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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website:

<https://opinions.arcourts.gov/ark/en/nav.do>

ANNOUNCEMENTS

On April 2, 2020, Supreme Court adopted revised Administrative Order 10.

On April 2, 2020, Supreme Court published for comment proposed revisions to Rules of Civil Procedure, 3, 5, 41 and Administrative Order 8. Comment period expires on May 31, 2020.

See the Arkansas Judiciary Website (www.arcourts.gov) for the Supreme Court's Statements and orders on the Covid-19 pandemic.

CRIMINAL

Burns v. State, 2020 Ark. App. 207 [**rape-shield statute**] Arkansas Code Annotated § 16-42-101(b) prohibits defendants from introducing evidence “of a victim’s prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true,” and evidence “concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denied making the allegations.” In appellant’s case, the trial court did not abuse its discretion when it excluded certain evidence pursuant to the rape-shield statute. The following evidence was properly excluded: (1) evidence that the victim made false

allegations that she performed oral sex on a boy at school; (2) evidence that the victim made false allegations about having intercourse with two men in Texas; and (3) evidence that the victim made false allegations against a man at a shelter for “sexually touching” her. The victim denied alleging that she performed oral sex on a boy at school, and she stated that the allegations against the men in Texas and the man at the shelter were true. Thus, the exclusion of these items was authorized by the rape-shield statute. However, evidence that the victim lied in her diary about who “took her virginity” and evidence about an entry in the victim’s diary in which she stated that no one would believe her if she reported sexual abuse because she “lie[s] too much,” did not fall squarely within the rape-shield statute. **[appellate practice; jury instructions; objections]** For appellate purposes, objections to a jury instruction must be made before the jury retires. Objections made after the jury retires to deliberate are not timely. (Yeargan, C.; CR-19-755; 4-1-2020; Vaught, L.)

Watts v. State, 2020 Ark. App. 218 **[corpus-delicti rule]** The *corpus-delicti* rule requires that the State establish the existence of an injury or harm caused by someone’s criminal activity. In appellant’s case, his confession was sufficiently corroborated under the law. Appellant confessed to killing his victims with a hammer and then disposing of the murder weapon. The victims’ bodies were recovered; both victims died from blunt-force trauma to the head, which was no accident, according to the autopsy. Thus, the evidence was sufficient to sustain the guilty verdicts under the *corpus-delicti* rule. **[404(b)]** The trial court did not abuse its discretion when it admitted evidence regarding a check that appellant forged, which was found in a purse that belonged to one of the victims. Pursuant to Rule 404(b) of the Arkansas Rules of Evidence, testimony concerning the forged check was an independently relevant fact tending to establish appellant’s knowledge, intent, or motive for murdering the two victims. Specifically, the forged-check evidence was independently relevant to support the inference that appellant killed the victims because he owed one of them money. The check’s existence tended to show that appellant was aware of the debt and had a motive to pay it—the motive being that appellant arguably feared one or more of the victims’ reprisals. (Ramey, J.; CR-19-634; 4-8-2020; Harrison, B.)

House v. State, 2020 Ark. App. 240 **[jury instruction; affirmative defense]** For the affirmative defense found at Ark. Code Ann. § 5-74-106(d) to apply, the defendant must establish (1) that he was in his home; and (2) that the firearm was not readily accessible for use. Because appellant was not inside his residence but was either in a detached garage or immediately outside the garage, there was no basis to conclude that appellant was in his home when the firearms were found. Therefore, appellant cannot satisfy the first element of the defense and the trial court did not abuse its discretion when it denied appellant’s request for the affirmative-defense instruction. (Fitzhugh, M.; CR-19-537; 4-15-2020; Hixson, K.)

Proctor v. Payne, 2020 Ark. 142 [**habeas corpus**] A petitioner seeking a writ of habeas corpus, who does not allege his or her actual innocence and proceed under Act 1780 of 2001, must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a showing by affidavit or other evidence of probable cause to believe that he or she is being illegally detained. Jurisdiction is the power of the court to hear and determine the subject matter in controversy. A circuit court has subject-matter jurisdiction to hear and determine cases involving violations of criminal statutes. Appellant's challenge to his parole eligibility was not properly raised in a habeas proceeding because it did not challenge the circuit court's jurisdiction or the facial invalidity of the judgment. Additionally, because appellant's gross disproportionality argument would have required an evaluation of the circumstances of his case, his claim was not cognizable in a habeas-corpus petition. Finally, appellant's allegations of trial error, did not implicate the facial validity of the judgment or the jurisdiction of the trial court and thus were not properly asserted in a petition seeking a writ of habeas corpus. (Dennis, J.; CV-19-791; 4-16-2020; Baker, K.)

Garcia-Chicol v. State, 2020 Ark. 148 [**mistrial; communication with jury**] Appellant requested a mistrial based upon the bailiff's interaction with the foreman of the jury. The interaction occurred after the jury had reached the verdict that appellant was guilty of rape and signed the verdict form. Based upon the bailiff's response, the jury also signed the verdict form finding that appellant was guilty of the lesser-included offense of attempted rape. The circuit court was able to cure any prejudice that resulted from the alleged inappropriate interaction by polling each member of the jury and determining that the original verdict of rape was the verdict that was unanimously reached by the jury and that the verdict was not influenced by any outside source. [**Confrontation Clause; translated document**] An interpreter is viewed as an agent of the defendant, and the translation is attributable to the defendant as his own admission. An interpreter is no more than a language conduit and therefore his translation does not create any additional hearsay. An interpreter's statements are statements of the declarant for the purposes of the Confrontation Clause. A defendant and an interpreter should be treated as identical for testimonial purposes if the interpreter acted merely as a language conduit. In determining whether an interpreter is acting as a conduit, a court should consider all relevant factors, including which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with statements as translated. Appellant could not establish that the State's translator was anything more than a language conduit. Appellant did not question the translator's qualifications, and the record indicated the translator was highly qualified. Additionally, appellant did not allege any motive on the part of the translator to mislead or to distort the contents of his letter. Thus, the circuit court properly treated the State's translator as a mere language conduit for appellant. Accordingly, appellant did not have a constitutional right to confrontation because the translated statements were directly attributable to appellant and, therefore, nontestimonial. (Karren, B.; CR-19-391; 4-16-2020; Womack, S.)

Gardner v. State, 2020 Ark. 147 **[right to self-representation]** A defendant has a constitutional right to self-representation under the Sixth Amendment of the United States Constitution and Article 2, Section 10 of the Arkansas Constitution. A defendant may invoke his right to defend himself provided that: (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. In appellant's case, during a pretrial hearing, appellant stated: "I don't want them [referring to his attorneys] on my case. . . . Your Honor, I'd ask to represent myself or get some other attorney. She's lied to me three times. He's lied to me. I don't want people lying to me. This is my life. . . . I ain't got nothing else to say to 'em." Appellant did not file a motion requesting to represent himself nor did he make any other statements to the court indicating that he wanted to waive his right to counsel. Because appellant's request was not unequivocal, the circuit court did not err in denying his right to waive counsel. **[jury instruction]** Appellant requested a non-model jury instruction that informed the jury that it "may show mercy simply by finding that the aggravating circumstances do not justify imposition of the death sentence." The circuit court refused to give the proffered instruction and instead used AMI Crim. 2d 1008. On appeal, the Supreme Court explained that the circuit court was not required to give the proffered "mercy" instruction because the model jury instruction accurately states the law. The Supreme Court noted that although AMI Crim. 2d 1008 does not contain the word "mercy," it permits the jury to conclude that the aggravating circumstances do not justify beyond a reasonable doubt a death sentence. The Court further held that the instruction properly informed the jury of the gravity of its decision and that it has the discretion to weigh the factors and determine whether to impose the death penalty. Thus, the circuit court's refusal to give appellant's proffered jury instruction was not an abuse of discretion. **[aggravating circumstances]** There was substantial evidence to support the circuit court's decision to submit certain aggravating circumstances to the jury. Specifically, there was substantial evidence to conclude that appellant committed the crime for pecuniary gain and that the murder was especially cruel or depraved. (Clawson, C.: CR-19-257; 4-16-2020; Wood, R.)

Rickman v. State, 2020 Ark. 138 **[jury instructions]** Kidnapping is a Class Y felony, but the charge can be lowered to a Class B felony if the defendant shows by a preponderance of the evidence that he voluntarily released the person restrained, alive and in a safe place prior to trial. The circuit court in appellant's case refused to give the Class B felony kidnapping jury instruction. On review, the Supreme Court noted that although the victim was released in her home, she was left blindfolded, bleeding, and alone in a debilitating physical condition in a rural area. Additionally, the Court explained that her home was the scene of the crimes, and appellant repeatedly threatened to kill the victim if she sought help after he left. Thus, the Court concluded that appellant did not release his victim in a safe place. Accordingly, the circuit court did not abuse its discretion when it refused to give the requested jury instruction. (Karren, B.; CR-19-156; 4-16-2020; Kemp, J.)

Goshien v. State, 2020 Ark. App. 265 [**Ark. R. Evid. 105**] Rule 105 of the Arkansas Rules of Evidence in relevant part provides: “[w]henver evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” Pursuant to Ark. R. Evid. 105, the trial court in appellant’s case abused its discretion by denying appellant’s request to instruct the jury that a videotaped interview, which was played solely for the purpose of refreshing the recollection of a witness, could not be considered substantive evidence. (Arnold, G.; CR-19-760; 4-22-2020; Brown, W.)

Kellensworth v. State, 2020 Ark. App. 249 [**sufficiency of the evidence; possession of controlled substance**] Appellant was charged with one count each of possession of oxycodone and possession of hydrocodone. The forensic chemist, who was responsible for analyzing the substances seized at appellant’s house, performed no chemical analysis. On review, the Court of Appeals concluded that based upon the identification of the pills as oxycodone and hydrocodone merely by means of a visual inspection and reference to the manufacturer’s imprint code using a drug-identification database, the State failed to meet its burden of demonstrating that the pills were, in fact, the actual controlled substances charged. Accordingly, there was not substantial evidence to support appellant’s convictions of possession of controlled substances. (Easley, E.; CR-19-684; 4-22-2020; Gladwin, R.)

Thomas v. State, 2020 Ark. 154 [**sufficiency of the evidence; capital murder**] Deliberate conduct that culminates in the death of another person constitutes circumstances manifesting an extreme indifference to the value of human life. In appellant’s case, the extreme-indifference-to-the-value-of-human-life element of the capital murder statute was established beyond speculation and conjecture when appellant fired a gun into an occupied vehicle that was being driven down the road. Accordingly, there was substantial evidence to support the jury’s capital-murder verdict. [**appellate procedure**] When the circuit court bases its decision for denying a motion to suppress on two independent grounds, and an appellant challenges only one ground on appeal, the appellate court will affirm the lower court’s ruling without addressing either basis of the circuit court’s decision. (Clawson, C.; CR-19-383; 4-23-2020; Hart, J.)

Parks v. State, 2020 Ark. App. 267 [**motion to suppress**] The exclusionary rule is inapplicable when the police conduct a search in objectively reasonable reliance on binding appellate precedent. Additionally, the good-faith exception applies to searches conducted in objectively reasonable reliance on statutes subsequently declared to be unconstitutional. In appellant’s case, the law enforcement official relied on the law as it existed before *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) and *Dortch v. State*, 2018 Ark. 135. The officer believed that the law required him to obtain a blood draw from appellant and the other driver involved in the accident because the accident involved a fatality. The officer’s actions were in accord with the statute in effect at the time of the accident. Thus, he did not advise appellant of his ability to decline consent or

explain the consequences of doing so. Moreover, appellant was nonresponsive and unconscious. The trial court correctly found that regardless of whether the search was unconstitutional, the officer's actions were taken in good faith, and he reasonably relied on the law as it existed at the time of the accident and declined to suppress the evidence. (Clawson, C.; CR-19-649; 4-29-2020; Gruber, R.)

Eans v. State, 2020 Ark. App. 271 [**postconviction relief**] Appellant's petition titled "Petition for Declaratory/Injunctive Relief; Petition for Writ of Mandamus; Motion for Evidentiary Hearing, etc.," which was filed after he entered a guilty plea and asserted that his plea was induced, misguided, and misinformed, should have been considered pursuant to Rule 37 regardless of the label placed on the petition. By requesting relief pursuant to Rule 37 appellant was obligated to satisfy the verification requirement found in Ark. R. Crim. P. 37.1(c). According to Ark. R. Crim. P. 37.1(d), "the circuit court or any appellate court shall dismiss any petition that fails to comply with subsection (c) of this rule." Because appellant's petition was not verified, the circuit court properly dismissed appellant's petition. (Dennis, J.; CR-19-596; 4-29-2020; Harrison, B.)

Guyton v. State, 2020 Ark. App. 273 [**jurisdiction**] Arkansas Code Annotated § 5-1-111 (b) provides that the State is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue. There is a presumption in favor of jurisdiction in the place where the charge is filed by the State. Thus, the State need not offer proof of jurisdiction unless there has been a showing of positive evidence that the offense occurred outside the court's jurisdiction. Positive evidence consists of something allowing the factfinder to identify, based on the record, where the crime occurred. Appellant was required to register as a sex offender. After his initial registration, appellant moved to a new state and did not notify Arkansas law enforcement officials prior to his move and did not register his new address. The Arkansas court had jurisdiction to consider a criminal information charging appellant with failing to comply with sex-offender reporting requirements. [**retroactivity; Sex Offender Registration Act**] The retroactive application of the sex offender registration statutes to appellant was not unconstitutional because the registration requirements are regulatory rather than punitive in nature and because there is a rational basis for the statute. [**Sex Offender Registration Act**] A person is subject to the requirements of the Sex Offender Registration Act regardless of whether it was reflected on the original judgment. [**Sex Offender Registration Act**] A suspended imposition of sentence is a form of community supervision under the Sex Offender Registration Act. [**admission of evidence**] Appellant challenged the admission into evidence of his previous sex-offender registration forms. On appeal, the Court of Appeals noted that the sex-offender-registration requirements are mandatory and that failure to comply with those duties is a strict-liability offense. The appellate court further explained appellant failed to comply with the requirements of the Sex Offender Registration Act. His failure to comply completed the offense. As such, even if the evidence of his previous registrations was

inadmissible, appellant was not prejudiced by the trial court's admission of such evidence, which was irrelevant or cumulative. (Green, R.; CR-19-606; 4-29-2020; Whiteaker, P.)

CIVIL

Gray v. Marianna Housing Authority, 2020 Ark. App. 203 [**premises liability**] Child fell into water main. The circuit court did not err in finding that the MHA owed no duty to inspect, maintain, or issue warnings about a condition located on property exclusively owned, inspected, and maintained by the Water Department. In premises-liability claims, liability cannot attach to the defendant unless the defendant owns or occupies the property that allegedly caused the plaintiff's injury. This principle applies to invitees. (Morledge, C.; CV-19-586; 4-1-20; Gladwin, R.)

Barrows, LLC v. HBVII, 2020 Ark. App. 208 [**Dismissal of Complaint**] Trial court's dismissal of complaint with prejudice was correct. The action was dismissed not because Barrows failed to *state* a claim; rather, it was dismissed because Barrows did not *have* a claim against HBVII or McAfee. There are no facts that Barrows pleaded to entitle it to the requested relief. The record is clear that McAfee acted only in his representative capacity of HBVII and cannot be held personally liable. Further, because HBVII did not have a contractual obligation to remove the animal-waste sludge from the leased property under the terms of the lease, HBVII did not breach the terms of the lease agreement. Additionally, promissory estoppel is an inappropriate basis for recovery when a formal contract was in place. Further, Barrows cannot prove its deceit claim because HBVII's alleged representations fall within the future-events rule. Barrows did not *have* a claim against either HBVII or McAfee, and dismissal with prejudice was the appropriate disposition of this matter. (Martin, D.; CV-19-282; 4-1-20; Hixson, K.)

Ponder v. McCain, 2020 Ark. App. 210 [**contract**] Appellant testified that when the vehicle was purchased nothing was signed about whether or not it was going to be a loan. At the time the loan agreement was signed, appellee had been in possession of the vehicle for more than four months. The vehicle was registered and titled in her name. Appellee received no benefit by signing the loan agreement; it bound her to make payments on a vehicle that she already owned free and clear, but it did not likewise bind appellant to any mutual obligation. The loan agreement did not contemplate any performance or obligation on appellant's part; it required nothing of him. Because neither party is bound unless both are bound, the loan agreement lacked the consideration and mutuality of promise required for a valid contract. (Mitchell, C.; CV-19-302; 4-1-20; Brown, W.)

Hermitage Newark, LLC v. Ark. Sand Co., 2020 Ark. App. 214 [**replevin**] The circuit court did not err by refusing to retroactively apply section 18-27-103. Section 18-27-103 is not similar to a statute of limitations—it addresses property rights. Thus, it is a matter affecting substantive rights. Even though the evidence shows that Behan assumed possession of the Volvo loader following the foreclosure sale, the evidence also supports a finding that the possession was not adverse. Both Spellmeyer and Behan testified they had told Sam that he could retrieve the personal property on the Newark Property after the sale. The April 2016 emails between Sam and Behan further show that Behan recognized Sam’s ownership interest in the property when he admitted that he had told Sam that he could retrieve the personal property. The circuit court further found that after the sale, the Rosses continued to express interest in the Volvo loader. Given the evidence that Behan’s possession was not adverse, the circuit court did not err by finding that Arkansas Sand’s claim was not barred by the three-year statute of limitations. (Harrod, M.; CV-19-306; 4-8-20; Abramson, R.)

Hayes v. Psenka, 2020 Ark. App. 216 [**contract**] The circuit court correctly ruled that HFT was not a party to the Angel Point development contract nor a party to the oral Shiloh mortgage-payment agreement. Cross-appellants did not establish that Everett was the agent of HFT. There was no evidence that Everett’s father gave him the power to contract on behalf of HFT to sell Angel Point, a property solely owned by Everett. Because Everett was not an agent for HFT, the elements of a contract were not met. (Hewett, M; CV-18-155; 4-8-20; Gladwin, M.)

Colonel Glenn Health v. Aldrich, 2020 Ark. App. 222 [**findings of fact/Arkansas R. Civ. P. 52**] Colonel Glenn Health contends that the order denying the motion to compel arbitration is a judgment pursuant to Arkansas Rule of Civil Procedure 54(a), which defines a judgment as a “decree and any order from which an appeal lies.” Because an order denying a motion to compel arbitration is an appealable order, Colonel Glenn Health asserts that it is a judgment as defined in Rule 54(a); therefore, findings of fact and conclusions of law are required under Rule 52(a)(1). Findings of fact and conclusions of law under Rule 52(a)(1) apply only to the entry of judgments in “contested actions tried upon the facts without a jury.” In the case at bar, there is no judgment in a contested action tried upon the facts without a jury. Here, the circuit court ruled as a matter of law on a motion to compel arbitration. Therefore, the order denying the motion to compel arbitration is not a judgment as contemplated by Rule 52. [**arbitration**] Jeffrey did not sign the arbitration agreement, and Mary did not have legal authority to sign for him. Colonel Glenn Health failed to demonstrate that when Mary signed the arbitration agreement as a “Responsible Party,” she did so in her individual capacity. Therefore, the third-party-beneficiary doctrine does not apply to bind Jeffrey to the arbitration agreement. (Fox, T.; CV-19-611; 4-8-20; Vaught, L.)

Duggar v. City of Springdale, 2020 Ark. App. 220 [**Rule 12 motion/Rule 56 motion**] A copy of a written instrument attached as an exhibit to a pleading is a part thereof and may be considered in a motion to dismiss as if it were part of the complaint. Therefore, the attachment of the federal court order as an exhibit to the City’s answer is considered a part of the complaint and can be

considered in a motion for judgment on the pleadings without converting the motion into one for summary judgment. **[outrage]** The circuit court correctly dismissed Duggar’s outrage claim because he did not state facts sufficient to support his claim. Duggar makes no allegation that any person *intended* to inflict emotional distress upon him. Duggar also failed to allege how he suffered mental distress. Discomfort, upset, embarrassment, anxiety, loss of sleep, and depression do not meet the “mental distress” element of the tort of outrage. Duggar does not even allege this type of mental distress; he simply asserts that the conduct caused him “severe emotional distress.” Again, merely alleging that conduct is outrageous does not make it so. **[invasion of privacy-seclusion]** Duggar’s complaint fails to state a claim upon which relief can be granted in three respects. First, even if the records in question were protected from release under the statutory provision, Duggar failed to state facts showing that the City’s and County’s release of the records in contravention of the statute was intentional. This circuit court will not presume intent. It must be proved, and in the pleadings phase, it must be alleged to withstand a motion to dismiss under Rule 12(b)(6). At most, the allegations reflect that the City’s and County’s release of the records may have been negligent or the result of a misinterpretation of the law. But there are no allegations that anyone acted intentionally. Second, Duggar failed to state facts as to how he conducted himself in a manner consistent with an actual expectation of privacy. Duggar stated in his complaint that he and his family were subjects of a reality television series “from which a certain level of celebrity locally, nationally, and internationally was attributable to each and every member of the immediate family.” Finally, Duggar failed to state how he suffered damages. He makes a generalized statement that he was emotionally distressed, mentally anguished, and had “substantial lost income,” which is not sufficient to support a claim for relief. (Martin, D.; CV-19-385; 4-8-20; Switzer, M.)

Sims v. Fay Servicing, LLC, 2020 Ark. App. 242 **[summary judgment]** The Simses argue that the circuit court erred in granting summary judgment because “a material issue of fact exists in connection with their claim of violation of the deceptive trade practices”; however, neither below nor on appeal do they identify or discuss any facts (not just material) that they contend are disputed. When a movant makes a prima facie showing of entitlement to a summary judgment, the respondent must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. Here, the Simses have not done so. (Proctor, R.; CV-19-513; 4-15-20; Murphy, M.)

Whitson v. Belt, 2020 Ark. App. 238 **[trespass]** The survey that was introduced into evidence and Buddy’s testimony both supported the Belts’ contention that the fence is the property line, and Whitson conceded that she cut down plants and destroyed signs on the Belts’ side of that property line. The Belts provided evidence to support each measure of damages. Therefore, the circuit court’s judgment for trespass was not clearly erroneous. (Sutterfield, D.; CV-19-587; 4-15-20; Vaught, L.)

Country Club Gardens, LLC v. Alexander, 2020 Ark. App. 239 [**Arbitration**] The arbitration agreement in the case at bar lacks mutuality of obligations, is invalid, and is unenforceable. Accordingly, the circuit court did not clearly err in denying Lake Hamilton Health’s motion to compel arbitration. (Wright, J.; CV-19-629; 4-15-20; Vaught, L.)

Hunter v. Keck, 2020 Ark. App. 233 [**legal malpractice/failure to file notice of appeal**] Keck and Austin contend that even if the appeal had been timely filed, Hunter would not have succeeded on his appeal of the legal malpractice judgment. Substantial evidence supported the jury’s verdicts concerning the August 8 loan and resulting conversion. The judgments associated with these verdicts would not have been reversed on appeal even if the notice of appeal had been timely filed. The circuit court correctly found that the underlying case would have been affirmed if the appeal had been timely filed. (Martin, D.; CV-19-439; 4-15-20; Switzer, M.)

Bank of the Ozarks v. Ford Motor Co., 2020 Ark. App. 231 [**limitations**] Appellants alleged that CDJ was negligent in allowing the Explorer to be sold to Nicholas “with improper tires and wheels without warnings, instructions or other steps to avoid the danger,” but the three-year limitations period for negligence has run. [**strict liability**] Strict liability eliminates both privity and negligence, but a plaintiff still has the burden of establishing that a particular defendant has sold a product it should not have sold, and that the product caused his injury. The mere possibility that the product caused the injury is not enough; there must be evidence from which the jury may reasonably conclude that it is more probable than not. The wheels and tires on this vehicle were not the same ones that were on it when it left the factory. Nicholas purchased this vehicle approximately eleven years after its manufacture, Nicholas had maintenance and repair work done and replaced at least two of the tires. The evidence and arguments focused causation on the later-added wheels and tires, not the inherent design of this vehicle. (Huckabee, S.; CV-19-665; 4-15-20; Klappenbach, M.)

Escue v. Riceland Foods, Inc., 2020 Ark. App. 234 [**summary judgment/slip and fall**] Escue argues that the circuit court’s grant of summary judgment was in error because Riceland knew or should have known that the combination of defatted rice bran and damp concrete created a slippery, dangerous condition. He also argues that if Riceland knew that agricultural facilities like Riceland were dangerous places where people could get injured, this proved Riceland had knowledge of an obvious danger. The circuit court granted summary judgment because there was no proof Riceland was aware or should have been aware of the danger or hazard. Summary judgment was proper. There was no evidence presented that Riceland knew or should have known of an allegedly dangerous condition. In the absence of such evidence, Riceland is not liable to Escue. Riceland employees explained the cleaning processes performed during the day and again after the last truck was loaded; these processes included sweeping and scooping excess rice bran from the loading area and washing down the area with a high-pressure hose. Evidence was presented that this process was performed on the night before Escue’s accident. Escue presented no evidence that the area where he fell had not been cleaned, or that if there was rice

bran on the wet concrete, the rice bran made the surface more slick than wet concrete. Escue testified in his deposition that the loading area looked normal. The concrete, ramp area, and scales looked clean, and he did not notice rice bran on the concrete. Escue stated that he had no evidence, other than his injury, that Riceland did not maintain its premises in a reasonable and safe condition. The mere fact that an accident occurred is not evidence of negligence. (Lusby, R.; CV-19-451; 4-15-20; Switzer, M.)

Hesse v. Simoff Horse Transport, LLC, 2020 Ark. App. 229 [**foreign judgment**] Hesse argues that (1) the circuit court erred in finding that service of process in the Delaware action was sufficient for purposes of registration of the foreign judgment; (2) the circuit court erred in failing to make a determination as to whether the Delaware court had personal jurisdiction over Hesse; (3) the underlying default judgment is void because the Delaware state court lacked personal jurisdiction over Hesse; (4) the circuit court erred in registering the foreign default judgment without a hearing; and (5) the Delaware default judgment was not eligible for registration under the Uniform Enforcement of Foreign Judgments Act (UEFJA). The UEFJA requires only that the foreign judgment be regular on its face and duly authenticated to be subject to registration. Both requirements have been met in this case. Simoff has demonstrated that jurisdiction in the Delaware court was proper under Delaware law. And although the service of process in the underlying Delaware case would not “strictly comply” with Arkansas’ requirements, Simoff did comply with Delaware’s relevant rules and statutes. The Delaware court specifically found that Hesse received proper service of process, and the circuit court’s ruling to the same effect is neither clearly erroneous nor an error of law. (Wright, J.; CV-19-472; 4-15-20; Gladwin, R.)

Hostler v. Dennison, 2020 Ark. App. 255 [**sovereign immunity**] Sovereign immunity precludes appellants’ claims against DCFS and the individual defendants in their official capacities. In their individual capacities, the appellees do not enjoy the immunity granted to the State under article 5, section 20 of the Arkansas Constitution. (Laser, D.; CV-19-337; 4-22-20; Klappenbach, M.)

Ashby v. Ragon, 2020 Ark. App. 251 [**intoxication/instructions**] The circuit court properly admitted the intoxication evidence. Shelter Insurance maintained throughout the trial that Ashby did not act negligently for any reason and in any way. The jury simply found that Ashby operated his car in a negligent manner and that his negligence proximately caused the Ragons’ damages. Given the general verdict and the instructions that were given, which act or omission the jury based its decision on cannot be determined. The record amply supports the jury’s verdict. Officer Coburn’s observations established a prima facie case of intoxication, so his testimony was admissible under Arkansas law. A jury was not, of course, required to conclude that Ashby was intoxicated or that, even if he was, his intoxication contributed to any negligent act or omission on his part while driving his car. Shelter invited the perceived error about which it now complains. The instructions were withdrawn because Shelter objected to them. When the parties had their instructions conference, the court had already admitted intoxication evidence over Shelter’s multiple objections. At that time, regardless of how an appellate court might

decide the admission question if appealed, Shelter had clearly preserved the argument that the circuit court should not have admitted the officer's intoxication testimony during the trial in the first place. The problem arose when Shelter did not fully appreciate that the jury-instructions phase is separate from the evidentiary-error question that occurred when the parties made their respective cases to the jury. (Piazza, C.; CV-19-192; 4-22-20; Harrison, B.)

First Presbyterian Church v. The Presbytery, 2020 Ark. App. 253 [**justiciable issue**] A court's first task when applying the neutral-principles approach in reviewing church documents is to review the language of the deed. The circuit court did not do so. Nor did it apply any other aspect of the relevant legal test. In fact, the circuit court mistakenly ruled that it could not adjudicate the dispute before it. Therefore, it did not decide the core question in this case: which church entity owns the local Magnolia property in dispute. It did not quiet title in either party. Instead, the court held that no justiciable issue was presented, and that was an error of law. On remand, the court must determine the merits of the church's complaint, applying neutral principles of law, and determine whether an express or implied trust in favor of the Presbyterian Church (U.S.A.) exists on the property to which the local Magnolia church holds title and resolve who owns the property. (Carroll, R.; CV-19-509; 4-22-20; Harrison, B.)

Sears v. City of Hot Springs, 2020 Ark. App. 247 [**civil service termination**] Sears argues that Dr. English did not determine his fitness for duty. Sears states that all of the undisputed evidence plainly shows that, although he was unable to do sit-ups, he was fit for duty in that he had performed his job functions without issue for twenty-one years. The City failed to follow its own policy, specifically, the steps to be taken when an officer performs unsatisfactorily on the revised physical-agility test. The policy provides that the chief of police will make a final decision on termination "based on the officer's fitness for duty evaluation and report from the physician." Clearly, Dr. English did not perform a fitness-for-duty evaluation. He merely recited what he had been told by Sears and did not form a medical opinion. Chief Stachey admitted that what the doctor had compiled was "incomplete" and "inconclusive." Despite the policy's express language requiring a fitness-for-duty evaluation on which to base a final decision, Chief Stachey simply terminated Sears. The circuit court clearly erred in finding that the City met the requirements set forth in its physical-fitness policy. (Williams, L.; CV-19-387; 4-22-20; Virden, B.)

Mitchell v. Sex Offender Assessment Ctte., 2020 Ark. App. 261 [**sex offender assessment**] Mitchell is a registered sex offender who petitioned the Sex Offender Community Notification Assessment (SOCNA) for reassessment. The SOCNA reassessed Mitchell as a Level 3 sex offender, and the Sex offender Assessment Committee (SOAC) affirmed that decision. Mitchell appealed to the IZard County Circuit Court, which affirmed. Mitchell was not prejudiced by delay in the assessment process. Because Mitchell has not demonstrated a basis for reversal of

his sex-offender reassessment pursuant to either the APA or the Due Process Clause, it is affirmed. (Meyer, H.; CV-19-674; 4-22-20; Vaught, L.)

Williams v. Baptist Health, 2020 Ark. 350 **[jury trial]** Dr. Williams’s claim—that Baptist Health violated its own professional-staff rules and bylaws—is not a constitutional one. The claim is subject to a limited judicial review. Other jurisdictions have recognized a limited review for alleged violations of medical-staff bylaws and have restricted the relief available to injunctive relief, not damages. The circuit court did not err in conducting a bench trial on the claim that Baptist Health violated its bylaws and professional-staff rules because the claim was an equitable one. **[compel discovery]** The disputed discovery fits within the plain language of section 16-46-105(b)(2). The discovery sought was in a legal action brought by a medical practitioner who had been subjected to disciplinary action by a hospital medical-staff or medical-review committee. The subdivision (b)(2) exception does not contain the limitation advanced by Baptist Health that Dr. Williams had the right to obtain only the medical records and documents reviewed and used in his own peer-review proceedings. Because the exception applies to the requested discovery, the circuit court abused its discretion in denying Dr. Williams’s motions to compel production of the disputed discovery. **[bylaws compliance claims]** The substantial-compliance standard is the one used by the majority of jurisdictions conducting a limited review of a bylaws-compliance claim. The circuit court correctly found that the actions taken by Baptist Health with respect to Dr. Williams’s administrative-review proceedings substantially complied with Baptist Health’s bylaws and professional-staff rules. Dr. Williams’s complaints about inconsistencies in deposition and trial testimony are credibility matters. **[defamation]** The substantial truth of a statement is a defense to an allegation of defamation. Although Dr. Williams disagreed with the result of the administrative proceeding, the report to the NPDB accurately described the adverse action taken against him, as stated in the Credentials Committee’s report and recommendation. Significantly, the report to the NPDB was mandated by federal law. Dr. Williams’s defamation claim based on an accurate and federally mandated report failed as a matter of law. (Fox, T.; CV-17-924; 4-23-20; Kemp, J.)

DOMESTIC RELATIONS

Callan v. Callan, 2020 Ark. App. 205 **[child tax exemptions]** Tax exemptions are a child-support matter. Giving those allocations to a noncustodial parent is considered a deviation from the child-support chart amount, which requires findings to support such a deviation. (Compton, C.; CV-19-367; 4-1-20; Klappenback, N.)

Hathcock v. Hathcock, 2020 Ark. App. 236 **[motion to modify child support was timely filed because it was filed before receipt of the retirement funds]** By previous Agreed Order, Appellant was to pay child support in the amount of 21% from all disbursements he received

from his family's trust. The death of his uncle triggered the termination of the trust, and Appellant petitioned the circuit court for a decrease in child support and requested that the court declare the funds received as distributions were not disbursements for which child support had to be paid. The circuit court found that the motion was not timely because it was filed after the termination of the trust and child support cannot be modified retroactively. However, because Appellant did not receive any distribution until after the motion was filed, the appellate court found it was timely and remanded for a decision on the modification request. (Moore, R.; CV-19-446; 4-15-20; Whiteaker, P.)

Farrell v. Farrell (Farrell IV), 2020 Ark. App. 250 **[division of stock as of date of mandate instead of date of divorce; circuit court correctly denied discovery on remand]** In *Farrell III*, the appellate court stated that an immediate division of stock was necessary for several reasons. On remand, the Appellant argued that the parties' marital business interests should have been divided as of the date of divorce rather than the date of the last appellate mandate. The appellate court found that the circuit court obeyed the mandate by ordering the shares of stock to be divided "immediately", not retrospectively. There have been three previous mandates in this case, and any retrospective correction would have to penetrate two mandates previous to the last. The parties have made decisions and have paid and received substantial amounts of cash in reliance on the previous orders. If they are obliged to divide the shares as of the date of divorce, then equity might require all the marital property existing on that date to be divided again. The appellate court also found that the circuit court correctly denied discovery under the mandate from *Farrell III*. The record was complete after *Farrell II*, and *Farrell III* asked the circuit court to execute the division of stock. The appellate court mandated that the circuit court divides the stock, making consideration of the value irrelevant. (Cox, J.; CV-19-782; 4-22-20; Gladwin, R.)

Pelayo v. Sims, 2020 Ark. App. 258 **[initial custody determination in paternity case; court not bound to follow attorney ad litem's recommendation; new bad behaviors of child after custody award is not new evidence as a basis for a new trial]** In an initial custody decision regarding a child born to an unmarried woman, the court may award custody to the father upon showing he is a fit parent, he has assumed his responsibilities towards the child, and it is in the best interest of the child. There was evidence that supported fitness of the father and him assuming responsibility for the child. As to best interest, there were significant changes in Appellant's life in a short period of time, while Appellee's job and living situation were more consistent. The circuit court weighed the evidence and concluded that Appellee had provided a more stable environment for the child. Appellant also argued that the circuit court did not give due consideration to the attorney ad litem's recommendation, but that circuit court is not bound to follow an ad litem's recommendation. Lastly, the appellate court found no error in the trial court's refusal to grant a new trial. Newly discovered evidence is one of the least favored grounds to justify a new trial. With respect to any behaviors from the child that arose after custody was awarded to Appellee- which is the major thrust of Appellee's argument- a critical

problem is that those behaviors do not constitute newly discovered evidence. While those behaviors may reflect a change of circumstances from those that existed at the time of the hearing, but evidence of those behaviors did not constitute newly discovered evidence that would support a new trial. (Blatt, S.; CV-19-797; 4-22-20; Switzer, M.)

Pledger v. Pledger, 2020 Ark. App. 264 [**Rule 60 motion to vacate the divorce decree denied because Appellant was negligent in failing to respond to the complaint**] The appellate court found no error in the circuit court's order that denied the Rule 60 motion. When one has notice of the pendency of an action for divorce and fails to appear and defend, a motion to vacate the decree will be denied when there is negligence or a lack of diligence shown. Appellant contended that he and Appellee had been working well together before the divorce, so he failed to file a timely response. Because Appellant was negligent and did not demonstrate any diligence when he failed to respond to the divorce action, of which he admittedly had notice. (Bailey, A.; CV-19-892; 4-22-20; Murphy, M.)

Price v. Price, 2020 Ark. App. 281 [**Singletary relocation order must make best interest and material change in circumstances findings**] The parties shared joint custody of their minor child, and Appellee requested to relocate out-of-state. The circuit court stated that *Singletary* applied, but there were no findings in the order regarding a material change in circumstances from the time of the initial custody determination. Although the relocation order made the requisite best-interest finding, the appellate court reversed and dismissed the relocation decision because there were no facts presented that would support a material-change-in-circumstances finding. (Smith, V.; CV-19-589; 4-29-20; Gladwin, R.)

JUVENILE

McClendon v. State, 2020 Ark. App. 217 [**Motion to transfer**] McClendon, a sixteen-year-old, was charged with first degree battery by means of a firearm and moved to transfer to juvenile court. On the first appeal, the case was reversed and remanded to the circuit court because the court failed to make each of the written findings required by statute. On this, the second appeal, the circuit court's denial of the motion to transfer included each of the ten written findings, and accordingly, the appellate court found no clear error. (Johnson, L.; CR-18-504; April 8, 2020; Harrison, B.)

Taylor v. Ark. Dep't of Human Servs., 2020 Ark. App. 227 [**TPR—right to counsel**] Mother who was facing termination of parental rights requested appointment of another court appointed attorney when she was unhappy with the representation provided by her attorney. The court denied the motion and the case proceeded to termination. On appeal, the mother argued that she had a sixth amendment right to counsel of her choosing and the court's denial of her motion

resulted in a violation of this constitutional right. However, the argument was not raised in the trial court below and thus, could not be considered on appeal. The circuit court's order terminating parental rights was thus affirmed. (Halsey, B.; JV-2018-176; April 15, 2020; Abramson, R.)

McCord v. Ark. Dep't of Human Servs., 2020 Ark. App. 244 [**Adjudication—sufficiency of the evidence**] Two siblings, ages two and six, were found to be dependent-neglected based on physical injuries to the two-year-old, K.M. The mother reported that the children were left with a babysitter when K.M. slammed her finger in the door, resulting in a bone fracture. The mother did not take the child to the doctor until three days later when she had a pre-scheduled appointment. Upon examination, the hospital found that the child had bruises on several areas of her body, which witnesses later testified did not seem consistent with the explanations given. On appeal, the mother challenged the sufficiency of the evidence, arguing that the bruises were typical for a two-year-old child and that the mother did not contribute to the bone fracture injury. The appellate court affirmed, finding the evidence sufficient and not clearly erroneous. (Halsey, B.; JV-19-150; April 22, 2020; Gruber, R.)

Chacon v. Ark. Dep't of Human Servs., 2020 Ark. App. 277 [**TPR—inmate putative father's due process rights**] Chacon was a putative father who was incarcerated throughout the pendency of the case. He appeals the termination of his parental rights, arguing that his due process rights were violated because he was never served any paperwork during the case, was not offered any services, and did not have any communication with DHS. However, because he did not obtain a ruling on his due process argument in the trial court, he was barred from raising the issue on appeal. Termination was affirmed. (Zuerker, L.; JV-16-544; April 29, 2020; Vaught, L.)

Salinas v. Ark. Dep't of Human Servs., 2020 Ark. App. 272 [**TPR—aggravated circumstances**] Mother appealed the termination of her rights to four children. The family had been involved with the department for over seven years, beginning with multiple reports of sexual abuse involving one of the children. After repeated sexual abuse at an early age, the child required extensive treatment and suffered ongoing effects from the trauma. At trial, the court heard evidence that the mother exposed the children to domestic violence by continuing in a relationship with an abuser, despite years of working with the department and extensive services offered, the mother was unable to care for the children, and made only meager efforts toward reunification. The appellate court affirmed termination based on aggravated circumstances, agreeing that there was little likelihood that further services would result in a successful reunification. The court affirmed the trial court's best interest finding, which took into account the adoptability of the children and the risk of potential harm should they be returned to the mother. (Zimmerman, S.; JV-18-438; April 29, 2020; Switzer, M.)

Salinas v. Ark. Dep't of Human Servs., 2020 Ark. App. 279 [TPR—sufficiency of the evidence]

This case involves the same Ms. Salinas as the other *Salinas* case decided the same day but involves different children, twins who were born to the mother and her domestic abuser after the initiation of the separate case. Due to the circumstances that led to the removal and ultimate termination of rights of the older four children, the twins were removed from the mother's custody at birth based on the substantial risk of harm should they remain with the mother. At permanency planning, the goal was changed to adoption because the court was concerned with the mother's ability to care for the children and keep them safe from harm and abuse. After a termination hearing, an order terminating parental rights was entered based on aggravated circumstances. The trial court found clear and convincing evidence that further services were unlikely to result in a successful reunification and that termination was in the best interest of the children. Finding no clear error, the trial court was affirmed. (Zimmerman, S.; JV-18-872; April 29, 2020; Hixson, K.)

U. S. SUPREME COURT

Kansas v. Glover [4th Amendment] A Kansas deputy sheriff ran a license plate check on a pickup truck, discovering that the truck belonged to respondent Glover and that Glover's driver's license had been revoked. The deputy pulled the truck over because he assumed that Glover was driving. Glover was in fact driving and was charged with driving as a habitual violator. He moved to suppress all evidence from the stop, claiming that the deputy lacked reasonable suspicion. The district court granted the motion, but the Court of Appeals reversed. The Kansas Supreme Court in turn reversed, holding that the deputy violated the Fourth Amendment by stopping Glover without reasonable suspicion of criminal activity.

Held: When the officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running a vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

Here, the deputy's commonsense inference that the owner of a vehicle was likely the vehicle's driver provided more than reasonable suspicion to initiate the stop. That inference is not made unreasonable merely because a vehicle's driver is not always its registered owner or because Glover had a revoked license. Though common sense suffices to justify the officer's inference, empirical studies demonstrate that drivers with suspended or revoked licenses frequently continue to drive. And Kansas' license-revocation scheme, which covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive, reinforces the reasonableness of the inference that an individual with a revoked license will continue to drive. The scope of this holding is narrow. The reasonable suspicion standard "takes into account the totality of the circumstances." The presence of additional facts might dispel reasonable

suspicion, but here, the deputy possessed no information sufficient to rebut the reasonable inference that Glover was driving his own truck. (No. 18–556 April 6, 2020)

Ramos v. Louisiana [**jury unanimous verdict**] Generally, in the state and federal courts of the United States, a single juror’s vote to acquit is enough to prevent a conviction. But two States, Louisiana and Oregon, have long punished people based on 10-to-2 verdicts. In this case, petitioner Ramos was convicted of a serious crime in a Louisiana court by a 10-to-2 jury verdict. Instead of the mistrial he would have received almost anywhere else, Ramos was sentenced to life without parole. He contests his conviction by a nonunanimous jury as an unconstitutional denial of the Sixth Amendment right to a jury trial.

Held: the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. (No. 18–5924; April 20, 2020)