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CIVIL

Halon V, LLC v. Terminella, 2023 Ark. App. 193 [**summary judgment; dismiss complaint**] The circuit court dismissed appellant’s first amended complaint. On appeal, appellant argued the circuit court erred when it dismissed all of its claims. When considering a Rule 12(b)(6) motion, the circuit court does not consider matters outside the four corners of the complaint, and all the allegations in the complaint are to be taken as true. Arkansas Rule of Civil Procedure 12(b)(6) also requires that if matters outside the complaint are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion. If the party moving for summary judgment makes a prima facie showing that it is entitled to judgment as a matter of law, then the nonmoving party has the opportunity to “meet proof with proof” by showing a material issue of fact. When a party presents material outside the complaint and the circuit court does not specifically exclude it, then the appellate court considers the material to have influenced the circuit court’s decision. Here, the appellees filed a verified answer to the complaint that included facts that were not pled in the complaint or amended complaint. The verified answer was not a simple list of which facts as stated in the complaint were denied and which were admitted along with a recitation of affirmative defenses. When the circuit court considered matters outside the first amended complaint the circuit court converted the motions to

dismiss to motions for summary judgment. There was no hearing on the motion, nor was there any notice given to the parties that the circuit court was converting the Rule 12(b)(6) motion to a motion for summary judgment. Thus, the circuit court erred by dismissing the first amended complaint before the appellant had the opportunity to conduct discovery and gather any document or other evidence it could use in an attempt to refute the new factual allegations made in the verified answer. (Duncan, X.; 04CV-20-2198; 4-5-23; Thyer, C.)

S & J Construction Co., Inc. v. Engineering Services, Inc., 2023 Ark. App. 194 [**summary-judgment; interlocutory order; jurisdiction**] The circuit court denied appellant's motion to amend a summary-judgment order that inadvertently dismissed appellant's claims against appellee in an interlocutory order. On appeal, appellant argued the circuit court erred because the summary-judgment order was not final, and the circuit court had the authority to amend it. Rule 54(b)(2) of the Arkansas Rules of Civil Procedure provides that absent the executed certificate required by Rule 54(b)(1), any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties. Prior to final judgment, a circuit court is at liberty to reconsider its previous, nonfinal rulings and decisions. An order granting summary judgment is not a final order when it does not dispose of all the claims of all the parties. Here, the summary-judgment order was not a final order because it did not dispose of the claims between the parties. The order specifically stated that the circuit court retained jurisdiction to determine the other claims and counterclaims pending in the action between the parties. Thus, the circuit court had the authority to amend the summary-judgment order, and it erred in concluding in its interlocutory order that it did not. (Webb, G.; 51CV-15-52; 4-5-23; Wood, W.)

SNC Revocable Trust v. Galdamez, 2023 Ark. App. 196 [**boundary by acquiescence; adverse possession; easement by prescription**] On appeal, appellant argued that the circuit court erred in denying its claims for title by boundary by acquiescence, adverse possession, or an easement by prescription. [**boundary by acquiescence**] Whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line and thus apparently consent to that line, it becomes the boundary by acquiescence. A boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. A boundary by acquiescence is usually represented by a fence, a turnrow, a lane, a ditch, or some other monument tacitly accepted as visible evidence of a dividing line. Arkansas law does not support the establishment of a boundary by acquiescence along an invisible line between two large landforms that are not truly capable of being used as accurate markers of a boundary. Here, the present case arose from a boundary-line dispute concerning a roughly 1828-square-foot strip of land between two tracts of land. While there were trees on the tract, they were sporadically situated such that they did not create a definite and certain boundary. Therefore, the sporadically placed trees feet away from the requested boundary line was

insufficient to establish a boundary by acquiescence. **[adverse possession]** To establish ownership to property by adverse possession, that party has the burden of proof to show, by a preponderance of the evidence, possession for seven years. The possession must be actual, open, continuous, hostile, and exclusive and be accompanied by an intent to hold adversely and in derogation of—and not in conformity with—the right of the true owner. If the claimant “raises his flag and keeps it up” continuously for the statutory period of time, knowledge of his hostile claim of title may be inferred as a matter of fact. Here, the general use of a graveled area where a portion was owned by appellants was not enough to put the adjoining landowners on notice. Additionally, there was evidence lacking to explain who originally placed gravel on the tract or why it was done. The appellate court held that the appellants did not raise their flag when it maintained the status quo. **[easement by prescription]** A prescriptive easement may be gained by one not in fee possession of the land by operation of law in a manner similar to adverse possession. Mere permissive use of an easement cannot ripen into an adverse claim without clear action that places the owner on notice. Here, because the evidence established the use was permissive, it, therefore, could not be adverse. Thus, the circuit court did not err in denying appellants’ claims for title by boundary by acquiescence, adverse possession, or an easement by prescription. (Meyer, H.; 12CV-21-69; 4-5-23; Murphy, M.)

Physicians' Specialty Hosp., LLC v. Ark. Dep't of Hum. Servs., 2023 Ark. App. 197 **[summary judgment; illegal exaction; equal protection]** The circuit court granted summary judgment on the issue of liability in favor of the appellees. On appeal, appellants argued that the circuit court erred in finding that the fee levied against it was a lawful assessment. **[taxes or fees]** An illegal exaction is defined as any exaction that either is not authorized by law or is contrary to law. To bring an illegal-exaction claim based on an “illegal tax,” the exaction must be a tax and not a fee. The distinction between a tax and a fee is that government imposes a tax for general revenue purposes, but a fee is imposed in the government’s exercise of its police powers. Taxing power is usually exercised to provide funding for public services at large, while police power is usually exercised to cover the cost of administering a regulatory scheme or providing a service. Here, the money collected was deposited in a separate Hospital Assessment Account, with the purpose of being matched with federal funds and redistributed to the same levied hospitals on the basis of the amount of Medicaid patients each hospital treats. Accordingly, the fees at bar were collected for a specific purpose that bears a reasonable relationship to the benefits conferred on those levied: defraying the hospital costs associated with treating Medicaid patients. Therefore, the circuit court did not err when it determined that the program assessments were fees and not taxes. **[equal protection]** To bring an equal protection claim in Arkansas to challenge an assessment fee or state tax, there must be, at a minimum, factual allegations that similarly situated payers are treated differently and there is no hypothetical rational basis for the different treatment. Although this case does not involve a tax, the case law analysis of an equal protection claim challenging an assessment fee and tax is the same. The Equal-Protection Clause permits classifications that have a rational basis and are reasonably related to a legitimate government purpose. Equal protection does not require that persons be dealt with identically; it only requires that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the

classification is made, and that their treatment be not so disparate as to be arbitrary. Here, the Hospital Assessment Fee Program was enacted with the stated purpose of levying an assessment fee on hospitals to improve health-care access for the citizens of Arkansas. That program excepts some hospitals from paying the fee. Appellant argued there was no rational basis for treating it (an orthopedic hospital) differently than the exempted hospitals. However, inherent in the power to tax is the power to discriminate in taxation. The appellate court held that it cannot strike down an entire classification merely because it is underinclusive. Additionally, appellant could have taken advantage of the statute because they could have taken on more Medicaid patients but did not. Therefore, the circuit court did not err in dismissing appellant's equal-protection claim. (Beaumont, C.; 72CV-16-1370; 4-5-23; Murphy, M.)

Parsons v. Preferred Family Healthcare, Inc., 2023 Ark. 56 [**illegal exaction; motion to dismiss; summary judgment**] The circuit court entered an order dismissing appellant's illegal exaction compliant with prejudice under Arkansas Rule of Civil Procedure 12(b)(6) for failure to state facts upon which relief can be granted. On appeal, appellant argued that (1) the circuit court incorrectly rendered factual findings contrary to the allegations in his complaint; and (2) the circuit court erred in finding that the facts alleged in the complaint did not constitute an illegal exaction. [**factual findings**] In a "public funds" illegal exaction case the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent. Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. A plaintiff is not required to allege wrongful State action in every case in order to state a claim for a "public funds" illegal exaction. Here, the motion to dismiss included settlement exhibits, therefore it would be treated as a grant of summary judgment. The circuit court found that the services were of the grade and the quantity bargained for, the State received what it bargained for, and that there was no question the appropriation was appropriate. The Supreme Court held that the findings were improper at that stage of the proceedings because the circuit court failed to view the evidence in the light most favorable to appellant, the nonmoving party. Because issues of material fact remained, the circuit court erred by dismissing the appellant's complaint. (Scott, J.; 04CV-20-1302; 4-6-23; Wynne, R.)

Barrs v. Todd, 2023 Ark. App. 206 [**summary judgment; HIPAA; military exception**] The circuit court granted appellee's motion for summary judgment in his civil suit for damages related to the disclosure of his medical information. On appeal, appellant alleged that appellee could have refrained from disclosing his one-time illegal drug use when she spoke to appellant's Senior Master Sergeant about his request for mental health and alcohol-abuse treatment, and therefore appellee violated the HIPAA by needlessly disclosing the protected information. The purpose of the HIPAA is to increase privacy surrounding a patient's medical records. However, covered entities are permitted to use and disclose protected health information, without an individual's authorization, for treatment or incident to an otherwise permitted use and disclosure. The Military Command Exception to the HIPAA provides that patient information may be disclosed without individual authorization or an opportunity to object. Covered entities may disclose protected health

information in a judicial or administrative proceeding if the request for the information is through an order from a court or administrative tribunal. A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request; however, the minimum necessary requirement is not imposed when it is a request by a healthcare provider for treatment. Here, appellee was not required to obtain appellant's permission to disclose his methamphetamine use, according to the Military Command Exception. Appellee was allowed—with or without consent from appellant—to disclose to appellant's superior officer healthcare information relating to "mental health and/or substance misuse conditions or related circumstances" when the condition involves harm to self or harm to the mission or the provider believes that the condition interferes with military duties. Also, because appellee was engaged in helping appellant obtain treatment for his substance abuse issue, the "minimum necessary" requirement did not apply to her disclosure. Thus, no HIPAA violation occurred, and the circuit court did not err in granting appellee's motion for summary judgment. (Huckabee, S.; 43CV-17-992; 4-12-23; Virden, B.)

Belvedere Nursing and Rehabilitation Center, LLC v. Ward, 2023 Ark. App. 208 [**motion to compel arbitration**] The circuit court entered an order denying appellant's motion to compel arbitration. On appeal, appellants argued that the circuit court erred in denying their motion to compel despite the existence of a valid and enforceable arbitration agreement and appellee's failure to establish any valid defense to enforcement of the contract. Two threshold questions must be answered when a court is asked to compel arbitration: (1) whether a dispute should be submitted to arbitration is a matter of contract construction, (2) if such an agreement exists, whether the dispute falls within its scope. The circuit court may do one of two things when ruling on a motion to compel arbitration: (1) determine whether there was a valid agreement to arbitrate; then, if the circuit court found that there was an agreement, determine whether the dispute fell within the scope of such agreement and, if so, consider whether the appellee had a valid defense; or (2) enter a blanket denial of the motion to compel, which would constitute a ruling on all of the issues raised by the parties. Here, the circuit court denied the motion to compel because the arbitration agreement was a condition of admission. Thus, the appellate court held the circuit court erred because they could not determine if the circuit court's decision was based on validity or enforceability. (Hearnberger, M.; 26CV-20-989; 4-12-23; Gladwin, R.)

Duensing v. Arkansas State Medical Board, 2023 Ark. App. 226 [**Administrative Procedure Act; specific findings**] The circuit court affirmed the decision of the Arkansas State Medical Board. On appeal, appellant argued that the appellee's decision was not supported by substantial evidence and was arbitrary, capricious, and characterized by an abuse of discretion. The Administrative Procedure Act requires that an administrative adjudication be accompanied by specific findings of fact and conclusions of law. The Board must translate testimony and other evidence into findings of fact and then explain how those factual findings support the action taken by the Board. Whether sufficient findings of fact have been made is a threshold question in an appeal from an administrative board. A satisfactory specific finding of fact is a simple, straightforward statement

of what happened. A statement of what the Board finds has happened, not a statement that a witness or witnesses testified. A conclusory statement that does not detail or analyze the facts on which it is based is not sufficient. Neither the circuit court nor the appellate court may supply findings by weighing the evidence; that function lies with the administrative agency. When an administrative agency fails to make findings on issues of fact, the courts do not decide the questions in the first instance; instead, the cause is remanded to the agency so that findings can be made. Here, the Board failed to translate the testimony or evidence into findings of facts. It merely listed the procedural history and recited testimony from a witness. Without proper findings, the courts cannot determine the Board's view of the facts or the basis for its conclusion that appellant engaged in habitual indulgence in the use of alcohol that impaired her skill and judgment in patient care in violation of Ark. Code Ann. § 17-95-409. Therefore, the circuit court erred in affirming the decision of the Board. (James, P.; 60CV-21-6082; 4-19-23; Abramson, R.)

Sex Offender Assessment Comm. v. Sera, 2023 Ark. App. 239 [**sex offender level**] The circuit court entered an order that reduced appellee's community-notification risk level from Level 4 to Level 3. On appeal, appellant argued that the circuit court erred and that appellant's original assessment at Level 4 was supported by substantial evidence. Under the Administrative Procedures Act, it is not the role of either the circuit courts or the appellate courts to conduct a de novo review of the record; rather, the review is limited to ascertaining whether there is substantial evidence to support the agency's decision or whether the agency's decision runs afoul of one of the other criteria set out in Ark. Code Ann. § 25-15-212. The question is not whether the evidence would have supported a contrary finding but whether it would support the finding made. Substantial evidence is defined as valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion and forces the mind to pass beyond conjecture. A Level 4 sex offender is described as a person who has been adjudicated guilty of a sex offense or acquitted on the grounds of mental disease or defect of a sex offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sex offenses. Here, the appellate court held that substantial evidence supported appellant's assessment, so it automatically follows that its assessment could not be classified as unreasonable or arbitrary. Appellee repeatedly used a sedative to render his multiple victims unconscious and incapable of consenting to the acts performed on or with them. Additionally, appellee videotaped the sexual acts for his own purposes and two professionals noted appellee had an "unspecified paraphilic disorder." Therefore, the circuit court erred in reducing appellee's community-notification risk level from Level 4 to Level 3. (Wright, H.; 60CV-19-5654; 4-26-23; Klappenbach, N.)

Salem Place Nursing & Rehab. Ctr., Inc. v. Jefferson, 2023 Ark. App. 237 [**arbitration; agent**] The circuit court entered an order denying the motion to compel arbitration for lack of a valid arbitration agreement. On appeal, appellant argued the circuit court erred in finding that it failed to meet its burden of demonstrating that a valid arbitration agreement existed. When a third party signs an arbitration agreement on behalf of another, the court must determine whether the third party was clothed with the authority to bind the other person to arbitration. Because the principal

is not the signor of the documents in question, a determination of the third party's authority must be the first step in reviewing a contract that seeks to bind the principal. The definition of agency provides that the relation of the agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. The two essential elements of the definition are authorization and right to control. Here, the primary issue was whether appellee had the agency authority to sign an admission agreement that included the arbitration agreement, on her mother's behalf. Appellee stated in an affidavit that her mother was too weak to sign anything at the time of admission and that she could not hold a fork, phone, or pen. She also stated that her mother agreed that she could fill out the admissions paperwork for her since she could not write and that her mother was mentally competent at the time of admission. The appellate court held that appellee had the authority to execute the admission agreement and arbitration agreement on her mother's behalf. Therefore, the circuit court erred in denying the motion to compel arbitration. (Weaver, S.; 23CV-21-239; 4-26-23; Virden, B.)

CRIMINAL

Egziabher v. State, 2023 Ark. App. 225 [**suspended sentence; written conditions**] The circuit court found that appellant had violated the conditions of his probation in two cases and violated the conditions of his suspended sentences in two separate cases. On appeal, appellant argued that the revocations in two of the cases were not based on written conditions. A court shall impose conditions on a person who receives a suspended sentence, and those conditions must be in writing. Even implied terms, such as good behavior, must be explicitly included in the written terms in order to revoke for a violation of those terms. In the present case, there was no evidence that a financial-obligations provision in two of the cases was expressly communicated in writing to appellant to be a condition of his suspended sentence. Therefore, the circuit court erred in revoking appellant's suspended sentence in two of the cases. (Lindsay, M.; 72CR-17-3383; 72CR-17-2601; 72CR11-1529; 72CR-10-2089; 4-19-23; Abramson, R.)

PROBATE

Halbrook v. Roberson, 2023 Ark. App. 202 [**will contest; actual notice**] The circuit court entered an order striking appellant's second motion to reopen the estate of her mother and contest her mother's will. If no hearing was held on the petition to admit a will to probate, the time to file a will contest ends three years after its admission to probate, unless a shorter period specified by statute is triggered by the publication or service of the notice. When a party has actual notice of an estate administration and participates in it until the estate is closed, the late discovery of legal arguments that might have been raised cannot be a "proper cause" to reopen the estate after the time to appeal has run. Here, the appellant was not served with statutory notice that the will was admitted to probate. Although appellant was served with a defective notice, she knew the will had

been admitted to probate and participated in the proceedings with counsel. After a series of adverse and unappealed orders were entered, including two orders distributing the estate assets under the terms of the contested will appellant raised the defective notice in a “Second Motion to Reopen Estate and Contest Will.” Legal arguments you wish you’d made before a judgment was entered are, if anything, the classic example of matters that are barred when the judgment is not timely appealed. Therefore, the circuit court did not err in striking appellant’s second motion to reopen the estate to contest the will. (McCain, G.; 58PR-20-66; 4-12-23; Harrison, B.)

DOMESTIC RELATIONS

Jennings v. Jennings, 2023 Ark. App. 185 [**Administrative Order 10; child support guidelines; joint custody**] The parties were granted joint custody of their child. The divorce decree ordered appellant to pay appellee \$514 a month, with the parties being “equally responsible” for daycare and preschool expenses. On appeal, appellant argued the circuit court did not properly calculate his child-support obligation considering that the parties share true joint physical custody of the child. He further argued that the circuit court’s method of calculating child support improperly accounted for additional child-rearing expenses. Administrative Order No. 10 under shared-custody adjustment provides that the Guidelines intend for the court to deviate (in an amount to be determined) on a case-by-case basis when the payor parent has more than 141 nights with a child(ren). This discretionary deviation shall also apply when the parents each have the child(ren) for approximately 50% of the time. Here, the circuit court had the parties complete a worksheet showing each as a payor and concluded that the child support amount was calculated by taking the difference between the child support obligations contained in the worksheets. The worksheet and guidelines presumed that appellant, as the payor parent, had the child less than 141 overnights in his residence. The appellate court found that the record was unclear whether the circuit court considered that the parties spent an equal amount of time with the child. There was no indication that the circuit court considered the shared-custody adjustment, which is a deviation for which written findings are required. Therefore, the circuit court erred in not taking into consideration that appellant had the child in his care for 182 overnights. (Keaton, E.; 70DR-20-281; 4-5-96; Viriden, B.)

Bogle v. Hanna, 2023 Ark. App. 232 [**income-withholding order**] The circuit court entered an order modifying child support and an income-withholding order/notice for support. On appeal, appellant argued the circuit court erroneously failed to include in the income-withholding order a credit for his overpayment of child support. Arkansas Code Annotated § 9-14-107(d) mandates that a modification in child support is retroactive to the date of service of the motion for modification “unless otherwise ordered by the court.” Here, the circuit court was silent in its order modifying child support regarding when, exactly, the reduction in child support was to begin, and the court did not award appellant credit for his overpayment of child support in the income-withholding order. Because the circuit court did not “otherwise order” an effective date, the appellate court held that the modification was effective as of the date of service on appellee of the

file-marked notice of appellant's motion for modification. Therefore, the circuit court should calculate the overpayment and enter an order accounting for that amount in future child-support payments. (Herzfeld, R.; 63DR-18-311; 4-19-23; Wood, W.)

JUVENILE

Iesha Knox v. Ark. Dep't of Human Servs., 2023 Ark. App. 203 [**TPR-best interest**] No error in finding it in minor child's best interest to terminate Appellant's parental rights, despite indication that Appellant had an aunt who was interested in placement. "[T]he Juvenile Code lists permanency goals in order of preference, prioritizing a plan for termination and adoption unless the juvenile is already being cared for by a relative, the relative has made a long-term commitment to the child, and termination of parental rights is not in the child's best interest." None of those factors appeared in the present case: the child was in a foster home since he was six (6) days old, the aunt had spent very little time with the child, and the aunt was elderly with accompanying health issues that prevented her from being able to care for a young child. Decision affirmed. (Byrd Manning, T.; CV-22-758; 4-12-23; Abramson, R.)

Justin Richie v. Ark. Dep't of Human Servs., 2023 Ark. App. 219 [**TPR-subsequent factors**] [**TPR-aggravated circumstances; little likelihood**] Appellant father's parental rights were terminated due to the trial court's concern of his on-again/off-again relationship with the children's mother, whose drug use led to the children's removal to foster care and eventual termination of her parental rights; Appellant was found not credible as to when their relationship ended, giving different dates each time. However, the appellate court found that a credibility finding was not synonymous to a finding that further services would not result in reunification or that Appellant was incapable of or indifferent to remedying the barriers to reunification. To the contrary, the only evidence in the record was that once Appellee clearly explained to Appellant that continued contact with the mother was keeping him from his children, Appellant took significant and measurable steps to cut ties with her. He sought advice from his therapist and support network, and every witness to testify stated that Appellant and the mother were not presently in a relationship. Appellant had achieved unsupervised visitation. By all accounts, Appellant was the opposite of an indifferent parent who could not benefit from services. The grounds for termination were not supported by clear and convincing evidence. [**TPR-best interest; potential harm**] For the same reasons, the best interest finding was also found to be unsupported by the record. Given Appellant's compliance, progress, and bond with his children, the appellate court could not say that his past relationship with the mother of his children necessarily justified severing his parental rights. There was no evidence that any real risk of potential harm existed because of this prior relationship, or that the children's best interest would be served by having their father permanently and irrevocably removed from their lives. The appellate court found clear error in the trial court's termination of Appellant's parental rights. (Byrd Manning, T.; CV-22-676; 4-12-23; Murphy, M.)

Jessika Goforth v. Ark. Dep't of Human Servs., 2023 Ark. App. 233 [**TPR-aggravated circumstances; little likelihood**] There was no clear error in finding little likelihood that further services to Appellant would result in reunification: Appellant first tested positive for methamphetamine in 2016 and had since refused all requests from Appellee to attend inpatient drug treatment; she repeatedly tested positive on drug screens since; she was discharged from outpatient drug treatment for non-compliance, overdosed on fentanyl, refused drug screens, and began but had yet to complete another outpatient drug treatment program only a few weeks prior to the termination hearing; Appellant failed to maintain stable employment or appropriate housing. Caseworker testified that Appellee had done everything in its power to assist Appellant in her recovery, to no avail. [**TPR-best interest; potential harm**] Although recent progress and efforts to comply in the months and weeks leading up to a termination hearing may and should be taken into consideration, it was not a bar to termination of parental rights when a parent failed to demonstrate an ability to remain sober in an unstructured environment for a significant period of time. As such, Appellant's behaviors over the course of the entire case did not demonstrate sufficient stability to render the circuit court's finding that Appellant posed a risk of potential harm to the child clearly erroneous. Decision affirmed. (Hendricks, A.; CV-22-518; 4-19-23; Hixson, K.)