

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

OCTOBER, 2012
VOLUME 20, NO. 2

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

Reminder: Administrative Judges are to be selected by February 1st.

From Administrative Order 14: “ In each judicial circuit in which there are two or more circuit judges, there shall be an administrative judge.

a. Means of Selection. On or before the first day of February of each year following the year in which the general election is held, the circuit judges of a judicial circuit shall select one of their number by secret ballot to serve as the administrative judge for the judicial circuit. In circuits with fewer than ten judges the selection must be unanimous among the judges in the judicial circuit. In circuits with 10 or more judges the selection shall require the approval of at least 75% of the judges. The name of the administrative judge shall be submitted in writing to the Supreme Court.... An administrative judge shall be selected on the basis of his or her administrative skills.

b. Term of Office. The administrative judge shall serve a term of two years and may serve successive terms.”

Administrative Plans are due July 1, 2013.

CRIMINAL

Federick v. State, 2012 Ark. App. 552 [**speedy trial**] Appellant filed a motion to dismiss the charges against him based on speedy-trial violations after 713 days had passed since his arrest. After the trial court determined that 435 days should be excluded from the speedy-trial calculations, it denied appellant's motion to dismiss. On appeal, the Court of Appeals concluded that because only 278 days counted towards appellant's speedy-trial time, and that time was less than the twelve months that the State is given to bring a defendant to trial, appellant's speedy-trial rights were not violated and the circuit court did not err by denying the motion to dismiss. (Arnold, G.; CACR 12-30; 10-3-12; Hoofman, C.)

Eagle v. State, 2012 Ark. 371 [**speedy trial**] After subtracting the excludable time from the days that elapsed between appellant's arrest and the filing of his speedy-trial motion, it was determined that only 273 days had elapsed. Thus, the speedy-trial rule was not violated and the circuit court did not err in denying appellant's motion to dismiss. (Wright, H.; CR 12-236; 10-4-12; Danielson, P.)

Gulley v. State, 2012 Ark. 368 [**admission of evidence; authentication**] Because there was sufficient evidence to authenticate several text messages that the State sought to introduce during appellant's trial, the circuit court did not abuse its discretion by admitting the messages. (Wright, R.; CR 11-271; 10-4-12; Brown, R.)

Wallace v. State, 2012 Ark. App. 571 [**revocation**] Because the period of the suspended sentence had expired prior to the State filing a petition for revocation, the trial court was without authority to revoke appellant's suspended imposition of sentence. (Tabor, S.; CACR 11-1240; 10-10-12; Glover, D.)

Vilayvanh v. State, 2012 Ark. App. 561 [**motion for mistrial**] The trial court did not abuse its discretion when it denied appellant's motion for a mistrial which was based upon an alleged discovery violation. [**mental evaluation**] The trial court did not err in failing to issue an order *sua sponte* that would have required appellant to undergo a second psychological exam. (Tabor, S.; CACR 12-132; 10-10-12; Pittman, J.)

Standridge v. State, 2012 Ark. App. 563 [**error coram nobis**] The circuit court did not abuse its discretion when it denied appellant's petition requesting a writ of *error coram nobis*. [**disqualification**] Appellant failed to establish that a conflict of interest would have prevented the prosecutor from participation in appellant's case. Additionally, there was no evidence that appellant was the victim of an overzealous prosecution motivated by the prosecutors's alleged bias against appellant. Thus, the trial court did not err in denying appellant's motion to disqualify the prosecutor in appellant's case. (McCorkindale, R.; CACR 12-25; 10-10-12; Gladwin, R.)

Craig v. State, 2012 Ark. 387 [**pedophile exception**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b), it admitted evidence of appellant's prior conviction. (Storey, W.; CR 12-128; 10-11-12; Gunter, J.)

Huff v. State, 2012 Ark. 388 [**sufficiency of the evidence; kidnapping**] There was substantial evidence to support appellant's conviction. [**Ark. Code Ann. § 16-97-103**] The trial court did not

abuse its discretion when it admitted testimony of uncharged-similar conduct during the sentencing phase of appellant's trial pursuant to Ark. Code Ann. § 16-97-103. (Wright, H.; CR 11-1071; 10-11-12; Baker, K.)

Brown v. State, 2012 Ark. App. 593 [**clerical errors; judgments**] The notation on appellant's judgment and disposition order that appellant had been found guilty of felony criminal mischief was a clerical error. Clerical errors do not prevent the enforcement of a judgment but rather require the court to correct the error. (Johnson, L.; CACR 12-247; 10-24-12; Abramson, R.)

Hughes v. State, 2012 Ark. App. 586 [**hearsay; harmless error**] Although the trial court allowed the State to introduce hearsay evidence, the evidence was cumulative to other evidence, which was properly admitted. Thus, any potential error that may have resulted from the admission of the hearsay testimony was harmless. (Hill, V.; CACR 12-175; 10-24-12; Robbins, J.)

Caery v. State, 2012 Ark. App. 583 [**Ark. R. Evid. 403**] It was not an abuse of discretion for the trial court to admit testimony regarding appellant's post-crime conduct because the evidence: (1) informed the jury of the facts surrounding appellant's crimes; (2) established how appellant was taken into custody; and (3) showed appellant's consciousness of guilt. (Piazza, C.; CACR 12-144; 10-24-12; Gladwin, R.)

Andrews v. State, 2012 Ark. App. 597 [**sufficiency of the evidence; theft; first-degree criminal mischief**] Although the State failed to present substantial evidence to support appellant's convictions of theft and first-degree criminal mischief, there was sufficient evidence to support convictions for misdemeanor theft of property and misdemeanor criminal mischief. Thus, the appellate court modified appellant's convictions accordingly. [**jury instructions**] The version of AMI Crim. 2d 9202 that was used in appellant's case did not accurately reflect the law. (Erwin, H.; CACR 12-274; 10-24-12; Martin, D.)

Wells v. State, 2012 Ark. App. 596 [**sufficiency of the evidence; attempted first-degree murder; committing a terroristic act**] There was substantial evidence to support appellant's convictions. [**motion to suppress**] Based upon a review of the totality of the circumstances, the appellate court concluded that appellant's custodial statement was voluntarily given. Thus, the trial court did not err when it denied appellant's motion to suppress the statement. [**Ark. R. Evid. 404 (b)**] Rule 404 (b) applies to evidence of subsequent bad acts as well as evidence of prior bad acts. (Shirron, P.; CACR 11-829; 10-24-12; Martin, D.)

Gordon v. State, 2012 Ark. 398 [**expert witness**] Because nothing in the witness's history or background indicated that he was qualified to testify as an expert on a particular matter, the trial court did not abuse its discretion when it prevented the witness's testimony on the subject. (Weaver, T.; CR 12-7; 10-25-12; Hannah, J.)

Brown v. State, 2012 Ark. 399 [**recusal**] The circuit judge was not required to recuse from appellant's case based solely on the fact that she had been the prosecutor in an earlier case in which appellant was involved. [**pedophile exception**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b), it admitted evidence of appellant's prior bad

acts. (Hearnsberger, M.; CR 12-182; 10-25-12; Corbin, D.)

Arnold v. State, 2012 Ark. 400 [**Ark. R. Evid. 606**] Pursuant to Rule 606(b) of the Arkansas Rules of Evidence, the trial court properly excluded testimony from a former juror regarding her understanding of the jury instructions that she had been given during appellant's trial. (Griffen, W.; CR 12-378; 10-25-12; Danielson, P.)

Magness v. State, 2012 Ark. App. 609 [**sufficiency of the evidence; felon in possession of a firearm**] There was substantial evidence to support appellant's conviction. [**mistrial**] The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon a pretrial conversation between witnesses and jurors. [**search warrant**] To uphold the validity of an affidavit made in support of a search warrant, it is not necessary that the affidavit be completely without inaccuracies as long as any inaccuracies are relatively minor when viewed in the context of the totality of the circumstances. [**admission of evidence**] The trial court did not abuse its discretion when it admitted into evidence pornographic material, which was found in plain view at appellant's cabin. (Reynolds, D.; CACR 12-71; 10-31-12; Wynne, R.)

Johnson v. State, 2012 Ark. App. 615 [**sufficiency of the evidence; theft by receiving**] There was substantial evidence to support appellant's conviction. [**jurisdiction**] When any person is liable to be prosecuted as the receiver of any personal property that may have been feloniously stolen, he may be indicted, tried, and convicted in any county where he received or had the property, notwithstanding that the larceny may have been committed in another county. (Cooper, T.; CACR 12-394; 10-31-12; Martin, D.)

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

McClard v. State, 2012 Ark. App. 573 (first-degree murder) CACR 12-93; 10-10-12; Abramson, R.

Jones v. State, 2012 Ark. App. 581 (delivery of cocaine) CACR 11-994; 10-24-12; Pittman, J.

Rainer v. State, 2012 Ark. App. 588 (second-degree murder) CACR 12-80; 10-24-12; Gruber, R.

Fraser v. State, 2012 Ark. App. 598 (possession of a firearm by certain persons) CACR 12-380; 10-24-12; Hoofman, C.

Smith v. State, 2012 Ark. App. 602 (residential burglary; theft of property) CACR 11-791; 10-31-12; Vaught, L.

Lands v. State, 2012 Ark. App. 616 (second-degree murder, first-degree battery) CACR 11-1291; 10-31-12; Hoofman, C.

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:

Pfeifer v. State, 2012 Ark. App. 556 (probation) CACR 12-140; 10-3-12; Brown, W.

Edwards v. State, 2012 Ark. App. 551 (suspended sentence) CACR 12-9; 10-3-12; Abramson, R.

Muldrew v. State, 2012 Ark. App. 568 (suspended sentence) CACR 12-136; 10-10-12; Gruber, R.

Graydon v. State, 2012 Ark. App. 587 (probation) CACR 12-38; 10-24-12; Wynne, R.

Winston v. State, 2012 Ark. App. 608 (suspended sentence) CACR 12-467; 10-31-12; Robbins, J.

CIVIL

Houchins v. Home Care Professionals, 2012 Ark. App. 553 **[jury misconduct]** Party failed to show that bailiff improperly communicated with the jury with regard to a question. Likewise, party failed to show juror misconduct with regard to response to voir dire question, exposure to extraneous information, and following the jury instructions. **[criminal convictions]** Court properly excluded evidence of employee's criminal convictions because under Rule 609 it was more than 20 years old. (Johnson, L.; CA 11-1247; 10-3-12; Hoofman, C.)

Cannady v. St. Vincent Infirmary Med. Center, 2012 Ark. 369 **[invasion/privacy]** The claim for invasion of privacy does not survive the death of the decedent. (Johnson, L.; SC 11-1298; 10-4-12; Gunter, J.)

Ark. Foundation for Med. Care v. Saline County Circuit Court, 2012 Ark. 372

[certiorari/discovery] Order at issue involving the Peer Review Improvement Act (reviewing health care providers under Medicare programs) is a mere discovery order; consequently, an appeal provides an adequate remedy and petition for writ of certiorari must be denied. (Arnold, G.; SC 12-88; 10-4-12; Danielson, P.)

DIRECTV, Inc. v. Murray, 2012 Ark. 366 **[arbitration]** Company failed to prove that customer assented to the arbitration provision or that customer's cancellation was not proper. Customer cancelled her service so quickly that she did not assent to the arbitration agreement by her continued use of service. **[class certification issues]** Class was properly certified in spite of objections over typicality, predominance, numerosity, and superiority requirements. (Johnson, K.; SC 11-1061; 10-4-12; Corbin, D.)

Acuna v. Watkins, 2012 Ark. App. 564 **[prescriptive easement]** The public acquired a prescriptive easement to use a road. The placement of cattle guards across the easement interferes with its use and is prohibited. **[restrictive covenant]** Purported covenant regarding fence is unduly vague and not enforceable. (McCormick, David.; CA 12-117; 10-10-12; Gladwin, R.)

Voltage Vehicles v. Ark. Motor Vehicle Commission, 2012 Ark. 386 **[admin. appeal]**

Commission failed to make sufficient findings of fact regarding issue of what constituted the current model year in order for court to conduct a judicial review. (Kilgore, C.; SC 12-211; 10-11-12; Brown, R.)

City of Marion v. City of West Memphis, 2012 Ark. 384 **[annexation]** Legal description used in annexation election was sufficient. (Hill, V.; SC 12-203; 10-11-12; Hannah, J.)

Harrill and Sutter v. Kosin, 2012 Ark. 385 **[Rule 60]** Motion to set aside judgement under Rule 60 based upon fraud was not established. **[fees]** A successful defendant in a breach of contract case may be the prevailing party for purposes of the award of attorney's fees, but the amount awarded must be adjusted because some of the amounts are duplicative. (Williams, L.; SC 12-51; 10-11-12; Corbin, D.)

Johnson v. Windstream, 2012 Ark. App. 590 **[summary judgment/ACRA action]** Court must evaluate Arkansas Civil Rights Cases using the *McDonnell Douglass* framework: prima facie case of discrimination; a legitimate non-discriminatory reason, and is reason a pretext for discrimination. Court must explain its ruling on each point. (Moody, J.; CA 12-143; 10-24-12; Gruber, R.)

Young, Adm'x. v. Kajkenova, 2012 Ark. App. 594 **[striking expert]** Striking of expert witness was an appropriate sanction for discovery violation. (Moody, J.; CA 11-1170; 10-24-12; Abramson, R.)

Thompson v. City of Bauxite, 2012 Ark. App. 580 **[annexation]** Filing an action in circuit court to challenge an annexation (in contrast to an appeal of the county court's annexation order) must be filed within 30 days of the order. (McAllister, B.; CA 12-11; 10-24-12; Vaught, L.)

Smith and Muldrew v. Heather Manor Care Center, 2012 Ark. App. 584 **[resident's right claim]** There is a proximate causation element in a resident's rights action that an infringement of a right caused the injury. **[Batson]** Explanations for the striking of jurors was race neutral and other blacks were seated on the jury; consequently, there was no showing of a violation of Batson. **[negligence]** Parties were properly dismissed because evidence does not show that various entities were negligent or contributed to the injuries. (Culpepper, D.; CA 12-5; 10-24-12; Gladwin, R.)

Harvest Construction General Contracting, Inc. v. LTCO Construction, Inc., 2012 Ark. App. 610 **[discovery/sanctions]** Court did not abuse its discretion in striking defendant's answer because of discovery violations. (Lindsay, M.; CA 11-1237; 10-31-12; Wynne, R.)

McMullen v. Healthcare Staffing Associates, Inc., 2012 Ark. App. 617 **[summary judgment/borrowed servant doctrine]** There are outstanding factual issues regarding who had the right to exercise control over the "borrowed" servants. (Shirron, P.; CA 11-1136; 10-31-12; Hoofman, C.)

Withrow v. Brissette, 2012 Ark. App. 611 **[employment]** Person was acting within his employment authority when he fired employers. Fired employees have no cause of action for

interference with contract because one cannot be held liable for interfering with own contract. Defendant was acting for the employer when the employees were terminated. (Griffen, W.; CA 12-54; 10-31-12; Wynne, R.)

Capital Zoning District Comm. v. Cowan, 2012 Ark. App. 619 [**admin. appeal**] There was substantial evidence to support Commission's decision that fence height was in violation of building regulations. (Griffen, W.; CA 12-192; 10-31-12; Brown, W.)

DOMESTIC RELATIONS

Lucas v. Jones, 2012 Ark. 365 [**adoption**] The circuit court entered a decree of adoption of the appellant's six-year-old daughter by the appellee maternal grandparents. Although the appellant argued that, as an indigent, she was entitled to appointed counsel in the adoption case, she failed to raise that issue clearly with the circuit court or to ask for a specific ruling by the court on the issue. The Supreme Court noted the evidence showed that the appellant had failed significantly without justifiable cause to communicate with the child or to support the child for at least one year, which is a statutory provision that is strictly construed. The Supreme Court affirmed the decree of adoption. (Lindsay, M.; No. SC 12-133; 10-4-12; Hannah, J.)

Atchison v. Atchison, 2012 Ark. App. 572 [**marital property--retirement account**] The appellant disputed the formula the court used to determine the amount she received from the appellee's retirement account, which included both pre-marital and marital contributions. The Court of Appeals noted that the appellant cited numerous appellate decisions in which courts used different formulas in dealing with distributions of pensions. The court affirmed the decision of the trial court, stating that by using the formula it chose, the trial court took into account that the size of the premarital contribution allowed the account to grow more than it would have otherwise been able to do. (Clark, D.; No. CA12-105; 10-10-12; Glover, D.)

Coker v. Coker, 2012 Ark. 383 [**divorce--general indignities; attorney's fees**] The appellee filed for divorce on the ground of general indignities. The trial court found that "[t]he Defendant was having an ongoing affair which [led] to Plaintiff's condition in life becoming intolerable." The Court of Appeals reversed and dismissed the divorce. On review, the Supreme Court affirmed and said, "While adultery can give rise to indignities that may cause the spouse's condition in life to become intolerable, the act of adultery itself is a separate distinct cause for divorce under the statute....The two causes for divorce should not be confused." The court reviewed the requirements for granting a divorce for general indignities, and noted that in this case the appellee offered evidence of her husband's rudeness, unmerited reproach, and studied neglect. The court said evidence was presented to show the continuous and permanent conduct arising from a long-term adulterous relationship, evidence constituting "settled hate." The court found that the circuit court did not clearly err in finding his conduct constituted such indignities to her as to render her condition intolerable. On the issue of attorney's fees, the court reversed and remanded for the circuit court to consider the request for fees and expenses in light of the appellee's failure to file an affidavit and request a specific sum except for a statement in her

proposed findings of fact and conclusions of law. (Williams, L.; No SC11-1257; 10-11-12; Hannah, J.)

Madden v. Madden, 2012 Ark. App. 582 [**child custody**] The Court of Appeals affirmed the change in custody from the appellant mother to the appellee father based upon a material change in circumstances and the best interest of the child. (Spears, J.; No. CA11-1230; 10-24-12; Hart, J.)

Byrd v. Byrd, et al., 2012 Ark. App. 589 [**child support**] The appellant appealed from the circuit court's modification of his child-support obligation. In affirming the circuit court's decision, the Court of Appeals noted that, given the evidence presented—or not presented—by the appellant to support his statements regarding his job search and his earning capacity, the court did not abuse its discretion in imputing income to the appellant. Regarding the appellant's argument that the court should have been required to find that he intended to evade his parental responsibilities before it could impute income to him, the court said the law governing imputed income was set by the Arkansas Supreme Court in case law and in Administrative Order No. 10, and that it has no authority to overrule, amend, or expand it. (Womack, S.; No. CA12-107; 10-24-12; Gruber, R.)

Mathis v. Estate of Doyle McSpadden, 2012 Ark. App. 599 [**paternity; res judicata**] Based upon res judicata, the circuit court dismissed the appellant's complaint to establish paternity against the appellee Estate of Doyle McSpadden. The appellant's mother had filed a 1980 bastardy complaint against Doyle McSpadden, resulting in a finding in county court that he was the appellant's father. It was subsequently dismissed with prejudice on appeal because her mother failed to appear at the hearing. Appellant claimed that she was not a party or in privity to a named party in that action. The Court of Appeals found that its holding in a previous case governed this case and affirmed on that basis. *Department of Human Services v. Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991). The court held in *Seamster* that without question a bastardy action under the previous statute was brought on behalf of the child, that the child was the real party in interest, and that the action barred a subsequent paternity complaint. The court also recognized that the paternity statutes have been rewritten and currently provide specifically that the action may be filed by the child as a named party, and that the child's rights in the matter may differ from those of the mother. Although the appellant claimed the two paternity actions involved different causes of action, the remedy sought was the same, the establishment of paternity. The decision was affirmed. (Hannah, C.; No. CA12-259; 10-24-12; Hoofman, C.)

Palmer v. Palmer, 2012 Ark. App. 607 [**divorce; non-marital property**] The trial court correctly determined that the Federal Employers' Liability Act (FELA) proceeds resulting from the husband's personal-injury lawsuit were not marital property as defined under section 9-12-315, and in accordance with *Collins v. Collins*, 347 Ark. 240, 61 S.W.3d 818 (2001). The trial court concluded from the evidence and testimony that ample evidence was presented that appellee was permanently disabled, that the entire settlement was for a degree of permanent disability and future medical expenses, and was not marital property. The court noted the "depth of the approach and consideration that the trial court employed in reaching its assessment," as demonstrated by the record. (Smith, V.; No. CA12-59; 10-31-12; Gladwin, R.)

PROBATE DIVISION

Gary Howard, Individually and as Administrator of the Estate of Odis Howard, Deceased, 2012 Ark. 562 [**breach of contract; professional negligence/legal malpractice; deceit**] The appellant filed an action for breach of contract, professional negligence, and deceit against the appellee and her law firm, essentially alleging that she failed to pursue a legal-malpractice claim against another lawyer who had previously represented the appellant and his father. The jury found that although the other lawyer had committed deceit and breached his fiduciary duty to the appellant, the appellee did not agree to pursue a claim against him, and she did not act deceitfully or negligently. The appellant raised a number of issues. The Court of Appeals affirmed on most of those, but reversed attorney fee awards to a law firm because the case on which it worked sounded in tort and there was no basis for the award under section 16-22-310. The court reversed and remanded for reconsideration the fee award to another individual attorney, because the case upon which she worked may have had the same problem—not sounding primarily in contract so that there was a statutory basis for the fee. The case was affirmed in part, and reversed and remanded in part. (Duncan, X.; No. CA 11-566; 10-12; Hart, J.)

McVesting, LLC v. Heirs of Macie McGoon and Cecil R. Curren, Sr., 2012 Ark. App. 541 [**determination of heirship**] The issue was whether the appellant Arkansas limited liability company had standing to bring a petition for the determination of heirship of fifty percent of the reserved mineral rights in real property, as provided for in Ark. Code Ann. § 28-53-101. The probate court found that McVesting lacked standing. The Court of Appeals found that, under the relevant statute, McVesting is a “person,” which term includes a “corporation, partnership, or other legal entity.” As a “person” under the statute, and claiming an interest in property in Arkansas through an heir or distributee, McVay had standing to bring the petition. The court reversed and remanded for further proceedings. (Maggio, M.; No. CA 11-1246; 10-3-12; Pittman, J.)

JUVENILE

M.L.R. v. State, 2012 Ark. App. 591 [**transfer**] Appellant, at age 16 charged with one count of first-degree murder and eleven counts of terroristic act, argued that the court erred in denying her motion to transfer to juvenile court. Appellant argued that the trial court failed to consider that she might benefit from a commitment to DYS. There was testimony that she had failed to take advantage of opportunities offered to her previously in juvenile court and the trial court was not obligated to believe she would take advantage of the opportunities if the case was transferred to juvenile court. The circuit court made specific findings required by A.C.A. 9-27-318 and the finding not to transfer was not clearly erroneous. Appellant also argued that EJJ would allow her more opportunity for rehabilitation. However, the case must be transferred to juvenile court before an order to transfer as an EJJ case may be entered. (Wright, H.; CACR12-164; 10-24-2012; Glover, D.).

Cowan v. Arkansas Dept. of Human Services, 2012 Ark. App. 576 [**adoption**] Appellants who had previously cared for E.C. sought to adopt him after he was removed from their home. Appellants argued that the court erred in dismissing their petition and granting a petition of adoption to his current foster parent. A petition for adoption may be granted after a determination that the required consents have been obtained or excused and that the adoption is in the best interest of the child. DHS did not consent to appellants' adoption, nor did appellants ask for a ruling on whether DHS was unreasonably withholding its consent. Further, the evidence supported the court's finding that it was not in E.C.'s best interest to be adopted by the appellants. Evidence revealed issues with truancy, chronic head lice, inappropriate behavior and environmental neglect while in appellants' care. Appellants also argued that the court erred in requesting additional testimony by witnesses after both parties had rested. The trial court relied on Ark. R. Evid. 614 to call witnesses and that all parties are entitled to cross-examine the witness called. The appellate court noted that case law provides for such judicial discretion. "The trial judge has the right and the duty to ask questions to clear up an obscurity in the testimony or even to develop facts in regard to some feature of the case he feels has not been properly developed." (Thyer, C.; CA12-376; 10-10-2012; Hoofman, C.).

Gutierrez v. Arkansas Dept. of Human Services, 2012 Ark. App. 575 [**TPR - best interest and grounds**] Appellant argued that the trial court erred in its best interest analysis. The trial court properly considered the evidence and found that the children were very likely to be adopted. As to potential harm, there was evidence that appellant had inadequate housing and income, poor parenting skills, inappropriate visitation with the children, and continued drug usage. Appellant's children came into care as a result of her arrest for drug related offenses and her drug problems escalated while her children were in her care. She also resisted attempts for a drug assessment which delayed services. Although appellant appeared to be getting her life together at the time of the termination, the trial court did not err in considering appellant's overall compliance with the case plan and court orders in finding sufficient grounds to terminate. (Elmore, B.; CA12-466; 10-10-2012; Martin, D.).

Ogden v. Arkansas Dept. of Human Services, 2012 Ark. App. 577 [**TPR - relative placement**] Appellants argued that the trial court erred in terminating their parental rights because the least restrictive alternative was to place custody of their child with her maternal grandmother citing A.C.A. 9-27-355. However, this argument has previously been rejected and is not relevant to termination proceedings. Appellants appealed from a termination order, not a permanency planning order. (Zimmerman, S.; CA12-526; 10-10-2012; Brown, W.)

Lowell v. Arkansas Dept. of Human Services, 2012 Ark. App. 547 [**TPR - relative placement**] Appellants argued that the trial court erred in terminating their parental rights because the least restrictive alternative was to place custody of their child with the paternal grandparents, citing A.C.A. 9-27-355. However, this argument citing preferential placement with relatives has previously been rejected and we will not overrule those decisions. In addition, a home study was conducted on the grandparent's home in April of 2011 and was not approved. The grandmother also withdrew her home as a potential placement as a result of threats and conflicts with her son. (Sullivan, T.; CA12-462; 10-3-2012; Robbins, J.)

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

1. *Ward v. Arkansas Dept. of Human Services*, 2012 Ark. App. 602 (Elmore, B.; CA12-486; 10-31-2012; Vaught, L.).
2. *Hicks v. Arkansas Dept. of Human Services*, 2012 Ark. App. 545 (Sullivan, T.; CA12-360; 10-3-2012; Gladwin, R.).
3. *Gibson v. Arkansas Dept. of Human Services*, 2012 Ark. App. 554 (Branton, W.; CA 12-525; 10-3-2012; Hoofman, C.).

DISTRICT COURT

Howard v. Arkansas Cama Technology, et al, 2012 Ark. App. 567 [**district court rule 9**] [**county court appeal**] [**service of notice**]. This appeal is from a circuit court order dismissing an appeal from the county court for lack of jurisdiction. The challenge was to a tax assessment first to the Board of Equalization, then to county court and finally to circuit court in Franklin County. The notice of appeal and certified copy of the county court judgment was filed within thirty days. Defendants filed a motion to dismiss with one of the grounds being that appellants failed to strictly comply with Arkansas District Court Rule 9 regarding service of notice. The circuit court agreed that appellants failed to serve a certified copy of the notice of appeal upon counsel for all other parties. It was held that Rule 9 requires strict compliance and that subdivision (e) of Rule 9 requires service of notice of the appeal upon counsel for all other parties. Circuit court did not acquire jurisdiction. (Pearson, J.; CA12-126; 10/10/12; Wynn, R.)

Chambers v. State, 2012 Ark. 407 [**DWI**] [**confrontation clause**]. This appeal from a district court DWI conviction argues that the circuit court erred in allowing testimony regarding the administration and results of the breathalyzer test because the person who calibrated the machine was not made available to testify, which violated appellant's Confrontation Clause rights. The Supreme Court granted a petition for review of the decision by the Court of Appeals affirming the circuit court. Upon review, the Supreme Court held that the two certificates were admitted to establish the officer's authority to perform the breathalyzer test and the accuracy of the machine and that they were nontestimonial in nature. Thus, no Confrontation Clause violation occurred. Unlike the documents in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), the certifications in this case were not created for the purpose of providing evidence against any particular defendant or in the furtherance of the prosecution of a defendant. (McCallister, J.; CR12-538; 11-1-12; Gunter, J.)

EIGHTH CIRCUIT

Ondirsek v. Hoffman [**torts/punitive damages**] Tony Alamo Christian Ministries' practices, which included beating and threatening the plaintiffs, were not protected by the First

Amendment. Any error in instructing the jury affected only the battery count and was harmless in light of the fact that the verdicts on the separate outrage and conspiracy counts were sufficient to support the damages awarded. The \$3 million in compensatory damages awarded each plaintiff was not excessive in light of the prolonged and continuous mistreatment they suffered; however, while an award of punitive damages was justified by the need to punish and deter the kind of conduct which occurred here, the awards of \$30 million to each plaintiff were unconstitutional, and a ratio of 4:1 is appropriate to maintain notions of fairness and due process; the punitive damages awards are remitted to \$12 million for each plaintiff. (W.D. Ark.; # 11-3003; 10-1-12)

Dunn v. Aamodt [**Property**] District court did not err in finding defendants' short-term rental of their residential property did not violate the provisions of the Restrictive Covenants in their subdivision. (No: 12-1402; W. D. Ark.: 10-10-12)

Retro Television Network, Inc. v. Luken Communications LLC: [**contracts**] Because plaintiff did not provide any basis for concluding that Retro Television, Inc., or any of its predecessors are responsible for Equity Broadcasting's obligations under the Intellectual Property Agreement in question, the district court correctly held plaintiff failed to plead sufficient facts to state a claim for relief; similarly, plaintiff failed to allege any facts which would make Luken liable for Equity's obligations. (E.D. Ark.; 10/17/12; No: 12-1287 and No: 12-1838)