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ANNOUNCEMENTS

Administrative Plans must be submitted to the Supreme Court by July 1, 2013.

CRIMINAL

Surratt v. State, 2013 Ark. App. 167 [**sentencing**] The firearm enhancement found in Ark. Code Ann. § 16-90-120 is not in conflict with the Criminal Code. (Sims, B.; CACR 12-497; 3-6-13; Wood, R.)

Spratt v. State, 2013 Ark. App. 170 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon answers given by prospective jurors during *voir dire*. (Pope, S.; CACR 11-1261; 3-6-13; Brown, W.)

Stevenson v. State, 2013 Ark. 100 [**sufficiency of the evidence; first-degree murder**] There was substantial evidence to support appellant's conviction. [**suppression of statement**] After appellant invoked his right to counsel, he expressed a desire to "go ahead" with the police interview, and to speak with law-enforcement officers. Thus, the circuit court's denial of appellant's motion to suppress the statement given to law enforcement during the requested interview was not clearly against the preponderance of the evidence. [**mistrial**] The circuit court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon comments made by the prosecutor during opening statements. [**404(b)**] The trial court did not abuse its discretion when it admitted evidence of appellant's prior crimes pursuant to Rule 404 (b) because the evidence was relevant to prove the elements of the charged crime, and the prior crimes, independent of revealing

other crimes, were relevant to prove intent in the charged crime. **[admission of evidence]** The trial court did not abuse its discretion when it admitted into evidence a cast form of the alleged murder weapon. (Philhours, R.; CR 12-697; 3-7-13; Hannah, J.)

Nalls v. State, 2013 Ark. App. 183 **[mistrial]** The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon comments made by the prosecutor during closing arguments. (Pope, S.; CACR 12-662; 3-13-13; Whiteaker, P.)

Dail v. State, 2013 Ark. App. 184 **[sufficiency of the evidence; manslaughter]** There was substantial evidence to support appellant's conviction. **[mistrial]** The trial court did not err when it denied appellant's request for a new trial, which was based upon an allegation of jury misconduct. (Halsey, B.; CACR 12-69; 3-13-13; Vaught, L.)

Williams v. State, 2013 Ark. App. 179 **[prosecutorial vindictiveness]** A presumption of prosecutorial vindictiveness arises when a prosecuting attorney files an additional charge after the defendant's initial trial that exposes the defendant to a longer possible period of imprisonment. In general, a modification in a charging decision that follows a mistrial for neutral reasons, such as a hung jury, and without objection from the government, raises no presumption of vindictiveness because there is no reason that the prosecutor would consider the defendant responsible for the need for a new trial. In appellant's case, a presumption of prosecutorial vindictiveness did not arise. **[illegal sentence]** Appellant's sentence pursuant Ark. Code Ann. 16-90-120 was not illegal. (Johnson, L.; CACR 12-484; 3-13-13; Wynne, R.)

Pedraza v. Circuit Court of Drew County, 2013 Ark. 116 **[writ of certiorari]** Petitioner filed a petition for a writ of *certiorari* asking the Supreme Court to order the Drew County Circuit Court to grant a continuance of his trial. The Supreme Court concluded that petitioner was not entitled to a writ of *certiorari* because he had an adequate remedy at law. Specifically, the petitioner can challenge the trial court's denial of his request for a continuance in a direct appeal. (Gibson, R.; CR 12-851; 3-14-13; Hoofman, C.)

Mullins v. State, 2013 Ark. App. 207 **[jury instructions]** Because appellant completely denied breaking into the victim's car, the trial court did not abuse its discretion by refusing to instruct the jury to consider criminal trespass as a lesser-included offense of breaking or entering. (Williams, C.; CACR 12-332; 3-27-13; Vaught, L.)

Lee v. State, 2013 Ark. App. 209 **[sentencing]** The trial court did not abuse its discretion by refusing to instruct the jury on concurrent and consecutive sentences. (Sims, B.; CACR 12-377; 3-27-13; Brown, W.)

Berks v. State, 2013 Ark. App. 203 **[sufficiency of the evidence; second-degree murder; aggravated residential burglary]** There was substantial evidence to support appellant's convictions. **[Daubert/Foote hearing]** The trial court did not abuse its discretion in its decision not to conduct a *Daubert/Foote* hearing to determine the admissibility of certain expert testimony or in

its decision to admit the testimony. **[admission of evidence]** The trial court did not abuse its discretion when it denied appellant's motion *in limine* to exclude the finding that sexual-abuse allegations appellant made against the victim were unsubstantiated because the evidence was relevant to show appellant's motive in the case. Where appellant did not request a continuance or attempt to retain his own expert to examine the evidence, the trial court did not abuse its discretion when it refused to exclude DNA evidence, which appellant argued was untimely. (Wright, J.; CACR 12-478; 3-27-13; Gruber, R.)

Kaufman v. State, 2013 Ark. 126 **[sufficiency of the evidence; first-degree murder]** There was substantial evidence to support appellant's conviction. **[mental disease or defect]** Because there was conflicting testimony on the question of appellant's mental state, the circuit court properly submitted the issue to the jury. (Cox, J.; CR 12-501; 3-28-13; Danielson, P.)

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:

Pevetoe v. State, 2013 Ark. App. 161 (suspended sentence) CACR 12-809; 3-6-13; Glover, D.

Bohlman v. State, 2013 Ark. App. 162 (suspended sentence) CACR 12-731; 3-6-13; Whiteaker, P.

Moore v. State, 2013 Ark. App. 159 (suspended sentence) CACR 12-775; 3-6-13; Gruber, R.

Mars v. State, 2013 Ark. App. 173 (suspended sentence) CACR 12-930; 3-13-13; Pittman, J.

Shackleford v. State, 2013 Ark. App. 176 (probation) CACR 12-641; 3-13-13; Harrison, B.

CIVIL

Edwards v. MSC Pipeline, LLC, 2013 Ark. App. 169 **[summary judgment]** The circuit court erred in granting summary judgment on fraud claims because of outstanding factual issues. (Maggio, M.; CA 12-44; 3-6-13; Hixson, K.)

Worden v. Kirchner, 2013 Ark. App. 168 **[motion to dismiss]** Dismissal of complaint was proper. (Fox, T.; CA 12-535; 3-6-13; Wood, R.)

Patterson v. Chilton, 2013 Ark. App. 154 **[intervene]** Discharged attorney did not have right to intervene in former client's lawsuit with respect to attorney's fee because attorney had the right to bring an independent action for fees. (Maggio, M.; CA 12-653; 3-6-13; Pittman, J.)

White v. Clay, 2013 Ark. App. 166 [**default judgment**] Answer filed by attorney who was the defendant and acting pro se, which was signed by his mother as power of attorney, was a nullity, and the plaintiff was entitled to a default judgment. (Moody, J.; CA 12-714; 3-6-13; Hixson, K.)

Robertson v. Daniel, 2013 Ark. App. 160 [**defamation/complaint**] Complaint failed to allege actual damage to reputation and should have been dismissed without prejudice. (Rogers, R.; CA 12-675 3-6-13; Gruber, R.)

Nationwide Ins. v. Matthews, 2013 Ark. App. 175 [**summary judgment**] Questions of fact preclude disposition via summary judgment. (Arnold, G.; CA 12-613; 3-13-13; Walmsley, B.)

Maestri v. Signature Bank, 2013 Ark. App. 174 [**summons**] Summons was not defective because when complaint was filed Rule 4 provided that a resident had 20 days in which to respond, but the summons were not issued until after the time of service in the rule had changed to 30 days, and the summons specified 30 days. The critical time is the time the summons was issued not the date that the complaint was filed. (Smith, K.; CA 12-365; 3-13-13; Walmsley, B.)

Evins v. Carvin, 2013 Ark. App. 185 [**Rule 41/dismissal**] Second complaint was involuntarily dismissed, as was the first, thus the second dismissal operated as an adjudication on the merits. The attempted third complaint was barred and should have been dismissed. (Moody, J.; CA 12-262; 3-13-13; Vaught, L.)

Pope v. John Hancock Ins., 2013 Ark. App. 189 [**deed**] Landowners were on notice of timber deed because it was referenced in warranty deed. A separate agreement was incorporated by reference in the timber deed and the landowners took the property subject to the timber deed and the agreement. [**contract/notice/**] Per the agreement, the owner of the timber rights could extend the term of the agreement, but the agreement specified a notice option was to be by overnight courier, but the notice was actually sent via "next day business delivery." Sending the notice in this manner was not a material breach of the contract. (Williams, C.; CA 12-735; 3-13-13; Wood, R.)

Lambert v. LQ Management, LLC, 2013 Ark. 114 [**certified question/retaliation**] Ark. Code Ann. § 16-118-107 does not revive the individual cause of action for common law remedies for retaliation under the workers' comp laws. Workers' comp is the exclusive remedy. (Certified Question; 3-14-13; Baker)

Coleman v. City of Pine Bluff, 2013 Ark. App. 112 [**ordinance**] Ordinance was not included in record; court cannot take judicial notice of ordinance. (Wyatt, R.; SC 12-911; 3-14-13; Hannah, J.)

Kennedy v. Morales, 2013 Ark. 113 [**abstract**] Summary judgment affirmed for noncompliance with Rule 4-2. (Erwin, H.; SC 11-570; 3-14-13; Baker, K.)

Moore v. Dunsworth, 2013 Ark. App. 197 [**mandate**] The trial court on remand did not violate the appellate court's mandate. The trial court held no additional hearings and, on the basis of the evidence presented in the former trial, resolved the ownership question. (Guthrie, K.; CA 12-114; 3-27-13; Pittman, J.)

Ver Weire v. Styles, 2013 Ark. App. 208 [**release**] Person attending drag race signed a release agreement. During the event, she was injured when she fell because of a defective bleacher. The negligence claims are completely unrelated to the unique and obvious dangers associated with automobile racing, as the claims relate only to the lack of care in maintaining safe bleachers for the ticket-purchasing spectators in attendance. Absent the release agreement, plaintiff was a business invitee protected by the owner's duty to maintain the premises in a reasonably safe condition. The release was inapplicable. The protection from liability as contemplated by such a release must be limited to injuries that are rationally associated with the dangerous nature of the activity. (Sutterfield, D.; CA 12-517; 3-27-13; Hixson, K.)

Derry Berrigan Co. v. KBS Leasing, Inc., 2013 Ark. App. 196 [**expert testimony**] Court did not abuse its discretion in allowing expert witness to base his estimate of repair costs on hearsay opinion of a sales rep for certain products. The *Daubert* factors may not be pertinent in addressing the reliability of an expert's opinion, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. In this case, it was not necessary for the circuit court to determine the admissibility of the testimony under the specific factors set out in *Daubert* because his testimony did not raise any novel scientific evidence, theory, or methodology. Lopez's testimony was based on his personal observation of the KBS office and its defects, his experience as a contractor, and the challenged hearsay. (Schrantz, D.; CA 11-876; 3-27-13; Pittman, J.)

Harp v. Security Credit Services, LLC, 2013 Ark. App. 202 [**credit card**] Creditor failed to prove that cardholder had authorized the charges made on the account. Credit card statements are not sufficient to prove that a particular individual authorized the charge. (Fox, T.; CA 12-405; 3-27-13; Wynne, R.)

Chase Bank USA v. Regions Bank, 2013 Ark. 129 [**summary judgment**] Summary judgment was not in order because of outstanding factual question on whether party had actual notice of another party's interest in the property. (Kilgore, C.; SC 11-900; 3-28-13; Baker, K.)

Circle D Contractors, Inc. v. Bartlett, 2013 Ark. 131 [**district court appeal**] On appeal to circuit court from district court, rule requires that the plaintiff replead the complaint, but the failure to do so should not result in the dismissal of the case. The requirement is procedural – not jurisdictional. In this case, all the district court's pleadings were filed in the circuit court so there was substantial compliance with the rule. (Pearson, W.; SC 12-863; 3-28-13; Hart, J.)

Hotfoot Logistics, LLC v. Shipping Point Marketing, Inc., 2013 Ark. 130 [**personal jurisdiction**] Factual questions remain to be resolved regarding defendant's contract and any substantial

connection it may have with Arkansas. (Fox, T.; SC 12-836; 3-28-13; Goodson, C.)

Kersten v. State Farm Ins., 2013 Ark. 124 [**class certification**] Trial court abused its discretion in prematurely denying class certification by failing to give due consideration to analysis under typicality, commonality, and predominance. (Gibson, B.; SC 12-725; 3-28-13; Corbin, D.)

DOMESTIC RELATIONS

Office of Child Support Enforcement, et al. v. Harper, 2013 Ark. App. 79 [**child support**] The Court of Appeals found that the circuit court judge erred in failing to include in its computation of modification of child support and arrearages a prior judgment of \$8,191.45, in not considering in calculating an arrearage unpaid child support after the January 17, 2008 judgment and before the June 1, 2008 modification, and in not including payments made by the appellee after June 1, 2011. The court remanded for recalculation, and encouraged the trial court to consider the differences in the calculations of the appellant and the appellee. Further, the appellate court ordered the trial court to adjust its calculation of arrearages to account for child support payments for a period for which the court found the appellee in contempt, and for any payments credited to the appellee that were not made (for a time period set out in the order). (Landers, M.; No. CA 12-738; 3-6-13; Brown, W.)

Davis v. Davis, 2013 Ark. App. 180 [**divorce--property division**] Before the parties' divorce hearing in 2010, they entered into an agreement that the appellant husband would take the divorce; that if they could not agree on property division within seven days, everything would be sold at a public auction. With proceeds of the auction, secured debts would be paid first and other debts would be paid with the remainder. When the parties failed to reach a settlement within seven days, the court ordered that the agreement be carried out. The appellant changed attorneys and his new attorney filed motions challenging the court's previous orders. The issues in this appeal involved the court's alleged errors, some raised for the first time on appeal or raised without citation to authority or convincing legal argument. The decision was affirmed in its entirety. (Weaver, T.; No. CA 11-886; 3-13-13; Gruber, R.)

Scudder v. Ramsey, 1013 Ark. 115 [**grandparent visitation; contempt; attorney's fees and costs**] The issue of first impression for the Supreme Court in this case is "the effect of an adoption on the visitation rights of a grandparent where, as here, the individual adopted is the adult daughter of the grandparent who enjoys visitation with the offspring of the daughter." The court said that Ark. Code Ann. section 9-9-215(a) provides that the effect of a final decree of adoption "terminates all legal relationships between the adopted individual and his or her biological relatives, including his or her biological parents, so that the adopted individual thereafter is a stranger to his or her former relatives for all purposes." Here, the appellant was adopted by third parties so that she was no longer legally related to the appellee, her biological mother. The appellee's rights to her grandchild were derived from her relationship to her daughter. Once that relationship was severed, the appellee was no longer entitled to visitation under the grandparent-visitiation statute.

That part of the circuit court's order that continued the visitation was reversed. That part of the order finding the appellant in civil contempt for failing to follow the court's visitation order before the adoption was granted was affirmed. That part of order awarding attorney's fees and costs to the appellee was reversed and remanded on the issue of the amount of fees awarded, because part of the fees was for work involving, not the contempt action, but the adoption proceeding. (Smith, P.; No. SC 12-476; 3-14-13; Goodson, C.)

Szabo v. Womack, 2013 Ark. App. 198 [**child support–Social Security disability benefits**] In this appeal after remand, the appellant argued that the trial court failed to give him credit for Social Security Disability benefits as required by the Court of Appeals, that the trial court erred in finding him in contempt for not disclosing his receipt of a lump-sum benefit check for \$7,980, and erred in awarding attorney's fees to the appellee. The court said that the trial court attempted to comply with the mandate to give appellant credit for an overpayment based upon reliance upon an Exhibit in the case, which led to a miscalculation by the circuit court. Therefore, the court reversed and directed that the appellant be credited with the correct amount of \$7,980. The court said it need not address the issue about the contempt, because no penalty was attached to the circuit court's finding. Finally, the court found that the trial court complied with its mandate regarding the award of attorney's fees. The decision was affirmed in part, reversed in part, and remanded. (Duncan, X.; No. CA 12-410; 3-27-13; Pittman, J.)

PROBATE

Foster v. Hatfield, 2013 Ark. App. 169 [**decedents' estates–claim against the estate–hearing**] The trial court erred in ordering a claim against an estate without scheduling or conducting a hearing on the claim as required by Ark. Code Ann. section 28-50-105(a)(3), when a claim "has been disapproved or not acted upon by the personal representative." (McGowan, M.; No. CA 12-566; 3-6-13; Wood, R.)

Furr v. James, et al., 2013 Ark. App. 181 [**custody; guardianship**] This was an appeal from change-of-custody and guardianship cases that were consolidated for hearing. In the original divorce case, the father of the three children was awarded custody. After that, the appellee paternal grandmother sought and was awarded guardianship of the children. This appeal involved the appellant mother's motion to have the custody of the children placed with her because, she alleged, the trial court did not find that she was unfit as a part of the guardianship case. In affirming, the Court of Appeals cited *Fletcher v. Scorza*, 2010 Ark. 64, 359 S.W3d 413, in which the Supreme Court found that no finding of parental unfitness is required in awarding guardianship, and the natural-parent preference is only one factor for the court to consider in deciding who is the most suitable guardian for the child. The best interest of the child is the "paramount consideration." In applying *Fletcher* to this case, the Court of Appeals also noted that in a case decided after the *Fletcher* case, *Madison v. Osburn*, 2012 Ark. App. 212, it had relied in part upon a fitness standard in a guardianship proceeding involving the statutory natural-parent preference. The court overruled *Madison* and any other prior cases that suggested such a standard be used in a third-party guardianship case involving the natural-parent preference. (Lindsay, M.; No. CA 12-708; 3-13-13; Glover, D.)

JUVENILE

White v. Arkansas Dept. of Human Services, 2013 Ark. App. 156 [**D-N Adjudication –sufficiency of the evidence**] Appellant argued that DHS failed to prove the allegations of sexual abuse, specifically arguing that the child’s testimony was not credible. The trial court specifically ruled that the child’s testimony was credible and the appellate court defers to the court’s evaluation and the credibility of witnesses. (Keaton, E.; CA12-993; 3-6-2013; Harrison, B.)

Payne v. Arkansas Dept. of Human Services, 2013 Ark. App. 186 [**TPR – Remand to supplement the record**] In this 5-4 decision the appellate court remanded to supplement the record of the testimony of the appellant from the adjudication hearing. Appellant did not testify at the termination hearing and the parties stipulated that the testimony would be the same as the adjudication hearing. The trial court found appellant not credible at the adjudication hearing. The adjudication was appealed; however, appellant did not object the issue of credibility. Yet, the appellate court found that evidence from all hearings and proceedings in the case must be reviewed if the trial court took judicial notice of or incorporated by reference pleadings or testimony that occurred before the termination hearing. (Keaton, E; CA12-828; 3-13-2013; Vaught, L)

Brown v. Arkansas Dept. of Human Services, 2013 Ark. App. 201 [**TPR – service evidence**] TPR reversed for failure to present evidence as to proper service under Rule 4 or Rule 5 of the Arkansas Rules of Civil Procedure. DHS argued that Appellant’s attorney was served but offered no evidence since Appellant appeared in court and the attorney had admitted to retrieving a copy of the petition from the court file. The attorney’s knowledge cannot cure a service defect. Proper service of legal process is required to vest the circuit court with the power to decide the dispute and a mistaken exercise of this power is never harmless. (Finch, J.; CA12-1020; 3-27-2013; Harrison, B.)

DISTRICT COURT

Jacobs v. State, 2013 Ark. App. 177 [**DWI appeal**] [**Motion to Suppress**] [**DWI Checkpoint**][**4th Amendment Seizure**]. Appellant was convicted in district court of DWI and refusing to submit to a chemical test. On appeal to circuit court, he argued that the initial traffic stop at a DWI checkpoint was made without reasonable suspicion or probable cause, so the stop violated Arkansas and federal law. Appellate court rejected the argument and affirmed. (Pope, S.; CACR 12-783; 3/13/13; Harrison, B.)

EIGHTH CIRCUIT

United States v. Paul Beard [**suppression**] District court did not clearly err in concluding officer had a better view of events than the camera in the patrol car and consequently it deferred to officer's testimony of events. Officer had an articulable and reasonable suspicion that defendant violated Arkansas traffic law and thus had a lawful basis for stopping defendant's car. Subsequent

search and seizure was lawful under the automobile exception and the district court correctly denied the motion to suppress. (E.D. Ark.; No: 11-3311; 3-8-13)

Universal Cooperatives, Inc. v. AAC Flying Service, Inc. [**negligence/duty**] In an action brought to recover attorneys' fees from third-party crop-dusters following Universal's successful defense of an action by farmers seeking damages arising from off-target aerial application of an herbicide it had manufactured, the district court did not err in dismissing the action for failure to state a claim. With respect to Universal's negligence claim, the defendant crop-dusters did not owe any duty to Universal; further, their alleged conduct failed to fit within the scope of unconscionable trade practices. Finally, the Arkansas Supreme Court recently rejected any cause of action against a third-party for attorneys' fees incurred in earlier litigation against another party and, in this case, there is no duty running from the third party to plaintiff which would support such a cause of action, and the district court did not err in dismissing Universal's claims based on the third-party-litigation exception to the American Rule and Restatement (Second) of Torts section 914(2). (E. D. Ark.; 3-26-13; No: 12-1970)

U.S. SUPREME COURT

Standard Fire Ins. v. Knowles: [**class action**] The Class Action Fairness Act of 2005 (CAFA) gives federal district courts original jurisdiction over class actions in which, among other things, the matter in controversy exceeds \$5 million in sum or value, 28 U. S. C. §§1332(d)(2), (5), and provides that to determine whether a matter exceeds that amount the “claims of the individual class members must be aggregated,” §1332(d)(6). When respondent Knowles filed a proposed class action in Arkansas state court against petitioner Standard Fire Insurance Company, he stipulated that he and the class would seek less than \$5 million in damages. Pointing to CAFA, petitioner removed the case to the Federal District Court, but it remanded to the state court, concluding that the amount in controversy fell below the CAFA threshold in light of Knowles’ stipulation, even though it found that the amount would have fallen above the threshold absent the stipulation.

Held: Knowles’ stipulation does not defeat federal jurisdiction under CAFA. The precertification stipulation can tie Knowles’ hands because stipulations are binding on the party who makes them. However, the stipulation does not speak for those Knowles purports to represent, for a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified. Because Knowles lacked authority to concede the amount in controversy for absent class members, the District Court wrongly concluded that his stipulation could overcome its finding that the CAFA jurisdictional threshold had been met.

(No. 11–1450; March 19, 2013)

Florida v. Jardines: **[search]** Police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis. The Supreme Court of Florida approved the trial court's decision to suppress the evidence, holding that the officers lacked probable cause. The U.S. Supreme Court affirmed.

Held: The investigation of Jardines' home was a "search." The officers entered the curtilage here: The front porch is the classic exemplar of an area "to which the activity of home life extends." A police officer not armed with a warrant may approach a home in hopes of speaking to its occupants, because that is "no more than any private citizen might do." But the scope of a license is limited not only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search.

(No. 11-564; March 26, 2013)