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CRIMINAL

Colston v. State, 2017 Ark. App. 282 **[Ark. R. Evid. 901]** A witness at appellant's trial was able to testify that she had personal knowledge of certain portions of a video, which the State was attempting to introduce, that depicted the crime. The witness was also able to testify that the remaining portions of the video accurately represented what she heard at the time the crime was committed. Based upon the witness's testimony, a proper foundation was established that allowed the trial court to determine that the subject matter of the video was what the State claimed. Accordingly, the trial court did not abuse its discretion when it admitted the video. (Johnson, K.; CR-16-717; 5-3-17; Brown, W.)

Hopkins v. State, 2017 Ark. App. 273 **[admission of evidence]** The trial court abused its discretion when it excluded all evidence regarding the victim's consultation with an attorney concerning a possible civil action against appellant's employer based upon events related to appellant's criminal case. The jury should have been able to consider the excluded evidence when it was assessing the victim's credibility, bias, and motive. (Jones, B.; CR-16-863; 5-3-17; Glover, D.)

Ivory v. State, 2017 Ark. App. 269 **[self-representation]** The trial court did not err when it concluded that appellant had knowingly and intelligently waived his right to counsel. Thus, the

trial court properly permitted appellant to represent himself. (Kemp, J.; CR-16-633; 5-3-17; Virden, B.)

Raglon v. State, 2017 Ark. App. 267 **[expert testimony]** The trial court did not abuse its discretion when it permitted expert testimony from a witness, who was an expert in the area of forensic pathology and an associate medical examiner at the state crime lab, to testify about the effects of using K2, a synthetic cannabinoid, because the testimony did not range too far outside of the witness's area of expertise and the witness demonstrated extraordinary knowledge of the issue. (Jones, B.; CR-16-266; 5-3-17; Gruber, R.)

McClendon v. State, 2017 Ark. App. 295 **[double jeopardy]** Appellant requested a mistrial. The State did not "goad" appellant into requesting the mistrial. Thus, double jeopardy did not prohibit appellant from being retried. Accordingly, the trial court correctly denied appellant's motion to dismiss. (Johnson, L.: CR-16-787; 5-10-17; Glover, D.)

Boose v. State, 2017 Ark. App. 302 **[jury instructions]** The model jury instructions for the offense of first-degree battery against a law enforcement officer and the verdict form used in appellant's case properly required the jury to find beyond a reasonable doubt that the victim of appellant's crime was a law enforcement officer acting in the line of duty before the penalty classification for appellant's crime was enhanced from a Class B felony to a Class Y felony. Under the plain language of Ark. Code Ann. § 5-13-201, the State was required to prove that appellant had the requisite level of intent in committing battery in the first degree and that appellant's victim was a law enforcement officer acting in the line of duty. The statute did not require the State to prove that appellant knew or should have known that the victim was a law enforcement officer acting in the line of duty. (Clawson, C.: CR-16-722; 5-10-17; Hixson, K.)

Williams v. State, 2017 Ark. App. 287 **[sufficiency of the evidence; first-degree domestic battery]** There was substantial evidence to support appellant's conviction. **[use of restraints]** The trial judge failed to make the required individualized security determination before directing that appellant be placed in shackles during the sentencing phase of his trial. (Sims, B.; CR-16-806; 5-10-17; Abramson, R.)

Jones v. State, 2017 Ark. App. 286 **[Ark. R. Evid. 615]** Because the testimony that was excluded from appellant's trial was essentially inconsequential, appellant failed to establish that he was prejudiced by the trial court's decision to exclude a witness's testimony pursuant to a violation of Ark. R. Evid. 615. (Wright, H.; CR-16-778; 5-10-17; Abramson, R.)

Williams v. State, 2017 Ark. App. 291 **[motion to suppress]** The law enforcement official, who had previous contact with appellant, had reasonable cause to believe that appellant was violating the law by driving on a suspended license. A belief that appellant was committing a traffic violation was sufficient probable cause to initiate a traffic stop. Because the stop of appellant's vehicle was lawful, the trial court did not err when it denied appellant's motion to suppress the evidence obtained therefrom. (Johnson, L.; CR-16-825; 5-10-17; Gladwin, R.)

Russell v. State, 2017 Ark. 174 **[Rule 37]** The circuit court did not clearly err in denying appellant's Rule 37 petition because appellant failed to establish that he suffered prejudice based

upon his trial counsel's alleged deficient performance and because his petition contained allegations that were inappropriate for postconviction relief. (Griffen, W.; CR-16-940; 5-11-17; Womack, S.)

Phillips v. State, 2017 Ark. App. 320 **[illegal sentence]** Arkansas Code Annotated § 5-4-205(a)(1) provides that "[a] defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense may be ordered to pay restitution." A finding by a preponderance of the evidence that a defendant has violated the terms and conditions of his probation is not an adjudication of guilt as required by Ark. Code Ann. § 5-4-205(a)(1). Thus, the trial court erred when it ordered appellant to pay restitution as part of her sentence following the revocation of her probation. (Cottrell, G.; CR-16-670; 5-17-17; Whiteaker, P.)

Easley v. State, 2017 Ark. App. 317**[illegal sentence]** Because the sentence imposed following the revocation of appellant's suspended sentence did not exceed the maximum sentence allowed by law, its imposition was within the trial court's authority and it was not an illegal sentence. (Hearnsberger, M; CR-16-1030; 5-17-17; Glover, D.)

Whitney v. State, 2017 Ark. App. 341 **[sufficiency of the evidence; distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child]** There was substantial evidence to support appellant's conviction. **[admission of evidence]** The trial court did not abuse its discretion when it admitted transcripts of conversations occurring in an on-line chat room because the evidence was relevant to establish that appellant did not mistakenly have sexually explicit images on his computer. (Lindsay, M.; CR-16-964; 5-24-17; Murphy, M.)

Brewer v. State, 2017 Ark. App. 335 **[right to counsel of choice; continuance]** Even when Sixth Amendment rights are at stake, a court can legitimately balance the right to counsel of choice against the demands of its calendar and make scheduling and other decisions that effectively exclude chosen counsel. The key is whether the court has indeed balanced those interests or instead has acted arbitrarily. In appellant's case, the trial court did not act improvidently, thoughtlessly, or without due consideration when it denied appellant's motion for a continuance to hire a new attorney because: (1) appellant's request was made the morning on his trial; (2) appellant did not identify any other attorney whom he wanted to represent him; (3) appellant had already requested and received at least two prior continuances; and (4) there was no evidence to counteract the court's determination that appellant was attempting to "game the system" by his requests. (Henry, D.; CR-16-734; 5-24-17; Whiteaker, P.)

Taylor v. State, 2017 Ark. App. 331 **[sufficiency of the evidence; first-degree murder; first-degree battery]** There was substantial evidence to support appellant's convictions. **[admission of evidence]** The trial court did not abuse its discretion when it excluded evidence related to the victim's intoxication at the time of his death because the presence of alcohol in the victim's blood was not relevant to the cause of his death. (Wright, J.; CR-15-229; 5-24-17; Gladwin, R.)

Harris v. State, 2017 Ark. App. 348 **[motion to suppress]** A statement need not be suppressed for failing to give a warning pursuant to Ark. R. Crim. P. 2.3 if the officer had probable cause to

arrest the individual. Additionally, the suspect need not be under arrest at the time that he accompanies officers to the police station for questioning, but merely probable cause must exist that he could be placed under arrest. Because there was sufficient probable cause to arrest appellant when he was transported to the police station, the trial court did not err when it refused to suppress appellant's custodial statements based upon law enforcement's failure to give appellant applicable warnings pursuant to Ark. R. Crim. P. 2.3. (Henry, D.; CR-16-881; 5-31-17; Abramson, R.)

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

Harjo v. State, 2017 Ark. App. 337 (possession of drug paraphernalia; simultaneous possession of drugs and firearms; possession of a defaced firearm; possession of marijuana with intent to deliver; illegal use of a communication device) CR-16-931; 5-24-17; Vaught, L.

Owens v. State, 2017 Ark. App. 353 (residential burglary; theft of property) CR-16-1032; 5-31-17; Virden, B.

Petty v. State, 2017 Ark. App. 347 (first-degree assault) CR-17-11; 5-31-17; Gruber, R.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Von Holt v. State, 2017 Ark. App. 314 (suspended sentence) CR-16-870; 5-17-17; Klappenbach, M.

Patterson v. State, 2017 Ark. App. 359 (probation) CR-16-988; 5-31-17; Glover, D.

Springs v. State, 2017 Ark. App. 364 (suspended sentence) CR-16-1050; 5-31-17; Brown, W.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to deny appellant's Rule 37 petition was not clearly erroneous:

Bridgeman v. State, 2017 Ark. App. 321; CR-16-971; 5-17-17; Whiteaker, P.

Rose v. State, 2017 Ark. App. 355; CR-16-1067; 5-31-17; Gladwin, R.

CIVIL

Serio v. Copeland Holdings, LLC, 2017 Ark. App. 280 **[summary judgment]** It is argued that Copeland should not have been awarded a judgment because Copeland was in violation of Ark. Code Ann. § 4-32-1007. A material issue of fact existed as to whether Copeland was transacting business in this state, and therefore Copeland was erroneously granted partial summary judgment. **[impossibility of performance/contract]** Specific performance will not lie where performance is impossible. Because the IRS and the first mortgagee refused to give their required assents to the real estate contract at issue, the Serios established the defense of impossibility of performance, and Copeland's breach-of-contract action fails. (Weaver, T.; CV-16-11; 5-3-17; Hixson, K.)

McMahen v. Robinson, 2017 Ark. App. 270 **[limitations/recession]** Arkansas Code Ann. section 4-59-209 sets out the statute of limitations for a cause of action with respect to a fraudulent transfer. Section 4-59-210 provides the principles of law and equity, including laches, supplement the statutory provisions. Despite the running of the applicable limitations period, appellant argues that his claim is saved under the doctrine of laches. The parties agree that the quitclaim deed was transferred from David to Rebecca on August 23, 2007. Robinson obtained his consent judgment against David on October 12, 2010, and it was filed of record on November 1, 2010, which is more than three years after the quitclaim deed had been transferred to Rebecca. Therefore, any cause of action to rescind the quitclaim deed based on the Arkansas Fraudulent Transfers Act was extinguished after August 23, 2010. The question whether or when Robinson knew of the quitclaim transfer is irrelevant in this circumstance because the time limitation in section 4-59-209 had run its course before Robinson obtained a judgment against David, and any claim attacking the quitclaim deed had been extinguished. Section 4-59-210 does not apply because Robinson did not obtain his judgment against David within the three-year period that the conveyance was vulnerable under section 4-59-209. Had his judgment been granted within the three-year period following the quitclaim-deed transfer to Rebecca, Rebecca could have utilized section 4-59-210 and argued that laches prevented any claim Robinson may have had after the three-year period had expired. (Coker, K.; CV-15-937; 5-3-17; Gladwin, R.)

Ioup v. City of Benton, 2017 Ark. App. 274 **[condemnation]** Ioup seeks to recover costs in addition to attorney's fees and expert witness fees under section 18-15-307(c)—specifically, costs for the appraisal ($3900.00), color copies ($528.50), copies ($198.00), court reporter ($528.50), expert fees ($3007.50), faxes ($28.00), and postage ($39.44). The cost of the appraisal should have been granted as a cost occasioned by the assessment. The other cost requests for other costs were properly denied. (Arnold, G.; CV-16-377; 5-3-17; Glover, D.)

Bales v. City of Fort Smith, 2017 Ark. 161 **[certified question/jurisdiction civil service appeals]** Certified question presented is whether the court of appeals has jurisdiction to hear appeals involving the suspension, discharge, or reduction in rank for certain civil-service officers? Civil-service-commission appeals are not required by law to be heard by the supreme court. (Tabor, S.; CV-16-148; 5-4-17; Kemp, J.)

Robinson Nursing Center v. Phillips, 2017 Ark. 162 **[class action]** As to the breach-of-contract, ADTPA, and unjust-enrichment claims, class certification is proper. The common, overarching

issues concern whether appellants have liability for chronic understaffing under the admission agreement and the asserted statutes. The circuit court correctly found that the commonality and predominance requirements of Rule 23 had been met. The class as certified in the present case is a cohesive and manageable group because the common question of understaffing can be ascertained on a classwide basis. Because the class representative's claim arises from the same alleged wrongful conduct, understaffing, the circuit court correctly found that the typicality requirement had been satisfied. Under the facts of this case, the proximate-causation analysis necessarily requires an individual inquiry, which renders Phillips's negligence claim inappropriate for class certification. (Fox, T.; CV-16-584; 5-4-17; Baker, K.)

Broadway Health and Rehab, LLC v. Roberts, 2017 Ark. App. 284 **[arbitration agreement]** A valid arbitration agreement has not been proven under either the agency theory or the third-party-beneficiary doctrine to establish that Ms. Roberts had authorization from her mother to execute the arbitration agreement on her behalf. (Fowler, T.; CV-16-978; 5-10-17; Gruber, R.)

American Gamebird Research, Inc. v. Burton, 2017 Ark. App. 297 **[summary judgement]** All evidence submitted in the course of summary-judgment proceedings must be under oath. Here, the letter from the AGFC was not under oath, nor was the document in the form of an affidavit. It was therefore not admissible for consideration by the trial court in the summary-judgment proceeding. It is clear from the record that the trial court did consider the letter in making its ruling. (Jones, C.; CV-16-885; 5-10-17; Whiteaker, P.)

Hyman v. Sadler, 2017 Ark. App. 292 **[FOIA/moot]** The State Police (ASP) argued that the request was moot because the requested records had been provided. The ASP explained that, after the lawsuit was filed, Earp pled guilty, and because the investigation exemption no longer applied, the records were immediately provided. The trial court ruled that the issue was moot. The purpose of Hyman's request for the dash-cam video of Earp's arrest was not to evaluate the performance of public officials but to aid him in his representation of Earp at a driver control hearing. The trial court's decision that Hyman's claim was moot is affirmed. (McGowan, M.; CV-16-1023; 5-10-17; Gladwin, R.)

Malloy v. Smith, 2017 Ark. App. **[service]** Pursuant to Ark. R. Civ. P. 4(e)(2), service is authorized "in any manner prescribed by the law of the place in which service is made." In this case, service was properly perfected according to New York law. On the summons, the space for the address of the party being served was left blank. It is important to note that the official form of summons sets forth that the form complies with Rule 4(b) and "does not modify of amend any part of that rule." With that in mind, Rule 4 does not specifically require that the defendant's address be stated on the summons. Arkansas Rule of Civil Procedure 4 requires only that the summons be directed to the defendant, which was done by filling in the correct names of the defendants. Furthermore, the purpose of a summons, as stated above, is to apprise a defendant that a suit is pending against him and afford him an opportunity to be heard. **[default judgment]** Because Malloy did not prove excusable neglect, there is no need to reach the second prong of the analysis regarding whether Malloy and Callaghan had a meritorious defense to the complaint. (Weaver, T.; CV-16-660; 5-10-17; Virden, B.)

James Tree, Inc. v. Fought, 2017 Ark. 173 **[new trial]** Circuit court did not abuse its discretion in granting Fought's motion for a new trial and setting aside the jury's unanimous verdict. In her new-trial motion, Fought contended that the jury's answer to Interrogatory Number 1, finding that she did not sustain any damages that were proximately caused by the negligence of James Tree, was clearly against the preponderance of the evidence presented at trial. She asserted that the evidence was undisputed that she sustained some injury and resulting damages due to the collision and that the primary issue in dispute was the severity of her injuries and the amount of damages to which she was entitled. Although James Tree's expert, Dr. Smith, disagreed with Fought's expert witnesses regarding the severity and permanent nature of her injuries, Dr. Smith did admit that the amount of force Fought would have sustained in the collision was consistent with the sprains and strains found by Dr. Bennett the day after the accident. Smith testified that such soft-tissue injuries typically resolve within six to eight weeks of treatment. Based on the uncontroverted evidence at trial that Fought suffered, at minimum, strains and sprains in her neck and back that caused her to seek chiropractic treatment shortly after the collision, combined with defense counsel's virtual concession on this issue during closing argument, the circuit court was justified in finding that the jury's verdict was clearly against the preponderance of the evidence and that a new trial was warranted under Rule 59(a)(6). (Gray, A.; CV-16-566; 5-11-17; Goodson, C.)

McGowan v. Massey, 2017 Ark. App. 318 **[damages]** McGowan contends Massey's award of $279,158.16 is excessive. When an award of damages is alleged to be excessive, this court reviews the proof and all reasonable inferences most favorably to the appellee and determines whether the verdict is so great as to shock the conscience of the court or demonstrate passion or prejudice on the part of the jury. In determining whether the amount of damages is so great as to shock the conscience of the court, such elements as past and future medical expenses, permanent injury, loss of earning capacity, scars resulting in disfigurement, and pain, suffering, and mental anguish are considered. Upon review, the court's conscience has not been shocked. (Sutterfield, D.; CV-16-942; 5-17-17; Glover, D.)

Kraft v. Limestone Partnership, LLC, 2017 Ark. App. 315 **[contract]** Arkansas law requires that different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is possible; giving effect to one clause to the exclusion of another on the same subject is erroneous. The provisions relied on by Limestone, however, do not apply to the same subject as section 6.11. Sections 6.1 and 9.2 are not applicable to Kraft's circumstances and have no bearing on his rights under section 6.11. As Kraft notes, Limestone's interpretation would render the unanimous-consent requirement of section 6.11 meaningless by allowing a majority vote to exclude Kraft or Coats from management, change their guaranteed payments, and force a sale of their membership interests under section 9.2. The plain language of the agreement provides in mandatory terms that Kraft's guaranteed payments cannot be changed without unanimous consent. A court cannot make a contract for the parties but can only construe and enforce the contract that they have made. The trial court's order granting summary judgment was in error. Murphy, M.; CV-16-910; 5-17-17; Klappenbach, M.)

Daily v. Langham, 2017 Ark. App. 310 **[res judicata]** The current litigation and the third-party complaint in the Perry litigation involve the same claim. 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. When 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. In this case, Tamara and T&M were in privity with Marvin because their interests were so identified in interest with Marvin's that he represented the same legal right. Tamara and Marvin are husband and wife, and they own T&M together. Further, T&M and Tamara were parties to the July 2012 agreement, and the agreement collectively referred to Marvin, Tamara, T&M, and Fleeting & Harbor as "Daily." (Fitzhugh, M.; CV-16-757; 5-17-17; Abramson, R.)

Stodola v. Lynch, 2017 Ark. 181 **[article 12, section 5 of the Arkansas Constitution.]** Case remanded to the circuit court with instructions to lift the injunction and dismiss complaint. (Pierce, M.; CV-16-473; 5-18-17; Hart, J.)

Coleman v. Wilmington Savings Fund, 2017 Ark. App. 342 **[rule 60 motion]** The narrow issue is whether the circuit court erred in denying the Colemans' Rule 60 motion alleging that Wilmington had committed fraud in obtaining the judgment of foreclosure against them. Even assuming the affidavit of debt proffered by Wilmington was completely false, the appropriate time to make that argument was when Wilmington moved for summary judgment at the beginning of litigation. When a moving party has established a prima facie entitlement to summary judgment, it is up to the other party to meet proof with proof to demonstrate that there is still a material issue of fact to be litigated. Regarding Rule 60 motions to vacate for fraud, it is not sufficient to show that the court reached its conclusion on false or incompetent evidence, or without any evidence at all; instead, it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, an issue in the proceeding before the court that resulted in the decree assailed. (Wyatt, R.; CV-16-1118; 5-24-17; Murphy, M.)

Garrison v. Aquino, 2017 Ark. App. 338 **[imputed negligence]** Lawsuit alleged negligence against minor and alleged that minor's negligence was imputed to parents, Carrie and Al, pursuant to Arkansas Code Annotated section 27-16-702. The parents were divorced and the father did not have custody and had not signed the child's driver's license-application form, was not authorized under the statute to do so, and had no authority to grant or withhold permission for the child to drive while in the mother's custody. (Fogleman, J.; CV-16-641; 5-24-17; Vaught, L.)

Stassi v. Isom, 2017 Ark. App. 334 **[admin. appeal]** Here, both parties acknowledge the Commission did not address and decide the "exemption" argument relied upon by Stassi. The issue was squarely before the Commission, yet the findings of fact and conclusions of law do not address this issue or the facts relied upon in support of it. Consequently, case must be reversed and remanded to the trial court with directions to remand this matter to the Commission for further proceedings. (Reif, M.; CV-16-1114; 5-24-17; Glover, D.)

Derrick v. Haynie, 2017 Ark. App. 327 **[lease/abandoned personal property]** Here, a specific statute governs the situation and provides that "[u]pon the voluntary or involuntary termination of any lease agreement, all property left in and about the premises by the lessee shall be

considered abandoned and may be disposed of by the lessor as the lessor shall see fit without recourse by the lessee." Ark. Code Ann. § 18-16-108(a). The statute dictates that the property left on the leased premises at the termination of a lease agreement "shall be considered abandoned." There is no question of fact to determine. Appellant's property was left in the leased premises and was therefore "abandoned." Appellee was free to dispose of it as she saw fit without recourse by appellant. (Hughes, T.; CV-16-1031; 5-24-17; Gruber, R.)

Self v. Hustead, 2017 Ark. App. 339 **[service]** The Husteads' affidavit for warning order failed to satisfy the requirements of Rule 4(f). The affidavit stated that their attorney made a "diligent inquiry"; however, this statement is conclusory as no details are included to describe what the diligent inquiry was. The affidavit stated that Self's last-known address was on McDonald Avenue, but there were no details explaining from where that information had come. Self stated in his affidavit that neither he nor any family member had ever lived at that address. While the affidavit states that personal service on Self was unsuccessfully attempted at the McDonald Avenue address, it lacks any facts to establish that Self ever lived there. Further, the affidavit failed to state that diligent inquiry led the Husteads to believe that Self's whereabouts were unknown, which is required by Rule 4(f). And here, the record reveals that the Husteads failed to use available information to locate Self. The Husteads' real-estate agent had Self's cell-phone number. When Self moved from the Husteads' home in Huntsville, Arkansas, he moved to Rogers, Arkansas, a neighboring town less than forty miles away. After moving from the Husteads' home, Self had jobs wherein he serviced the general public. The Husteads failed to demonstrate in the warning-order affidavit that they conducted a sufficient, diligent inquiry into Self's whereabouts in accordance with Rule 4(f)(1). (Martin, D.; CV-17-21; 5-24-17; Vaught, L.)

City of Tontitown v. First Security Bank, 2017 Ark. App. 333 **[municipal services]** Tontitown contends that it complied with its obligations under the statute because the services were already available to the property. However, the evidence established that while water and sewer services had been provided to the improved portion of the commercially zoned property, they had not been provided to the rest of the property. Despite needing plans to move forward with making services available, the city did not inform the Bank of what was needed or request that plans be filed. Rather, Tontitown took no steps after making its written commitment. Arkansas Code Annotated section 14-40-2002 requires that the city take substantial steps toward providing the requested services. (Martin, D.; CV-16-164; 5-24-17; Klappenbach, M.)

City of Tontitown v. First Security Bank, 2017 Ark. App. 326 **[service]** Dismissal of suit over annexation for failure to obtain timely service was properly with prejudice as service was never accomplished and the savings statute did not apply. (Martin, D.; CV-16-802; 5-24-17; Gruber, R.)

Wartick v. United Services Auto. Assoc., 2017 Ark. App. 329 **[class action]** Court did not err in refusing attempts to intervene because proper pleadings were never timely filed. (Ryan, J.; CV-16-393; 5-24-17; Virden, B.)

O'Neal v. Love, 2017 Ark. App. 336 **[deed]** Ethel obtained only such interest as Herbert had in the property at the time of the execution of the quitclaim deed. Herbert owned the property with Gloria as tenants by the entirety. As a result, Gloria owned a survivorship interest in the

property. Thus, while Herbert could convey his interest in the property, he could not convey away Gloria's right of survivorship. When Herbert died in 2004, Gloria became sole owner of the property, thereby extinguishing any interest Ethel had through conveyance by the quitclaim deed. (Fox, T.; CV-16-1084; 5-24-17; Whiteaker, P.)

Greenberg v. Horizon Publications, Inc., 2017 Ark. App. 328 **[defamation]** The standard of proof in defamation cases involving public figures is high. Evidence of actual malice must be proved by clear and convincing evidence, and the mere presence of some circumstantial evidence is insufficient to create a factual question. Here, the circumstantial evidence presented by Greenberg was insufficient to create a material question of fact regarding whether Kuykendall made any statements with knowledge they were false or with reckless disregard of whether they were false. The evidence could not support a reasonable jury's finding that actual malice was shown by clear and convincing evidence. Besides the element of malice, the element of false facts has not been shown – assertion of fact versus opinion; whether the published assertion is susceptible of being proved true or false. (Phillips, G.; CV-16-139; 5-24-17; Abramson, R.)

Booth v. Franks, 2017 Ark. 193 **[bank merger]** State Banking Board's notice of the merger hearing was not deficient. Minority stockholder's protest of merger were not timely filed with the Board. (Cox, J.; CV-15-898; 5-25-17; Womack, S.)

Tenants of 1974 v. U.S. Bank, 2017 Ark. App. 362 **[warning order]** Service of process, which was by warning order, was defective because the affidavit in support of the warning order was insufficient in demonstrating a diligent inquiry prior to issuance of warning order. There was a failure of strict compliance with our service requirements, and the trial court erred in denying the motion to set aside the judgment. (Weaver, T; CV-16-396; 5-31-17; Hixson, K.)

Ford v. Safeco Ins. Co., 2017 Ark. App. 363 **[insurance/summary judgment]** The provision of the policy still contemplates first assigning a "cause" to the loss. Safeco would have us put the cart before the horse in interpreting the insurance policy to deny coverage without ever establishing the cause of the loss. Only when causation is established can it be determined whether and which exclusionary provisions might apply. An award of summary judgment was in error. (Fox, T.; CV-16-1076; 5-31-17; Murphy, M.)

Chambers v. McDougald, 2017 Ark. App. 357 **[contract]** The circuit court erroneously excluded the evidence concerning Paragraph 7 on the basis that only BLC could enforce that claim and that it was not a party to this case. Evidence that McDougald breached Paragraph 7 was also admissible on the question of whether McDougald could enforce the note because, if McDougald was to enforce the note at all, it was to be according to the terms of the purchase agreement. That agreement required McDougald to continue his employment with BLC through the term of the note. It also required McDougald to defer his salary. The Chamberses argue that he did neither. (Glover, D.; CV-16-273; 5-31-17; Harrison, B.)

Roberts v. Wortz, 2017 Ark. App. 349 **[discovery sanctions]** The circuit court did not abuse its discretion in dismissing Roberts's complaint for the discovery violation. The circuit court in its order of dismissal specifically found that Roberts's failure to supplement his response prejudiced

Wortz. The court further found that Roberts's failure to supplement was "deliberate" and "deceitful" and that his excuses for the failure were "disingenuous" and "bizarre." While the dismissal of a complaint with prejudice is obviously a severe sanction, dismissal is a sanction expressly provided for under Rule 37 when a party fails to comply with an order to provide discovery, and it is crucial to our judicial system that circuit courts retain the discretion to control their dockets. (Tabor, S.; CV-15-1012; 5-31-17; Abramson, R.)

DOMESTIC RELATIONS

Mossholder v. Coker, et al., 2017 Ark. App. 279 **[guardianship of a child]** The appellant mother appealed the order entered by the circuit court awarding guardianship of her two children to their paternal grandmother. She alleged three errors on appeal: (1) the guardian did not properly intervene; (2) she was unsuitable to be guardian; and (3) she failed to prove that the mother was unfit. On the first issue, the court, the Court of Appeals said that the guardian did not file a written motion to intervene, as provided in Rule 24(c) in the Arkansas Rules of Civil Procedure. However, she orally requested custody of the children in a temporary hearing on custody in the child's parents' domestic relations case. The circuit court allowed the pleadings to conform to the proof, stated on the record that she was permitted to intervene in the case, and awarded her custody. She subsequently filed for guardianship as an intervenor. The Court said the circuit court did not abuse its discretion in allowing the pleadings to conform to the proof presented at that hearing, the court subsequently confirmed that she had moved orally to intervene, and no one complained. On the second point, whether the guardian was "unsuitable," the Court noted that this case had a long history. There were at least twelve DHS and two Faulkner County Sheriff's Office investigations instigated by the appellant alleging that the children's father had sexually abused them. All were found to be unsubstantiated. The children denied the abuse and revealed that their mother told them to lie about it. A psychologist who performed forensic evaluations of both parents and the children concluded that the father did not sexually abuse the children and that he did not have "pedophile tendencies." He also provided results of the appellant mother's personality test results which "were very elevated, which demonstrated psychopathic, paranoid, and 'hype-mania' tendencies." His diagnosis was "borderline personality disorder" and his opinion was that the test results "undermine[d] her allegations . . . almost completely." The children's therapist testified that much of the treatment she provided the children addressed their sadness and guilt about making false statements about their father at the request of their mother. She said the mother was a source of anxiety and distress for the children and that they were doing well in their grandmother's care, that they had a good relationship with her, and that it was in their best interest to remain in her care. The Court of Appeals said that the appellant's entire argument that the children's guardian is unsuitable is without merit and that the circuit court did not err in finding that she is a suitable guardian. The Court said there "was an even larger mountain of evidence" that the mother was unsuitable. Finally, on the challenge that the guardian did not meet her burden of proving that the mother is unfit, the Court of Appeals said the guardian had no such burden. There is no requirement in the Probate Code that a parent be unfit before a guardianship can be entered. Under Arkansas Code Annotated, section 28-65-204(a), a parent of an unmarried minor, "if qualified and suitable," is preferred over all others for appointment as guardian of the person. In *Fletcher v. Scorza*, 2010 Ark. 64, the Supreme Court held that "the sole considerations in determining guardianship"

under the statute are "whether the natural parent is qualified and suitable and what is in the child's best interests" and that "prior cases [that]suggest a standard of fitness or unfitness in guardianship proceedings involving the statutory natural-parent preference" were overruled. The Court affirmed the circuit court decision awarding guardianship of the children to the paternal grandmother. (Foster, H.; No. CV-16-29; 5-3-17; Murphy, M.)

Beck v. Beck, 2017 Ark. App. 301 **[marital property; alimony; attorney's fees]** The circuit court granted the parties' divorce, awarded custody and child support, divided marital property, awarded alimony to the appellee wife, and awarded substantial attorney's fees to the appellee wife. The appellant husband on appeal claimed the circuit court erred in finding any marital interest in B&B Construction and Specialties, Inc., in awarding permanent alimony after the final decree was entered, and in awarding attorney's fees to the appellant. The Court of Appeals found no error and affirmed the decree in its entirety. (Pierce, M.; No. CV-16-689; 5-17-17; Gladwin, R.)

Acklin v. Grisham, 2017 Ark. App. 322 **[modification of child custody]** The appellant father appealed from the circuit court's finding that a material change in circumstances had occurred and its order that joint custody be changed to primary custody with the appellee mother and visitation with the appellant father. In affirming, the Court of Appeals noted that discord and an inability to cooperate in sharing joint custody can constitute a material change in circumstances. Here, the circuit court found that on the issue of the best interest of the child, this was a close case and both parents were fit to have custody. The court considered that, in the mother's home, the child had a half-sibling, which the court said is not determinative but can be a factor. The Court of Appeals found no clear error in the decision of the circuit court. (Putman, J.; No. CV-16-701; 5-17-17; Hixson, K.)

Blair v. Willis, 2017 Ark. App. 324 **[retroactive child support]** The appellant mother appeals from an order awarding retroactive child support to her former husband, appellee Willis, contending that the trial court erred in not treating the appellee's petition as a modification and in not denying the claim under equitable principles. In affirming, the Court of Appeals noted that, beginning with a temporary order in August 2003, when custody and visitation were awarded to the appellee, then a final decree in December 2003, then an order in October 2007 on a joint petition for clarification of visitation, no mention was ever made of child support, until the appellant filed a motion for change of custody and child support in September 2015. At that time, the appellee father counterclaimed for back child support from the time of the 2002 decree to the 2007 order, and asserted that his former wife had not been helping with school supplies, clothes, or orthodontics. The Court of Appeals said this was not a modification of child support, which would go back only to the date a motion for modification was filed, but was an initial award of child support. The appellant also argues that equitable principles barred the appellant from seeking retroactive child support. However, the trial court never ruled on the issue of equitable defenses (which were never raised), and the Court of Appeals will not review a matter on which the circuit court has not ruled. (Williams, L.; No. CV-16-636; 5-17-17; Murphy, M.)

Dare v. Frost, 2017 Ark. App. 325 **[modification of visitation; child support]** The plaintiff mother of the child appeals from a circuit court order calculating child support and finding a material change in circumstances to support a modification of the appellee father's visitation

with the parties' daughter. In affirming the modification of visitation to provide more visitation for the father, the Court of Appeals said it has held that an elevated degree of discord between parties can amount to a material change in circumstances. Both parties testified that they previously had been able to agree on extended summer visitation, in excess of the two weeks each summer to which the parties had agreed in their original decree in Virginia. However, the mother testified that "she did 'not see a reason to do anything outside of the visitation guidelines if he isn't going to do anything outside of the support guidelines.'" The evidence showed that the mother had shown the child court pleadings and emails between the parents. She once sent their daughter to Virginia to visit her father with an empty suitcase, which she admitted was an "act of 'gamesmanship'" to send a message to the appellee father. The Court of Appeals said that, given this evidence, it was appropriate for the trial court to modify the visitation schedule to more closely reflect the actual conduct of the parties before the relationship dissolved, and it affirmed on this point. The second issue the appellant raised was that the circuit court erred when it did not consider the growth of the appellee's stock portfolio in calculating child support or imputing his income. The Court of Appeals agreed. The Court remanded with instructions that the circuit court consider the gains realized by the appellee as income. The appellant also contends that the circuit court erred in not imputing defendant's income commensurate with his lifestyle. The appellee is employed full time as a behavioral-specialist counselor for at-risk middle schoolers, making $1,017 semi-monthly and his wife works, as well. The appellant did not point to any evidence that the appellee is "unemployed or working below full earning capacity" as set out as a reason for imputing income in Administrative Order No. 10. The Court of Appeals found no error in the circuit court's decision not to impute his income, and affirmed on this point. (McCallister, B.; No. CV-16-1022; 5-17-17; Murphy, M.)

Klever v. Klever, 2017 Ark. App. 330 **[motion to dismiss; motion for summary judgment]** The appellant former husband filed a motion for abatement or reduction of alimony. The appellee former wife filed a motion to dismiss contending that he had failed to state facts upon which relief could be granted and requested a hearing on the motion. A telephone hearing was conducted during which the court heard arguments from counsel of both parties and testimony from the appellee. The appellant was represented by counsel but did not testify and it was not clear whether he was present at the hearing. The circuit court granted the motion to dismiss, finding that the decree in this case was agreed upon by the parties. The court found that the alimony provision could not be modified except by consent of the parties and that it granted the motion to dismiss on that ground. In reversing, the Court of Appeals noted that the court went beyond the complaint in reaching its decision. It said that, in dismissing a motion to dismiss under Ark. R. Civ. P. 12(b)(6), the court cannot look beyond the complaint. Here, the circuit court looked beyond the complaint and considered the appellee's oral testimony about the formation of the contract between the parties. The Court said it appears the circuit court may have intended the motion to dismiss to be converted to a motion for summary judgment, in which case a circuit court may consider matters outside the pleadings. However, the Court said a separate issue arises because the court heard and considered the appellant's oral testimony, which is improper in a summary-judgment proceeding. The court cited *Hannon v. Armorel Sch. Dist. No. 9*, 329 Ark. 267, 270-71, 946 S.W.2d 950, 952 (1997), in which the Supreme Court held that "although the order refers to summary judgment, because the circuit court received testimony at the summary-judgment hearing and thus went beyond the pleadings, discovery, and affidavits in reaching its decision, the court converted the matter from a proceeding for summary

judgment to a bench trial." The Court of Appeals said it is not clear that the issues were fully developed, for example, whether the appellant was at the hearing or not, that the parties had no notice that the issues would be tried or that they should prepare for anything other than a motion to dismiss. "The alimony clause within the divorce decree is a contested matter that requires the testimony of both parties as to the formation of a contract for alimony. In light of the need for full development of the issues..." the Court reversed and remanded for a full trial on the merits. (Parker, A.; No. CV-16-1025; 5-24-17; Virden, B.)

PROBATE

Allmon-Lipscomb v. State, 2017 Ark. App. 301 **[conditional release—acquittal by reason of mental disease or defect]** The appellant was acquitted by reason of mental disease or defect of the offenses of aggravated assault, terroristic threatening, and endangering the welfare of a minor. She was committed to the custody of the director of DHS for evaluation and treatment. Over the next seventeen years, she was conditionally released from treatment and had her release revoked five times. In this case, she appealed from an order revoking her order of conditional release because she said there was insufficient evidence to revoke. The Court of Appeals set out a detailed history, including the appellant's diagnosis, her treatment, her failure to comply with treatment time and again, including a failure to take prescribed medication, and her violence and aggression against treatment providers, family, and loved ones. Treatment providers testified that her behavior was escalating. The Court said the evidence demonstrates her noncompliance, her verbal hostility to those assisting with her treatment, and her threats to beat and kill people. The decision of the circuit court revoking her conditional release was affirmed. (McGowan, M.; No. CV-16-691; 5-10-17; Vaught, L.)

Rodgers v. Rodgers, 2017 Ark. 182 **[stepparent adoption]** The circuit court granted the appellee's request to adopt her four stepchildren, the children of her husband and his former wife, the appellant. On appeal, the appellant argues that the circuit court erred in finding that her consent was unnecessary because she had failed, for at least one year and without justifiable cause, to communicate with her children or to provide for their care and support as required by law or court order. The Court of Appeals affirmed the adoption and the Supreme Court accepted it on a petition for review. The record indicated that the father was given custody of the children after their mother tested positive for amphetamine and methamphetamine. The circuit court ordered that the mother was to have no visitation at all with the children and she told their father that if he permitted any visitation between the mother and the children, the court would hold him in contempt. The court also told the mother that she could come back to ask the court to reverse its ruling when she decided that her children were more important to her than drugs and the court would look at it, but until that happened there would be no visitation. The mother ultimately had clean drug screens, but she never filed a petition for visitation. At the hearing on the adoption, the appellant mother argued to the circuit court that she believed her failures to visit and to pay support were justified because the court had ordered no visitation and had not ordered child support. In affirming the adoption, the Supreme Court found that the circuit court's findings were not clearly erroneous. The Court said the statute is written in terms of a failure to communicate with a child, not a failure to have visitation with a child, that permits an adoption without a parent's consent. Here, the appellant mother made no phone calls, sent no cards,

letters or emails, and did not attempt any of these. She did not attend any school, church, or sporting events involving the children. She failed to petition for a review of the "no visitation" order after she became drug free. The Court distinguished the case from *Martini v. Price*, 2016 Ark. 472, 507 S.W.3d 486, a stepparent adoption case that the Court reversed. The decision was affirmed, with two justices concurring and three justices dissenting. (Hearnsberger, M.; No. CV-16-926; 5-18-17; Wood, R.)

Foster v. DHS, Division of Aging and Adult Services, **[termination of guardianship]** The circuit court denied the appellant's petition to terminate a guardianship over his person and his estate. The appellant entered a residential-care facility after he and his wife separated and during their process of divorcing. After the appellant was diagnosed with bipolar disorder and depression, with a history of poly-substance abuse, all which required medication supervision, an administrator of the facility acted to have a guardian appointed for him. He is a ward of a guardian from the Office of the Public Guardian through the Department of Human Services's Division of Aging and Adult Services, the appellee. The Court of Appeals reviewed the testimony and other evidence and the pertinent statutes, and found that the trial court did not clearly err. It said the appellant did not provide the trial court with persuasive compelling evidence that he was no longer incapacitated or that a guardianship was no longer necessary to protect his best interest. The trial court heard the testimony of a mental health professional who had assessed the appellant and opined that the appellant could work with his caregivers to move toward independence but was not yet ready to be without the protections afforded him by the guardianship. The Court said that he had the burden to establish his competency or that a guardianship was no longer necessary, and the circuit court did not clearly err in finding that he did not carry that burden at the time the petition was heard. The decision was affirmed. (McCormick, D.; No. CV-16-869; 5-24-17; Klappenback, M.)

Pace v. Steele and Estate of Steele, 2017 Ark. App. 354 **[decedent's estate—admitting will to probate—procurement; mental capacity and undue influence]** The appellant is the niece of the decedent and the separate appellee, Cora Steele, is another niece who along with her now-deceased husband, was the primary beneficiary of the decedent's will. The circuit court found that the appellee niece and her deceased husband did not procure the will and that the decedent had the requisite mental capacity and freedom from undue influence to make the will. The Court of Appeals held that the circuit court clearly erred in finding there was no procurement, but affirmed the court's decision admitting the will to probate nevertheless. The Court set out the facts of the case, including testimony about the relationship of the decedent to the appellee and her now-deceased husband. The Court held that the appellee procured the will and that, because of that, a rebuttable presumption of undue influence arose, and the appellee had the burden of going forward with evidence from which a rational fact-finder could conclude beyond a reasonable doubt that the will was not the product of insufficient mental capacity or undue influence (the Court noted that these two are closely related and interwoven so that they are considered together). The question is whether the decedent had the requisite mental capacity at the time the will was signed. Considering the extensive testimony and other evidence, such as medical records, the Court concluded that ample evidence existed to support beyond a reasonable doubt that the decedent's will was not the product of insufficient mental capacity or undue influence. The Court said the appellant failed to meet her burden of proof by a preponderance of the evidence, and affirmed the decision. (Smith, P.; No. CV-16-671; 5-31-17; Virden, B.)

JUVENILE

Holloway v. DHS, 2017 Ark. App. 268 **[termination parental rights]** One case worker testified extensively about the children's behavioral problems but concluded that she believed the children were adoptable. She noted that the children had been participating in therapy and extracurricular activities and that their behavior was improving. Another caseworker's testimony, even though she testified that she believed all children are adoptable, she considered the children's behavioral and special needs in this case and stated the children are adoptable. Accordingly, there was sufficient evidence on the issue of adoptability and that termination was in children's best interest. (Halsey, B.; CV-17-31; 5-3-17; Abramson, R.)

Madore v. DHS, 2017 Ark. App. 296 **[d-n]** There was no evidence presented to support the trial court's specific finding of neglect based on the children being left alone. (Goodson, D.; CV-16-816; 5-10-17; Whiteaker, P.)

Grosso v. DHS, 2017 Ark. App. 305 **[termination parental rights]** While it is true that it was not until the third order that Del Grosso was ordered to live separately from Ray, it had been ordered from the beginning of the case that R.D. was not to have any unsupervised contact with Ray, and Del Grosso has not remedied this. Additionally, the circuit court made repeated findings at multiple hearings that DHS had made reasonable efforts to provide family services, yet Del Grosso did not appeal from the circuit court's previous findings that DHS had made reasonable efforts, nor did he raise this issue at the termination hearing. The failure to appeal from a circuit court's prior meaningful-efforts findings precludes reviewing those adverse rulings in this appeal. DHS does not have an affirmative duty to re-prove factual findings made by the circuit court in earlier orders. Furthermore, Del Grosso has been aware of the expectations of him from the time the case first began, but he has shown a lack of urgency. This, coupled with the circuit court's finding that Del Grosso has stated repeatedly throughout the case that he will not remove Ray from his home, and if he did, it would be only temporary, indicates that Del Grosso has no intention of putting his child first. Del Grosso does not indicate which services DHS could have offered him that would have remedied the situation. Thus, the circuit court's finding that appropriate services had been provided to Del Grosso was not clearly erroneous, and the termination of Del Grosso's parental rights is affirmed. (Coker, K.; CV-17-20; 5-10-17; Murphy, M.)

DHS v. Hellyer, 2017 Ark. App. 294 **[contempt]** Substantial evidence supports the circuit court's decision. The emergency hold ordered by the judge was released by DHS. The emergency-hold order was clear, and it was not necessary to assign a duty specifically to Gibson within that order. The $200 fine in the form of providing children's books is not an "impermissible criminal contempt sanction. (Zimmerman, S.; CV-17-43; 5-10-17; Harrison, B.)

Earls v. DHS, 2017 Ark. 171 **[termination parental rights]** Although the record demonstrates that Earls was appointed counsel for the termination hearing and was afforded rights as a parent, the record does not demonstrate that Earls's legal status as the biological parent was established to apply the twelve-month time period described in the statute. Therefore, Earls's rights had not attached to then be terminated. (Halsey, B.; CV-17-112; 5-11-17; Baker, K.)

Edgar v. DHS, 2017 Ark. 312 **[termination parental rights]** The trial court's conditions-not-remedied finding was not clearly erroneous. Regarding the aggravated-circumstances ground, clear and convincing evidence shows that the trial court's aggravated-circumstances finding was not clearly erroneous. Neglect and abuse led to ADHS's long-term involvement with appellant, A.E., and A.N. ADHS's involvement included A.E. and A.N.'s out-of-home placement, totaling approximately nineteen months. After A.E. and A.N.'s initial removal for neglect and abuse, appellant succeeded in regaining their custody. ADHS provided multiple services to keep A.E. and A.N. in appellant's custody, but she lost it because of continued neglect and abuse. Appellant throughout this case exhibited poor judgment and raises great concerns about appellant's ability to satisfy A.E. and A.N.'s moral, intellectual, and physical developmental needs. The trial court's finding that continued contact with appellant was not in the children's best interests. (Coker, K.; CV-17-49; 5-17-17; Gladwin, R.)

Choate v. DHS, 2017 Ark. 319 **[termination parental rights]** The conditions that caused removal of these two children, as found in the adjudication order and recited in the termination order, were "based on mother's lack of stability in housing and employment and failure to protect by violating the visitation order and father's prior addiction to pornography and lack of stability in employment and housing." With respect to the father, the trial court made a mistake in concluding that the statutory "failure to remedy" ground was proven by clear and convincing evidence. At worst, it was established that the family-service worker did not know whether Rod's housing and employment were stable; at best, it was established that he had lived in the same home since before the parties divorced, and even if Rod's hours varied, he had worked for Dairy Queen for at least a year, and the only example of income instability offered was that the couple had to sell things to get to "visits and such." The only "subsequent factors" the trial court relied upon in finding DHS had proved this ground by clear and convincing evidence was summarized in the termination order: "The Mother made a choice in re-marrying the Father, and this subsequent factor demonstrates that the juveniles cannot be placed with Mother and that Mother is not making proper, protective decisions as regards her children. Father has not demonstrated to this Court that he is a fit and proper parent for the children." The evidence does not support termination of the father's parental rights. With regard to the mother, the family-service worker, in effect, testified that "[e]verything [she] put down that they have not done, is not stuff I really know." She acknowledged the following relevant information. Lisa was on disability but stated she "was not requiring [Lisa] to have stable employment"; she had some concerns about Lisa having to sell some things to get to her sessions with the children but stated

she did not "think we should go around and take everybody's children away who have to sell some things to make ends meet"; and she had never been to Lisa and Rod's home and had no idea if it was clean or stable (even though her court report stated Lisa had not maintained clean and stable housing). In addition, the court relied on Lisa's "failure to protect" the children from Rod, but DHS provided no evidence upon which to base a conclusion that Rod was doing anything Lisa needed to protect the children from. The trial court clearly erred in finding that statutory grounds for termination of Lisa's parental rights had been proved. (Zimmerman, S.; CV-16-1155; 5-11-17; Glover, D.)

DHS v. Jones, 2017 Ark. App. 365 **[contempt]** There is no factual basis for contempt. The order did not set out a time frame by which DHS was to pay for Jones's classes, and the order failed to mention reimbursement to Jones. The court made no finding that DHS willfully disobeyed the court order. In fact, it stated that DHS was "trying to do what [it] was supposed to do" and that DHS had acted in "good faith." Therefore, a finding of contempt under these circumstances is clearly against the preponderance of the evidence. (Wright, R.; CV-16-1141; 5-31-17; Brown, W.)

DISTRICT COURT

Stuart v. State, 2017 Ark. App. 356 **[DWI/suppression]** Probable cause supported the stop for traffic violations, which led to arrest for other offenses. Suppression motion denied. (Pope, S.; CR-16-1110; 5-31-17; Harrison. B.)

U. S. SUPREME COURT

Kindred Nursing Centers v. Clark **[arbitration]** Respondents Beverly Wellner and Janis Clark—the wife and daughter, respectively, of Joe Wellner and Olive Clark—each held a power of attorney affording broad authority to manage family member's affairs. When Joe and Olive moved into a nursing home operated by petitioner Kindred Nursing Centers L. P., Beverly and Janis used their powers of attorney to complete all necessary paperwork. As part of that process, each signed an arbitration agreement on her relative's behalf providing that any claims arising from the relative's stay at the facility would be resolved through binding arbitration. After Joe and Olive died, their estates (represented by Beverly and Janis) filed suits alleging that Kindred's substandard care had caused their deaths. Kindred moved to dismiss the cases, arguing that the arbitration agreements prohibited bringing the disputes to court. The trial court denied Kindred's motions, and the Kentucky Court of Appeals agreed that the suits could go forward.

The Kentucky Supreme Court consolidated the cases and affirmed. The court initially found that the language of the Wellner power of attorney did not permit Beverly to enter into an arbitration agreement on Joe's behalf, but that the Clark document gave Janis the capacity to do so on behalf

of Olive. Nonetheless, the court held, both arbitration agreements were invalid because neither power of attorney *specifically* entitled the representative to enter into an arbitration agreement. Because the Kentucky Constitution declares the rights of access to the courts and trial by jury to be "sacred" and "inviolate," the court determined, an agent could deprive her principal of such rights only if expressly provided in the power of attorney.

> *Held*: The Kentucky Supreme Court's clear-statement rule violates the Federal Arbitration Act by singling out arbitration agreements for disfavored treatment.

(a) The FAA, which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. §2, establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on "generally applicable contract defenses," but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333. The Act thus preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements.

The Kentucky Supreme Court's clear-statement rule fails to put arbitration agreements on an equal plane with other contracts. By requiring an explicit statement before an agent can relinquish her principal's right to go to court and receive a jury trial, the court did exactly what this Court has barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement.

(b) In support of the decision below, respondents argue that the clear-statement rule affects only contract formation, and that the FAA does not apply to contract formation questions. But the Act's text says otherwise. The FAA cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"—that is, about what it takes to enter into them. 9 U. S. C. §2. (No. 16–32; May 15, 2017)

Howell v. Howell **[divorce/military retirement]** The Uniformed Services Former Spouses' Protection Act authorizes States to treat veterans' "disposable retired pay" as community property divisible upon divorce, 10 U. S. C. §1408, but expressly excludes from its definition of "disposable retired pay" amounts deducted from that pay "as a result of a waiver . . . required by law in order to receive" disability benefits, §1408(a)(4)(B). The divorce decree of petitioner John Howell and respondent Sandra Howell awarded Sandra 50% of John's future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, the Department of Veterans Affairs found that John was partially disabled due to an earlier service-related injury. To receive disability pay, federal law required John to give up an equivalent amount of retirement pay. 38 U. S. C. §5305. By his election, John waived about $250 of his retirement pay, which also reduced the value of Sandra's 50% share. Sandra petitioned the Arizona family court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The court held that the original divorce decree had given Sandra a vested interest in the prewaiver amount of John's retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court's order.

Held: A state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive service-related disability benefits.

This Court's decision in *Mansell* v. *Mansell*, 490 U. S. 581, determines the outcome here. There, the Court held that federal law completely pre-empts the States from treating waived military retirement pay as divisible community property. *Id.*, at 594–595. The Arizona Supreme Court attempted to distinguish *Mansell* by emphasizing the fact that the veteran's waiver in that case took place before the divorce proceeding while the waiver here took place several years after the divorce. This temporal difference highlights only that John's military pay at the time it came to Sandra was subject to a future contingency, meaning that the value of Sandra's share of military retirement pay was possibly worth less at the time of the divorce. Nothing in this circumstance makes the Arizona courts' reimbursement award to Sandra any the less an award of the portion of military pay that John waived in order to obtain disability benefits. That the Arizona courts referred to her interest in the waivable portion as having "vested" does not help: State courts cannot "vest" that which they lack the authority to give. Neither can the State avoid *Mansell* by describing the family court order as an order requiring John to "reimburse" or to "indemnify" Sandra, rather than an order dividing property, a semantic difference and nothing more. Regardless of their form, such orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. Family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support. Here, however, the state courts made clear that the original divorce decree divided the whole of John's military pay, and their decisions rested entirely upon the need to restore Sandra's lost portion. (No. 15–1031; May 15, 2017)