

# APPELLATE UPDATE

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## CRIMINAL

*Terrell v. State*, 2019 Ark. App. 433 [**Ark. R. Evid. 702**] The trial court did not abuse its discretion when it determined that an agent from the FBI's Cellular Analysis Survey Team was an expert witness pursuant to Ark. R. Evid. 702 and that his testimony contained scientific, technical, or other specialized knowledge that would assist the trier of fact to understand the evidence or to determine a fact in issue. The agent had been part of the Team for seven years, had been through extensive training, and had testified more than eighty times. [**Ark. R. Evid. 804**] The trial court did not err when it permitted the State to introduce the testimony of an unavailable witness through a transcript of his testimony from appellant's previous trial, which ended in a mistrial. Although appellant did not cross-examine the witness at the first trial, he had the opportunity to cross-examine the witness and he had a similar motive to develop the witness's testimony. (Fogleman, J.; CR-18-921; 10-2-19; Klappenbach, N.)

*Seyller v. State*, 2019 Ark. App. 423 [**"prior violent-felony conviction;" Ark. Code Ann. § 5-73-103**] Appellant's conviction under 18 U.S.C. § 113(a)(3) qualifies as a violent felony under Ark. Code Ann. § 5-73-101(11)(B). (Weaver, T.; CR-19-152; 10-2-19; Gruber, R.)

*Patton v. State*, 2019 Ark. App. 440 [**Ark. R. Evid. 803 (6)**] Rule 803 (6) of the Arkansas Rules of Evidence provides an exception to the hearsay rule for the admission of business records. That exception has seven requirements: (1) a record or other compilation, (2) of acts or events, (3) made at or near the time the act or event occurred, (4) by a person with knowledge, or from information transmitted by a person with knowledge, (5) kept in the course of regularly conducted business, (6) which has a regular practice of recording such information, and (7) all as shown by the testimony of the custodian or other qualified witness. In appellant's case, the trial court did not abuse its discretion when, pursuant to Ark. R. Evid. 803 (6), it admitted an invoice through the testimony of an employee to establish the amount of damages and restitution owed. The employee had been employed at the medical center where the crime occurred for ten years, had knowledge of the replacement cost of the damaged items, and was familiar with the normal billing and operations of the center. (Pope, S.; CR-19-268; 10-2-19; Murphy, M.)

*Rayburn v. State*, 2019 Ark. 254 [**evidence; sentencing**] Evidence of an appellant's prior convictions is admissible during the sentencing phase of trial as proof of the allegation that the appellant was a habitual offender. The State bears the burden of proving a defendant's prior convictions under the habitual-offender statute. A prior felony may be proved by any evidence that satisfies the circuit court beyond a reasonable doubt that the defendant was convicted or found guilty of the prior felony. Arkansas Code Annotated § 5-4-504(b) lists examples of certain documents that are sufficient to support a finding of a prior conviction or a finding of guilt. In appellant's case, during the sentencing phase, the circuit court admitted the ADC pen pack and an opinion from the Arkansas Court of Appeals as evidence of appellant's prior convictions. Although neither of these documents strictly complied with the requirements of Ark. Code Ann. § 5-4-504(b), they did satisfy the circuit court beyond a reasonable doubt under 5-4-504(a) that appellant had been found guilty of the prior felonies and it was not an abuse of discretion for the court to admit them. (Weaver, T.; CR-18-707; 10-3-19; Kemp, J.)

*Braud v. State*, 2019 Ark. 256 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon an outburst by a witness during defense counsel's cross-examination, because the outburst was elicited by defense counsel who was aware that the witness was hostile. Additionally, any prejudice that may have resulted from the outburst was cured by the court's admonition. (Piazza, C.; CR-18-1044; 10-3-19; Baker, K.)

*Coakley v. State*, 2019 Ark. 259 [**404(b)**] The trial court did not abuse its discretion when it admitted testimony about three prior events in which appellant engaged in violent acts toward the victim or the victim's brother because the evidence was independently relevant to and probative of appellant's intent as well as his motive in pointing a gun at the victim. [**jury instruction; manslaughter**] In appellant's case, the jury was instructed on murder in the first degree, justification for murder in the first degree, and manslaughter. Appellant requested an instruction on justification for manslaughter, which was denied. Appellant was convicted of murder in the

first degree. Before the jury may consider any lesser-included offense, it must first determine that the proof is insufficient to convict on the greater offense. Here, the jury determined that the proof was sufficient to convict appellant of murder in the first degree. Accordingly, it never considered the lesser-included offense of manslaughter. Because the jury never considered manslaughter, there can be no prejudice to appellant from the trial court's refusal to instruct the jury on justification for manslaughter (Haltom, B.; CR-18-706; 10-3-19; Wynne, R.)

*Scott v. State*, 2019 Ark. 269 [**error coram nobis**] A writ of *error coram nobis* is available for addressing certain errors that are found in one of four categories: (1) insanity at the time of trial, (2) a coerced guilty plea, (3) material evidence withheld by the prosecutor, or (4) a third-party confession to the crime during the time between conviction and appeal. The basis of appellant's *error coram nobis* petition was an alleged *Brady* violation. To establish a *Brady* violation, three elements are required: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. To warrant *coram nobis* relief, the petitioner has the burden of demonstrating a fundamental error extrinsic to the record that would have prevented rendition of the judgment had it been known and, through no fault of his own, was not brought forward before rendition of judgment. This means that the petitioner alleging a *Brady* violation must demonstrate that the evidence that was allegedly suppressed was sufficient to alter the outcome of the trial. Because appellant either had access to the exculpatory evidence or failed to establish that he was prejudiced by not receiving the exculpatory evidence, he did not provide a basis for *coram nobis* relief and the trial court did not abuse its discretion when it denied his petition. (Johnson, L.; CR-18-685; 10-10-19; Hart, J.)

*Malone v. State*, 2019 Ark. 273 [**error coram nobis**] Due diligence is required in making an application for *coram nobis* relief, and in the absence of a valid excuse for delay, the petition can be denied on that basis alone. This court will itself examine the diligence requirement and deny a petition when it is evident that a petitioner failed to proceed diligently. Due diligence requires that: (1) the defendant be unaware of the fact at the time of trial; (2) the defendant could not have, in the exercise of due diligence, presented the fact at trial; and (3) upon discovering the fact, the defendant did not delay bringing the petition. In appellant's case, the record demonstrates that appellant waited more than ten years from the entry of his guilty plea before seeking *coram nobis* relief. The trial court did not err when it concluded that appellant failed to proceed diligently in claiming entitlement to *coram nobis* relief. (Sims, B.; CR-18-977; 10-10-19; Womack, S.)

*Ezekiel v. State*, 2019 Ark. App. 460 [**Confrontation Clause**] The right to cross-examination guaranteed by the Confrontation Clause of the Sixth Amendment is not unlimited. Circuit courts have wide latitude to impose restrictions on cross-examination. The Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective

in whatever way, and to whatever extent, the defense might wish. A defendant's Confrontation Clause right of cross-examination can be limited and made to yield to a witness's individual right against self-incrimination. The circuit court has a duty to protect a witness from cross-examination that represents an attempted invasion of his or her properly invoked constitutional protection against self-incrimination. However, the testimony of a witness must be struck when the witness refuses to answer questions on cross-examination citing the Fifth Amendment privilege if failure to answer deprives the party questioning the witness of the right to test the truth of the witness's direct testimony, as opposed to a collateral matter. Specifically, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony that witness's testimony should be stricken in whole or in part. In appellant's case, the trial court refused to strike the testimony of a witness, who asserted her Fifth Amendment Rights during cross-examination. Because the trial court did not act thoughtlessly or improvidently in determining that the cross-examination questions were collateral to the witness's direct testimony, it did not abuse its discretion by refusing to strike the testimony. (Vardaman, G.; CR-19-141; 10-16-19; Vaught, L.)

*Clark v. State*, 2019 Ark. App. 455 [**sufficiency of the evidence; aggravated robbery; felony murder**] The State did not present enough evidence that tended to connect appellant with the aggravated robbery for which he was convicted. Specifically, the accomplice testimony that was offered to connect appellant to the crime was insufficiently corroborated. Thus, substantial evidence did not support appellant's aggravated-robbery conviction. Because aggravated robbery was the predicate felony for the felony-murder charge for which appellant was convicted, his first-degree murder conviction was likewise not supported by substantial evidence. (Wilson, R.; CR-19-262; 10-16-19; Harrison, B.)

*Alejandro-Alvarez v. State*, 2019 Ark. App. 450 [**Confrontation Clause**] The trial court abused its discretion during appellant's trial by allowing a substitute analyst to testify on the data analysis he performed on the results of the initial analyst's work. The admitted report was "testimonial" in nature, and it was not explained by the person who actually performed the analysis. The governing case law consistently indicates that the testimony must be by an analyst who performed the analysis at issue, not someone who merely reviewed the data. Thus, the admission of the substitute analyst's testimony and the related DNA-evidence data report violated appellant's right to confront his accuser. (Cottrell, G.; CR-18-955; 10-16-19; Gladwin, R.)

*Ellis v. State*, 2019 Ark. 286 [**sentencing; firearm enhancement**] During the guilt phase of appellant's trial, the jury found beyond a reasonable doubt that appellant employed a firearm as a means of committing murder in the first degree. However, during the sentencing phase, the jury-imposed firearm-enhancements to appellant's sentence based upon a finding that appellant employed a firearm as a means of committing terroristic acts. On appeal, the Supreme Court

explained that because the jury did not find beyond a reasonable doubt that appellant employed a firearm as a means of committing terroristic acts, appellant's firearm-enhancements to his sentence were improper. (Erwin, H.; CR-18-460; 10-17-19; Wynne, R.)

*Matlock v. State*, 2019 Ark. App. 470 [**jury instruction**] Because the offense of first-degree sexual assault pursuant to Ark. Code Ann. § 5-14-124(a)(1)(C) includes an additional element that the offense of rape under Ark. Code Ann. § 5-14-103(a)(4)(A)(i) does not contain, first-degree sexual assault is not a lesser-included offense of rape. Thus, the trial court did not abuse its discretion in refusing appellant's proffered first-degree sexual assault jury instruction. (Wilson, R.; CR-19-14; 10-23-19; Virden, B.)

*Peebles v. State*, 2019 Ark. App. 483 [**Ark. R. Evid. 403**] The rules of evidence apply to evidence introduced at the sentencing phase of a trial. While the rules of evidence apply during all stages of the proceeding, under Ark. Code Ann. § 16-97-103, certain evidence is admissible during sentencing that would not be admissible during the guilt phase of the trial. Arkansas Code Annotated § 16-97-103(5) provides that relevant character evidence is admissible during the sentencing phase of a trial. Evidence of prior or subsequent uncharged criminal conduct can be admissible at the penalty phase of a trial if it is relevant evidence of the defendant's character. Although evidence in a sentencing hearing is relevant, it may nonetheless be excluded under Rule 403 of the Arkansas Rules of Evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The fact that evidence is prejudicial to a party is not, in itself, reason to exclude evidence; the danger of unfair prejudice must substantially outweigh the probative value of the evidence. In appellant's case, the State sought to introduce evidence of appellant's other criminal activities. The trial court concluded that the evidence was relevant and admitted it. On review, the Court of Appeals concluded that the trial court abused its discretion by admitting the evidence without first engaging in the required Rule 403 inquiry. (Wright, J.; CR-18-986; 10-23-19; Hixson, K.)

*Rankin v. State*, 2019 Ark. App. 481 [**severance**] A defendant has a right to a severance when two or more offenses have been joined solely on the ground that they are of the same or similar character. Otherwise, granting or refusing a severance is within the discretion of the circuit court. A severance motion may be denied if the two offenses were part of a single scheme or plan or if both offenses require the same evidence. In determining whether there was a single scheme or plan, several factors must be considered. First, the same body of evidence would be offered to prove each offense that is alleged to make up the single scheme or plan. Second, to be a single scheme or plan, the offenses must arise from the same conduct or be a series of acts connected together. Third, closeness in proximity and time are considered. The circuit court in appellant's case made findings on each of the three foregoing factors, and the evidence supported those findings. Accordingly, the circuit court did not abuse its discretion by: (1) finding that the acts giving rise to the terroristic-act charge and the first-degree-murder charge constituted a single

scheme or plan; and (2) denying appellant's motion to sever the two charges. (Honeycutt, P.; CR-19-239; 10-23-19; Vaught, L.)

*Devries v. State*, 2019 Ark. App. 478 [**video voyeurism; Ark. Code Ann. § 5-16-101**] Although children do not have a reasonable expectation of privacy in their family homes for purposes of the Fourth Amendment, they have a reasonable expectation of privacy from being viewed, filmed, or photographed, even by their parents, for purposes of the crime of video voyeurism when they are behind closed doors in private areas of the home. (Phillips, G.; CR-18-971; 10-23-19; Whiteaker, P.)

*Turner v. State*, 2019 Ark. App. 476 [**sufficiency of the evidence; first-degree battery**] A person who operates an automobile while intoxicated does so under circumstances manifesting extreme indifference to the value of human life. By pleading guilty to DWI, appellant admitted he possessed the requisite intent for battery in the first degree. (Ritchey, D.; CR-19-323; 10-23-19; Switzer, M.)

*Jemison v. State*, 2019 Ark. App. 475 [**motion to suppress**] The United States Constitution and Rule 13.2 (b)(iv) of the Arkansas Rules of Criminal Procedure require that a warrant describe with particularity the persons or things constituting the object of a search. The search warrant in appellant's case provided in pertinent part: "[T]here is now being concealed, conducted, or possessed, namely guns, ammunition, clothing, currency, ammunition (live and spent shells), cellular phone, electronic devices, blood, and trace evidence as well as any other items that may contain blood transfer or trace evidence, as well as paraphernalia associated with the possession of evidence of Attempted Capital Murder and Aggravated Robbery, and any articles thereof, including, but not limited to, books, records, currency, electronic devices, and articles of identification, which are being possessed . . . and as I am satisfied that there is probable cause to believe that the property so described is being concealed in the vehicle above described." During the search, law enforcement officials obtained two packages of cigarettes from appellant's vehicle. Appellant requested that the cigarettes be suppressed based upon a challenge to the language of the search warrant itself. He argued that overall the language of the warrant was too general and did not satisfy the particularity requirement of the constitution. Appellant also argued that even if the search warrant was "particular" enough, the cigarettes fell outside the scope of the warrant. The trial court admitted the evidence. On review, the Court of Appeals held that the search warrant did not satisfy the constitutional requirements for particularity because it left a great deal of discretion with law enforcement officials. (Jones, C.; CR-19-140; 10-23-19; Switzer, M.)

*Thompson v. State*, 2019 Ark. 290 [**mistrial**] In determining whether a circuit court abused its discretion in denying a mistrial motion, the appellate court will consider the following factors: (1) whether the prosecutor deliberately induced a prejudicial response; and (2) whether an

admonition to the jury could have cured any resulting prejudice. There is always some prejudice that results from the mention of a prior bad act in front of the jury. In instances where the infraction creates minimal prejudice, the proper remedy is an objection to the evidence and an admonition or instruction to the jury to disregard the remark. The trial court in appellant's case did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon a statement made by a witness during cross-examination, because the prosecutor did not deliberately induce a prejudicial response from the witness and the circuit court gave an admonition to the jury that could have cured any resulting prejudice. (Pope, S.; CR-19-169; 10-24-19; Kemp, J.)

*Beene v. State*, 2019 Ark. App. 493 [**sufficiency of the evidence; theft by receiving**] On appeal, appellant argued that the circuit court erred in denying his motion to dismiss the Class D felony theft-by-receiving charge because the State failed to introduce substantial evidence that the stolen vehicle appellant received had a value of more than \$1,000 at the time it was stolen. Although the preferred method of establishing fair market value is through expert testimony, the purchase price paid by the owner of the property can be used to determine its market value when the purchase is not too remote in time and bears a reasonable relation to the present value of the property. An owner's testimony about the purchase price of a vehicle coupled with evidence that the vehicle was in good condition when it was stolen can constitute substantial evidence of the fair market value of the vehicle when it was stolen. One reason for admitting an owner's estimate of value is that of necessity—the owner necessarily knows something about the quality, cost, and condition of the article. In appellant's case, the owner testified that she purchased the vehicle approximately one year before it was stolen. She also testified as to the amount that she would have been willing to sell the vehicle for at the time of the theft. Additionally, the State presented the testimony of the officer, who was involved in a high-speed chase of the vehicle, and a video that captured the chase, which allowed the circuit court to observe the stolen vehicle and make a determination that it met the minimum statutory value. Accordingly, the circuit court did not err by finding that the State met its burden of proving that the vehicle had a fair market value of more than \$1,000 when appellant stole it. (Wright, H.; CR-19-93; 10-30-19; Gladwin, R.)

*Sharp v. State*, 2019 Ark. App. 506 [**motion to dismiss; affirmative defense of mental disease**] Appellant contends that the court erred by denying her motion to dismiss based on her affirmative defense of mental disease. She argues that the expert's opinion that she could not appreciate the criminality of her conduct or conform her conduct within the bounds of the law at the time of the crime was enough to show that she lacked criminal responsibility. The factfinder may believe all or part of any witness's testimony and is responsible for resolving questions of conflicting testimony and inconsistent evidence. This is true even of opinion testimony offered by experts. The court in appellant's case, acting as the factfinder, chose to credit the victim's testimony that appellant was high on methamphetamine at the time of the crime over the expert's

opinion that she was suffering from a mental disease. The court was entitled to believe the victim's testimony over appellant's expert and to decide that appellant had not established the defense of mental disease by a preponderance of the evidence. (Yeargan, C.; CR-19-247; 10-30-19; Brown, W.)

*Adway v. State*, 2019 Ark. App. 495 [**mistrial**] Appellant failed to establish that he was prejudiced by the mistaken presence of an alternate juror in the jury room during the guilt-phase deliberations of his trial. Thus, it was not error for the trial court to deny appellant's request for a mistrial, which was based upon the alternate juror's conduct. (Dennis, J.; CR-19-309; 10-30-19; Harrison, B.)

*Barfield v. State*, 2019 Ark. App. 501 [**sentencing**] The trial court did not abuse its discretion when it accepted the jury's alternative sentencing recommendation of probation and imposed a fine as a condition thereof. (Hearnberger, M.; CR-19-281; 10-30-19; Whiteaker, P.)

*Sirkaneo v. State*, 2019 Ark. 308 [**mistrial**] Appellant requested a mistrial based upon an allegation that a witness improperly testified about appellant exercising his Fifth Amendment right to remain silent when he was arrested. The Fifth Amendment prohibits the prosecution from commenting on the accused's silence. Although *Miranda* warnings do not expressly assure there is no penalty for invoking silence, such assurance is implicit to all who receive the warning because it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. However, when a comment on a defendant's post-arrest silence is not an attempt to impeach the defendant, it is not the type of comment that is prohibited. In appellant's case, his "silence" was not used to impeach his trial testimony. In fact, the challenged testimony occurred while appellant, acting pro se, was cross-examining a witness and the line of questions led to the witness's unanticipated response which mentioned appellant's post-arrest silence. Thus, the trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon the testimony. (Proctor, R.; CR-18-87; 10-31-19; Wood, R.)

## CIVIL

*Johnson v. Bradley*, 2019 Ark. App. 427 [**nonparty fault/ Ark. R. Civ. P. 9**] Arkansas Rule of Civil Procedure 9(h) addresses allocation of nonparty fault and notice and creates the exclusive procedural mechanism for asserting the right to an allocation of nonparty fault. Notice must be given in the original responsive pleading "if the factual and legal basis upon which fault can be allocated is then known" or in an amended or supplemental pleading under Ark. R. Civ. P. 15. Rule 9 contains no deadline. Although Ark. R. Civ. P. 15 allows amended and supplemental pleadings, the court may, on motion, strike the amended or supplemental pleading or grant a



continuance if it determines that “prejudice would result, or the disposition of the cause would be unduly delayed.” The trial court found that the circumstances prior to the May 2018 expert-witness depositions, specifically, the hospital’s own medical records with respect to Ashley’s instructions to follow up with the doctor, constituted the requisite factual and legal bases under Rule 9(h)(2) upon which fault could be allocated. Being unpersuaded that the expert depositions were the exact moment that appellants had the appropriate factual and legal bases to recognize the need to seek an allocation of nonparty fault against the mother, the trial court found that the facts were known well in advance of that date and that notice could have been provided in a much timelier manner. The trial court declined to impose a requirement that the legal basis to assert the fault of another person—a layperson—must be established by expert testimony. Furthermore, the trial court found that prejudice would result if the amended answers were allowed, that the disposition of the cause would be unduly delayed, and that a conflict would ensue only shortly before trial with respect to the Estate’s counsel if it were to permit the amended answers. The trial court did not abuse its discretion; nor did it act improvidently, thoughtlessly, or without due consideration. (Richardson, M; CV-18-893; 10-2-19; Virden, B.)

*Early v. Crockett*, 2019 Ark. 274 [**summary judgment/ 1983 claim**] In order to establish an Eighth Amendment failure-to-protect claim and thereby strip prison staff of their qualified immunity, Early must demonstrate that Appellees were deliberately indifferent to a substantial risk of serious harm from other inmates. To show prison officials acted with deliberate indifference, the relevant inquiries are (1) whether a substantial risk to the inmate’s health or safety existed; and (2) whether the officials had knowledge of the substantial risk to the inmate’s health or safety, but nevertheless disregarded it. No liability will attach unless the official knows of and disregards an excessive risk to inmate health and safety. Early has not met his burden and summary judgment was proper. (Dennis, J.; CV-17-235; 10-10-19; Womack, S.)

*Konecny v. Federated Rural Electric Ins. Exchange*, 2019 Ark. App. 452 [**insurance/uninsured coverage**] The circuit court correctly held that failure to comply with Ark. Code Ann. section 27-19-503 does not create a presumption that the unidentified vehicle was uninsured. Moreover, the circuit court correctly declined to allow a jury to speculate that the other vehicle was uninsured merely because it left the scene. In an attempt to circumvent his lack of proof that the other vehicle was uninsured, Konecny argued that the mere fact that the other vehicle fled the scene was sufficient evidence to create a factual question as to whether that vehicle was insured. To the contrary, there are many possible motivations for the other driver to have left the scene other than a lack of insurance. Konecny simply failed to provide sufficient evidence to create a factual question as to whether the unidentified vehicle was covered by a liability bond or policy at the time of the accident. When a plaintiff fails to present evidence that the other vehicle is uninsured, summary judgment in favor of the insurance company is proper. [**underinsured**] The plain language of the policies requires, as a condition of underinsured-motorist coverage, that physical contact occur. It is undisputed that the unidentified Jeep that fled the scene and caused

the accident did not make physical contact with either Konecny or his vehicle. Konecny did not meet the conditions for coverage under the “hit and run” provisions because his vehicle did not come into physical contact with the fleeing Jeep. Konecny makes one last attempt with respect to the contact requirement, urging that it is not a statutory requirement and is inconsistent with the uninsured-motorist statute. It discourages an obedient driver from attempting to avoid striking a vehicle that violates traffic laws and causes property damage and personal injury to the nonoffending driver. He cites cases from several other states that have held the contact requirement is void as against public policy and claims that it contravenes the Arkansas public-policy goal of protecting drivers who are injured by financially irresponsible drivers. However, the Arkansas Supreme Court has previously addressed whether the contact requirement violated public policy and found that it did not. (Hughes, T.; CV-18-945; 10-16-19; Gladwin, R.)

*Kline v. PHH Mortgage Corp.* 2019 Ark. App. 462 [**mortgage**] The circuit court did not make a finding of compliance with Ark. Code Ann. Section 18-12- 403. Instead, it found that the protections of Section 403 were not available to Kline because she was aware of PHH’s lien on the property and that her actions estopped her from relying on it. The circuit court did not err by finding that Kline was estopped from relying on the protections of Section 403. Kline’s testimony clearly demonstrates that she was aware of the Merrill Lynch loan and that it obligated her. Despite these admissions, Kline attested that she did not know her signature had been forged on the Merrill Lynch loan during her bankruptcies. She explained that she did not learn of the forgeries until February 2015 during the pendency of her divorce from Marquez. Nevertheless, she agreed to take ownership of the property and any debt or liability associated with it in her divorce decree, which was entered in April 2015 after she admittedly had learned about the alleged forgeries. The facts in this case are precisely those that the defense of estoppel was designed to cover. Kline knew that there was a loan in favor of Merrill Lynch that obligated her to pay a debt. She behaved as though she agreed and understood that she was obligated to pay the debt for several years—through two bankruptcies and a divorce. Even after she claims she learned about the alleged forgeries in 2015, she agreed to take responsibility for any debt or liability on the property in exchange for sole ownership of it. Then, she filed this action seeking to void the mortgage on the property. Kline’s own acts preclude her from asserting a right to which she may have otherwise been entitled. (Scott, J.; CV-18-17; 10-16-19; Murphy, M.)

*McKim v. Sullivan*, 2019 Ark. App. 485 [**Arkansas Code Annotated section 27-51-1405**] The statute provides that no person shall throw or deposit upon any highway any substance likely to injure any person, animal, or vehicle, and any person who drops or permits to be dropped or thrown upon any highway any destructive or injurious material shall immediately remove it or cause it to be removed. Canons of statutory construction, such as *noscitur a sociis*, will not be applied where there is no ambiguity. Based on the plain language of the statute, nothing in the statute limits the substances and materials referenced therein to unnatural ones. The focus is instead on whether the material is “destructive or injurious. To hold otherwise would defeat the

clear legislative intent and purpose of the statute. The statute cannot be read to allow a person to throw or deposit substantial amounts of dirt, gravel, timber, or hay on the road without possible consequences simply because those substances are natural rather than unnatural. The circuit court erred in restricting the interpretation of the phrases “substance likely to injure,” “destructive or injurious material,” and “injurious substance” to only unnatural substances or materials. (Carnahan, C.; CV-18-994; 10-23-19; Hixson, K.)

*McDermott v. Cline*, 2019 Ark. App. 472 [**Rule 11 Sanctions**] It was not an abuse of discretion for the circuit court to find that McDermott violated Rule 11 by failing to make a reasonable inquiry into the law and the facts. Further, Jacqueline is not McDermott’s client; Angela is. Jacqueline signed an affidavit that refuted McDermott’s allegations regarding abuse. McDermott had been warned not to publicize such an allegation without evidentiary support. The circuit court observed that there was no good reason for that kind of an allegation to be in the pleading. Considering (1) McDermott’s failure to amend or withdraw his complaint after being served with a motion for Rule 11 sanctions, (2) McDermott’s testimony, (3) trial exhibits, and (4) arguments, the circuit court did not abuse its discretion by imposing Rule 11 sanctions. [**recusal**] McDermott does not cite a single comment from the circuit court that demonstrates bias. McDermott construes the circuit court’s rulings to support his argument that the circuit court was “subconsciously” protecting opposing counsel who had committed “malpractice.” McDermott’s arguments are premised on his belief that Susan and James had entered into mutual wills and a trust for the purpose of providing for Angela. However, the Trust does not support this argument. A review of the record illustrates that the circuit court demonstrated it was unbiased by admonishing counsel throughout and by allowing every opportunity for counsel to explain and support his reasoning for conducting the lawsuit in the manner in which he did. (Duncan, X.; CV-18-997; 10-23-19; Gladwin, R.)

*Prescott School District v. Steed*, 2019 Ark. App. 480 [**contract**] The school district contends that the contract on which the teacher relies was not executed by the board and was not binding. Steed performed the duties of a certified teacher for the District. Principal Applegate confirmed that Steed performed functions long-term substitutes were not permitted to perform and that could only be performed by certified teachers. He also admitted that the District could have obtained a waiver from the ADE to allow her to teach while she obtained her license but did not do so. In addition, evidence showed that Steed’s license was issued retroactively because the ADE had been informed by the District that Steed had contracted with the District to teach English. She indicated that if she had been advised by the District that no contract was in place, the provisional license would have been rescinded. Here, the party’s intent is not clear from the face of the employment contract. At the very least, there is a question of fact as to whether the District’s requirement that Steed obtain certification was a condition precedent to the formation of the contract and, if the condition was satisfied, whether the District was obligated to execute the written contract. Accordingly, the trial court did not err in denying the District’s motion for

directed verdict and in submitting these issues to the jury. (Wright, R.; CV-19-60; 10-23-19; Whiteaker, P.)

*Williams v. City of Sherwood*, 2019 Ark. App. 487 [**justiciable issue**] The question is whether there was a justiciable issue. Appellants urge that the justiciable controversy presented in the petition for declaratory judgment was “the issue of the allocation of the cost of the Project.” However, the allocation of the cost of the project was sufficiently detailed in the receivership order entered by the circuit court in October 2005 and affirmed on appeal. Appellants’ contention that there are “uncertainties” regarding funding of the project is not supported by the evidence. Appellants’ argument that the City of Sherwood is unfairly benefiting from the project is an attempt to in some way modify the financing and contribution arrangements outlined in the receivership order. Because the City of Sherwood has no control over the receivership or the handling or financing of the projects undertaken pursuant to its authority, any declaration of “fairness” will have no effect as the City of Sherwood is not in a position to provide relief, nor have appellants asserted that the City of Sherwood can provide any relief. Appellants have shown no reason to answer any question posed in its petition for declaratory judgment. Therefore, the circuit court’s denial of appellant’s petition for declaratory judgment finding that no justiciable controversy exists is affirmed. (Compton, C.; CV-19-91; 10-23-19; Brown, W.)

*Williams v. Baptist Health*, 2019 Ark. App. 482 [**Hospital peer-review evidence**] Circuit court’s rulings on summary judgments in favor of the Baptist Health appellees on the constitutional claims, defamation claim, retaliation claim, and the judgment in favor of Baptist Health on the claim alleging that it failed to follow its own bylaws during the peer-review process are affirmed. Circuit court reversed the judgment in favor of the Baptist Health appellees on the discrimination and tortious-interference claims because the circuit court abused its discretion when it denied Dr. Williams’s motions to compel discovery of peer-review records regarding other physicians at Baptist Health. Dr. Williams’ right to the peer-review evidence is established by the plain language of section 16-46-105(b)(2), which unambiguously provides an exception to the peer-review privilege when the plaintiff in the legal action is, as here, the doctor who was adversely affected by the peer-review proceedings. This language does not support Baptist Health’s contention that it only “allows a physician such as [Dr. Williams] the right to obtain the medical records and documents reviewed and used in his own peer review proceedings.” Additionally, section 20-9-503(a)(1) does not forbid the use of peer-review evidence in a doctor’s lawsuit—like the one here—that challenges the peer-review process, as Baptist Health claims. Rather, the statute appears to prohibit using peer-review evidence in a lawsuit—such as a medical-malpractice action—against a doctor that is based on the same conduct that led to the doctor’s discipline. Accordingly, because section 16-46-105(b)(2) allows the peer-review evidence that Dr. Williams sought in his motions to compel, the circuit court abused its discretion. The ability to compare the proceedings in his case against those involving similarly situated white physicians, for example, could have enabled Dr. Williams to show a genuine issue of material

fact regarding whether the Baptist Health appellees subjected him to disparate treatment. Evidence showing disparate treatment or discriminatory intent could have rebutted the Baptist Health appellees' claims of statutory immunity, which are qualified by the absence of malice, and could have established improper conduct as a predicate for his tortious-interference claims. **[jury trial/by-law claim]** Article 2, section 7 of the Arkansas Constitution provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy[.]" Nevertheless, the "Arkansas Constitution does not assure the right to a jury trial in all possible instances. The constitutional right to a jury trial does not extend to equity. Dr. Williams is only entitled to equitable relief on his claim that Baptist Hospital failed to follow its own bylaws during the peer-review process. (Fox, T.; CV-17-924; 10-23-19; Vaught, L.)

*Carlock v. City of Blytheville*, 2019 Ark. 302 **[illegal exaction]** Carlock argues on appeal that the trial court should have been permitted to look beyond the wording of the enabling ordinance and ballot title in determining whether tax money is being spent for an approved purpose. Any use of sales-tax revenue for purposes other than those designated by the levying ordinance and the ballot is in violation of article 16, § 11 of the Arkansas Constitution and constitutes an illegal exaction. The Supreme Court limits review to the enacting ordinance and ballot title because it has long been regarded as axiomatic that the majority of voters, when called upon to vote for or against a proposed measure at a general election, will derive their information about its contents from an inspection of the ballot title immediately before exercising the right of suffrage. (Lusby, R.; CV-18-992; 10-24-19; Wynne, R.)

*Driver Solution, LLC v. Downey*, 2019 Ark. 296 **[class certification]** The circuit court's determination that each requirement for class certification was satisfied in this case was not an abuse of discretion. (Pierce, M.; CV-18-799; 10-24-19; Hart, J.)

*Boston Mountain Regional Solid Waste District v. Benton County Regional Solid Waste District*, 2019 Ark. App. 488 **[statutory construction]** This appeal arises from a dispute between two regional solid-waste management districts over statutory fees related to the movement or disposal of solid waste within and between districts. Instead of the equal division of fees called for in the code, the Benton County Circuit Court found that the statutory fee division provided for an "unjust enrichment" to the appellant Boston Mountain Regional Solid Waste Management District and that the entire fee should be paid over to the appellee Benton County Regional Solid Waste Management District. The circuit court erred in applying the doctrine of unjust enrichment in the circumstances of this case. There was no basis for the application of unjust enrichment. Instead, the court should have applied section 8-6-714 as written. That would have forced the two districts to either negotiate an interlocal agreement acceptable to both regarding the division of the fees or, in the absence of such an agreement, equally divide the fees. (Duncan, X.; CV-18-14; 10-30-19; Gruber, R.)

*Bazzadega v. Vernon*, 2019 Ark. App. 496 [**trust/mediate-litigate**] The circuit court's order denying Julia's motion to compel arbitration is reversed and vacated. The case is remanded to the circuit court for the court to order mediation. If mediation is unsuccessful, then the court must determine which of the plaintiffs' claims are subject to the trust's arbitration provision and then compel the parties to arbitrate those claims. The settlor of the Cannon Trust expressly intended that courts exercise a limited role when resolving trust disputes. The trust mandates mediation and, if necessary, arbitration regarding all disputes arising from the trust. The ADR provision in the Cannon Trust is enforceable. The Cannon Trust is not a contract. It is a legal instrument through which the settlor Dolores Cannon expressly communicated how trust property was to be managed and administered. Nancy and Julia were both named successor cotrustees and each is a named beneficiary of the trust. They agreed to the trust terms by acting as cotrustees in the years since their mother's death. Ms. Cannon intended the trust to benefit her children and intended that her children resolve their disputes using mediation or arbitration, as necessary. As successor cotrustees and cobeneficiaries, Nancy and Julia are bound by all terms in the trust. Therefore, Nancy individually, and as a fiduciary, is bound to resolve her grievances using an ADR process. (Martin, D.; CV-19-989; 10-30-19; Harrison, B)

*Robinson Nursing Center v. Phillips*, 2019 Ark. 305 [**arbitration**] This class action challenge involving arbitration agreements include 271 arbitration agreements executed by "responsible parties." That is, they were not signed by the resident, a legal guardian of the resident, or a person with a power of attorney over the resident. These agreements were instead signed by the resident's "responsible party" or "legal representative." It has not been demonstrated that the individuals signing these arbitrations agreements were acting in an individual rather than a representative capacity. There was no valid arbitration agreement between Robinson and these individuals, and the circuit court correctly denied Robinson's motion to compel arbitration with respect to them. With respect to other agreements in question containing a \$30,000 dispute limitation, they lack mutuality. The arbitration agreements serve to shield Robinson from defending itself in the court system against the majority of potential claims by residents, while reserving its right to utilize the court system for its likely claims. Other agreements are not enforceable because signatures were not properly authenticated; Robinson failed to show that its representatives were authorized to bind the nursing home to the terms of the agreement or even signed the agreement; and Robinson failed to produce a complete copy of each arbitration agreement. (Fox, T.; CV-18-45; 10-31-19; Hudson, C.)

## DOMESTIC RELATIONS

*Ward v. Ward*, 2019 Ark. App. 430 [**appellate court found no material change of circumstances in the record**] The appellate court found error in the circuit court's stated reasons for finding that a material change in circumstance had occurred sufficient to change

custody to Appellee since entry of the parties' arrangement to share custody in their Decree. The circuit court found that the parties agreed that a material change had occurred since entry of the Decree because Appellee worked on a riverboat; however, Appellee testified that he quit his employment and was going to find a job locally. As a result of Appellee's own testimony, the riverboat situation was no longer an alleged material change of circumstance that could have arguably fueled a custody change. The circuit court also found that Appellant had "no money" which was a material change in circumstance. However, she received support in excess of her monthly expenses, she lived in the same house since the divorce without any mortgage or rent payments owed, and her employment status had not changed since the divorce. All things considered, the appellate court found that the circuit court's stated reasons for finding that a material change in circumstances had occurred were erroneous given the proof of record. (Watson, T.; CV-19-207; 10-2-19; Harrison, B.)

*Conley v. Conley*, 2019 Ark. App. 424 [**attorney's fees in domestic relations matter**] The sole point on appeal is whether the circuit court's award of attorney's fees to Appellee was an abuse of discretion. There is no requirement in domestic-relations cases that a party "prevail" for the court to award fees; however, the appellate court found that Appellee did prevail, and the circuit court did not abuse its discretion in awarding fees. Appellant refused for 16 months to cooperate with Appellee in selling the real estate and had intentionally delayed the process. No legal fees to pursue the petition to sell real estate would have been required had Appellant followed the court's directives, and Appellee's failure to pay spousal support during this time was a result of the financial strain caused by Appellant's failure to cooperate. Note: the appellate court dismissed the other four points on appeal because they should have been raised following entry of the parties' Decree of Divorce-- a final appealable order from which Appellant failed to perfect his appeal. (Landers, M.; CV-18-748; 10-2-19; Gruber, R.)

*Perser v. Perser*, 2019 Ark. App. 467 [**award of spousal support; award of child support not based on recent tax returns; division of nonmarital property to achieve equitable outcome**] The appellate court found no error in the circuit court's division of nonmarital property or the award of spousal and child support. The circuit court awarded Appellee alimony after recognizing the disparity of the parties' incomes, the fact that Appellee worked in Appellant's business the entire length of the marriage, and the health of the parties. The circuit court also awarded Appellee child support based upon several years of Appellant's income, as the court did not believe the recent tax returns showed the correct amount of earnings. Regarding the nonmarital property, the circuit court found that the nonmarital business's debt was paid with marital funds, that Appellee worked in the nonmarital business, and that Appellee was entitled to some benefit in the nonmarital business. The circuit court further found that Appellee was entitled to a portion of Appellant's nonmarital home because marital funds and funds from the sale of Appellee's premarital home were used to pay the debt on Appellant's home. The law does not require the circuit court to give Appellee a mathematically certain amount, and the circuit

court has broad powers to distribute both the marital and nonmarital property to achieve an equitable division. Furthermore, alimony is a complementary device that the circuit court used to make the division of assets financially equitable. Therefore, considering the award of alimony and the division of the nonmarital property together, there was no abuse of discretion. (Welch, M.; CV-18-743; 10-23-19; Gruber, R.)

*Kyle v. OCSE et al.*, 2019 Ark. App. 491 [**UCCJEA- Arkansas lost continuing exclusive jurisdiction by Mississippi court entering a new custody order**] The UCCJEA provides that a court who has made an initial child-custody determination has continuing, exclusive jurisdiction until either: (1) a court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state. While Arkansas made an initial child-custody determination in 2010, the appellate court found that the circuit court lost jurisdiction when the Mississippi court entered the emergency custody order and determined that the child and any person acting as a parent do not reside in Arkansas. The appellate court found that Appellant met the UCCJEA definition of a "person acting as a parent." "Person acting as a parent" means a person who has physical custody of the child for six consecutive months within one year immediately before the commencement of a child custody proceeding and has been awarded legal custody by a court or claims a right to legal custody under the law of the state. The child had lived with the Appellant for five years in Mississippi, and the appellate court found that Appellant's assertion of a custody right, i.e. filing a petition to dissolve the guardianship, satisfied the UCCJEA requirements for fulfilling the role of a "person acting as a parent." The child's only living parent also lived in Mississippi. Because Arkansas lost jurisdiction, the other arguments were not addressed. (Ritchey, D.; CV-18-1035; 10-30-19; Virden, B.)

*Pham v. Nguyen*, 2019 Ark. App. 500 [**exclusion of evidence when violation of scheduling order; distribution of assets acquired during separation; division of debts including those incurred during separation**] First, the appellate court found no error in the circuit court's exclusion of evidence. Appellant's untimely presentation of the report to opposing counsel violated the scheduling order, and Arkansas Rule of Civil Procedure 37 specifically provides for exclusion of evidence when a party fails to comply with discovery orders. Furthermore, Appellant was unable to show he was prejudiced by the refusal to allow the expert to use his report while testifying. Second, the appellate court found that there was no error in the equal distribution of the assets as of the date of the divorce. Appellant requested that the circuit court divide assets as of the date of separation in light of their lengthy separation and that an unequal distribution be made. Because the circuit court determined an equal distribution was appropriate, it did not have to explore the factors that a court is required to consider when making an unequal



distribution. Appellant could have proceeded with the divorce at an earlier date. Third, the appellate court found no error in holding both parties equally responsible for the money Appellee borrowed from her brother for paying her living expenses during the extended separation. Appellant cited no legal authority to support his position that he should not be responsible for one-half of the monies, and there was ample evidence that Appellee believed she needed the money to survive. Lastly, the appellate court found no error in holding Appellant solely responsible for the 26-year-old debt owed to his relatives for his office space. It appears the circuit court believed that it was unlikely that the relatives would demand repayment after 26 years, and the circuit court is not required to equally divide debts upon divorce. (Reif, M.; CV-18-843; 10-30-19; Switzer, M.)

## PROBATE

*In the Matter of the Guardianship of LJP, a Minor*, 2019 Ark. App. 456 [**guardianship termination burden of proof; permissive intervention**] Appellant claimed that he was determined by court order to be a fit parent in a paternity case involving another child, and therefore should not be required to prove his fitness to terminate the guardianship pertaining to his other child. However, the appellate court found that the order in the paternity case was an emergency removal from the mother's custody, which is wholly separate from this child's situation in the guardianship case. Furthermore, Appellant's position to the circuit court was that he bore the burden to establish that he is a fit parent, completely contrary to the position he now takes on appeal; therefore, he invited the error. Lastly, the appellate court found no reversible error in the circuit court allowing the maternal grandmother to intervene, as she was already a party to the case for all intents and purposes by her previous filings in the case and award of visitation. (Webb, B.; CV-19-221; 10-16-19; Klappenbach, N.)

## JUVENILE

*Cooper v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 425 [**TPR—sufficiency of the evidence**] There was sufficient evidence to support the termination order where mother continued testing positive for illegal drugs throughout the case, including in the days between the two-day termination hearing. Returning the children to the mother under these circumstances, especially where this was the second dependency-neglect case involving the family, demonstrated potential harm and was not in the children's best interest. (Harrod, L.; 12JV-17-10; October 2, 2019; Abramson, R.)

*Easter v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 441 [**TPR—sufficiency of the evidence**] After twenty months, the mother's incapacity or indifference to remedy the situation or

rehabilitate her circumstances warranted termination of her parental rights. The mother's instability and failure to obtain an appropriate home for the family by the termination hearing demonstrated the potential harm that would exist if the children were returned to the mother. Termination was affirmed. (Sullivan, T.; 15JV-17-50; October 2, 2019; Murphy, M.)

*Gipson v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 444 [**TPR—motion for continuance**] Trial court did not abuse its discretion when it denied motion for continuance requested by mother's attorney due to the extradition and subsequent incarceration of the mother in Texas. The mother was extradited more than five weeks prior to the TPR hearing and no motion for continuance was made until the scheduled hearing date. (Warren, J.; 60JV-17-928; October 2, 2019; Brown, W.)

*Migues v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 439 [**TPR—sufficiency of the evidence; failure to place with family**] Trial court did not err in terminating rights in lieu of placement with relative where only two distant relatives were identified, neither had a relationship with the child, and both moved around frequently. Furthermore, both relatives lived out of state and the appellant mother objected to moving the child out of state. (James, P.; 60JV-18-40; October 2, 2019; Hixson, K.)

*Whitehead v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 442 [**TPR—best interest; teenage children**] Appellant mother argued that termination was not in children's best interest where children were thirteen and sixteen years of age. She argued that neither of the children wanted to be adopted, that they wanted to remain together, and that adoption would be more difficult to achieve at their age. The appellate court rejected the appellant's arguments, some of which were not raised at the trial court level. Because the mother failed to remedy her situation after nineteen months and the children's need for permanency and stability takes priority, the appellate court found no clear error in termination. (Warren, J.; 60JV-17-879; October 2, 2019; Murphy, M.)

*A.J.A. v. State*, 2019 Ark. App. 464 [**DELINQUENCY-sufficiency**] Because the defendant failed to challenge the sufficiency of the evidence at trial, the argument is not preserved for review and the adjudication is affirmed. (Cooper, T.; 31JV-19-3; October 16, 2019; Brown, W.)

*Atwood & Peal v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 448 [**TPR—sufficiency of the evidence; evidence of adoptability; aggravated circumstances**] Both parents appeal the order terminating their rights, arguing that there was insufficient evidence of adoptability and that meaningful services were not provided. The appellate court affirmed, finding that there is neither a requirement of a "specific quantum" of evidence to support adoptability nor is proof that a child will be adopted required, but the trial court must make a finding concerning adoptability that is supported by the evidence. Data presented by the petitioner concerning adoptability was deemed sufficient. In response to the allegation that no meaningful services were provided, the

appellate court pointed out that aggravated circumstances was one of the grounds for termination and that meaningful reunification services are not required when rights are terminated based on aggravated circumstances. Finding no clear error, the termination order was affirmed. (James, P.; 60JV-18-8; October 16, 2019; Abramson, R.)

*Donson v. State of Arkansas*, 2019 Ark. App. 459 [**motion to transfer criminal case to juvenile court**] The trial court's denial of the motion to transfer a capital murder case to juvenile court was affirmed. Although there was conflicting evidence, the trial court properly made written findings on each of the ten transfer factors. It is not the role of the appellate court to re-weigh the evidence as requested by the defendant. Finding no clear error, the appellate court affirmed. (Guynn, A.; 35CR-17-274; October 16, 2019; Vaught, L.)

*Hernandez v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 449 [**TPR—sufficiency of the evidence**] Termination order was not clearly erroneous where children were removed in part due to mother's drug use and mother continued to test positive for illegal substances nearly two years later; the circumstances that led to removal had not been remedied. Father's argument that he was denied due process rights by not being appointed counsel before the permanency planning hearing was without merit because he was not the parent from whom custody was removed. Finding no clear error in the trial court's findings that the parents are unfit and termination is in the children's best interest, the termination order was affirmed. (Halsey, B.; 28JV-16-314; October 16, 2019; Virden, B.)

*B.T. v. State of Arkansas*, 2019 Ark. App. 471 [**DELINQUENCY—residential burglary; theft of a firearm; minor in possession of handgun; theft of property**] The defendant's arguments that his delinquency adjudication was not supported by sufficient evidence is without merit. Viewing the evidence in the light most favorable to the state, each of the charges is supported by substantial evidence, direct or indirect, that is of sufficient force and character to compel a conclusion, without speculation or conjecture, that the defendant committed the alleged offenses. The defendant's arguments to the contrary fail. (Halsey, B.; 16JJV-18-379; October 23, 2019; Virden, B.)

*Crawford v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 474 [**TPR-sufficiency of the evidence**] Despite more than two years of services from the department, appellant was in no better position to take custody of her children than when the case began. The trial court's finding that factors arose subsequent to the filing of the petition for dependency-neglect that indicate that returning the children to their mother's custody would be contrary to their health, safety, or welfare and that the mother has manifested the incapacity or indifference to remedy the situation was not clearly erroneous. Because the mother was unfit and termination was in the children's best interest, the termination order was affirmed. (Jones, C.; 46JV-6-178; October 23, 2019; Klappenbach, N.)

*Fronterhouse v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 477 [**TPR—sufficiency of the evidence**] The trial court's decision to terminate rather than place children in custody of grandparent was not clear error where no home study was introduced, the grandparent did not testify, and there was no evidence presented of a relationship between the children and grandparent. Grounds were not challenged on appeal and the appellant's argument that termination was not in the children's best interest was unconvincing based on the evidence. (Zuerker, L.; 66FJV-17-520; October 23, 2019; Switzer, M.)

*Chastain v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 503 [**TPR—willful failure to maintain contact**] Child was removed from father, and noncustodial mother, who lived out of state, appealed termination order. The trial court found that the mother had no relationship with the child, that the single visit that the mother exercised caused a negative reaction in the child, and the mother made little effort to develop and maintain a relationship with the child. Based on clear and convincing evidence, the trial court's finding that the mother's willful failure to maintain meaningful contact with the child was not clearly erroneous nor was the finding that termination was in the child's best interest. (Easley, E.; 30JV-16-158; October 30, 2019; Vaught, L.)

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

*Mahoney v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 453 (Elmore, B.; 43JV-17-128; October 16, 2019; Gladwin, R.)

*Cogburn v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 446 (Batson, B.; 10JV-18-1; October 16, 2019; Gruber, R.)

*Hampton v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 497 (Sullivan, T.; 64JV-17-37; October 30, 2019; Klappenbach, N.)

*Westbrook v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 504 (Hendricks, A.; 66FJV-18-464; October 30, 2019; Hixson, K.)

## **DISTRICT COURT**

*Wells v. State of Arkansas*, 2019 Ark. App. 451, [**District Court**] [**Lack of Jurisdiction**] Wells appealed his conviction of battery-third degree from the Blytheville District Court to the Circuit Court. The circuit court found that Wells' notice of appeal was untimely and dismissed the appeal. Wells then appealed to the Court of Appeals. Rule 36 of the Arkansas Rules of Criminal Procedure is strictly enforced and is jurisdictional in nature. If the circuit court lacked

jurisdiction to hear the appeal, the Court of Appeals is likewise without jurisdiction to hear the appeal on the merits. (Wilson, R.; CR-19-440; 10-16-19; Gladwin, R.)

*Pettry v. State of Arkansas*, 2019 Ark. App. 457, **[District Court] [Lack of Jurisdiction]** Pettry appealed his conviction of carrying a weapon in violation of Arkansas Code Annotated §5-73-120 from the District Court of Washington County to the Circuit Court. He was convicted again and filed his notice of appeal with the Court of Appeals. The State filed a motion to dismiss the appeal for lack of jurisdiction. The record did not demonstrate that Pettry strictly complied with the requirements of Rule 36 (c) of the Arkansas Rules of Criminal Procedure. Without a perfected appeal, the circuit court was without jurisdiction to try the case, leaving the Court of Appeals with no jurisdiction to hear the appeal. (Lindsay, M.; CR-18-1021; 10-16-19; Switzer, M.)

*Cordero v. State of Arkansas*, 2019 Ark. App. 484 **[Sufficiency of Evidence] [Driving Under the Influence] [Mental State] [Mens Rea]** Cordero appealed her conviction of driving while intoxicated (DWI) from the Saline County District Court to Circuit Court and then to Court of Appeals. Cordero's sole argument was sufficiency of the evidence. Although the trial court incorrectly held that the applicable mental state under Ark. Code Ann. §5-5-203 was strict liability, appellant's conviction was affirmed based on the circuit court's alternative finding under the correct standard of reckless conduct. The State submitted sufficient proof of reckless conduct based on testimony of the law enforcement officer, a pharmacist and appellant's own admission that she took prescribed barbiturates for a migraine headache, was having trouble focusing and then operated a motor vehicle. (Webb, B.; CR-19-89; 10-23-19; Hixson, K.)