

APPELLATE UPDATE

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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 or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On December 13th, the supreme court adopted amendments to Administrative Order Numbers 14 and 18, and a copy of the per curiam order was included in the weekly mailout. **The changes will impact the administrative plans that are due for submission to the court by July 1st, particularly in the areas of specialty courts and use of state district judges.**

Each circuit should have notified the supreme court of its administrative judge by February 1st.

CRIMINAL

Winkler v. State, 2012 Ark. App. 704 [**sufficiency of the evidence; conspiracy**] There was substantial evidence to support appellant's conviction. [**conspiracy**] One conspiracy can involve multiple object offenses. (Dennis, J.; CACR 11-1223; 12-12-12; Martin, D.)

Ratterree v. State, 2012 Ark. App. 701 [**admission of evidence**] The trial court did not abuse its discretion when it excluded from evidence the victim's autopsy report and testimony regarding the victim's drug use. [**jury instruction**] Because there was no rational basis for giving a negligent-homicide instruction to the jury, the trial court did not abuse its discretion when it refused appellant's request for the instruction. (Jones, B.; CACR 12-498; 12-12-12; Glover, D.)

Briggs v. State, 2012 Ark. App. 692 [**motion to suppress**] The trial court did not err when it concluded that appellant's handyman had apparent authority to give law-enforcement officers permission to enter appellant's house. Thus, a warrantless entry into appellant's house and a warrantless search of appellant's home was valid. Accordingly, the trial court did not err in denying appellant's motion to suppress the fruits of the search. (Wright, J.; CACR 12-483; 12-12-12; Pittman, J.)

Leek v. State, 2012 Ark. App. 699 [**statute of limitations**] Arkansas Code Annotated § 5-1-109(b)(2) (Repl. 2006) provides that Class B felonies have a three-year statute of limitations. However, section 5-1-109(c)(1) states that, although a statute of limitations outlined in subsection (b) may have expired, a prosecution may be commenced for any offense involving fraud or breach of a fiduciary obligation within one year after the offense is discovered or should have been discovered. Appellant was convicted of using her position to steal money from her employer over a three-year period. Appellant's actions constituted fraud. Appellant was arrested within one year from the date upon which her crime was discovered. Therefore, the statute of limitations had not run as to any of the applicable thefts at the time the criminal proceedings were initiated against appellant. (Wright, H.; CACR 12-224; 12-12-12; Wynne, R.)

Reynolds v. State, 2012 Ark. App. 705 [**revocation; admission of evidence**] Because testimony, which was properly admitted, provided an independent basis upon which to revoke appellant's suspended sentence, appellant could not establish that he was prejudiced by the admission of certain other testimony. (Jones, B.; CACR 12-443; 12-12-12; Martin, D.)

Holian v. State, 2013 Ark. 7 [**jury instructions; lesser-included offense**] Felony manslaughter is not a lesser-included offense of felony murder. (Clawson, C.; CR 12-266; 1-17-13; Hart, J.)

McLaughlin v. State, 2013 Ark. App. 26 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon a statement made by a witness. In affirming the trial court, the appellate court noted that the challenged statement was not improperly induced by the prosecution and did not provide evidence of appellant's guilt. The appellate court also noted that appellant did not request an admonition after the statement was made, which could have removed any prejudicial effect the statement may have had on the jury. (Hearnberger, M.; CACR 12-417; 1-23-13; Walmsley, B.)

Mason v. State, 2013 Ark. App. 48 [**jury instruction**] There was no rational basis upon which to instruct the jury to consider negligent homicide. Thus, the trial court did not abuse its discretion in refusing to do so. (Tabor, S.; CACR 12-302; 1-30-13; Gruber, R.)

Mister v. State, 2013 Ark. App. 49 [**Batson challenge**] A *Batson* challenge is timely so long as the objection is made before the jury is sworn. The trial court's findings that the State had given racially neutral reasons for striking two potential jurors were not clearly erroneous. (Cox, J.; CACR 11-1054; 1-30-13; Glover, D.)

Lewis v. State, 2013 Ark. App. 39 [**sufficiency of the evidence; DWI**] There was substantial evidence to support appellant's conviction. [**motion to suppress**] Because the law enforcement official had probable cause to stop and arrest appellant, the trial court did not err in denying appellant's request to suppress the evidence obtained as a result of the stop and arrest. [**right to counsel**] A criminal defendant has no right to counsel before taking a breathalyzer test. (Sims, B.; CACR 11-1224; 1-30-13; Pittman, J.)

Upshaw v. State, 2013 Ark. App. 41 [**sufficiency of the evidence; revocation**] The trial court's determination that appellant violated the terms of his suspended sentence was not clearly against the preponderance of the evidence. [**admission of expert testimony**] The trial court did not abuse its discretion when it permitted a law enforcement official to offer opinion testimony regarding a fact in issue. (Davis, B.; CACR 12-545; 1-30-13; Walmsley, B.)

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

Bass v. State, 2013 Ark. App. 55 (aggravated robbery, theft of property, aggravated assault) CACR 12-327; 1-30-13; Hixson, K.

Blakely v. State, 2013 Ark. App. 37 (theft of a credit/debit card) CACR 12-452; 1-30-13; Gladwin, 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:

Sanders v. State, 2012 Ark. App. 697 (probation) CACR 12-597; 12-12-12; Gladwin, R.

Lanfair v. State, 2013 Ark. App. 51 (probation) CACR 12-398; 1-30-13; Whiteaker, P.

Jones v. State, 2013 Ark. App. 58 (probation) CACR 12-575; 1-30-13; Wood, R.

Atkins v. State, 2013 Ark. App. 60 (probation) CACR 12-115; 1-30-13; Brown, W.

CIVIL

Sullivan v. Coney, 2012 Ark. App. 687 [**summary judgment**] Court erred in not addressing the merits of the qualified-immunity issue when it was raised in the pleading but not actually argued during the hearing. (Hughes, T.; CA 12-22; 12-5-12; Glover, D.)

Marshall v. Truman Constr. Corp., 2012 Ark. App. 686 [**limitations**] Three-year limitations period applied to claim for negligent construction of house's foundation. (Fogleman, J.; CA 12-264; 12-5-12; Gruber, R.)

Ark. Elder Outreach, Inc. v. Thompson, 2012 Ark. App. 681 [**charitable immunity**] Entity did not prove its entitlement to charitable immunity as a matter of law; factual questions remained to be resolved. (Hill, V.; CA 11-1310; 12-5-12; Vaught, L.)

McCutchen v. City of Fort Smith, 2012 Ark. 452 [**foia**] City administrator did not violate freedom of information act regarding open meetings when he presented to individual Board members in advance of a study session a memorandum expressing his opinion on a proposed ordinance. This case is distinguishable from precedent in *Harris v. Fort Smith*. Moreover, the court declined the request to overrule *Harris*. Declaratory action did not constitute a real case and controversy; rather, it sought an advisory opinion on the constitutionality of Ark. Code Ann. sections 25-19-104 and 106. (Cox, J.; SC 11-1086; 12-6-12; Hannah, J.)

Carnell v. Ark. Elder Outreach, Inc., 2012 Ark. App. 698 [**Professional Conduct R. 4.2**] Trial court order precluding plaintiff's ex parte contact with current or former employees of corporate defendants was not an abuse of discretion. [**charitable immunity**] Entity did not prove its entitlement to charitable immunity as a matter of law; factual questions remained to be resolved. (Thyer, C.; CA 11-1188; 12-12-12; Gladwin, R.)

Durham v. Smith, 2012 Ark. App. 690 [**mandate**] Court did not hear additional evidence on damages because mandate directed court to reconsider damages under a fair market value theory as opposed to an unjust enrichment analysis. The mandate did not require additional evidence and the court ruled on the record before it. (Weaver, T.; CA 12-197; 12-12-12; Vaught, L.)

Van Cleve v. City of North Little Rock, 2012 Ark. App. 694 [**lease**] Agreement is illusory and unenforceable for lack of mutuality. Party is attempting to enforce an agreement to make a contract in the future which either party could simply walk away from. (Griffen, W.; CA 12-72; 12-12-12; Pittman, J.)

Perkins v. Henry, 2012 Ark. App. 707 [**res judicata**] Res judicata does not bar this claim because former suit and this suit did not involve the same claim that was litigated or which could have been litigated. At the time of the first suit, there was no controversy concerning the use of the runway; thus, no reason for the claim to have been litigated. (Whiteaker, P.; CA 12-499; 12-12-12; Brown, W.)

Gross and Janes Co. v. Brooks, 2012 Ark. App. 702 [**evidence**] Court did not err by allowing evidence of the amounts of future medical expenses because of the late disclosure of this information to the defendant. Defendant was aware that such damages were being sought and was not prejudiced by the timing of the exact amounts. [**loss of earning capacity**] There was substantial evidence to show a permanent injury. [**caretaking expenses**] No prejudice was shown in the submission to jury of claim for caretaking expenses. (Piazza, C.; CA 12-139; 12-12-12; Glover, D.)

Varadan v. Pagnozzi, 2012 Ark. App. 700 [**statute of repose**] Court correctly applied the statute of repose (ACA 16-56-112) rather than the statute of limitations relating to dispute over construction defects. (Mason, C.; CA 12-216; 12-12-12; Wynne, R.)

LVNV Funding, LLC v. Nardi, 2012 Ark. 460 [**pleading/rule 10**] Rule 10(d) of the Rules of Civil Procedure require that in an action on a written instrument, a copy of the document must be attached to the complaint. Defendant was entitled to summary judgment because of the failure to attach the agreement in this case. (Looney, J.; SC 12-216; 12-13-12; Hannah, J.)

Falcon Cable Media v. PSC, 2012 Ark. 463 [**judicial notice**] Court may take judicial notice of orders entered by the PSC in other proceedings. [**cable tv**] The intangible personal property of a cable television company is subject to ad valorem taxation. (Moody, J.; SC 11-1168; 12-13-12; Goodson, C.)

Proassurance Indemnity Co. v. Metheny, 2012 Ark. 461 [**instructions**] Court properly instructed the jury. It is not proper to instruct the jury to apportion fault against non-parties or parties that have settled. [**damages**] Court properly reduced damages because there was only one medical incident (brain surgery) and additional insurance coverage could not be bundled based upon a claim of multiple incidents. (Brantley, E.; SC 11-823; 12-13-12; Corbin, D.)

Buckalew v. Arvest Trust Co., 2013 Ark. App. 28 [**trusts**] Sole beneficiary did not establish a change in circumstances to authorize the termination of the trust. (Duncan, X.; CA 12-429; 1-23-13; Wynne, R.)

Titan Transportation, Inc. v. O.K. Foods, Inc., 2013 Ark. App. 33 [**carrier/agency**] Case involved the shipment of frozen poultry. Shipper contracted with company A to transport the product but company A subcontracted with another to do the actual shipment. Poultry was not shipped at proper temperature and delivery was refused. Company A claimed that it was merely a broker. If a broker does not disclose its principal nor the fact that it is acting as a broker and deals personally, then it may be held liable. Company A was held to be an agent and not an independent contractor. When an agent makes a contract for an undisclosed principal, both the principal and the agent may be held liable at the election of the party who dealt with the agent. (Fitzhugh, M.; CA 12-436; 1-23-13; Vaught, L.)

The Willows, LLC v. Bogy, 2013 Ark. App. 59 [**prescriptive easement**] Party overtly and adversely used land for access to property, which entitled him to an easement by prescription. (Wyatt, R.; CA 12-523; 1-30-13; Wood, R.)

Launius v. Beasley, 2013 Ark. App. 42 [**constructive trust**] Creation of an oral trust and its terms must be established by clear and convincing evidence. This case remanded to reconcile inconsistent findings. (Guthrie, D.; CA 12-442; 1-30-13; Walmsley, B.)

Steve's Outdoor Investments, LLC v. Reynolds Forestry, Inc., 2013 Ark. App. 40 [**remand**] On remand, allegation that contract is void for illegality will not be considered because doctrine of law of the case precludes raising an issue that was not presented in first appeal but could have been. Court did not err in refusing to award prejudgment interest or attorney fees. (Guthrie, D.; CA 12-307; 1-30-13; Pittman, J.)

Gregory v. Gregory, 2013 Ark. App. 57 [**pleadings conform to evidence**] Court did not err in permitting testimony regarding an unplead theory of recovery as Rule 15 (b) allows for the amendment of pleadings to conform to the evidence. The objecting party did not seek a continuance nor demonstrate prejudice. [**constructive trust**] Court properly imposed constructive trust on real property in favor of mother who had previously conveyed it to one of her sons. (Cooper, T.; CA 12-268; 1-30-13; Hixson, K.)

Deering v. Supermarket Investors, Inc., 2013 Ark. App. 56 [**service**] No issues were preserved for appeal and case affirmed. (Fox, T.; CA 12-138; 1-30-13; Hixson, K.)

Eusanio v. Tippin, 2013 Ark. App. 38 [**default**] Court did not abuse its discretion in refusing to set aside the default judgment. The motion for an extension to file was not filed within the prescribed time. Defendant did not establish grounds to set aside the judgment. Reasons for failing to file were due to carelessness and not excusable. (Wyatt, R.; CA 11-1117; 1-30-13; Gladwin, R.)

Bowen v. Gardner, 2013 Ark. App. 52 [**contract**] A contract, though not in writing, was valid and enforceable under UCC, section 4-2-201. There was a breach but the non-defaulting party resold the goods at a higher price than the contract price, and was only entitled to incidental damages. (Mason, C.; CA 12-578; 1-30-13; Whiteaker, P.)

Washington v. Washington, 2013 Ark. App. 54 [**deed**] Case involved title to property within a family dispute. Although deed was not recorded, it was delivered and was effective between the parties. Adverse possession was not established because there was no showing of hostile or adverse possession. (Harkey, A.; CA 12-325; 1-30-13; Vaught, L.)

Young v. Blytheville Sch. Distr., 2013 Ark. App. 50 [**school immunity**] Parent sued school district after daughter was raped in school building after exiting a school bus. Ark. Public Education Act does not establish a private right of action. School's immunity under section 21-9-301 does not violate article 2, section 13 of the state constitution. There is no basis to claim that district was anything but negligent even though conduct of student's assailant was an intentional tort. Complaint failed to state a federal claim under 1983 as there was no showing that district had actual knowledge of any risk to child or that it exhibited deliberative indifference to a risk. (Davis, B.; CA 12-696; 1-30-13; Glover, D.)

Meador v. Total Compliance, Inc., 2013 Ark. 22: No issues preserved for appeal. (Duncan, X.; SC 12-408; 1-31-13; Corbin, D.)

City of Malvern v. Jenkins., 2013 Ark. 24: [**sovereign immunity**] Claim for damage to property from water allegedly caused by damage to a culvert arising from city's installation of a sewer line sounded in tort rather than contract. City was immune from suit in tort. (Koon, E.; SC 12-297; 1-31-13; Hoofman, C.)

DOMESTIC RELATIONS

Farrell v. Farrell, 2013 Ark. App. 23 [**divorce—marital property; alimony**] Although the trial court gave reasons for its unequal division of property in its letter opinion, it did not incorporate the letter opinion into the decree. A letter opinion that has not been incorporated into the judgment is not the equivalent of a written order and does not constitute a judgment or decree. Therefore, the issue was remanded for the court to satisfy the statute requiring the recitation of the basis and reasons for an unequal division of property in the court's order. Because alimony and property divisions are complementary devices, the trial court may reconsider its alimony award on remand. (Spears, J.; No. CA 12-275; 1-23-13; Gladwin, R.)

Paschal v. Paschal, 2013 Ark. App. 27 [**order of protection**] The decision granting an order of protection against the appellant preventing his contact with his two children for one year was affirmed without the court's reaching the merits because the appellant failed to remedy deficiencies in his brief, despite two opportunities to make corrections. (Taylor, J.; No. CA 11-209; 1-23-13; Wynne, R.)

Nicholson v. Harrison, 2013 Ark. App. 44 [**child custody; child support**] After a detailed recitation of the testimony, the Court of Appeals found that the circuit court did not err in awarding custody of the parties three children to the appellee father, and it affirmed on this point. However, it found a \$4.00 error, under Administrative Order No. 10, in the amount of child support the appellant mother was ordered to pay, so it modified the court's order on that point. (Harkey, A.; No. CA 12-448; 1-30-13; Harrison, B.)

Newton v. OCSE, 2013 Ark. App. 53 [**abatement of child support--estoppel**] The Court of Appeals found that the circuit court did not err in denying the appellant father's request for abatement of his obligation to pay child support based upon a lack of income resulting from his being incarcerated. The trial court relied upon a previous Court of Appeals case. The facts were similar in the cited case, in which the appellant had been convicted and imprisoned for raping his daughter, and in this case, in which the appellant was imprisoned for sexual abuse against his stepdaughter. The Court of Appeals stated that when reduced earnings are the obligor's own fault, he is not entitled to a reduction in child support. The trial court also dismissed appellant's estoppel argument, that child support should be abated because he was denied visitation. The

Court of Appeals said the trial court was correct that visitation and child support are separate matters, involving independent duties of the parties. (Bryan, E.; No. CA 12-147; 1-30-13; Vaught, L.)

PROBATE

Harvill v. Bridges, et al., 2012 Ark. App. 683 [**grandparent visitation**] After denying the appellee maternal grandparents permanent guardianship of their three grandchildren, ages eight, seven, and four, the circuit court granted their alternative plea, unsupervised visitation with the children for one weekend a month and one week during the summer. The appellant father of the children appealed. In reversing, the Court of Appeals held that the grandparents had failed to rebut the statutory presumption that the custodian's decision denying or limiting grandparent visitation is in the best interest of the children. The court held that the evidence was insufficient to show either that the grandparents' relationship with the children had been lost or that the appellees were willing to cooperate with the children's father if visitation were allowed. Here, there was no evidence that a relationship had been lost or would be lost absent court-ordered visitation. The appellant had allowed the grandparents to visit the children before they filed for grandparent visitation. He never told them that visitation would not be allowed in the future. Equally important, the court said, was the appellee grandparents' failure to show a spirit of cooperation with the father. To the contrary, their actions show that they "will be satisfied with nothing less than control over the children." (McCallister, B.; No. CA 12-371; 12-5-12; Pittman, J.)

Tait, et al. v. Community First Trust Company, et al., 2012 Ark. 455 [**inter vivos trust; lapse**] In this case of first impression, the issue was whether the interest of a beneficiary to an inter vivos trust lapses when the beneficiary dies before the settlor. The Supreme Court held that the interest of a beneficiary to an inter vivos trust vests at the time the trust is created, and thus the beneficial interest does not lapse when the beneficiary predeceases the settlor. To the extent that the Court of Appeals decision in *Farr v. Henson*, 79 Ark. App. 114, 84 S.W.3d 871 (2002), is inconsistent with the opinion in this case, the court overruled it. Because the court held that the interests of the deceased beneficiaries did not lapse, the court did not need to address the appellants' arguments concerning whether the anti-lapse statute or the provision regarding custodial trust could apply to an inter vivos trust. The decision was reversed and remanded for proceedings consistent with the court's decision. (Looney, J.; No. SC 12-406; 12-6-12; Goodson, C.)

Crenshaw v. Crenshaw, et al., 2012 Ark. App. 695 [**guardianship of a child—termination; directed verdict or dismissal**] The circuit court granted the appellee grandparents' motion for a "directed verdict" at the close of appellant mother's case to terminate the guardianship of her child. The court found that the mother had presented no evidence about the best interest of the child. The Court of Appeals agreed with the appellant that the circuit court had erred in its finding and reversed the decision. The court said that under the Code, a guardianship should be

terminated if it is no longer necessary or for the best interest of the ward. Prior cases have held, the Court said, that it was necessary to show both that the parent was fit and that termination of the guardianship was in the child's best interest. The Supreme Court has held that a fit parent is presumed to act in the best interest of the child. Here, the court held the proof presented was sufficient to show that it was in the child's best interest to terminate the guardianship and, thus, to withstand a motion for a directed verdict or dismissal. (Hendricks, A.; No. CA 12-232; 12-12-12; Pittman, J.)

Yerby v. Yerby, 2013 Ark. App. 25 [**adoption—consent of father**] The trial court denied the single-parent adoption by the mother of her three children, finding that the father's consent was required but not given. The mother contended that the father had failed significantly without justifiable cause to communicate with the children or to provide for their care and support for a period of at least one year. The trial court found that the father had justifiable cause for his lapses. The court found that his physical and mental health had improved and that his devotion to his children was such that it would be contrary to their best interest to sever the parental relationship by granting the adoption. (Cottrell, G.; No. CA 12-511; 1-23-13; Pittman, J.)

JUVENILE

Gray v. Arkansas Department of Human Servs., 2013 Ark. App. 24 [**TPR- Educational Neglect**] Appellants argued that educational neglect was not the cause of removal, but a subsequent condition. They also argued that their inability to adequately communicate with their child, who was deaf, did not constitute educational neglect. Appellants' failure to object at the trial procedurally bars review on appeal. [**Environmental Neglect**] Appellants argued that the environmental neglect did not threaten the physical health and safety of their children. Yet, there was evidence at the termination hearing of continuing problems with raw sewage, mold, and trash. The court's order was not clearly erroneous. (Medlock; M.; 12-709; 1-23-2013; Gladwin, R.)

Cushman v. Arkansas Department of Human Servs., 2013 Ark. App. 3 [**TPR – potential harm**] Appellant argued that the trial court failed to consider whether her child's health and safety would be at risk if returned to her. Potential harm is a factor in the best interest analysis and the court is not required to identify a potential harm or to find that actual harm would result if returned to the parent. Appellant failed to preserve her argument for appeal because she did not object below. However, the court noted that even if appellant preserved the argument for appeal the circuit court would be affirmed because the court considered potential harm the child would face if returned to the parent in its order and letter ruling presented at the final hearing. (Chandler, L.; 12-733; 1-16-2013; Gladwin, R.)

Carr v. Arkansas Department of Human Servs., 2012 Ark. App. 688 [**TPR**] This case originated as a sex abuse case and failure to protect that resulted in termination of parental rights of the father and then the mother. Only the mother appealed. Appellant argued that there was no change in circumstances to modify the goal of reunification to termination and that DHS failed to provide her the case plan timely, which prejudiced her. Appellant's arguments are procedurally barred because she failed to raise them with the trial court. (Fryauf, M.; 12-477; 12-5-2012; Glover, D.)

Smart v. Arkansas Department of Human Servs., 2012 Ark. App. 682 [**No Merit –TPR & Motion to withdraw**] Motion to withdraw denied and remanded to supplement record with substituted brief, abstract, and addendum to cure deficiencies at attorney's own expense. (Vaught, L; 12-637; 12-5-2012; Vaught, L.)

DISTRICT COURT

Green v. Pruitt 2013 Ark. App. 47 [**District Court appeal**] Appellant won a default judgment in the small claims division of district court. The defendant appealed to circuit court and the appellant properly filed a complaint in circuit court. This appeal is from the bench trial in circuit court after which a judgment in favor of the defendant was entered. Appellant's arguments to the Court of Appeals were denied because of the failure to bring up a record sufficient to demonstrate error and for failing to preserve the argument for appellate review. (Moody, J.; CA12-608; 1/30/13; Wynne, R.)

EIGHTH CIRCUIT

Sutton v. Bailey: [**civil rights**] District court erred in denying defendants' motion for summary judgment based on qualified immunity as reasonable school officials would not have know that their conduct violated plaintiff's clearly established due-process rights. (E. D. Ark.; 12-3-12; No: 12-1276)

Town of Gilbert v. Fruehauff, 2013 Ark. App. 17 [**street dedication**] For a valid dedication of land, the owner must appropriate the property specifically to its intended use, and the public must accept the land. Here, the evidence of the first requirement, intent to dedicate as a public street, is lacking. (Clawson, C.; CA 12-506; 1-16-13, Vaught, L.)

U.S. SUPREME COURT

Ark. Game and Fish Commission v. U.S.: [**taking/compensation**] Petitioner, Arkansas Game and Fish Commission (Commission), owns and manages the Dave Donaldson Black River Wildlife Management Area (Management Area or Area), which comprises 23,000 acres along the Black River that are forested with multiple hardwood oak species and serve as a venue for recreation and hunting. In 1948, the U. S. Army Corps of Engineers (Corps) constructed the

Clearwater Dam (Dam) upstream from the Management Area and adopted a plan known as the Water Control Manual (Manual), which sets seasonally varying rates for the release of water from the Dam. Periodically from 1993 until 2000, the Corps, at the request of farmers, authorized deviations from the Manual that extended flooding into the Management Area's peak timber growing season. The Commission objected to the deviations on the ground that they adversely impacted the Management Area, and opposed the Corps' proposal to make the temporary deviations part of the Manual's permanent water-release plan. After testing the effect of the deviations, the Corps abandoned the proposed Manual revision and ceased its temporary deviations.

The Commission sued the United States, alleging that the temporary deviations constituted a taking of property that entitled the Commission to compensation. The Commission maintained that the deviations caused sustained flooding during tree-growing season, and that the cumulative impact of the flooding caused the destruction of timber in the Area and a substantial change in the character of the terrain, necessitating costly reclamation measures. The Court of Federal Claims' judgment in favor of the Commission was reversed by the Federal Circuit. The Court of Appeals acknowledged that temporary government action may give rise to a takings claim if permanent action of the same character would constitute a taking. It held, however, that government-induced flooding can give rise to a taking claim only if the flooding is "permanent or inevitably recurring."

Held: Government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.

As to the question whether temporary flooding can ever give rise to a takings claim, this Court has ruled that government-induced flooding, and seasonally recurring flooding can constitute takings. The Court has also ruled that takings temporary in duration can be compensable. This Court's precedent thus indicates that government-induced flooding of limited duration may be compensable. None of the Court's decisions authorizes a blanket temporary-flooding exception to the Court's Takings Clause jurisprudence, and the Court declines to create such an exception in this case. (No. 11-597; December 4, 2012)