17-14; Glover, D.

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:

*Rowe v. State*, 2014 Ark. App. 446 (probation) CR-13-1093; 9-3-14; Vaught, L.

*Bohannon v. State*, 2014 Ark. App. 434 (probation) CR-14-44; 9-3-14; Gladwin, R.

## **CIVIL**

*Ahern Rentals, Inc. v. Salter Constr., Inc.*, 2014 Ark. App. 423 [**construction lien**] 75 Day Notice complied with the relevant statutory requirements with respect to the description of the services provided and the amount due and owing. A lien claimant is statutorily required to provide only a general description of the work provided in order to strictly comply with the statute. The description, "rental equipment," is sufficiently descriptive to strictly comply with the statutory requirement to provide a general description of the labor, service, or materials provided. Subcontractor strictly complied with the requirement of the statute by providing an amount due and unpaid even though the initial amount provided in the 75 Day Notice was ultimately for more than it could prove as lienable. Whether the amount stated in the 75 Day Notice can be proved at trial is not a requirement of section 18-44-115 when determining strict compliance. (Maggio, M.; Civ-14-20; 8-27-14; Gladwin, R.)

*Gamble v. Wagner*, 2014 Ark. App. 442 [**negligence**] Claim for negligence was not sustained. Res ipsa loquitur is not applicable because exclusive control of the instrumentality was not shown. (Laser, D.; Civ-13-1060; 9-3-14; Gruber, R.)

*Lookabaugh v. Hanna Oil Co.*, 2014 Ark. App. 445 [**unjust enrichment**] It was unjust for party to retain royalties that were mistakenly payable to his brother. Although as a general rule, payments that are voluntarily made cannot be recovered, when the payments are made as a result of duress, fraud, failure of consideration, or mistake, as here, the “voluntariness” of the payment is not a bar to recovery. (Cox, J.; Civ-13-651; 9-3-14; Whiteaker, P.)

*Taylor v. City of Fort Smith*, 2014 Ark. App. 450 [**municipal clean-up lien**] The issue is whether the eighteen-month limitation period in subsection (a)(1) of the statute applies when a municipality chooses the certification method contained in subsection (a)(2). The time period does not apply and the city was not time-barred from enforcing the lien. (Tabor, S.; Civ-14-27; 9-3-14; Brown, W.)

*Southern Bldg. Services v. City of Fort Smith*, 2014 Ark. App. 437 [**attorney’s fees**] When considered as a whole, Southern is the prevailing party because it was declared entitled to 100% of the amount it claimed in the litigation while the City was awarded only 53% of the amount it sought. [**prejudgment interest**] Southern seeks application of a form of the “interest-on-the-balance” rule under which prejudgment interest would be awarded only on the net difference between its claim and the City’s counterclaim. This rule is applicable and case is remanded for a determination. (Fitzhugh, M.; Civ-13-1132; 9-3-14; Walmsley, B.)

*Ver Weire v. Styles*, 2014 Ark. App. 459 [**premises liability/summary judgment**] Reasonable men could reach different conclusions from these facts regarding whether the property owner breached its duty to maintain its premises in a reasonably safe condition and whether the owner should have anticipated that harm to its invitee might arise under the circumstances presented in this case. Thus, summary judgment was inappropriate. (Sutterfield, D.; CV-13-1100; 9-10-14; Hixson, K.)

*Simpson v. Cavalry SPV, LLC*, 2014 Ark. 363 [**certified question answered/collection agency**] An entity that purchases delinquent accounts and then retains a licensed Arkansas lawyer to collect on the delinquent accounts and file lawsuits on its behalf in Arkansas is a “collection agency” pursuant to Ark. Code Ann. § 17-24-101. An entity that purchases delinquent accounts and has lawsuits filed on its behalf in Arkansas is attempting to collect and is required to be licensed by the Arkansas State Board of Collection Agencies. (E.D. Ark.; CV-14-45; 9-11-14; Hoofman, C.)

*Regional Care of Jacksonville, LLC v. Henry*, 2014 Ark. 361 [**arbitration**] The arbitration clause lacked mutuality. The nursing home reserved the right to litigate billing or collection disputes; thus, excluding from arbitration the only likely claim it might have against a resident. (Fox, T.; CV-14-37; 9-11-14; Goodson, C.)

*Overturff v. Read*, 2014 Ark. App. 473 [**damages/summary judgment**] A question of fact existed as to the amount of damages for the breach of the land-sale contract. [**interference with contract**] Business expectancy was not shown to be sufficiently precise or concrete. (Maggio, M.; Civ-14-232; 9-17-14; Glover, D.)

*Bly v. Collister*, 2014 Ark. App. 476 [**scire facias**] No foreclosure judgment was ever entered; thus, there was no judgment to revive. (Maggio, M.; Civ-13-1142; 9-17-14; Vaught, L.)

*Hartman v. Edwards*, 2014 Ark. App. 480 [**AMI 206**] Doctor gave justifications for his medical decisions. This was not an affirmative defense. Plaintiff has burden to establish the standard of care. (Medlock, M.; Civ-13-632; 9-17-14; Wood, R.)

*Alltel Corp. v. Rosenow*, 2014 Ark. 375 [**arbitration**] The arbitration clause lacked mutuality. Alltel provided itself with an “out” to the required arbitration. Its customers, however, were limited to pursuing relief against Alltel in the form of arbitration. Requiring mutuality in arbitration does not violate the Federal Arbitration Act. By requiring mutuality in arbitration agreements, arbitration provisions are not placed on an unequal footing with other contract provisions in a manner that disfavors arbitration. The doctrine of mutuality to determine whether there has even been a valid agreement to arbitrate in the first instance is consistent with the analysis of any contract claim – is there a valid contract? (Phillips, G.; CV-13-995; 9-18-14; Danielson, P.)

*City of Jacksonville v. Nixon*, 2014 Ark. App. 485 [**eminent domain**]. Living fences are recognized when the growth serves the purposes of confinement, means of protection or use as a boundary, and the removal of such growth is compensable if it caused damage to the lands not taken. The compensation is not for the replacement value of the trees and shrubs taken but for the value of their loss. In partial-takings cases, just compensation for permanent easements is the difference between market value of the whole tract before the taking and market value of that part which remains after the taking, less any enhancement peculiar to the lands. The value of a temporary easement is the fair rental value of the property for the time that it is used. (Griffen, W.; Civ-14-65; 9-24-14; Gladwin, R.)

*Fort v. Estate of Miller*, 2014 Ark. App. 498 [**new trial motion**] Substantial evidence existed in the record from which the jury could have concluded that plaintiff was not seriously injured in the accident, that her shoulder complaints and medical treatment for those complaints were not proximately caused by the accident, and/or that the medical treatment was not reasonable and necessary. (Beaumont, C.; CV-14-26; 9-24-14; Vaught, L.)

*Bowerman v. Takeda Pharmaceuticals*, 2014 Ark. 388 [**certified questions/illegal exaction**] Article 16 § 13 of the Arkansas Constitution does not provide Bowerman with a claim for illegal exaction. In order to state a claim for an illegal exaction, Bowerman must allege that the expenditure was illegal, misapplied, or arbitrary. *Nelson v. Berry Petroleum Co.*, 242 Ark. 273, 413 S.W.2d 46 (1967) is not applicable to the facts and circumstances of this case. (U.S. Dist. Ct., Louisiana; CV-13-1051; 9-25-14; Baker, K.)

*Ark. Realtors Assoc. v. Real Forms, LLC*, 2014 Ark. 385 [**breach of contract**] Substantial evidence supports the jury’s verdict that Appellant materially breached its contract with Appellee by failing to deliver software and source code as required by the parties’ contract. Circuit court properly refused to give AMI 2439 as the evidence presented at trial did not support the

impossibility defense. The evidence suggests that Appellant failed to take every action within its power to perform its duty under the contract to obtain the software and source code. No evidence supports a finding of impossibility—either objective or subjective. (Mason, C.; CV-13-87; 9-25-14; Corbin, D.)

*Jasper School Dist. v. Cooper*, 2014 Ark. 390 [**teacher fair dismissal act (TFDA)**] The circuit court did not err in finding that school district failed to bring to principal/teacher's attention the problems identified as the nine reasons for termination and failed to document the efforts undertaken to assist her to correct the causes for potential termination as required by the TFDA. The circuit court did not err in concluding that the contract created a property right in Cooper's position as principal. By the explicit terms of the contract, she was employed as the principal. Retirement benefits are a collateral source and are not to be deducted from a teacher's award of back pay. (Pearson, W; CV-13-962; 9-25-14; Hart, J.)

## DOMESTIC RELATIONS

*Ball v. Ball*, 2014 Ark. App. 432 [**divorce—contempt**] The Court of Appeals affirmed the circuit court's finding that the appellee wife did not willfully violate the trial court's orders and was not in contempt. The appellant husband had claimed on appeal that his wife had left the marital home in disrepair and that she had taken personal property awarded to him by the divorce decree. The appellee disputed his claims. In affirming, the Court of Appeals noted that credibility determinations are left to the trial court. (Hendricks, A.; No. CV-14-73; 8-27-14; Hixson, K.)

*Evans v. McKinney*, 2014 Ark. App. 440 [**child custody**] The circuit court ordered that custody of the parties' four-year-old child be changed from the appellant mother to the appellee father. Finding a "substantial" change of circumstances, the court said problems with visitation and visitation exchanges, alienation of the child from the father, remarriage of both parties, the father's subsequent remarriage and relocation were all changes that affected the child. The court blamed the mother for trauma to the child at every visitation exchange. The Court of Appeals found no clear error and affirmed the decision of the trial court. The Court said that judgment of change of circumstances is based upon the specific facts of a case and that deference is given to the circuit court's superior ability to judge the credibility of the parties. The decision was affirmed. (Duncan, X.; No. CV-14-84; 9-3-14; Wynne, R.)

*Brown v. Brown, et al.*, 2014 Ark. App. 455 [**child support—arrearages**] The appellant non-custodial father appealed from an order reducing his child-support arrearages to a judgment. The parties' divorce was heard in Pulaski County, and included a temporary order in March 2009 for the appellant to pay child support. When the final decree was entered in December 2010, the court transferred all issues relating to the parties' child, including child support, to Boone County, where a dependency-neglect action had been initiated while the divorce action was pending. The appellant subsequently filed a motion to modify child support, and the Office of Child Support Enforcement (OCSE) responded, seeking a judgment on arrears. The Boone County Circuit Court granted both

motions in August 2013. The appellant argued on appeal (1) that the temporary order of support entered in Pulaski County was extinguished by the initiation of the Boone County dependency-neglect action when the child was removed from the home, and (2) that the trial court erred in imputing income to him over his actual income of \$25 a week. The Court of Appeals said that the December 2010 order of the Pulaski County Circuit Court did not modify or set aside the March 2009 temporary order of support. Instead, it did nothing more than transfer the case to Boone County, so the March 2009 order of support remained in effect until it was actually modified by the Boone County court in August 2013. But the Court of Appeals said the error was harmless. While the court erroneously found that the temporary order of support ended in December 2010, the court set retroactive support during the gap-in-support period at an amount equal to the award in the temporary order. Therefore, the court's calculation of arrearages is mathematically the same under either calculation. The Court found no error in the circuit court's imputing income to him. The decision was affirmed as modified. (Womack, S.; No. CV-13-1069; 9-10-14; Whiteaker, P.)

*Abo v. Walker*, 2014 Ark. App. 500 [**paternity–custody**] The parties' child was born in March 2009 and the three of them lived together until May 2012. The parties never married. After the parties' relationship ended, the appellant mother moved out of the house and the child remained primarily with the appellee father, although the parties shared time with the child. In March 2012, the appellee filed a paternity action and asked for custody of the child, who continued to live with him. In her response, the appellant contended that she was the legal custodian and she asked for a paternity test, custody, and child support. A DNA test confirmed that the appellee was the biological father of the child. The circuit court entered a judgment finding that he appellee was the father of the child, that he had provided housing and support for her since her birth, that a visitation schedule would be established for appellant after a permanent hearing, and ordered the appellant to pay child support. On appeal, the appellant alleged that the circuit court erred in not recognizing that, under Ark. Code Ann. Sec. 9-10-113(a), custody is in the birth mother until a child reaches eighteen. The Court of Appeals agreed, but said that subsections (b) and (c) of that statute provide that a biological father may petition for custody if certain requirements are met. The Court said, "The appropriate inquiry is whether a court of competent jurisdiction has made an initial judicial determination of custody so as to trigger an additional requirement that the father seeking custody plead and prove a material change of circumstances," which is the appellant's second point on appeal. (established in *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993)). However, the appellant did not raise this issue to the trial court or obtain a ruling on it, so the issue of "material change in circumstances" was not preserved for appellate review. The judgment was affirmed. (Herzfeld, R.; No. CV-13-1117; 9-24-14; Hixson, K.)

*Wymer v. Hutto*, 2014 Ark. App. 497 [**evidence; change in custody**] On appeal from a judgment awarding custody of the parties' child to the appellee mother, the appellant father alleged that the trial court improperly limited his introduction of evidence and that the court erred in finding that it was in the best interest of the child to grant custody to the mother. The Court of Appeals did not review the evidentiary point because the appellant failed to proffer the testimony that he claimed should have been allowed. Secondly, the appellant argued that the court erred in awarding primary physical custody of the child to the appellant mother. The court found that the mother's remarriage

and her move resulted in a material change in circumstances, which the appellant did not contest. Finally, the appellant claims that the trial court erred in finding that it was in the child's best interest to award primary physical custody to the appellee. The Court said that its review of the evidence showed that both parents are good, loving parents who had attempted to maintain a true joint custody approach. But the trial court determined that it was in the child's best interest to place custody with the appellee mother, and the Court of Appeals held that was not clear error. The decision was affirmed. (McGowan, M.; No. CV-14-170; 9-24-14; Whiteaker, P.)

*Dorrell v. Dorrell*, 2014 Ark. App. 496 [**child custody; medical expenses**] When the parties divorced in 2009, their consent decree provided that joint custody be awarded for their then-two-year-old child. The decree provided that the parties would agree on school choice at the proper time, depending on where each was living then. The appellant father filed a petition for change of custody within months of the consent decree, but never took any action on his petition. In 2013, the appellee mother counter-petitioned for change of custody and sought to have primary custody placed with her, alleging that it was time for the child to begin kindergarten and that the parties could not agree on a school, as contemplated by the consent decree. The circuit court granted her counter-petition and found that it was in the best interest of the child for her mother to have primary custody, and the father appealed. On appeal, the appellant contends the circuit court erred in (1) destroying joint custody in light of a new statutory provision favoring joint custody; (2) finding it to be in the child's best interest to place custody with the mother; and (3) not awarding the appellant judgment on unpaid medical expenses. Because the appellant made procedural errors, the Court of Appeals was unable to reach the first and third arguments the appellant raised. On the remaining issue, whether the circuit court erred in finding it in the child's best interest to modify the joint-custody arrangement and award primary custody to the appellee mother, the Court of Appeals found that the circuit court did not err. The circuit court had carefully considered the time each party had to devote to the child given their respective jobs, the extended family in close proximity to the mother and child in Arkansas, their financial situations, and the schools each parent favored for the kindergarten child. The Court of Appeals, finding no error, affirmed the trial court. (Keaton, E.; No. CV-13-1110; 9-24-14; Whiteaker, P.)

*Phillips v. Phillips*, 2014 Ark. App. 486 [**contempt; visitation; attorney's fees**] The appellant non-custodial mother appealed two circuit court orders finding her in contempt, limiting her visitation, and ordering her to pay the appellee's attorney's fees. Under the original custody order, the appellee father had custody of the parties' three minor children and the appellant had visitation every other weekend, on specified holidays, and in the summer. The appellant was subsequently found in contempt of court, was sentenced to thirty days in jail with twenty-eight days suspended, and was limited to supervised visitation of four hours every other Saturday and Sunday for thirty days, with a provision that if no further incidents occurred during the thirty days, the supervised visitation would be every other weekend. Five months later, the visitation was again limited. Within three months of that order, the appellee filed another motion for contempt and to terminate visitation. Two hearings were held, at which the appellee testified and presented exhibits about appellant's negative communications to him and the children. The circuit court found her in contempt and sentenced her to twenty-eight days in jail, further limited her visitation, and ordered her to pay \$2,500 in attorney's

fees. For her first issue, appellant claims the circuit court had no authority to impose the suspended sentence of 28 days of incarceration. The Court of Appeals said the court did not err on this issue. A circuit court cannot indefinitely suspend a contempt sentence, but it can conditionally postpone it. The Court also found the punishment was not too severe, particularly in light of the history of the case. The circuit court gave the appellant “multiple and consistent prior warnings and sanctions.” The Court of Appeals also found that the record contains sufficient evidence to support the circuit court’s decision to further limit her visitation. The Court said “that this is an example of an extraordinary case where the circuit court’s ruling severely curtailing visitation should be upheld” in order to prevent the children’s exposure to appellant’s pattern of communication “objectively and specifically intended to undermine and erode the children’s respect and love for appellee and his family.” The appellate court did not reach the appellant’s argument on the issue of attorney’s fees because she failed to raise it below. The decision was affirmed. (Herzfeld, R.; No. CV-14-180; 9-24-14; Gladwin, R.)

## **PROBATE**

*Doran v. Arkansas Department of Human Services*, 2014 Ark. App. 505 [**adult protective custody**] The appellant appealed from an order committing her to the protective custody of the Arkansas Department of Human Services (DHS). She argues that the circuit court erred in finding (1) that the evidence showed by clear and convincing evidence that she was in need of long-term placement in the custody of DHS, and (2) that institutional care was the least restrictive means of placement. In affirming, the Court of Appeals reviewed the facts, the extensive testimony, and the Adult Maltreatment Custody Act. The Court found that the evidence clearly showed that the appellant was neglecting herself, that her situation presented an imminent danger to her health or safety, and that she was unable to provide for her own protection from maltreatment, specifically self-neglect, because of her mental and physical ailments. The Court found that the circuit court did not clearly err in granting DHS’s petition for long-term custody. The argument that the court erred in failing to determine whether institutional care was the least restrictive method for appellant’s protection was not raised before the trial court, so the Court did not consider it on appeal. (Cox, J.; No. CV-13-770; 9-24-14; Brown, W.)

## **JUVENILE**

*X.O.P v. State*, 2014 Ark. App. 424 [**Delinquency**] The state charged the juvenile with rape; however, the court found him delinquent for second-degree sexual assault. Appellant argued his due process rights were violated because he was not given notice that he was being accused of second-degree assault. Second-degree assault is a lesser-include offense of rape. Appellant is entitled to notice but cannot claim surprise when the only issue in dispute was forcible compulsion and is an element in both crimes. “When the proof offered supports a conviction on a lesser included offense, but not the offense the accuse was convicted of, we may reduce the punishment.” (Medlock, M.; CV13-928; 8-27-14; Walmsley, B.)

*McHenry v. Ark. Dep't of Human Services*, 2014 Ark. App. 443 [**No Reunification Services**]

After the grandparents' guardianship and the mother's parental rights were terminated in May 2013, the circuit court ordered the DHS to develop an appropriate case plan with the father and to conduct a staffing for him. Seven months later, the court granted DHS's Motion for No Reunification Services after finding that the children had been out of the custody of the father for almost four years. Although the father has not been included in the case plan during the 21 month duration of the case, the father had consistently attended hearings. He did not request custody or make any significant attempts to regain custody of the children up to the point where the court terminated rights of the custodians and the mother. [**aggravated circumstances**] The circuit court found aggravated circumstances based on little likelihood of successful reunification. Although the Court of Appeals acknowledged that the father could not be accountable for knowing all of the "ins and outs" of DHS proceedings, it was clear that he could have demonstrated a stronger interest in shifting custody to himself and finding out what he needed to do to make that happen and his efforts came too late. (Wilson, R.; CV-14-214; 9-3-14; Glover, D.)

*Whitt v Ark. Dep't of Human Services*, 2014 Ark. App. 449 [**Review - permanent custody w/ mother**] Appellant, father who had legal custody of the children at the time of removal, appealed a review order granting permanent custody of the children to the mother and closing the case. He argued that placement of the children with the mother was contrary to their best interest. Both the DHS and the AAL agreed with appellant on this issue. [**insufficient evidence**] The Court of Appeals found that there was not enough evidence in front of the circuit court to make such a decision. The Court of Appeals noted that there were numerous issues with the mother's living situation: (1) she was living with an individual recently placed on probation for child neglect and the court did not inquire into the factual basis of the case and in fact ordered him to supervise the father's visits, (2) the mother had not completed a court ordered psychological evaluation, (3) she was not working and there was not testimony that she could support four children, and (4) there was no specific testimony about her living situation. The Court of Appeals reversed and remanded. (Zimmerman, S.; CV-14-6; 9-3-14; Wood, R.)

*Villasaldo v. Ark. Dep't of Human Services*, 2014 Ark. App 465 [**TPR - insufficient evidence**]

The juvenile was adjudicated DN due to physical abuse (skull fracture and several broken ribs) and both parents' failure to protect their son in September 2011. At the TPR hearing in 2013, the trial court found that the child had been out of the parents' custody for 22 months; that Dr. Farst's testimony that the child's injuries were the result of child abuse was credible; that the Appellant was the primary caregiver; and that she did not appeal the court's prior finding that she did not protect her son. The trial court noted that given that the injuries to the child could have endangered the life of the child, there would have not been any requirement of the Department to provide 12 months of services and the parents were given considerably more than was required by law to give them the opportunity to have the child returned. The trial court further found that while the mother technically complied with the case plan, the condition that caused removal was not resolved given that the identify of the person who caused the injuries was still unknown and the mother's lack of empathy regarding the injuries posed a significant risk of harm. Appellant's only argument was the sufficiency of the evidence pertaining to a ground cited by the trial court's order to support

termination that was not pled in the petition by the DHS. The Court of Appeals noted that the court could not rely on a ground not alleged in the petition, but affirmed based on sufficient evidence to support other grounds pled and that appellant did not challenge. The appellate court also noted that the appellant failed to appeal the adjudication order in which the trial court found that she failed to protect the juvenile from abuse; therefore, that fact had been established. (Hendricks, A; CV-13-834; 9-17-14; Walmsley, B.)

*Moses v. Ark. Dep't of Human Services*, 2014 Ark. App. 466 [**TPR - incarceration**]

The juveniles were placed in foster care on two separate occasions due to multiple unexplained bone fractures while in the mother's custody. The father was incarcerated and not involved in the incidents of child abuse. Although the circuit court terminated parental rights on three statutory grounds, only one of the grounds was pled in the petition by the DHS and they did not move to conform the pleadings to the proof. Therefore, the Court of Appeals only considered the ground pled by the DHS (incarceration for a substantial period of the juvenile's life). In affirming the decision, the Court of Appeals noted that the court looks at the length of the prison sentence, not the potential release date in determining whether it is a substantial period of the juvenile's life and that the incarceration statutory ground does not require DHS to provide services to Moses while he is in prison as a prerequisite to termination or to contemplate what it will do when he is released. [**best interest/potential harm**] In affirming the potential harm factor, the Court of Appeal's noted that the finding was based primarily on the determination that the father "has a significant history of violence including physical abuse to the mother and a police officer." (Sullivan, T.; CV-14-304; 9-17-14; Harrison, B.)

*Tuck v. Ark. Dep't of Human Services*, 2014 Ark. App. 468 [**TPR**]

The children were removed in December 2012 due to the mother's arrest for DWI and endangering the welfare of a minor. The father was incarcerated at the time of the incident. The circuit court based its termination on five statutory grounds. [**12 month failure to remedy**] On the ground that the children were out of the appellants' custody for more than twelve months and despite services the appellants' failed to remedy the condition that caused removal, the mother testified that she was arrested for another DWI eight months after the children were removed and the circuit court expressed concern that attending AA alone was not sufficient to address the mother's ongoing problem. The Court of Appeals found that this ground was not clearly erroneous regarding the mother. [**subsequent factors**] Appellants argued that the "subsequent factors" ground was not proven by clear and convincing efforts. The evidence demonstrated that with regard to the mother, issues that arose subsequent to the filing of the petition included her mental-health issues and her refusal to take her medication, her lack of employment until one month prior to the TPR hearing and her unstable housing. [**incarceration**] With regard to the father, his parole was revoked during the pendency of the case, was in prison at the time of the TPR hearing and his release date was uncertain. The father did not argue that his sentence was not a substantial period of the children's lives, but instead focused on his testimony that he would be released within a month or two. Given that his release was not assured and he had previously been released and violated conditions of parole twice, the Court of Appeals did not find that this ground was clearly erroneous. [**evidence**] The Appellants also argued that the circuit court erred by not allowing testimony regarding DHS's efforts to place

the children with a relative; specifically, that if a relative is willing to take the child it might not be in their best interest to terminate parental rights. [**jurisdiction**] Additionally, Appellants argued that the TPR hearing was held more than 90 days after the Petition was filed. These last two issues were not raised below and they were barred from review by the Court of Appeals. (Smith, T.; CV-14-316; 9-17-14; Wynne, R.)

*Warren v. Ark. Dep't of Human Services*, 2014 Ark. App. 469 [**TPR - sufficiency of evidence**] Appellant, mom, argues that there was not sufficient evidence to support the termination of parental rights. The juveniles were removed from the mother's custody after the three month old suffered a subdural hematoma. [**aggravated circumstances**] Although the circuit court referenced bruising and bite marks in the termination order that were mentioned in the affidavit submitted in support of the petition for emergency custody but were not supported by any evidence at the termination hearing, evidence of the brain injury sustained by the child was part of the record and the aggravated circumstances finding was not clearly erroneous. [**subsequent factors**] The Court of Appeals found that the finding of subsequent factors was supported by evidence that the mother had only been employed for a short time; that although she had appropriate housing, she had only had it for a short time and had lost similar housing the past due to criminal activity; she continued to associate with a man who she claimed beat her while she was pregnant and became pregnant by him again. The [**best interest**] Court of Appeals found that the best interest finding was supported by evidence that the children were adoptable; that the mother lacked sufficient income to meet the needs of the children; that services had not rendered her fit to care for the children; and that one of the children had suffered a serious non-accidental injury. (Zimmerman, S.; CV-14-405; 9-17-14; Wynne, R.)

*Drake v. Ark. Dep't of Human Services*, 2014 Ark. App. 475 [**TPR - potential harm**] The only issue raised on appeal is the trial court's determination of potential harm. This termination was appealed by the father, but not the mother. The mother has had her parental rights terminated on seven children during four separate proceedings. The Appellant was married to the mother and had three children with her. Two of those children were previously terminated on and this appeal involves only the youngest child. [**evidence**] The Court of Appeals found that the trial court was entitled to consider the findings contained in the previous termination order in this case. The circuit court found that the father's failure to understand the danger that the mother posed to the children due to her mental health issues and the child's age and inability to protect himself posed a potential threat of harm if the child was returned to the father. The Court of Appeals affirmed. (Hewett, M.; CV-14-306; 9-17-14; Whiteaker, P.)

*Williams v. Ark. Dep't of Human Services*, 2014 Ark. App. 481 [**TPR - adoptability**] This case was appealed by the father, but not the mother. The Court of Appeals found that it was clearly erroneous for the circuit court to terminate parental rights for the two oldest children where there was no evidence presented to the court regarding their adoptability. The adoption specialist only testified about the four youngest children. The Court of Appeals further found that the circuit court made no finding that the absence of evidence about adoptability did not make a legal difference to the ultimate decision of what was in the best interest of the children. The Appellant did not challenge the statutory grounds for the TPR. Therefore, the Court of Appeals affirmed the

termination of the four youngest children, but reversed and remanded regarding the two oldest children. (Cook, V.; CV-14-320; 9-17-14; Wood, R.)

*Hudson v. Ark. Dep't of Human Services*, 2014 Ark. App. 487 [**Paternity, PPH**]

Appellant is a man named on a birth certificate as the child's father, who was served by publication but did not appear prior to the circuit court's placement of the child in the custody of the biological father as determined by DNA testing. Placement with biological father was affirmed by appellate court.. Appellant in this case has since appeared at the trial court and has purported to appeal the paternity order and several orders of the circuit court related to the DN case. He was not a party to these cases, but argued that he was not served and these orders should be set aside. The Court of Appeals found that the circuit court had previously granted Appellant's motion and set aside the paternity order because appellant was not properly served and held the case open for a new determination of paternity and that no hearing has yet been held on that issue. Therefore, the appeal is not ripe for determination. Appellant's argument's depend on his status as parent to the child whom he has not seen in seven years. (Zimmerman, S.; CV-14-195; 9-24-14; Pittman, J.)

*Duncan v. Ark. Dep't of Human Services*, 2014 Ark. App. 489 [**TPR - statutory grounds**]

The Court of Appeals found that the circuit court's finding regarding all three statutory grounds for termination were clearly erroneous. [**failure to remedy**] Because of the mother's compliance with the case plan and the DHS's delay in making referrals for services, the Court of Appeals found that it was clearly erroneous to find that she had not remedied the conditions that caused removal and to find that additional services would not result in successful reunification. The Court of Appeals noted that the evidence before the court was that the mother had separated and was living independently from the father as ordered by the court and that she was in compliance with the case plan and making progress in therapy. [**aggravated circumstances**] Failure to resolve issues were the result in part to DHS's delay. [**child support**] The findings were not supported by the record . There was no evidence before the circuit court about the order of child support or the payments made by the appellant. (Medlock, M.; CV-14-302; 9-24-14; Walmsley, B.)

*Ward v. Ark. Dep't of Human Services*, 2014 Ark. App. 491 [**DN Adjudication**]

The children were removed after the three month old was diagnosed with a skull fracture and the explanations provided by the parents were at variance with the injuries. The Court of Appeals found appellants' arguments without merit. Specifically, where the circuit court's written order only indicates that the child was abused, but the judge clearly indicated at the hearing that the finding of abuse was based on an injury at variance with the history given and the finding was supported by testimony at the adjudication hearing, the Court of Appeals may utilize the oral pronouncements to determine the intent behind the written orders. The Court of Appeals found that although the person who caused the injury to the child was unknown, since the child was in the legal custody of the parents at the time of the injury, it necessarily follows that the injury was caused either by the appellants or by someone they entrusted with the child's care. (Wilson, R.; CV-14-319; 9-24-14; Wynne, R.)

*Sawyer v. Ark. Dep't of Human Services*, 2014 Ark. App. 495 [**TPR - Motion for Continuance**] Appellant does not appeal the termination finding, but argued that the circuit court erred in denying her motion for continuance on the day of the termination hearing. Where the Appellant asserted her Fifth Amendment right for the first time at the TPR hearing and asked for a continuance due to her pending criminal charges, but did not appeal the adjudication order or termination of reunification services based on the finding that she had submitted the juvenile to aggravated circumstances, the Court of Appeals did not find that the circuit court had abused its discretion in denying the continuance. (King, K.; CV-14-323; 9-24-14; Glover, D.)

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

*Harris v. Ark. Dep't of Human Services*, 2014 Ark. App. 447 (Warren, J.; CV-14-215; 9-3-14; Hixson, K.)

*Treadwell v. Ark. Dep't of Human Services*, 2014 Ark. App. 457 (Smith, T.; CV-14-22; 9-10-14; Vaught, L.)

*Wilhite v. Ark. Dep't Human Services*, 2014 Ark. App. 461 (Hewett, M.; CV-14-303; 9-17-14; Gladwin, R.)

*Lindsay v. Ark. Dep't Human Services*, 2014 Ark. App. 464 (Zimmerman, S.; CV-14-259; 9-17-14; Pittman, J.)

*Ware v. Ark. Dep't Human Services*, 2014 Ark. App. 467 (Smith, T.; CV-14-372; 9-17-14; Harrison, B.)

*Miles v. Ark. Dep't of Human Services*, 2014 Ark. App. 477 (Smith, T.; CV-14-336; 9-17-14; Vaught, L.)

*Holmes v. Ark. Dep't of Human Services*, 2014 Ark. App. 482 (Hewett, M.; CV-14-356; 9-17-14; Brown, W.)

*Dawson v. Ark. Dep't of Human Services*, 2014 Ark. App. 490 (Spears, J.; CV-14-395; 9-24-14; Walmsey, B.)

*Compton v. Ark. Dep't of Human Services*, 2014 Ark. App. 501 (Harrod, L; CV-14-322; 9-24-14; Hixson, K.)

*Williams v. Ark. Dep't of Human Services*, 2014 Ark. App.503 (Cook, V.; CV-14-435; 9-24-14; Wood, R.)

*White v. Ark. Dep't of Human Services*, 2014 Ark. App. 506 (Sullivan, T.; CV-13-1161; 9-24-14; Brown, W.)

*Singleton v. Ark. Dep't of Human Services*, 2014 Ark. App. 511 (Sullivan, T; CV-14-458; 9-24-14; Walmsley, B.)

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

*Poss v. Ark. Dep't of Human Services*, 2014 Ark. App. 514 (Zimmerman, S.; CV-14-203; 9-24-14; Harrison, B.) (The no-merit brief was affirmed and motion to withdraw was granted for the mother, but re-briefing was ordered on behalf of the father.)