

# APPELLATE UPDATE

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## CIVIL

*Thompson Thrift Construction, Inc. v. Modus Studio, PLLC*, 2025 Ark. App. 193 [**statute of repose; saving statute**] This appeal presented an issue of first impression in Arkansas: may a party who timely filed claims that are covered by the statute of repose, Ark. Code Ann. § 16-56-112, refile them under the savings statute, Ark. Code Ann. § 16-56-126, within one year of a dismissal without prejudice, even if the repose period has ended before the one-year savings statute period had run? Put another way, does the statute of repose trump, toll, or defeat the savings statute? The appellate court held that the Arkansas savings statute, Ark. Code Ann. § 16-56-126(a)(1), permits a plaintiff to refile an action within one year after a nonsuit or dismissal without prejudice, even if the repose period under the construction statute of repose, Ark. Code Ann. § 16-56-112(a) & (b), has expired before the one-year savings statute period. Here, appellant filed a third-party complaint against appellee, the architect for a student housing project, within the 5-year repose period under Ark. Code Ann. § 16-56-112. The circuit court dismissed appellant's third-party complaint without prejudice when the main action was nonsuited. Appellant refiled claims against appellee 364 days after the dismissal but more than 7 years after the construction project was substantially completed. The appellate court held that the circuit court erred in dismissing the appellant's refiled claims against appellee because the savings statute allowed the appellant to refile the claims within one

year of the dismissal despite the expiration of the construction statute of repose period. (Bryan, B.; 72CV-21-2676; 4-2-25; Harrison, B.)

*Mejia v. State Farm Mutual Automobile Insurance Company*, 2025 Ark. App. 254 [**insurance payment; statutory construction**] The circuit court granted summary judgment in favor of appellee. On appeal, appellant argued that the circuit court erred as a matter of law in concluding that a claim is “paid” when a check is mailed by the insurance company and not when the check is received by the insured. Arkansas Code Annotated § 23-89-208(b) provides that benefits for any period are overdue if not paid within thirty days after the insurer received reasonable proof of the amount of all benefits accruing during that period. If that time period expires without payment of the claim, penalties are imposed in the form of attorneys’ fees, a 12 percent penalty, and pre-and post-judgment interest. Here, the appellant contended that the word “paid” is synonymous with receipt; appellee contended that it means mailed. The appellant acknowledged that the intent of the legislature in crafting this statute was to encourage the prompt payment of no-fault insurance claims. In that regard, the legislature provided a finite amount of time for an insurer to review a claim and either oppose it or pay it. The appellate court concluded that the time period for payment should be uniform in every case, which they found corresponds with the mailing date being the operative date. An insurer relinquishes control over a check once it is placed in the mail. That is, it has no control over the timing of its delivery by the U.S. Postal Service and no control over what happens once it reaches its destination. The appellate court accepted the more certain and predictable mailing date as the date by which a claim is “paid” pursuant to the statute. In the present case, appellee presented evidence that a check was issued and mailed to appellant’s counsel within the thirty-day window. Appellant provided no substantive proof to the contrary. Thus, payment was timely made, and the circuit court’s grant of summary judgment was appropriate. (Duncan, X.; 04CV-23-2241; 4-23-25; Thyer, C.)

## CRIMINAL

*Smith v. State*, 2025 Ark. 26 [**evidence; jury instruction**] Appellant was convicted by a jury of two counts of capital murder, one count of attempted capital murder, five counts of first-degree unlawful discharge of a firearm from a vehicle, one count of second-degree unlawful discharge of a firearm from a vehicle, six counts of terroristic act, and one count of unauthorized use of property to facilitate a crime. On appeal, appellant argued that the circuit court abused its discretion by admitting evidence that he possessed a firearm when he was arrested and erred by giving a nonmodel jury instruction that evidence of appellant’s flight from the scene could be considered as evidence of his guilt. [**evidence**] Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Pursuant to Rule 404(b) of the Arkansas Rules of Evidence, evidence of other crimes, wrongs, or acts is not admissible to prove

the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Under the doctrine of *res gestae*, the State can introduce evidence showing all of the circumstances surrounding the charged act, as this provides context to the crime and places the jury in possession of the entire transaction. The acts, conduct, and declarations of the accused, before and after the crime, may furnish necessary corroboration; for example, flight following the commission of an offense is a factor that may be considered with other evidence in determining guilt. Here, evidence that appellant possessed a firearm when he was arrested in another state not only showed all the circumstances surrounding his flight from the scene of the crimes but was also relevant because appellant stated that he had that same gun with him when the crimes were committed. Furthermore, the circuit court concluded after listening to appellant's interrogation that his statements about the gun were inextricably intertwined with the remainder of his confession. *Res gestae* evidence is presumptively admissible. Further, while evidence offered by the State is often likely to be prejudicial, it should not be excluded unless the accused can show that it lacks probative value in view of the risk of unfair prejudice. Evidence of appellant's firearm was not unfairly prejudicial in this case. The jury was informed that the gun was not connected to the homicides, and the jury was also unaware that appellant could not legally possess a firearm as a felon. Thus, the Arkansas Supreme Court held the circuit court did not err in admitting evidence that appellant possessed a firearm when he was arrested. **[jury instruction]** A nonmodel jury instruction should be given only when the model instructions do not correctly state the law or there is no model instruction on the subject. The instruction given to the jury here stated: "Evidence that the defendant fled to avoid arrest or detection by the police may be considered by you in your deliberations as circumstantial evidence corroborative of the guilt of the defendant." Although there is no model jury instruction on the subject, the Arkansas Supreme Court has held that a jury may consider evidence of flight as consciousness of guilt. Thus, the jury instruction contained a correct statement of the law. Although appellant claimed that he was in Kansas to visit his girlfriend rather than to avoid arrest, the instruction did not require that the jury reach any particular conclusion from the evidence that was presented; rather, the instruction merely stated the evidence "may" be considered as corroborative of appellant's guilt. Thus, the circuit court did not abuse its discretion by giving this nonmodel instruction. (Gynn, A.; 35CR-20-558; 4-3-25; Hudson, C.)

*Meacham v. State*, 2025 Ark. 27 **[hearsay; pedophile exception; motion for mistrial]** Appellant was convicted of three counts of rape of a minor victim. On appeal, appellant argued that the circuit erred in: (1) allowing hearsay testimony from Children's Safety Center forensic interviewer; (2) allowing testimony from the victim's mother related to appellant videoing the victim naked in the shower in violation of Ark. R. Evid. 404(b); and (3) denying appellant's motion for mistrial related to the victim's reference to gender-identity issues in connection with appellant's abuse. **[hearsay]** Hearsay is a statement, other than one made by the declarant while testifying at trial, offered to

prove the truth of the matter asserted. Generally, hearsay statements are inadmissible. There are, however, several exceptions to the inadmissibility of hearsay statements found in Ark. R. Evid. 803 and 804. Here, the statement given by the interviewer was not hearsay. Here, the interviewer testified that the victim disclosed to her that the appellant sexually abused her. The statement was offered to establish the interviewer's course of conduct when conducting the victim's interview at the Children's Safety Center. Such testimony is admissible as non-hearsay. Thus, the circuit court did not abuse its discretion in allowing this testimony. **[pedophile exception]** Generally, evidence of a person's character is not admissible to prove he or she acted in conformity with his or her character on a particular occasion. However, when a charge concerns the sexual abuse of a child, evidence of other crimes, wrongs or acts that show motive, intent or planning is admissible under the pedophile exception to Rule 404(b). Even if evidence falls into this exception, it is still subject to exclusion under Rule 403 if its probative value is substantially outweighed by unfair prejudice. Here, all elements of the pedophile exception to Rule 404(b) were satisfied. First, appellant was charged with the rape of his daughter, thus, an intimate relationship existed between the perpetrator and victim in this case. Next, videoing a naked minor in the shower shows a proclivity for a depraved sexual instinct—specifically, that appellant had a deviate sexual interest in his minor daughter. This evidence of another wrong was sufficiently similar to other forms of sexual abuse appellant committed. Finally, this evidence was not unduly remote such that it requires exclusion. Arkansas appellate courts have held that the pedophile exception to Rule 404(b) applies to acts that occurred eleven, fourteen, and even twenty-eight years apart. The alleged videoing of the victim took place when she was eight years old, the rapes began when she was nine years old, the rape charges were filed when she was thirteen years old, and she testified at trial when she was fifteen years old. Additionally, the evidence's probative value was not outweighed by any unfair prejudice. Evidence that the victim was sexually abused was already before the jury by way of forensic and testimonial evidence. Because the pedophile exception to Rule 404(b) applied to the mother's testimony and because the probative value of the testimony outweighed any unfair prejudice, the circuit court did not abuse its discretion in making this evidentiary ruling and allowing this testimony. **[motion for mistrial]** The appellate courts consider several factors in determining whether a circuit court abused its discretion in denying a mistrial motion, such as whether the prosecutor deliberately induced a prejudicial response and whether an admonition to the jury could have cured any resulting prejudice. An admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial. Here, the state questioned the victim on her gender identity, to which appellant's counsel objected. The circuit court sustained the objection. The State then asked whether there was a point in time when the abuse got worse, and the victim responded, "Yes, once I had come out as—". The State immediately stopped the victim and told her she only needed to provide a yes or no answer. The circuit court properly exercised its discretion in denying appellant's mistrial motion, as the challenged testimony was an isolated and unfinished statement that the State promptly curtailed. The circuit court found that the State had not violated its order and had not attempted to elicit improper testimony regarding the victim's gender identity.

Additionally, the circuit court determined that the question itself did not solicit a response about her identity and, following precedent, considered the context before rejecting the mistrial request. Likewise, the circuit court did not abuse its discretion in denying appellant's request for an admonition, recognizing that highlighting the victim's brief statement could have drawn unnecessary attention to it. Thus, the circuit court's denial of appellant's mistrial motion and request to admonish the jury was not an abuse of discretion. (Lindsay, M.; 72CR-22-860; 4-3-25; Womack, S.)

*Ross v. State*, 2025 Ark. App. 204 **[custodial statements; jury instructions]** Appellant was convicted by a jury of first-degree murder. On appeal, appellant argued that the circuit court erred in denying his motion to suppress custodial statements and denying his request to give jury instructions for manslaughter and justification. **[motion to suppress]** In cases involving a ruling on the voluntariness of a confession, the appellate court makes an independent determination based on the totality of the circumstances. The totality of the circumstances may include the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of the detention; the repeated and prolonged nature of the questioning; the use of mental or physical punishment; and statements made by the interrogating officers and the vulnerability of the defendant. For a defendant's statement to be the involuntary product of coercion, there must be an essential link between the coercive activity of the State and a resulting confession by a defendant. Here, the circuit court did not err in finding that appellant's statement was not coerced. The videos of appellant's interviews show that before both interviews, the detectives informed appellant of his Miranda rights, and he stated several times that he understood his rights and did not want to have a lawyer present. Appellant initiated his second interview, and both of his interviews lasted less than an hour. During the first and second interviews, detectives told appellant that he could be sentenced to life in prison and the death penalty, respectively; however, the appellate court has held that informing a defendant of the penalty for a murder charge is not considered coercion. Thus, the circuit court did not err in denying the motion to suppress. **[manslaughter; justification jury instructions]** When the defendant has offered sufficient evidence to raise a question of fact concerning a defense, the instructions must fully and fairly declare the law applicable to that defense; however, there is no error in refusing to give a jury instruction when there is no basis in the evidence to support the giving of the instruction. Our appellate courts have affirmed a circuit court's refusal to submit a proffered jury instruction when the only basis for the instruction was the defendant's self-serving statements or testimony, contradicted by other witnesses. Here, appellant made a statement that he thought the victim was reaching into his jacket for a gun. In denying appellant's request, the court noted that the appellant chased the victim, and it disagreed that video evidence showed the victim appearing to reach into his jacket. There were no eyewitnesses that corroborated appellant's statements that he felt he was in danger. The circuit court correctly concluded that a previous incident of conflict between the shooter and the victim did not merit a manslaughter instruction. Accordingly, the circuit court did

not abuse its discretion in deciding there was neither slight evidence that appellant reasonably believed the victim was using or about to use unlawful deadly physical force nor evidence that he reasonably believed his life was in imminent danger. (Philhours, R.; 18CR-23-38; 4-9-25; Virden, B.)

*Guthary v. State*, 2025 Ark. App. 210 [**motion to suppress; traffic stop**] Appellant was convicted by a jury of possession of methamphetamine with intent to deliver and possession of drug paraphernalia. On appeal, appellant argued that the circuit court erred in denying her motion to suppress the evidence because she was unlawfully detained when the officers completed the traffic stop and extended the stop without probable cause. While a dog sniff conducted during a lawful traffic stop does not violate a person's right to be free from unreasonable seizures—the police may not extend an otherwise-completed traffic stop, without reasonable suspicion, in order to conduct a dog sniff of the vehicle. A law enforcement officer, as part of a valid traffic stop, may detain a traffic offender while completing certain routine tasks, such as computerized checks of the vehicle's registration and the driver's license and criminal history, as well as writing a citation or warning; the officer may also ask routine questions, ask if he may search the vehicle, and act on any information that is volunteered; however, after these routine tasks are completed, continued detention of the driver may become unreasonable unless the officer has a reasonably articulable suspicion that criminal activity is occurring or about to occur. Some of the factors to be considered in determining if an officer has grounds to reasonably suspect are listed in Ark. Code Ann. § 16-81-203. Here, the appellate court held that the officer who stopped appellant developed reasonable suspicion to continue to detain appellant after he had written the ticket for driving on a suspended license. Appellant attempted to evade the officer when leaving a gas station parking lot by driving through another parking lot and taking a circuitous route back to the highway instead of driving straight out of the gas station parking lot. The officer saw appellant cross the center line, and when he activated his lights appellant did not immediately pull over, driving past multiple parking lots and side roads before turning onto one and then stopping in the middle of the road. While mere nervousness cannot constitute reasonable grounds for detention, the video from the officer's body cam showed appellant was anxious and tense and she lied to the officer about getting gas. After performing a record check, the officer learned that appellant was driving on a suspended license, and appellant and her passenger both had criminal histories, including drug charges; he then immediately called for a K9 to perform a search. Under these circumstances and the deference given to the circuit court's inferences and credibility determinations, the appellate court could not say that the denial of appellant's motion to suppress was erroneous. (Taylor, J.; 72CR-20-918; 4-9-25; Barrett, S.)

*Mitchell v. State*, 2025 Ark. App. 233 [**jury instructions; justification; EED manslaughter**] A jury convicted appellant of first-degree murder with a firearm enhancement and of tampering with

physical evidence. On appeal, appellant argued that the circuit court erred in refusing to give his proffered jury instructions on justification and extreme-emotional-disturbance (EED) manslaughter. **[justification instruction]** At the time of the incident giving rise to this appeal, a person was justified in using deadly force if he reasonably believed that another person was committing or about to commit a felony involving physical force or violence or using or about to use unlawful deadly force. A person could not use deadly force, however, if the person knew that he could avoid the necessity by retreating with complete safety. A “reasonable belief” is the belief that “an ordinary and prudent person would form under the circumstances in question.” The question of justification is largely a matter of the defendant’s intent. A defendant’s intention, being a subjective matter, is ordinarily not subject to proof by direct evidence but rather must be established by circumstantial evidence. The defendant’s belief must be objectively reasonable and not arrived at via fault or carelessness. A justification instruction must be given if there is any evidence to support it. Here, the appellate court held that the circuit court abused its discretion in denying the justification instruction on the basis of its finding that there was not “any evidence of what the defendant believed.” A defendant’s testimony is not required to raise the issue of justification. Additionally, justification becomes a defense when any evidence is offered tending to support its existence, and this evidence may be introduced by either the prosecution or the defense. In the case at bar, there was some evidence that appellant reasonably believed the victim was about to commit a felony involving force or violence upon appellant when he shot the victim. There was testimony that the victim kicked open the door to a one-room, one-door pool hall, approached appellant with a liquor bottle, hit the pool table with the bottle, cursed at appellant, told him to stop “messing with his mom,” and threatened to kill appellant. The victim had to be removed from the pool hall, and there was testimony that once outside he went to his vehicle to retrieve a gun. Appellant checked his surroundings leaving the pool hall approximately five or six minutes after the victim was removed. As the appellant stood on the front porch of the pool hall with his back to the door, the victim ran to the front of the pool hall, sneaked up to the front porch, threatened to kill appellant again, reached into his pants, and “pulled” as if he had a gun. There was testimony that appellant had nowhere to go, looked scared, stumbled backward, and shot the victim. There was evidence the victim was the initial aggressor in both encounters and seemed intoxicated. Because there was some evidence to support it, the justification instruction should have been submitted to the jury so that it could make the factual determination of whether the charged conduct was committed in self-defense. Accordingly, the appellate court held that the circuit court abused its discretion when it refused appellant’s proffered justification instruction. **[EED manslaughter instruction]** A person commits EED manslaughter if the person causes the death of another person under circumstances that would be murder, except that he or she causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. A jury instruction on EED manslaughter requires evidence that the defendant killed the victim following provocation such as physical fighting, a threat, or a brandished weapon. However, mere threats or menaces, where the person killed was unarmed and neither committing nor attempting to commit violence on the defendant at the time of the killing, will not free him of the

guilt of murder. Adequate provocation can occur when the victim is armed or is attempting to commit violence toward the defendant. A person is not entitled to an instruction on EED manslaughter, however, when he invited the provocation that ensued between him and the victim. Here, evidence demonstrated that the victim was the initial aggressor both inside and outside the pool hall; he provoked appellant inside and outside the pool hall; he was angry, yelling, and cursing at appellant; he hit a liquor bottle against the pool table; he had to be physically removed from the pool hall; he threatened to kill appellant more than once; and he “ran up on” appellant as appellant stepped out of the pool hall and was moving up the steps toward appellant with his hand in his pants, pulling as if he had a weapon. On this evidence, a jury could rationally determine that appellant was acting under the influence of extreme emotional distress for which there was a reasonable excuse. Therefore, the appellate court held that the circuit court abused its discretion when it refused appellant’s request to give the jury the EED-manslaughter instruction. (Singleton, S.; 70CR-21-150; 4-16-25; Wood, W.)

*Palmer v. State*, 2025 Ark. App. 236 [**statute of limitations**] Appellant was convicted by a jury of three counts of second-degree sexual assault. On appeal, appellant argued the applicable statute of limitation had expired. Arkansas case law provides that no one has any vested right in a statute of limitations until the bar of the statute has become effective. Accordingly, the General Assembly may validly enlarge the period of limitations and make the new statute apply to a cause of action that has not been barred when the new statute becomes effective. However, if the action is already time-barred when the new statute becomes effective, the General Assembly may not revive a cause of action. In 2003, Ark. Code Ann. § 5-1-109(b)(2) was amended such that a prosecution for second-degree sexual assault may be commenced within three years of when the victim reached the age of eighteen, or twenty-one years of age, so long as the violation had not been previously reported to law enforcement or the prosecutor. Here, between 2007 and 2013, appellant had sexually assaulted his three daughters when they were under fourteen years old. In 2011 when all three of the victims were under twenty-one years of age and therefore still within the then existing limitations period, the statute was amended again to permit prosecution of second-degree sexual assault any time before the child victim reached the age of twenty-eight. The statute was amended again in 2013, also before the existing statute of limitations had expired since none of the victims had yet turned twenty-eight, to allow the prosecution for second-degree sexual assault to be commenced at any time. This 2013 version of the statute, which permitted the prosecution for second-degree sexual assault to be commenced at any time, was in effect when the second-degree sexual-assault charges were brought against appellant in 2023. Therefore, the second-degree sexual-assault charges against appellant were not time-barred, and appellant’s statute-of-limitations challenges failed. (Lindsay, M.; 72CR-23-637; 4-16-25; Hixson, K.)



*Settles v. State*, 2025 Ark. App. 243 [**confrontation clause; unavailable witness**] Appellant was convicted by a jury of first-degree domestic battery. On appeal, appellant argued that the victim's statements should have been excluded. Specifically, he argued that because there was no evidence that he caused the victim's unavailability to testify, his Sixth Amendment right to confront the witness was violated. The Sixth Amendment provides that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination. Further, if the witness is unavailable, his or her prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him. Federal Rule of Evidence 804(b)(6) sets forth the federal rule regarding forfeiture by wrongdoing; however, Arkansas has not adopted the federal rule, and instead, our courts rely on common law. Arkansas applied the forfeiture-by-wrongdoing doctrine in *Gore v. State*, 52 Ark. 285 (1889). In *Gore*, the appellant "absented himself," and the trial proceeded without him. The Arkansas Supreme Court in *Gore* referred to the long-standing English rule from Lord Morley's Case and subsequent American cases, including *Reynolds v. United States*, 98 U.S. 145, 158 (1878), in which the United States Supreme Court held that the constitution gives the accused the right to a trial at which he shall be confronted with the witnesses against him; but, if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but, if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated. Here, appellant repeatedly told the victim to contact prosecutors and the court to have his charges dropped and the no-contact order removed. Appellant called the victim 387 times and sent her 191 text messages from January, when a no-contact order was entered, to October. He expressed his belief that he could not be convicted of first-degree domestic battering if the victim refused to testify and hounded her not to testify. He also promised her love, marriage, financial assistance, and medical care if she helped him get the charges dismissed. Additionally, appellant planned with a third party to pretend to be a legal assistant and urged him to "stay on her" to sign an affidavit recanting her accusations. Eventually, appellant pressured the victim into not testifying against him. The appellate court found that the circuit court did not err in determining that appellant's continual contact with the victim while he was awaiting trial was designed to keep her from testifying against him. Thus, the appellate court could not say that appellant's Sixth Amendment right of confrontation was violated. (Honorable, L; 60CR-23-569; 4-23-25; Virden, B.)

*McElroy v. State*, 2025 Ark. App. 270 [**motion to suppress; traffic stop**] A jury found appellant guilty of possession of a Schedule VI controlled substance. On appeal, appellant argued that the circuit court erred when it denied his motion to suppress evidence. A law enforcement officer may detain a traffic offender while completing routine tasks, such as a computerized check of the

vehicle's registration and the driver's license, writing a citation, and asking routine questions. However, after those routine checks are completed, unless the officer has a reasonably articulable suspicion for believing that criminal activity is afoot, continued detention of the driver can become unreasonable. The smell of marijuana emanating from a vehicle gives rise to a reasonable suspicion, justifying the detention of the occupants to determine the lawfulness of their conduct; to search the vehicle; and, depending on the circumstances, to arrest the occupants. Here, the circuit court determined that the stopping officer was in the process of issuing a citation to appellant when he smelled marijuana. The legality of the initial stop was never in question. Since appellant did not have a driver's license, the officer returned to the car, leaned down, and began asking him questions that were necessary to complete the citation. The officer asked for appellant's address and the make and model of the car he was driving. He then told appellant that he smelled weed and needed the occupants to exit the vehicle so he could conduct a probable-cause search. At that point, appellant handed the officer an ashtray full of marijuana cigarette butts, and other officers that had joined the stopping officer searched the rest of the car. When the officers searched the car's trunk, they found a black bag containing over fourteen ounces of marijuana. Having reviewed the totality of the circumstances, the appellate court held that the circuit court's denial of the motion to suppress was supported by a preponderance of the evidence. The legitimate traffic stop had not concluded, the officer was asking for the information necessary to issue the citation, when he detected the odor of marijuana coming from the appellant's car. That odor gave rise to a reasonable suspicion justifying the officers' search of the car. Thus, the circuit court correctly denied appellant's motion to suppress. (Karren, B.; 04CR-19-2555; 4-30-35; Tucker, C.)

### DOMESTIC RELATIONS

*Miller v. Brown*, 2025 Ark. App. 189 [**order of protection; service**] The circuit court entered a final order of protection. On appeal, appellant argued that the circuit court erred because he was not properly served. Arkansas Code Annotated § 9-15-204(b)(1)(A) provides that service of a copy of the petition, the ex parte temporary order of protection, and notice of the date and place set for the hearing shall be made upon the respondent at least five days before the date of the hearing. Proceedings conducted where the attempted service was invalid render judgments arising under them void. In *Duvall v. Chiung-Fang Liang*, 2014 Ark. App. 359, the appellate court held that an order of protection was void where the attempted service did not comply with Ark. Code Ann. § 9-15-204 and the respondent was not present at the hearing. Here, appellant was allegedly served on September 26, and the hearing at issue took place on September 28, which neither appellant nor his counsel on his behalf appeared. The statutory service requirements were not satisfied here, and appellant did not waive the defense of personal jurisdiction. Because appellant was not served at least five days before the date of the hearing as required by statute, and appellant did not waive the defense of personal jurisdiction, the circuit court was without authority to act, and the order was void. (Bailey, R.; 60DR-23-2749; 4-2-25; Klappenbach, N.)

*Sterkel v. Sisler*, 2025 Ark. App. 212 **[paternity; res judicata]** The circuit court dismissed the appellant's paternity action against appellees. On appeal, appellant argued that res judicata and Ark. Code Ann. § 9-10-115 did not bar his paternity action. **[res judicata]** Res judicata bars relitigation of a subsequent suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. Res judicata bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. Where a case is based on the same events as the subject matter of a previous lawsuit, res judicata will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. Here, appellant and one of the appellees had a relationship resulting in the birth of a child, with DNA testing revealing appellant was the child's biological father. Two years after the child was born, appellees married, and the appellees signed and notarized a declaration of paternity in California. The appellees names were also listed on the child's birth certificate. The appellees divorced in 2023, with the circuit court finding appellant was the child's legal father and parent on the basis of the declaration of paternity and because the appellee's name was on the child's birth certificate. Appellant was not a party to that action. The appellate court held that the principle of res judicata based on the appellees' divorce decree could not govern the outcome of the case because the appellees' divorce action and the appellant's paternity action did not involve the same parties or their privies. Appellant was not a party to the divorce decree and was not in privity with a party to the divorce decree. Thus, the appellees' divorce decree did not bar a subsequent paternity action by appellant under the principle of res judicata. **[Ark. Code Ann. § 9-10-115]** The modification provisions of Ark. Code Ann. § 9-10-115 are not relevant to appellant's paternity action because his petition to establish paternity is an original action rather than a modification. Further, the Arkansas Supreme Court has held that Ark. Code Ann. § 9-10-115 is a part of the Paternity Code and is intended to apply only to judicial findings of paternity or to acknowledgments of paternity and does not apply to divorce decrees. (Horwart, C.; 04DR-23-890; 4-9-25; Barrett, S.)

*Bay v. Fajriati*, 2025 Ark. App. 226 **[jurisdiction; change in custody]** The circuit court entered an order changing custody of the parties' child to appellee. On appeal, appellant argued that the circuit court lacked jurisdiction to re-decide custody, there were no material changes in circumstances, and changing custody was not in the child's best interest. **[jurisdiction]** Circuit courts in Arkansas retain exclusive, continuing jurisdiction over issues of child custody, visitation, and support. This jurisdiction continues regardless of the status of the parties' divorce. Here, appellant argued that the circuit court lacked the power to amend the original divorce decree after ninety days. Regardless of whether the circuit court viewed the award of custody to appellee as an initial custody determination or a modification of custody, the appellate court held that the circuit

court did not err when it found that it had jurisdiction over the parties and the subject matter involved. **[material change]** A circuit court may also find a material change in circumstances on the basis of the failure of communication, increasing parental alienation by a custodial parent, and inability to cooperate. Here, the circuit court heard significant evidence of appellant's inability to co-parent alongside appellee since an agreed order was entered, including how he created an extremely hostile environment toward appellee and how the child was at great risk of continued negative exposure should joint custody continue. Additionally, testimony was given by both appellee and a worker from an organization that provides services to human trafficking victims, that after a Christmas visit with appellant, the child returned to appellee with bruising on the face. Accordingly, there was some evidence of physical harm presented to the circuit court that could be relied on to establish that there had been a material change in circumstances. The record included evidence of appellant's inability to communicate with appellee and his manipulation of her due to language barriers. Additionally, the record contained many communications over a period of time via email and the court-approved application AppClose showcasing appellant's abrupt and bullying behavior towards appellee. Accordingly, the appellate court held that there was sufficient evidence presented for the circuit court to determine there was a material change in circumstances to support its ultimate change of custody. **[best interest]** The appellate court has considered the treatment—or rather, the maltreatment—of spouses in determining and weighing the best interest of the child. In *Corter v. Corter*, 2023 Ark. App. 266, the appellate court upheld the circuit court's decision where the underlying record indicated that the husband physically abused the wife numerous times, including well-documented incidents of physical assault and verbal attacks on her throughout their marriage. Like the facts in *Corter*, evidence was presented that appellant physically abused appellee and treated her as if she was “not much more than breeding stock.” The appellate court has held that physical abuse is evidence that may be utilized in establishing the best interest of a child and that it is the legislative directive that it is not in a child's best interest to be in the custody of an abusive parent. In determining the child's best interest, the circuit court heard three days of testimony from various witnesses including the parties, appellant's mother, and a worker from an organization that provides services to human-trafficking victims that the appellee was receiving services from. The evidence included photos of bowls of food that were left out for appellee to eat with crude language written on them, and appellee testified that she was not allowed to be downstairs in what was supposed to be her home. The appellee further testified that her lack of employment was due to her not having the required documentation because appellant kept it from her. The worker from the human trafficking support organization testified that the appellee would have care, housing, and coverage of legal fees, especially in handling her immigration issues, as long as necessary. The circuit court also placed great emphasis on the recommendation of the court-appointed attorney ad litem, who said that it was her opinion that it was in the child's best interest for appellee to have primary custody. The record indicates that the circuit court found credible the testimony and evidence of the abuse suffered by appellee from appellant and his family. The circuit court found that the best interest of the child in a stable environment is for her to be placed with appellee, as supported by multiple

witnesses. The circuit court considered an overwhelming amount of testimony and evidence that supports its adjudication and determination of the best-interest issue. Thus, the appellate court concluded that the circuit court's decision to modify the custody arrangement in this case was not erroneous. (Schrantz, D.; 04DR-21-1262; 4-16-25; Gladwin, R.)

*Hall v. Sims*, 2025 Ark. App. 227 **[order of protection]** A final order of protection was entered preventing appellant from harassing, abusing, or initiating contact with her daughter-in-law, appellee, or appellee's four minor children. On appeal, appellant argued that the circuit court erred in finding she committed domestic abuse. Arkansas Code Annotated § 9-15-103(4) defines domestic abuse as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members. Here, appellee petitioned for an order of protection on behalf of the children and herself. Appellant threatened the appellee and her husband stating that "I have something that will end you," and brandished a gun toward them if she were not allowed to see the grandchildren. The circuit court also found that the appellant set the appellee and her husband's clothes and bed on fire, ransacked her own mother's house they were living at, and sought an order of protection against appellee and her husband in another county which was denied after a hearing, attempted to get appellee's husband fired from his job, and called DHS without just cause. The appellate court has affirmed domestic abuse findings based on a variety of conduct short of actual physical harm. Thus, the circuit court did not err in its finding of domestic abuse against appellee. Appellee stated in her petition that appellant spanked the children with a belt after appellee had told her never to hit them, and that the children told appellee that the appellant whipped them hard until they cried. Appellant spanked the children with objects other than her hand and insisted on a right to do so over their parent's objection. Further, the circuit court was not required to assess appellant's conduct toward the grandchildren in isolation from her conduct towards appellee and husband. Therefore, the circuit court did not err in entering the final order of protection. (Huff, M.; 38DR-23-82; 4-16-25; Harrison, B.)

*Emis v. Emis*, 2025 Ark. App. 232 **[custody dispute]** The circuit court entered an order appellant contended modified a child-custody order without a finding of a material change in circumstances. On appeal, appellant argued the circuit court materially altered the terms of its prior orders and significantly diminished his decision-making authority (1) by limiting his ability to sign his children up for extracurricular activities and (2) by ordering the children to remain in therapy with their court-appointed therapist. **[extracurricular activities]** A material-change-in-circumstances analysis was not triggered when the circuit court did not order a change in custody but rather made specific adjustments in parenting time. Here, in an August 2022 revised order, in addition to setting forth the parties' responsibilities for transportation to and from those activities and setting guidelines for appellee's participation in such events, directed that appellant refrain from authorizing extracurricular activities without the written approval of the children obtained from

their attorney ad litem. Those parameters concerning extracurricular activities were permanently adopted in a June 2023 order with the additional provision that the approval could be obtained by the children's therapist if no ad litem had been appointed. Given that appellant retained legal custody over the children, and the court made only adjustments to the prior order that were critical to ensure the physical and mental well-being of the children, a material-change-in-circumstances analysis was not triggered in this case. Under the extraordinary facts of this case, it was clear that the children could not achieve stability, and that repeated litigation would likely occur without the revisions made by the circuit court here. Accordingly, while the nature of the parties' conflict has not changed over the years, and thus the circuit court may be correct in its conclusion that there had not been a material change of circumstances, their discord has been consistent, ongoing, and enduring, and it was detrimental and damaging to the well-being of the children. Thus, in the appellate court's opinion, the circuit court's revisions were necessary to ensure the safety, security, and welfare of these children. As to the provisions related to the extracurricular activities, appellant appeared to have acquiesced in their adoption. Under the invited error doctrine, an appellant may not complain on appeal of an erroneous action of the circuit court if the appellant has induced, consented to, or acquiesced in that action. **[therapy]** While appellant's counsel expressed some concern that therapy was hurting the children more than helping, counsel also stated on the record that they did not dispute that the children needed some type of therapy. Additionally, the court had testimony and evidence before it, including multiple psychological evaluations of the children, regarding the psychological impact the divorce and ensuing child-custody dispute had on the children. Under these circumstances, the appellate court could not say the circuit court erred in ordering individual counseling for the children. (Tucker, C.; 60DR-10-1616; 4-16-25; Thyer, C.)

## JUVENILE

*Rohr v. Ark. Dep't of Human Servs.*, 2025 Ark. App. 203 **[TPR-consent]** Appellant argued the court wrongly refused his consent to terminate voluntarily. However, Appellant hesitated and said he "was thinking about it" when asked by the court at the start of the hearing whether he was consenting to the voluntary termination of his parental rights. Further, Appellant only executed the consent after Appellee's testimony had concluded. Since the trial court had discretion to accept or reject a parent's consent, no specific findings were required. No abuse of discretion was found. (Elmore, B.; CV-24-851; 4-9-25; Abramson, R.)

*Dedrick v. Ark. Dep't of Human Servs.*, 2025 Ark. App. 220 **[sufficiency of evidence]** Appellant challenged the circuit court's decision awarding permanent custody of her daughter (MC) to the child's father and closing the case. Appellant argued that there was insufficient evidence to support the transfer and that the father was unfit. However, the court found that the father had complied with court orders, maintained appropriate visitation with MC, and had no safety issues despite testing positive for drugs once (an assessment found no treatment was needed). In contrast,

Appellant failed to complete required services, demonstrated disruptive behavior during visitations, showed hostility toward Appellee's staff, and displayed instability; there was no evidence that she addressed her mental health issues, despite her psychological evaluation indicating several necessary services. Testimony from Appellee and Appellant's own mother raised serious concerns about Appellant's ability to safely parent. Appellant's argument was, at its heart, a request to reweigh evidence, which the Court of Appeals would not do. (Byrd Manning, T.; CV-24-799; 4-9-25; Brown, W.)

*Smith v. Ark. Dep't of Human Servs.*, 2025 Ark. App. 271 **[TPR]** Appellee initiated proceedings due to concerns about environmental neglect and parental unfitness. Appellants' home was found to be in unsanitary condition, posing health risks to the children, while Appellant father was incarcerated on charges unrelated to the case. **[TPR; failure to remedy]** Appellant mother's parental rights were terminated for her inability to correct within twelve months the conditions that caused removal: her inability to provide a safe environment for the children. On appeal, mother contended that Appellee never assisted her in cleaning her home nor helped her obtain the necessary homemaker services after the children had been removed from her custody. Mother did not appeal from the finding in the permanency-planning order that Appellee had made reasonable efforts to provide family services. Furthermore, she made no objection at the termination hearing that Appellee failed to provide services; therefore, she waived that issue on appeal; it was not raised below and was not preserved for appellate review. Decision terminating mother's parental rights was affirmed. **[TPR; failure to remedy]** At the time of the removal of the children from the home, the father was in custody for pending criminal charges; he was identified in the adjudication order as a non-offending parent. Terminating his parental rights based upon his failure to remedy the conditions that caused removal was improper, because according to the court's earlier findings, it was not the father who caused the removal and, thus, he had nothing to remedy. **[TPR; sentenced for a substantial portion of a child's life]** The father remained in custody, held on bond, for the duration of the case. In its termination petition, Appellee alleged that due to the serious nature of the allegations, it was likely that by the time the termination hearing was held, the father would have been sentenced to the Arkansas Department of Corrections for a substantial period. However, at the time of the termination hearing, the father's criminal charges had not yet been adjudicated. Therefore, he had not been sentenced in a criminal proceeding that would constitute a substantial period of the children's lives. Therefore, it was error to terminate his parental rights based upon that ground, as well. (Williams, L.; CV-25-2; 4-30-25; Potter Barrett, S.)

*Minor Child v. State*, 2025 Ark. App. 224 **[ADJ; sufficiency of evidence]** Minor Child (MC) appealed his delinquency adjudication for several offenses, including third-degree assault, after an incident at a Burger King where he threw a milkshake at an employee, knocked over a display, and later resisted arrest. MC challenged the sufficiency of the evidence supporting his third-degree assault adjudication, arguing there was no proof he intended to hit the employee or that she feared imminent injury. However, throwing the milkshake, which splattered the employee, was sufficient

evidence that MC's actions created apprehension of injury. MC's challenge to the intent element was not raised at trial and thus not preserved for appeal. (Braswell, T.; CR-24-304; 4-16-25; Virden, B.)

*Minor Child v. State*, 2025 Ark. App. 261 **[sufficiency of the evidence; forensic evaluations]** Minor Child (MC) appealed the delinquency adjudications for resisting arrest and second-degree domestic battering. The charges stemmed from two separate incidents: in April 2023, MC had an altercation with her grandfather, during which she struck and bit him and poured diesel fuel on him. When police arrived, she resisted arrest, requiring assistance from multiple officers. In a separate incident in December 2022, MC threatened her grandfather and resisted officers' attempts to detain her. On appeal, MC argued that the evidence was insufficient to support the domestic battering adjudication and that the circuit court erred by denying her request for a forensic evaluation. **[ADJ; sufficiency of evidence]** At her adjudication hearing, MC argued that the State failed to prove that she intentionally, purposefully, or knowingly caused injuries to her grandfather. However, on appeal, she contended that there was no evidence of physical injury to him and that there was no evidence that she knew that he was over sixty years of age. This was not the same argument MC made to the circuit court. Because MC changed her sufficiency challenge on appeal, it was not preserved for review. Therefore, Appellant's delinquency adjudication for second-degree domestic battering was affirmed. **[ADJ; forensic evaluations]** As her second point, MC argued that the circuit court erred when it denied her request for a forensic evaluation at the beginning of her delinquency hearing. Here, although evidence showed that MC suffered from bipolar disorder, her grandfather testified that she was doing much better with her current medication and that she was doing well in school and on track to graduate. MC had already undergone a forensic evaluation, and there was no evidence presented to the circuit court as to why MC needed another evaluation. Additionally, when MC's counsel was trying to decide whether to present a defense, he consulted with her. Thus, substantial evidence supported the circuit court's denial of MC's request for a forensic evaluation on the day of the hearing. (Alexander, T.; CR-24-450; 4-23-25; Brown, W.)