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Johnnie Russell McGEE *v.* Teresa Lynn McGEE

CA 06-1342 262 S.W.3d 622

Court of Appeals of Arkansas
Opinion delivered September 19, 2007

Eugene Bramblett, P.A., by: *Eugene D. Bramblett*, for appellant.

Kinard, Crane & Butler, P.A., by: *Stephen R. Crane*, for appellee.

SAM BIRD, Judge. Appellant Johnnie Russell McGee and appellee Teresa Lynn McGee Winkler were divorced on January 5, 1994. This appeal arises out of an order of the Columbia County Circuit Court entered on May 11, 2006, holding that the parties' divorce decree was res judicata on the issue of paternity, requiring appellant to pay child support, and denying appellant's request for paternity testing. Appellant presents three points on appeal: (1) the trial court erred in applying the doctrine of res judicata where the parties agreed before the divorce that appellant would not challenge paternity and appellee would not make appellant responsible for child support or medical bills; (2) the trial court erred in failing to find that appellee was estopped from seeking child support;

and (3) the trial court erred in modifying appellant's child-support obligation without requiring appellee to meet her burden of establishing a change of circumstances sufficient to warrant modification. We find no error and affirm.

The parties were married on July 12, 1991, and divorced on January 5, 1994. On August 13, 1993, appellee gave birth to twins. The divorce decree stated that two children were born of the marriage and awarded custody to appellee but provided that appellant would pay no child support. This case began in February 2005 when appellee filed a petition alleging that the circumstances of the parties had changed and requesting the court to order appellant to pay child support, provide insurance, and be responsible for the children's medical expenses. Appellee also asked the court to order restitution from the date of the divorce decree. Appellant responded, asserting estoppel and fraud because the parties agreed before they divorced that appellant would not be responsible for child support or medical bills if he would not contest paternity. Appellant also filed a motion to require appellee and the children to submit to DNA testing to determine the issue of paternity.

The trial court held a hearing on March 14, 2006. During the hearing, appellee admitted that she was having an extramarital affair with another man during the time that the twins were conceived and that she did not know whether he or appellant was the biological father of the children. She also testified that appellant is listed as the father on the children's birth certificates and that the children think that appellant is their father. Appellant testified that he and appellee both knew at the time of the divorce that he was not the father of the children. He also said that, when they decided to end their marriage, they reached an agreement that he would not challenge paternity of the children and, in exchange, she would not make him responsible for the payment of any child support or medical bills. Appellee testified that she let appellant "handle it all," that he was the only party represented by counsel at the time, and that she did sign the papers providing that there were two children born of the marriage and that appellant would not pay child support.

The trial court entered an order holding that the doctrine of res judicata barred re-litigation of the finding of paternity in the original divorce decree, finding that appellant had a full and fair opportunity to litigate the issue of paternity and chose not to do so. The trial court also held that appellant mandated the terms of the

agreement the parties may have entered into regarding paternity of the children and he therefore could not assert fraud as a basis for challenging paternity. The trial court rejected appellant's defense of estoppel, finding that appellant was aware of the facts regarding the paternity of the children and therefore did not meet his burden of proving that he was ignorant of the facts. Finally, the court held that any agreement between the parties regarding the non-payment of child support would not be binding upon the children, who were not represented in the matter. The trial court then ordered appellant to pay child support in the amount of $741 per month from February 14, 2005, the date appellee filed the petition for support, until the children reach the age of eighteen or graduate high school, whichever last occurs. Appellant brought this appeal.

Our standard of review for an appeal from a child-support order is de novo, and we will not reverse a finding of fact by the trial court unless it is clearly erroneous. *Hardy v. Wilbourne*, 370 Ark. 359, 259 S.W.3d 405 (2007). In reviewing a trial court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* We give no deference to a trial court's conclusions of law. *Id.*

I. Res Judicata

For his first point on appeal, appellant argues that the trial court erred in applying the doctrine of res judicata because the issue of paternity was not fully contested in good faith. Res judicata bars re-litigation of a claim in a subsequent suit if certain elements are present. One of these elements is that the first suit was "fully contested in good faith." *State Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 350, 995 S.W.2d 338, 339 (1999). Res judicata bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. *Id.* If, however, there was "fraud or collusion in the procurement of the first judgment," res judicata does not apply. *Nat'l Bank of Commerce v. Dow Chem. Co.*, 338 Ark. 752, 759-60, 1 S.W.3d 443, 448 (1999). Appellant explains that the reason he did not contest paternity in the divorce decree was because of an agreement between appellee and him that he would not challenge paternity in exchange for her agreement not to hold him financially responsible for the children. He argues that the trial court erred in finding that he could not be rewarded for his own

fraudulent conduct by being allowed to relitigate paternity because appellee also perpetrated a fraud and was allowed to relitigate child support. We disagree.

The supreme court has held that res judicata bars relitigation of the issue of paternity when paternity was established under a divorce decree. *Williams*, 338 Ark. at 351, 995 S.W.2d at 339. The critical question regarding res judicata of the divorce decree on the issue of paternity is not whether child support was ordered but whether the issue of paternity was decided and, if so, whether appellant had a full and fair opportunity to litigate the issue. *Id.* If it was decided and appellant did have such an opportunity, the divorce decree is res judicata on that issue.

In the case before us, the divorce decree stated that there were two children born of the marriage and granted custody to appellee, subject to the reasonable visitation rights of appellant. The issue of paternity, accordingly, was decided. We reject appellant's argument that he did not have a full and fair opportunity to litigate the issue. He testified that he knew at the time the parties were divorced that paternity was in question and that he did not believe that he was the father of the twins. In fact, the alleged agreement between the parties suggests this was foremost on his mind. He simply chose not to litigate the issue. Res judicata bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. *Williams*, 338 Ark. at 350, 995 S.W.2d at 339. We agree with the trial court's determination that, if there was fraud involved here, appellant cannot be the beneficiary of his own fraudulent conduct. Moreover, *Williams* strongly suggests that this is not the type of fraud that will provide a "defrauded" father the opportunity to relitigate the issue of paternity. *Id.* at 352, 995 S.W.2d at 340; *see also Graves v. Stevison*, 81 Ark. App. 137, 98 S.W.3d 848 (2003). We affirm the trial court's holding that res judicata bars relitigation of the finding of paternity in the original divorce decree.

II. Estoppel

For his second point on appeal, appellant argues that the trial court erred in failing to find that appellee was estopped from seeking child support because appellant relied to his detriment on appellee's promise not to seek child support in exchange for his promise not to challenge paternity. First and foremost, it is settled law in this state that the duty of child support cannot be bartered

away permanently to the detriment of the child. *Storey v. Ward*, 258 Ark. 24, 523 S.W.2d 387 (1975); *Paul M. v. Teresa M.*, 36 Ark. App. 116, 818 S.W.2d 594 (1991). The trial court always retains jurisdiction and authority over child support as a matter of public policy and, no matter what an independent contract states, either party has the right to request modification of a child-support award. *Crow v. Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988) (holding agreement not to seek any increases or decreases in child support void as against public policy). Child support is an obligation owed to the child and, even in the absence of a court order requiring a parent to support his or her minor child, a parent continues to have a legal and moral duty to do so. *Akins v. Mofield*, 355 Ark. 215, 225-26, 132 S.W.3d 760, 767 (2003) (citing *Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998)).

In *Fonken*, the supreme court held that Mrs. Fonken's actions in telling Mr. Fonken to stop paying child support, and his reliance thereupon, were insufficient to relieve Mr. Fonken of his legal obligation to his minor child. In *Paul M.*, we held that, to the extent the father's theory was founded upon the mother's alleged agreement to take full responsibility for their child when she refused to have an abortion, such an agreement was not enforceable because it was not supported by consideration *and* it violated public policy. *Paul M.*, 36 Ark. App. at 118, 818 S.W.2d at 595. We explained that "the interests of minors have always been the subject of jealous and watchful care by courts of chancery, and that a chancery court always retains jurisdiction over child support as a matter of public policy . . . . Insofar as the agreement at issue here represents an attempt to permanently deprive the child of support, it is void as against public policy, and thus cannot form the basis for an actionable claim against appellee." *Id.* at 119, 818 S.W.2d at 595-96. *See also Erwin L.D. v. Myla Jean L.*, 41 Ark. App. 16, 847 S.W.2d 45 (1993) (holding that a mother's agreement or assurances that she would not pursue a paternity action to request support could not validly be interposed by a putative father as a defense in paternity proceeding). We hold that the trial court did not err in failing to find that appellee was estopped from seeking child support.

III. Change in Circumstances

Finally, appellant contends that the trial court erred in modifying appellant's child-support obligation without requiring appellee to meet her burden of showing a change in circumstances

sufficient to warrant modification. A change in circumstances must be shown before a court can modify an order for child support, and the party seeking modification has the burden of showing a change in circumstances. *Reynolds v. Reynolds*, 299 Ark. 200, 771 S.W.2d 764 (1989). Ordinarily, the amount of child support lies within the sound discretion of the trial court, and that determination may be reviewed and modified to serve the best interests of the children when there are changed circumstances. *Ross v. Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989). A trial court's determination as to whether there are sufficient changed circumstances to warrant an increase in child support is a finding of fact, and we will not reverse this finding unless it is clearly erroneous. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993).

In determining whether there has been a change in circumstances warranting an adjustment in support, the court should consider remarriage of the parties, a minor's reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child-support chart. *Woodson v. Johnson*, 63 Ark. App. 192, 195, 975 S.W.2d 880, 881 (1998) (quoting *Roland*, 43 Ark. App. at 63-64, 859 S.W.2d at 656). It is mandatory that a trial court refer to the family-support chart in making a determination of what is a reasonable amount of child support. Ark. Code Ann. § 9-14-106 (Repl. 2002). This statute creates a rebuttable presumption that the amount contained in the family-support chart is the correct amount of child support to be awarded. *Id.*

In reviewing a trial court's findings regarding child support, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Hardy v. Wilbourne*, 370 Ark. 359, 259 S.W.3d 405 (2007). Over twelve years have passed since the divorce decree awarding no child support was entered in this case. Appellee testified that the children had gotten older, that they played ball, had medical expenses, and quickly outgrew clothing and shoes. She added that "the need is never ending." The parties agreed on the amount of appellant's income for purposes of the family-support chart. Moreover, the only deviation that the trial court made from the family-support chart was a credit given to appellant for his two children that live in his home. *See Freeman v. Freeman*, 29 Ark. App. 137, 778 S.W.2d 222 (1989) (noting that

the fact that the child support ordered was in conformity with the chart was an indication that it was not clearly erroneous). We have examined the evidence in the record and, affording the trial court the deference to which it is entitled, we cannot say that its determination that there were sufficient changed circumstances to warrant an increase in child support is clearly erroneous.

Accordingly, we affirm.

MARSHALL and HEFFLEY, JJ., agree.

MBNA AMERICA BANK, N.A. *v.* Deborah K. BLANKS

CA 06-1396 262 S.W.3d 618

Court of Appeals of Arkansas
Opinion delivered September 19, 2007

Mac Golden, for appellant.

Gill Elrod Owen & Sherman, P.A., by: *Drake Mann*, for appellee.

DAVID M. GLOVER, Judge. This appeal concerns the denial of appellant MBNA's Petition and Application to Confirm Arbitration Award against appellee Deborah Blanks. We affirm the trial court's denial of confirmation.

When filing its confirmation petition in the trial court, MBNA attached an arbitration award dated October 4, 2004, from National Arbitration Forum awarding MBNA $11,335.59 and a document entitled "Important Amendments to Your Credit Card Agreement." On the arbitration award, there was an acknowledgment and certificate of service stating that a copy of the award had been sent by first-class mail postage prepaid to the parties at their referenced addresses on October 4, 2004.

The amendment to the credit card agreement stated in pertinent part:

> As provided in your Credit Card Agreement and under Delaware law, we are amending the Credit Card Agreement to include an Arbitration Section. Please read it carefully because it will affect your right to go to court, including any right you may have to have a jury trial. Instead, you (and we) will have to arbitrate claims. You may choose not to be subject to this Arbitration Section by following the instructions at the end of this notice. This Arbitration Section will become effective on February 1, 2000. The Arbitration Section reads:

Arbitration: Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents, or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), including Claims regarding the applicability of the Arbitration Section or the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration.

The arbitration shall be conducted by the National Arbitration Forum ("NAF"), under the Code of Procedure in effect at the time the claim is filed. . . . If the NAF is unable or unwilling to act as arbitrator, we may substitute another nationally recognized, independent arbitration organization that uses a similar code of procedure. . . . Any arbitration hearing at which you appear will take place within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). Judgment upon any arbitration award may be entered in any court having jurisdiction. The arbitrator shall follow existing substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor any claims or privilege recognized by law. . . .

. . . .

THE RESULT OF THIS ARBITRATION SECTION IS THAT, EXCEPT AS PROVIDED ABOVE, CLAIMS CANNOT BE LITIGATED IN COURT, INCLUDING SOME CLAIMS THAT COULD HAVE BEEN TRIED BEFORE A JURY, AS CLASS ACTIONS OR AS PRIVATE ATTORNEY GENERAL ACTIONS.

If you do not wish your account to be subject to this Arbitration Section, you must write to us at MBNA America, P.O. Box 15565, Wilmington, DE 19850. Clearly print or type your name and credit card account number and state that you reject this Arbitration Section. You must give notice in writing; it is not sufficient to telephone us. Send this notice only to the address in this paragraph; do not send it with a payment. We must receive your letter at the above address by January 25, 2000 or your rejection of the Arbitration Section will not be effective.

In response to the Petition and Application to Confirm Arbitration Award, Blanks filed a Motion to Dismiss, arguing that the trial court's jurisdiction was "premised upon the existence of a written agreement between the parties to submit to arbitration a controversy that arises after entering the written agreement," that MBNA had failed to attach the signed credit-card agreement upon which it relied upon for its claim as required by Rule 10(d) of the Arkansas Rules of Civil Procedure, and that dismissal was proper for failure to state facts upon which relief could be granted. Blanks simultaneously filed a Motion to Vacate, alleging that she did not enter into a written agreement to submit to arbitration; that she did not receive notice of the initiation of the arbitration proceeding; and that she did not participate in the arbitration hearing and therefore could not have participated in the arbitration hearing without raising an objection. MBNA then filed a "Motion to Dismiss or in the Alternative Motion for Summary Judgment and Brief in Support," alleging that modification to an arbitration award must be made within twenty days after delivery of the award to the defendant; that written notice of the award was sent by the arbitrator to Blanks on October 4, 2004; that more than twenty days had expired since the arbitration award had been delivered to Blanks and it therefore could not be modified, amended, or corrected; and that an application to vacate an award was not filed within ninety days after delivery of a copy of the award and therefore Blanks was not entitled to vacate the award.

At the hearing, when asked by the trial court if the arbitration award was sent by certified mail to Blanks, counsel for MBNA stated that the arbitration award was sent by first-class mail to the address where MBNA sent Blanks's credit-card statements. MBNA's counsel also stated that Blanks had been sent notice of the arbitration request and that she did not present an argument to the arbitrator. At the close of the hearing, the trial court stated, "I just have a bad feeling about this and I am going to deny the motion for summary judgment and the petition to confirm the arbitration award." The order states, "1. Plaintiff's Motion for Summary Judgment is denied. 2. Plaintiff's Petition and Application to Confirm Arbitration Award is denied." On appeal, MBNA argues that the trial court erred in denying the petition to confirm the arbitration award rendered in MBNA's favor and requests reversal of the trial court's decision with a remand directing entry of a judgment confirming the award. We affirm the denial of the confirmation of the arbitration award.

At the outset, Blanks argues that this court has no jurisdiction because a denial of summary judgment is not an appealable order. However, MBNA is appealing from the denial of its petition to confirm the arbitration award, not from the denial of its motion for summary judgment. An order denying a petition to confirm an arbitration award is appealable under Arkansas Code Annotated section 16-108-219(a)(4) (Repl. 2006), and Rule 2(a)(12) of the Arkansas Rules of Appellate Procedure–Civil. Therefore, this court has jurisdiction to address MBNA's argument.

We hold that the controlling case in this matter is *Danner v. MBNA America Bank, N.A.*, 369 Ark. 435, 255 S.W.3d 863 (2007), alluded to by MBNA in its reply brief as not decided prior to the briefs being due in this case. *Danner* concerns the exact same arbitration amendment that is the subject of this appeal. In that case, the trial court granted summary judgment to MBNA and confirmed the arbitration award that had been issued in favor of MBNA. Our supreme court reversed and remanded the case to the trial court.

In *Danner*, our supreme court held that the Federal Arbitration Act, not the Arkansas Uniform Arbitration Act, was applicable in the case because the transaction involved interstate commerce, and that sections two and twelve of the FAA, found at 9 U.S.C. §§ 2 and 12 (2000), were the sections relevant to the appeal:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000).

> § 12. Notice of motions to vacate or modify; service; stay of proceedings
>
> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months

> after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

As in the case at bar, Danner did not challenge the arbitrator's award until MBNA sought confirmation, which was more than ninety days after the award was issued, but she argued that she was not required to do so within three months after the award was filed or delivered because she disputed entering into an arbitration agreement, because she did not participate in the arbitration, and because MBNA failed to provide proof that she had actually received notice of the award. Our supreme court, citing *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426 (1st Cir. 1998), held that the time limit imposed by 9 U.S.C. § 12 was not triggered unless there was a written agreement to arbitrate, that there was a fact issue as to whether there was such a written agreement between MBNA and Danner, and that the circuit court erred in granting summary judgment to MBNA. The supreme court then reversed and remanded the case to the trial court for determination of whether there was a written agreement to arbitrate between Danner and MBNA.

Although *Danner* concerns a grant of confirmation of an arbitration award and the present case involves the denial of such an award, we still find *Danner* instructive in this case. In the present case, MBNA did not present evidence of a written agreement between MBNA and Blanks to arbitrate. Rather, MBNA presented only a document that purported to amend a credit-card agreement to allow arbitration. MBNA never presented the entire agreement from which a trial court could ascertain that Blanks had entered into a written agreement with MBNA that allowed amendments to it. Based upon *Danner*, the three-month time limit to file a motion to vacate, modify, or correct an award under 9 U.S.C. § 12 is not triggered unless there is a written agreement to arbitrate; therefore, MBNA is incorrect in its assertion that Blanks

was time barred from objecting to the arbitration award. Furthermore, because MBNA did not show that there was a written agreement between it and Blanks to arbitrate, we hold that the trial court did not err in denying MBNA's petition to confirm the arbitration award.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Mark WILSON *v.* STATE of Arkansas

CA CR 07-106 262 S.W.3d 628

Court of Appeals of Arkansas
Opinion delivered September 19, 2007

James P. Clouette, for appellant.

Dustin McDaniel, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Mark Wilson pled guilty to four drug-related offenses. In exchange for his plea, the State withdrew the habitual-offender enhancement that it had included in the information. Despite the fact that the State was no longer attempting to prove that Wilson was a habitual criminal, at the sentencing hearing the State introduced evidence relating to Wilson's four prior convictions — violation of the Arkansas hot-check law, fraudulent use of a credit card, theft by receiving, and theft by deception. On appeal, Wilson argues that the trial court erred by allowing evidence of his criminal history during sentencing. We disagree and affirm.

We will reverse a sentencing decision only if the defendant can show that he was prejudiced by the erroneously admitted evidence. *Buckley v. State*, 341 Ark. 864, 875, 20 S.W.3d 331, 339 (2000). Evidence relevant to sentencing may be introduced at the sentencing hearing, including prior "convictions of

the defendant, both felony and misdemeanor." *See* Ark. Code Ann. § 16-97-103 (Repl. 2006). However, section 16-97-104 (Repl. 2006) mandates that "[p]roof of prior convictions, both felony and misdemeanor, and proof of juvenile adjudications shall follow the procedures outlined in §§ 5-4-502–5-4-504." Sections 5-4-502 through -504 (Repl. 2006 and Supp. 2006) explain how prior convictions are to be considered in sentencing and what type of evidence is required to prove prior convictions.

Wilson argues that the trial court's decision to permit the State to introduce evidence relating to his prior convictions violated Arkansas Code Annotated section 16-97-103 and that he was prejudicially denied the benefit he was promised in exchange for his plea. Specifically, he alleges that when these two statutes are read together it becomes "clear that the legislature intend (sic) that prior convictions only be submitted to the jury where there is an allegation of habitual status." Unfortunately, the interpretation advanced by Wilson ignores the fact that section 16-97-104 specifically includes juvenile adjudications and misdemeanor convictions, which are not implicated in a habitual-offender context.

To construe the statute as applying only to sentencing in habitual-offender cases would violate our canons of statutory interpretation. As our supreme court mandates, we do not construe penal statutes so strictly as to reach absurd consequences that are contrary to legislative intent. *Williams v. State*, 364 Ark. 203, 208, 217 S.W.3d 817, 820 (2005). As such, we hold that the trial court's decision to permit the introduction of evidence relating to Wilson's criminal history during the sentencing phase of his trial is consistent with the mandates of Arkansas Code Annotated section 16-97-103.

Furthermore, contrary to Wilson's assertion otherwise, he did receive the benefit of his plea bargain, and the court did not "go beyond the scope" of the information. At sentencing, Wilson was subjected to the normal ranges of Class A and Y felonies as opposed to the enhanced ranges designated for habitual offenders. *See* Ark. Code Ann. § 5-4-401(a)(1) (Repl. 2006). Wilson actually received the minimum sentences allowed on two of his four convictions and less than the maximum on the other two. Also, his sentences were ordered to run concurrently rather than consecutively, as they could have. *See* Ark. Code Ann. § 5-4-403 (Repl. 2006). As such, Wilson has not only failed to

establish a threshold evidentiary error supporting reversal, but he has also failed to show that he suffered prejudice during sentencing.

We affirm.

GLADWIN and GRIFFEN, JJ., agree.

Mary K. JONES *v.* WAL-MART STORES, INC. and Claims Management, Inc.

CA 07-37 262 S.W.3d 630

Court of Appeals of Arkansas
Opinion delivered September 19, 2007

Harrelson Moore & Giles, by: *Gregory Ross Giles*, for appellant.

Bassett Law Firm, LLP, by: *Tod C. Bassett*, for appellee.

KAREN R. BAKER, Judge. Appellant, Mary K. Jones, appeals the decision of the Workers' Compensation Commission finding that she failed to prove by a preponderance of the evidence both that she is entitled to permanent disability benefits and that additional medical treatment was reasonably necessary in connection with the compensable injury. She has two arguments on appeal. First, she asserts that the Commission erred both as a matter of law and in its interpretation of the evidence when it denied her permanent disability benefits because she had no doctor's opinion assigning her an impairment rating. Second, she asserts that the Commission erred in concluding that she is not entitled to further medical treatment. We affirm in part and reverse and remand in part.

Appellant was employed as a sales clerk at Wal-Mart in Ashdown when she sustained a compensable injury to her back after falling between two-and-one-half and three feet from a ladder on July 13, 2002. After her fall, appellant went to the emergency room complaining of an injury to her back and neck. At the emergency room, Dr. Kleinschmidt examined her. Following his examination, his written instructions included specific steps in caring for her wounds, her sprain and fracture, and her neck and back injury. She was instructed to rest and to take her medication as directed. She returned to Dr. Kleinschmidt for a follow-up visit on July 24, 2002, and he recommended physical therapy. Appellant attempted physical therapy; however, she testified that she did not continue with physical therapy due to the increased pain in her back. She saw Dr. Kleinschmidt again on July 31, 2002. He recommended an MRI of her lumbar spine. He also recommended that she remain off work for two weeks.

On August 7, 2002, at the request of Wal-Mart's workers' compensation representative, appellant had an appointment to see Dr. Gabbie. She was not examined by Dr. Gabbie; rather, she was examined by Norman Herbert, Dr. Gabbie's physician assistant.

Herbert listed appellant's diagnosis as L-5 strain, prescribed medications, and recommended "work hardening" physical therapy. Herbert released her to go back to work with light-duty restrictions. Appellant did not return to work, and she was ultimately terminated by her employer. Appellant testified that she did not return to work because she was unable to perform even the light-duty work suggested by Herbert due to constant back pain.

It was not until September 2002 that appellant underwent the MRI ordered by Dr. Kleinschmidt. The MRI of the thoracic spine indicated moderate central bulging at T6-7, and the MRI of the lumbar spine indicated a ten centimeter irregular area of fluid within the adipose tissue posterior to L1 through L3.

Appellant saw Dr. Weems, an orthopedic doctor, on January 29, 2003, and for a follow-up visit on February 26, 2003. After her initial visit, Dr. Weems, noting that he did not have the MRI films or records to review, assessed appellant with "what sounds like chronic thoracic and lumbar back strain" and recommended therapy to provide appellant with symptomatic relief. At her follow-up visit, Dr. Weems explained to appellant that he had reviewed her MRI results and that the MRI only showed a bulging disc in the thoracic spine "which was not causing any significant foraminal or spinal stenosis" and a contusion in the soft tissue in the lumbar region. He told her that the only way she would improve would be to go to physical therapy; however, appellant explained that physical therapy was too painful and that she would not go.

Appellant contends that she has numerous injuries as a result of her July 13, 2002 fall and that she has seen various other doctors as a result. She testified that in addition to a fractured neck, diagnosed by Dr. Kleinschmidt, she has a fractured coccyx and a fractured tailbone. She testified that she has a loss of vision from fluid in her head, neck, and behind her eyes, as well as a pseudotumor, migraine headaches, and paralysis of the face. Appellant saw Dr. Vora on June 28, 2004, and Dr. Vora's notes indicated that he explained to appellant that he would need to begin her evaluation with MRIs in order to determine how to treat her back pain. When the two discussed medication, appellant requested narcotics; however, Dr. Vora refused to prescribe narcotics to her. When he told appellant that a pseudotumor was not likely to be a secondary injury to a neck and back injury, appellant "did not like it and at that point she took all her papers" and decided not to go back there. When she saw Dr. Rutherford, she explained her other

injuries to him, such as an ovarian cyst, a pseudotumor, hypertension, exacerbation of asthma, and swelling of her left knee, all of which she thought were the result of her fall at work; however, Dr. Rutherford did not agree that all of these conditions were a result of her fall. He stated specifically that "[c]ertainly there would be no causal relationship between pseudotumor, asthma or complex ovarian cyst." Dr. Rutherford suggested an additional MRI of the thoracic spine; however, appellant initially declined the MRI. Once appellant decided to have the MRI in January 2006, it showed little if any change.

The Administrative Law Judge determined that appellant was not entitled to permanent disability benefits or wage-loss benefits in the absence of a physician's report assigning a permanent impairment rating. The Administrative Law Judge also determined that since there were no treatment recommendations outstanding and it appeared that all previously suggested treatment options had been exhausted, that appellant failed to prove by a preponderance of the evidence that additional medical treatment was reasonably necessary. The Commission affirmed the decision of the Administrative Law Judge. From that decision, comes this appeal.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Liaromatis v. Baxter County Reg'l Hosp.*, 95 Ark. App. 296, 236 S.W.3d 524 (2006) (citing *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995)). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; even if a preponderance of the evidence might indicate a contrary result, if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The Commission is required to weigh the evidence impartially without giving the benefit of the doubt to any party. *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992).

The Commission also has the duty of weighing the medical evidence as it does any other evidence. *Liaromatis,* 95 Ark. App. at 298, 236 S.W.3d at 526 (citing *Roberson v. Waste Mgmt.,* 58 Ark. App. 11, 944 S.W.2d 858 (1997)). The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Poulan Weed Eater v. Marshall,* 79 Ark. App. 129, 84 S.W.3d 878 (2002). When the Commission denies benefits upon finding that the claimant failed to meet his burden of proof, the substantial evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for relief. *Cooper v. Hiland Dairy,* 69 Ark. App. 200, 11 S.W.3d 5 (2000). In addition, the Commission cannot arbitrarily disregard any witness's testimony. *Freeman v. Con-Agra Frozen Foods,* 344 Ark. 296, 40 S.W.3d 760 (2001).

For her first point on appeal, appellant argues that the Commission erred both as a matter of law and in its interpretation of the evidence when it denied her permanent disability benefits because she had no doctor's opinion assigning her an impairment rating. In her brief, she asserts that the Commission erred when it failed to assign a percentage impairment rating, where there was no impairment rating provided by a doctor. The precise issue presented in this case is whether the Commission has the authority to assess its own impairment rating in the absence of a physician-assigned impairment rating.

The ALJ found that in the absence of a physician's report assigning a permanent impairment rating, appellant was not entitled to permanent disability benefits. In so holding, the ALJ relied upon the case of *Wren v. Sanders Plumbing Supply,* 83 Ark. App. 111, 116 S.W.3d 461 (2003). However, in *Wren,* this court held only that Mr. Wren was not entitled to permanent disability benefits because there was no evidence of a permanent physical impairment. In *Johnson v. General Dynamics,* 46 Ark. App. 188, 878 S.W.2d 411 (1994), this court remanded on a similar issue where the Commission failed to translate the evidence into a finding of whether the claimant proved entitlement to a rating, when it had cogent evidence before it that could support a finding of permanent, anatomical impairment.

In *Johnson v. General Dynamics,* 46 Ark. App. 188, 192, 878 S.W.2d 411, 412-13 (1994), we explained:

> Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing

> period has been reached. *Ouachita Marine v. Morrison,* 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* In the case of *Wilson & Co. v. Christman,* 244 Ark. 132, 424 S.W.2d 863 (1968), the supreme court stated that the Commission is "not limited, and never has been limited, to medical evidence only in arriving at its decision as to the *amount* or *extent* of permanent partial disability suffered by an injured employee as a result of injury." In fact, it is the duty of the Workers' Compensation Commission to translate the evidence on all issues before it into findings of fact. *Gencorp Polymer Products v. Landers,* 36 Ark. App. 190, 820 S.W.2d 475 (1991). It has also been said that nothing in our law does or should require precise evidence of the precise amount of disability. *Bibler Bros. v. Ingram,* 266 Ark. 969, 587 S.W.2d 841 (1979). It appears that the court in *Bibler* was referring to anatomical impairment and/or wage loss disability.
>
> After reviewing the record it is clear that the Commission denied appellant benefits for permanent, partial, *anatomical* loss of the use of her body for the sole reason that there was no numerical rating assigned by a physician. However, the record contains evidence from which reasonable minds could conclude that appellant sustained some degree of permanent impairment.

Relying on *Johnson*, this court held in *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001), that the Commission was authorized to assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. Specifically, this court in *Polk County* stated that:

> The Workers' Compensation Act of 1993 directed the Commission to adopt an impairment-rating guide to be used in the assessment of anatomical impairment, and the Commission adopted the AMA *Guides*. Thus, in all cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, it is the Commission's duty to determine, using the AMA *Guides,* whether the claimant met his burden of proof. This being the case, we hold that the Commission can, and indeed, should, consult the AMA *Guides* when determining the existence and extent of permanent impairment, whether or not the relevant portions of the *Guides* have been offered into evidence by either party.

> Polk County also contends that the Commission exceeded the scope of its authority when it assessed its own impairment rating rather than relying solely on its determination of the validity of ratings assigned by physicians. We disagree. It is the duty of the Commission to translate evidence into findings of fact. *Johnson v. General Dynamics,* 46 Ark. App. 188, 878 S.W.2d 411 (1994). In the instant case, the Commission was authorized to decide which portions of the medical evidence to credit, and translate this medical evidence into a finding of permanent impairment using the AMA *Guides.*

Polk County, 74 Ark. App. at 164-65, 47 S.W.3d at 907-08.

In this case, as in *Johnson* and *Polk County*, the Commission was authorized to decide which portions of the medical evidence to credit and translate the medical evidence into a finding using the AMA *Guides,* as to whether the claimant met her burden of proof. Because the Commission denied appellant benefits solely because there was no impairment rating assigned by a physician, we reverse and remand for the Commission to determine whether appellant proved the existence and extent of a permanent impairment.

For her second point on appeal, appellant argues that the Commission erred in concluding that she is not entitled to further medical treatment. Our workers' compensation law provides that an employer shall provide the medical services that are reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Supp. 2007); *Fayetteville Sch. Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Kunzelman, supra.* What constitutes reasonably necessary medical treatment is a question to be determined by the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001) (citing *Gansky v. Hi Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996)).

In this case, appellant was examined by various physicians, none of whom recommended any future treatment options other than physical therapy. Although both Dr. Kleinschmidt and Dr. Weems initially recommended physical therapy for appellant, appellant refused to participate in the recommended therapy because she found it too painful. On these facts, we find that

substantial evidence supports the Commission's decision that appellant was not entitled to additional medical treatment.

For the reasons stated above, we affirm the Commission's decision that appellant did not prove entitlement to additional medical treatment; however, we reverse and remand for the Commission to determine whether appellant proved the existence and extent of a permanent impairment.

Affirmed in part; reversed and remanded in part.

ROBBINS and GLOVER, JJ., agree.

Tonya NELMS and Jackie Nelms *v.*
Dr. Kenneth MARTIN, et al.

CA 06-1380 263 S.W.3d 567

Court of Appeals of Arkansas
Opinion delivered September 26, 2007

Robert L. Depper, Jr., for appellants.

Mitchell, Williams, Selig, Gates & Woodyard, PLLC, by: *R.T. Beard, III*, *Anthony W. Juneau*, and *Ben Jackson*, for appellees.

ROBERT J. GLADWIN, Judge. Appellants Tonya and Jackie Nelms, husband and wife, appeal the Drew County Circuit Court's October 21, 2004 judgment dismissing their complaint for malpractice pursuant to a motion for summary judgment

filed by appellees Dr. Kenneth Martin and U.S. Orthopedic Surgical Center. Appellants contend on appeal that the trial court committed reversible error as a matter of law by granting the appellees' motion. We affirm.

Appellant Tonya Nelms underwent arthroscopic surgery on her left knee on September 7, 1999. Appellee Dr. Kenneth Martin performed the surgery, and he inadvertently left the tip[1] of a canula, which is a small flexible tube that encloses the scope or camera that is used to inspect the knee arthroscopically, in Mrs. Nelms's knee. On September 14, 1999, Mrs. Nelms returned to Dr. Martin's office and complained of mild pain, which is expected after undergoing arthroscopic surgery. On October 28, 1999, Mrs. Nelms returned for another office visit complaining of pain in her knee, which Dr. Martin attributed to incomplete rehabilitation and significant muscle atrophy. On November 2, 1999, Dr. Martin discovered that one of his nurses had taken an x-ray of Mrs. Nelms's knee on October 28, 1999, which revealed the presence of a metallic fragment in the superior lateral aspect of the knee that appeared to be consistent with the tip of a canula. Dr. Martin located the type of canula that had been used during Mrs. Nelms's surgery and discovered that the canula was not a solid piece of metal, but instead consisted of two pieces. Upon discovering this, Dr. Martin immediately called Mrs. Nelms and explained that the tip of the canula used during her arthroscopy had broken, and asked her to come in for arthroscopy and removal of the piece.

The canula had been provided by appellee U. S. Orthopedic Surgical Center, of which Dr. Martin was an owner and employee. Dr. Martin performed an additional arthroscopy on November 9, 1999, and removed the tip of the canula. Dr. Martin stated in his deposition that Mrs. Nelms was not charged for the surgery because "we weren't supposed to charge or anything because that was just a - - - a mistake that we made."

The appellants filed suit asserting that appellees were liable to them under theories of medical negligence. After filing the initial suit, the appellants amended their suit to add Stryker Corporation, the manufacturer of the canula that broke off in Mrs. Nelms's left knee. Appellees filed a motion for summary judgment asserting that they were in no way negligent. Attached to the motion was Dr. Martin's affidavit wherein he states that he did not

[1] The canula tip measured approximately 4 millimeters in length.

violate the standard of care and that leaving the tip of the canula in the knee did not fall below the standard of care. In response, appellants presented affidavits of two laymen who assert that leaving the tip of a canula in someone's knee does not require expert testimony to know that such falls below the standard of care, and that, therefore, it is their belief that Dr. Martin, and thereby appellees did not meet the standard of care required of a licensed physician.

The trial court granted the motion for summary judgment and dismissed the lawsuit against the appellees because appellants failed to meet proof with proof. The appellants appealed, and this court dismissed the case as not ripe since the summary judgment order did not dismiss all the parties to the case, leaving Stryker Corporation. The case between Stryker and appellants was settled and the case as to Stryker was dismissed with prejudice. The summary judgment order as to appellees dated September 30, 2004, became a final judgment, and this appeal followed.

Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Stoltze v. Ark. Valley Elec. Coop. Corp.*, 354 Ark. 601, 127 S.W.3d 466 (2003). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Gafford v. Cox*, 84 Ark. App. 57, 129 S.W.3d 296 (2003). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). All proof submitted must be viewed in the light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.* Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appeal, the reviewing court need only decide if the grant of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Liberty Mut. Ins. Co. v. Whitaker*, 83 Ark. App. 412, 128 S.W.3d 473 (2003). In making this decision, we view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and

inferences against the moving party. *Saine v. Comcast Cablevision of Ark., Inc.*, 354 Ark. 492, 126 S.W.3d 339 (2003). Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

Expert testimony

Appellants argue that Dr. Martin was negligent in leaving the tip of the canula in Mrs. Nelms's knee. Further, they claim that U. S. Orthopedic Surgical Center was negligent in not noticing that the canula was missing a tip after the canula was pulled out of Mrs. Nelms's knee and given back to their personnel. Appellants claim that a jury's comprehension is such that a jury will understand without the necessity of an expert that surgeons do not leave surgical implements in a surgical site, and to do so is negligence. They argue, therefore, that affidavits of two laypersons are the proof of medical negligence that counters Dr. Martin's self-serving affidavit, and that proof was met with proof. *See Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996); and *Watts v. St. Edwards Mercy Med. Ctr.*, 74 Ark. App. 406, 49 S.W.3d 149 (2001).

Appellees argue that the trial court properly granted the motion for summary judgment because the appellants failed to set forth any expert-witness testimony. Arkansas Code Annotated section 16-114-206(a) (Supp. 2003) requires expert testimony when the negligence asserted cannot be understood by a jury based upon common knowledge, and states as follows:

> (a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:
>
> (1) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;
>
> (2) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and
>
> (3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

The Arkansas Supreme Court and Court of Appeals have held on numerous occasions that a plaintiff in a medical malpractice case must present expert testimony when the asserted negligence does not lie within the jury's comprehension and when the applicable standard of care is not a matter of common knowledge. *See Eady v. Lansford*, 351 Ark. 249, 92 S.W.3d 57 (2002); *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002); *Skaggs v. Johnson*, 323 Ark. 320, 915 S.W.2d 253 (1996); *Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995); *Dodd v. Sparks Reg'l Med. Ctr.*, 90 Ark. App. 191, 204 S.W.3d 579 (2005).

Appellees argue that the common-knowledge exception does not apply in this case, and that expert testimony is required. We agree. The Arkansas Supreme Court stated in *Mitchell v. Lincoln*, 366 Ark. 592, 599, 237 S.W.3d 455, 460 (2006), "The vast majority of our cases to have considered this issue [whether expert testimony is necessary in negligence cases] hold that expert medical testimony is necessary because the alleged medical negligence is not within the comprehension of a jury of laymen."

Appellees cite *Robbins v. Johnson*, 367 Ark. 506, 241 S.W.3d 747 (2006), as controlling here. In *Robbins*, our supreme court determined that even though expert testimony is not required in every medical malpractice case, but only in those where the standard of care is not within the jury's common knowledge and when an expert is needed to help the jury decide the issue of negligence, it was required to assist the jury in determining whether the surgeon had breached the standard of care during a cervical diskectomy. The court concluded:

> [I]n order for a jury to decide whether Dr. Johnson was negligent, the jury must understand what a cervical diskectomy and fusion is, what instruments are used to perform the procedure, what procedures and risks are involved, and whether Dr. Johnson's actions proximately caused the injury alleged by the Robbinses. Dr. Johnson's letter makes it clear that, according to his version of the events, more was involved in this alleged negligence than simply dropping a sharp surgical instrument. We agree with the circuit court that an expert was required for Mr. and Mrs. Robbins to meet their statutory burden of proof.

Robbins, 367 Ark. at 513, 241 S.W.3d at 752.

As in *Robbins*, "in order for the jury to decide whether Dr. [Martin] was negligent, the jury must understand what an [arthroscopic knee surgery] is, what instruments are used to perform the

surgery, what procedures and risks are involved, and whether Dr. [Martin's] actions proximately caused the injury alleged by the [appellants]." *Id.*

In *Haase, supra,* our supreme court stated:

> The necessity for the introduction of expert medical testimony in malpractice cases was exhaustively considered in *Lanier v. Trammell,* 207 Ark. 372, 180 S.W.2d 818 (1944). There we held that expert testimony is not required when the asserted negligence lies within the comprehension of a jury of laymen, such as a surgeon's failure to sterilize his instruments or to remove a sponge from the incision before closing it. On the other hand, when the applicable standard of care is not a matter of common knowledge the jury must have the assistance of expert witnesses in coming to a conclusion upon the issue of negligence.

Haase, 323 Ark. at 269, 915 S.W.2d at 678. Here, appellees contend that the inadvertent leaving of the canula tip in a patient's surgical wound is distinguishable from leaving a sponge in the patient's surgical incision. We agree. Placing a surgical sponge in a patient's incision and failing to remove it when surgery is completed is an obvious act of negligence that a jury can determine without expert testimony. In this instance, however, Dr. Martin placed a canula into Mrs. Nelms's knee and in fact retrieved the same canula from the surgical site. The inadvertent leaving behind of the canula tip begs the question of whether Dr. Martin breached the standard of care in doing so.

Appellees claim that the jury would need to know the extent to which the standard of care required Dr. Martin to inspect the knee after surgery, whether the standard of care required him to take x-rays of the knee prior to closing the incisions, and whether the standard of care required him to thoroughly inspect each and every medical instrument utilized during the surgery. We agree. Also, the jury would need help from an expert to understand whether the surgical technique used by Dr. Martin fell below the standard of care and to understand the difference between the condition of Mrs. Nelms's knee after the second surgery as compared to the condition it would have been in had the second surgery not been required. We hold, therefore, that the appellants were required to present expert testimony, and failed to meet proof with proof.

Res ipsa loquitur

Appellants assert that the doctrine of res ipsa loquitur[2] establishes that appellees were negligent, and that the burden in trial shifts to appellees to prove that they were not negligent. In *Sherwood Forest Mobile Home Park v. Champion Home Builders Co.*, 89 Ark. App. 1, 3, 199 S.W.3d 707, 710 (2004), we noted that the res ipsa loquitur doctrine was "developed to assist in the proof of negligence where the cause of an unusual happening connected with some instrumentality in the exclusive possession and control of defendant could not be readily established." We went on to cite the four essential elements that must be established before the doctrine of res ipsa loquitur is applicable: (1) the defendant must owe a duty to the plaintiff to use due care; (2) the accident must be caused by the thing or instrumentality under the control of the defendant; (3) the accident that caused the injury must be one that, in the ordinary course of things, would not occur if those having control and management of the instrumentality used proper care; (4) there must be an absence of evidence to the contrary. *Id.* at 3-4, 199 S.W.3d at 710. In addition, it must be shown that the instrumentality causing the injury was in the defendant's exclusive possession and control at the time of the injury. *Id.* This doctrine may apply in medical malpractice cases if the essential elements are present. *See Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991).

Appellants argue that the requirements of res ipsa loquitur have been met. First, they argue that appellees owed a duty to Mrs. Nelms. *See* Ark. Code Ann. § 16-114-201 (Supp. 2003). Second, appellants claim that the canula was under the control of appellees while Mrs. Nelms was under anesthesia. Third, appellants claim that the accident which caused Mrs. Nelms's injury is one that in the ordinary course of things would not have occurred if appellees had used proper care. Appellants note that Dr. Martin examined the surgery site when surgery was completed. When he later discovered that the canula tip was left in Mrs. Nelms's knee, he went back into the knee and withdrew it from the original surgery site. Therefore, appellants argue that had the doctor taken the time in the ordinary course of things and looked thoroughly at the

[2] Res ipsa loquitur is a "doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case." *Black's Law Dictionary* 1336 (8th ed. 2004).

surgical site the first time he performed the surgery, he would have or should have noticed the piece of metal in Mrs. Nelms's knee.

Also, appellants argue that had the staff of U. S. Orthopedic Surgical Center properly maintained their surgical equipment, then the missing tip would have been noticed and removed in a timely manner. Fourth, appellants argue that there is an absence of evidence to the contrary. Appellants refute appellees' claim that the appellants' products liability allegations constitute "evidence to the contrary." Appellants argue that Dr. Martin did not discover the broken tip when he looked inside Mrs. Nelms's knee during the first surgery nor did he discover the fact of the missing tip when he extracted the canula. Likewise, U. S. Orthopedic Surgical Center staff did not notice the damaged canula. Appellants claim that but for the appellees' failure to notice the broken canula there would not be an injury in this case.

Appellees argue that res ipsa loquitur does not apply to the facts and circumstances of this case because the appellants failed to satisfy the third requirement that "the accident that caused the injury must be one that, in the ordinary course of things, would not occur if those having control and management of the instrumentality used proper care." *See Sherwood Forest Mobile Home Park, supra.* We agree.

In *Taylor v. Riddell,* 320 Ark. 394, 896 S.W.2d 891 (1995), Ms. Taylor alleged that Dr. Riddell negligently punctured her bladder during surgery and failed to discover the puncture or to repair it before the incision was enclosed. The jury returned a verdict in favor of Dr. Riddell. On appeal, Ms. Taylor argued that the trial court should have given a res ipsa loquitur instruction to the jury. In finding that the third requirement of res ipsa loquitur could not be met, the court held that "there was clear and unequivocal testimony that Dr. Riddell had met the requisite standard of care." *Id.* at 404, 896 S.W.2d at 896. The court relied on testimony by Dr. Barclay, the physician who repaired the puncture, who stated that "Dr. Riddell did not deviate from the standard of care in performing the surgery." *Id.* The court held that Ms. Taylor failed to establish that "the accident that caused the injury was one that, in the ordinary course of things, would not have occurred if those having control and management of the instrumentality had used proper care." *Id.*

Here, appellants failed to show that the accident would not have occurred if those having control and management of the instrumentality used proper care. All relevant evidence on this

issue points to the conclusion that Dr. Martin used proper care. Dr. Martin's affidavit stated that he never noticed the tip of the canula break off. He did not find the tip during his final inspection of the knee. Furthermore, he claimed that had he seen the canula tip, he would have immediately removed it from the knee. He also stated that his treatment of Mrs. Nelms did not fall below the standard of care. Because Dr. Martin is the only person who gave testimony in this matter who is competent to testify as to the standard of care of an orthopedic surgeon, it is left undisputed that he used proper care. Therefore, the doctrine of res ipsa loquitur is not applicable.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.

John Leelyn SEELY *v.* STATE of Arkansas

CA CR 06-1318 263 S.W.3d 559

Court of Appeals of Arkansas
Opinion delivered September 26, 2007

The Cannon Law Firm, PLC, by: *David R. Cannon*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant John Seely appeals his conviction for the rape of his then three-year-old daughter, as found by a jury in Pulaski County Circuit Court. Appellant posits a single argument for reversal: that the trial court erred in admitting hearsay evidence of his daughter through the testimony of her mother and a social worker. He contends that this violated his right secured by

the Sixth Amendment to confront witnesses against him. We agree that the testimony of the social worker included inadmissible hearsay evidence in violation of the Confrontation Clause of the Sixth Amendment. We further conclude that this error was not harmless beyond a reasonable doubt. Therefore, we reverse and remand.

Before trial, defense counsel moved to have a competency hearing to determine if the child, JB, would testify at trial. When that hearing was conducted, JB was four years old. The trial judge found her not to be competent to testify. For purposes of trial, the State intended to call as witnesses JB's mother and the social worker who interviewed JB at Arkansas Children's Hospital. The State sought a hearing pursuant to Ark. R. Evid. 804(b)(7), to determine the admissibility of the testimony of JB's mother (Suzette Barnes) and the social worker (Trish Smith). This particular rule concerns the admissibility of child hearsay when certain guarantees of trustworthiness are established in a hearing outside the presence of the jury. *See* Ark. R. Evid. 804(b)(7).[1]

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[1] This Rule provides specifically:

(7) Child hearsay in criminal cases. A statement made by a child under the age of ten (10) years concerning any type of sexual offense against that child, where the Confrontation Clause of the Sixth Amendment of the United States is applicable, provided:

(A) The trial court conducts a hearing outside the presence of the jury, and, with the evidentiary presumption that the statement is unreliable and inadmissible, finds that the statement offered possesses sufficient guarantees of trustworthiness that the truthfulness of the child's statement is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The trial court may employ any factor it deems appropriate including, but not limited to those listed below, in deciding whether the statement is sufficiently trustworthy.

1. The spontaneity of the statement.

2. The lack of time to fabricate.

3. The consistency and repetition of the statement and whether the child has recanted the statement.

4. The mental state of the child.

5. The competency of the child to testify.

6. The child's use of terminology unexpected of a child of similar age.

7. The lack of a motive by the child to fabricate the statement.

At this hearing, the State argued, in anticipation that the defense would raise a confrontation clause argument, that the social worker's testimony did not violate the prohibition against "testimonial" hearsay pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). The defense argued that the testimony did not comport with Ark. R. Evid. 804, and further that the social worker's testimony was in fact "testimonial" in violation of Supreme Court principles announced in *Crawford, supra*, and in *Davis v. Washington*, 126 S. Ct. 2266 (2006). The defense concluded by arguing that if either the mother or the social worker were allowed to testify to what the child said, then this violated the defendant's right to confrontation pursuant to the Sixth Amendment. The trial judge found that each woman's testimony was admissible.

At trial, appellant's counsel renewed the pre-trial objections to the statements attributable to JB, which were overruled as continuing objections. The following evidence came forth at trial. Suzette testified that three-year-old JB came to her with complaints that her "booty" was hurting, which Suzette explained was her vaginal area.[2] Suzette stated that she had JB lie down, and Suzette observed redness and raw-appearing skin in her vaginal area. Suzette cleansed the area and put Vaseline on it. Thereupon, JB resumed playing, but about an hour later, JB came back to her mother complaining of pain. Suzette applied more Vaseline, and JB again resumed playing. However, at bedtime, JB complained again that her "booty" was hurting and that she wanted her mother to take her to the doctor. This raised concerns to Suzette

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8. The lack of bias by the child.

9. Whether it is an embarrassing event the child would not normally relate.

10. The credibility of the person testifying to the statement.

11. Suggestiveness created by leading questions.

12. Whether an adult with custody or control of the child may bear a grudge against the accused offender, and may attempt to coach the child into making false charges.

(B) The proponent of the statement gives the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

(C) This section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable rule of evidence.

[2] Suzette stated that JB used the word "butt" for her buttocks and anus.

because JB was generally afraid to go to the doctor for fear of getting injections. Suzette then asked if JB knew why she was hurting. Suzette said that JB responded, "Yes. My daddy did it." Suzette asked JB, "what do you mean your daddy did it?" JB then said to her mother, "My daddy put his fingers in my booty, dug in my booty." Suzette asked when this happened, and JB replied, "Monday, Tuesday and Wednesday." Suzette believed her daughter to be telling the truth. At that point, she took JB to Arkansas Children's Hospital emergency room.

Trish Smith testified that she was a social worker at Arkansas Children's Hospital, where she was working on September 23, 2005, when JB was brought in for a sexual-abuse evaluation. Trish said she routinely developed rapport with children who were brought in concerning suspected abuse cases; she was a mandated reporter of suspected abuse. Trish explained that, for such cases, she typically generated conversation to determine whether the child was aware of why he or she was brought to the hospital and to determine the child's terminology for anatomy. Trish translated this information to give to the physician prior to the physical exam.

Upon questioning, JB gave the word "booty" for her vagina. When Trish asked JB why she was at the hospital, JB responded that her father had put his fingers in her booty, pointing to her front genital area. Trish asked if JB's father had said anything, and JB replied, "He said he would whip my ass if I told."

Dr. Esquivel, the pediatrician at the hospital, testified that she examined JB's genitals, finding an abrasion or laceration inside her labia majora and a superficial abrasion within the labia minora. The doctor believed these abrasions to be between two and three days old upon examination. Dr. Esquivel opined that this was consistent with the history of sexual abuse but could also be consistent with many other means of irritating the vaginal tissues.

Appellant testified in his own defense, adamantly denying that he touched his daughter inappropriately. He said that he and Suzette were living together at that time, and he was contributing to the household expenses, but they were more like roommates than husband and wife.

The jury considered the foregoing and determined that appellant was guilty of raping JB. He was sentenced to a twenty-year prison term. A judgment and commitment order was filed, and appellant timely filed a notice of appeal. This brings us to

appellant's argument, which is that the trial court violated his constitutional right to confront the witness against him by allowing JB's hearsay statements into evidence through the testimony of her mother and the social worker. The State asserts that no error occurred, and even if it did, it was harmless beyond a reasonable doubt.

The Confrontation Clause, found in both the United States and Arkansas Constitutions, is intended to permit a defendant to confront the witnesses against him and to provide him with the opportunity to cross-examine those witnesses. *See Smith v. State*, 340 Ark. 116, 8 S.W.3d 534 (2000); *Huddleston v. State*, 339 Ark. 266, 5 S.W.3d 46 (1999). In *Crawford v. Washington*, 541 U.S. 36 (2004), upon which appellant relies, the Supreme Court held that out-of-court statements by a witness that are "testimonial" are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the court, abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980).[3] Testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause, because this means one is "bearing witness" against the accused. *Davis*, *supra*. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations on hearsay evidence, is not subject to the Confrontation Clause. *Id.* The word "testimonial" is used in its colloquial rather than technical legal sense. *Id.*

The child, per appellant's request, was found to be incompetent to testify. Whether JB's incompetency had any bearing on admissibility of the hearsay statements is not advanced on appeal as a basis to reverse. Appellant argued to the trial court that the child was not "unavailable" for purposes of Rule 804, but neither is this argument advanced on appeal. It is undisputed that appellant was not afforded a prior opportunity to cross-examine JB or that the statements attributed to JB were hearsay. Therefore, the only question presented on appeal for us to resolve, and the only one argued in appellant's brief, is whether JB's statements to her mother and to the social worker were "testimonial" hearsay. If so,

[3] Arkansas Rule of Evidence 804(b)(7) was drafted to protect children from the potential harms that might result from giving testimony in open court. Under prior case law, including *Ohio v. Roberts*, 448 U.S. 56 (1980), this Rule passed constitutional muster, where reliability of the testimony was tested in a pre-trial hearing.

then they were admitted into evidence in violation of appellant's Sixth Amendment right to confront this witness. This is an issue of first impression in Arkansas.[4] We hold that the social worker's testimony included "testimonial" hearsay. We hold that the mother's testimony did not include "testimonial" hearsay.

The term "testimonial" applies at a minimum to prior testimony at a preliminary hearing and to police interrogations. *See Crawford, supra.* The accompanying formality is key in those situations. *See id.* However, statements made to police or emergency personnel in the midst of an emergency are not generally considered testimonial because those are made most often in a rapid rendition of a present event, an exigent circumstance. *See Davis, supra.* When the context of the questioning is for the purpose of establishing past events potentially relevant to later criminal prosecution, then the questioning is inherently testimonial. *See id.* The Supreme Court has heretofore not defined precisely what "testimonial" means, but instead, it gave a generalized framework of asking whether, objectively considered, the interrogation produced testimonial statements. *See id.*

As concerns the social worker, who is a mandated abuse reporter, we hold that this presented testimonial hearsay, in excess of constitutional bounds. This was not an emergency situation, relating immediate information seeking assistance for an immediate need. *Compare Davis, supra.* While the interview also had a medical purpose, that does not alter the fact that the statements taken from JB were testimonial as well. Statements can have dual purposes, but to the extent that one such purpose was to determine facts that could be used in a criminal proceeding, it is testimonial.

Appellant presents a compelling case, *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005), which we deem very persuasive. In that appeal, Mr. Bordeaux was facing charges of aggravated sexual abuse and objected to the admission of hearsay of the child victim admitted through a videotaped interview. A "forensic interviewer" spoke to the child before being examined by a doctor. In that interview, the victim said that Bordeaux placed his penis in her mouth. The tape was played for the jury, and the doctor was allowed to recount what the child said on the tape. The Eighth Circuit held that the child's statements were testimonial

[4] We attempted to certify this case to our supreme court. Certification was denied.

and violated Bordeaux's Sixth Amendment right to confront this witness. The court noted that the purpose of the interview was in dispute, but one such purpose was to collect information for law enforcement. Even though another purpose was for medical care, "*Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial." *Id.* at 556. The Eighth Circuit decided that this interview was the sort of ex parte examination at which the confrontation clause was aimed. Accordingly, the evidence was deemed inadmissible. We decide likewise in the present appeal.

We hasten to add that the Eighth Circuit has also commented on the standard to be employed when the State seeks to admit into evidence the identity of the abuser as relevant to treatment of emotional and psychological injuries. The Eighth Circuit announced that the threshold is met where a physician makes clear to the victim that inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests understanding of that idea. *See United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985). We do not announce that we adopt such a standard, but had we done so, this standard is not met in this case. *Compare United States v. Gabe*, 237 F.3d 548 (8th Cir. 2001).

Moving to the mother's testimony, we hold that the hearsay statements attributable to JB were not "testimonial." Therefore, those hearsay statements were not in violation of the Confrontation Clause. In *United States v. Manfre*, 368 F.3d 832 (8th Cir. 2004), the Eighth Circuit noted its belief that statements made to loved ones or acquaintances are not the kind of evidence to which *Crawford* is directed. *See* footnote 1. The mother's questioning of her daughter was not formal or in the nature of an interrogation, as those terms have been defined under *Crawford*.[5] There were only three questions posed to JB by her mother that resulted in incriminating responses, contrary to the dissenting judge's assertion of repeated questioning to elicit a desired response.

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[5] For an interesting overview of the issue of child hearsay as it relates to the Confrontation Clause, see Professor Richard D. Friedman's law review article *"Grappling with the Meaning of 'Testimonial' "* published in the 2005-2006 edition of the Brooklyn Law Review beginning at page 241. *See also Note, Confronting the Rules: Needed Changes to the Arkansas Rules of Evidence After Crawford v. Washington*, 59 Ark. L. Rev. 973 (2007).

This brings us to the outcome of the error in admitting the testimonial hearsay through the social worker. We hold that this appeal must be reversed and remanded because this error was not harmless beyond a reasonable doubt.

Our supreme court has held that trial error, even involving the Confrontation Clause, is subject to a harmless-error analysis. *See Watson v. State*, 318 Ark. 603, 887 S.W.2d 518 (1994); *see also Winfrey v. State*, 293 Ark. 342, 738 S.W.2d 391 (1987). To conclude that a constitutional error is harmless and does not mandate a reversal, this court must conclude beyond a reasonable doubt that the error did not contribute to the verdict. *Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995); *Vann v. State*, 309 Ark. 303, 831 S.W.2d 126 (1992). When determining whether the denial of a party's right to cross-examine a witness for possible bias is harmless error, the court considers a host of factors, including the importance of the witness's testimony, whether the testimony was cumulative, whether evidence existed that corroborates or contradicts the testimony of a witness, and the overall strength of the prosecution's case. *See Sullivan v. State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990). To perform this review, we excise the impermissible hearsay statements and determine whether the remaining evidence shows beyond a reasonable doubt that the error did not contribute to the verdict. *See Sparkman v. State*, 91 Ark. App. 138, 208 S.W.3d 822 (2005).

We cannot conclude with certainty that the verdict was not affected by JB's statement to the social worker that accused her father of digital penetration and of threatening to whip her if she revealed this information. The State's witnesses were able to establish, without JB's words to the social worker, that JB suffered trauma to her genitals that occurred within a few days of her complaints of pain, and that the trauma was consistent with a history of sexual abuse but could also be consistent with a number of other non-criminal causes. The mother's hearsay testimony was the sole evidence identifying appellant as the perpetrator. The social worker's testimony was cumulative to the mother's regarding identity, but nonetheless, it significantly bolstered the mother's testimony and it added the report of a threat to punish JB if she revealed the abuse. The social worker was purportedly an uninterested witness, so her testimony was particularly important. While the social worker's testimonial hearsay might not have contributed to the verdict, we cannot conclude with any certainty that it did not, which is the test for "harmless beyond a reasonable

doubt." *Compare Sparkman, supra* (holding that even if videotaped interview of child violated Sparkman's constitutional right to confront this witness, the evidence was harmless beyond a reasonable doubt where appellant admitted engaging in inappropriate sexual conduct with child, among other evidence of direct accusation of criminal sexual conduct).

Because appellant's Sixth Amendment right to confront the witness against him was violated, and we cannot conclude that it was harmless beyond a reasonable doubt, we reverse and remand.

GLADWIN, GLOVER, and MILLER, JJ., agree.

HART and BAKER, JJ., concur in part; dissent in part.

JOSEPHINE LINKER HART, Judge, concurring in part, dissenting in part. I agree that this case must be reversed and remanded. However, I believe that the majority has adopted a far too restrictive view of what constitutes "testimonial hearsay," and therefore, I write separately.

As the majority notes, when the Supreme Court handed down *Crawford*, it expressly stated that it did not intend to exhaustively define testimonial hearsay, but noted "at a minimum" it included prior testimony at a preliminary hearing and police interrogation. I do not disagree with the majority's conclusion that the hearsay statements allegedly made by JB to social worker Trish Smith, who was a mandatory reporter, should have been excluded, as Smith's testimony violated Seely's rights under the Confrontation Clause. I believe that the majority's reasoning was sound in this instance: because Smith's questioning of the child was not necessitated by exigent circumstances and involved the "accompanying formality" that we associate with police interrogation, the hearsay in this instance was closely akin to the *Crawford* Court's "minimum" definition of "testimonial hearsay."

I do not, however, believe that their analysis properly excludes the hearsay statements that were allegedly made to Suzette Barnes. I believe they wrongly rely on *United States v. Manfre*, 368 F.3d 832 (8th Cir. 2004), asserting that it stands for the proposition that a hearsay statement made to "loved ones or acquaintances" does not violate the Confrontation Clause. Furthermore, I believe they mischaracterize the evidence when they assert that Barnes's questioning of her daughter "was not formal or in the nature of an interrogation."

In the first place, *Manfre's* analysis of *Crawford* was confined to a footnote because the Supreme Court had handed down *Crawford* after the Eighth Circuit had taken *Manfre* under submission. Needless to say, the implications of *Crawford* were not briefed at any level, and of course, the fact that the Eighth Circuit's whole *Crawford* analysis was confined to a footnote makes it mere dicta.

If, for argument's sake, I were to accept the premise that *Manfre* was even persuasive authority, it is so factually distinguishable as to make it completely inapplicable to the case at bar. First and foremost, the *Manfre* statements could not by themselves establish that a crime had been committed. The hearsay statements merely offered an explanation about the declarant's discussion about a propane tank with his former employer after a phone call that was partially overheard by a co-conspirator's half-brother. The sponsor of the hearsay statement had no more than a casual interest in the declarant's statements at the time they were made, and in fact, he ascribed no importance to the statements whatsoever until several months later when he was contacted by federal authorities pursuant to an arson investigation following a fire that took his brother's life. Conversely, the victim's alleged statements constituted almost all of the evidence in the instant case and independently supplied proof of all of the elements of rape.

Additionally, the rule that the majority purports to lift from *Manfre* — that admission of hearsay statements made to *family members* does not violate the Confrontation Clause — is all but cut out of whole cloth. I submit that it would not matter if the hearsay statements in *Manfre* were made to family members or the Director of the F.B.I.

I also disagree with the majority's assertion that the lack of "formality" is a determinative factor in deciding whether or not the alleged victim's statements to her mother constituted testimonial hearsay. Here, the supposed lack of "formality" is illusory at best. As the majority notes, the statement was elicited from JB after repeated questioning by one of the most imposing authority figures in any three-year-old's life — the child's mother.

I note that the Confrontation Clause of the Sixth Amendment states in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." I would look to the nature of the statement; if it accusatory, it is testimonial. *See State v. Mizenko*, 127 P.3d 458 (Mt. 2006) (Nelson, J., dissenting). To do otherwise is to

court absurd results as we have here. Despite the fact that JB has been determined to be incompetent to testify, her testimony was nonetheless placed in evidence through her mother in a form that could not be tested by cross-examination. If this does not violate the Confrontation Clause, nothing does.

Finally, while it is certainly true that *Crawford* does not provide all the definitive answers and definitions that would make this case easy to analyze, it does clearly abrogate the analytical formations promulgated in *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that the Confrontation Clause would not be violated if the hearsay that was admitted "falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." (Internal punctuation omitted.) *Crawford,* 541 U.S. at 60. As the *Crawford* Court stated:

> [T]he Clause's ultimate goal is to ensure the reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that the evidence be reliable, but that the reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but how reliability can best be determined.

Even though the appellant has abandoned his arguments based on Arkansas Rule of Evidence 804(b)(7), I wish to express my concern about the rule's constitutionality. It appears to me that while it may have passed muster under *Ohio v. Roberts, supra*, it does not comport with the Supreme Court's decision in *Crawford*. I recommend that the bar and our supreme court examine Rule 804(b)(7).

BAKER, J., joins.

ARKANSAS DEPARTMENT of HEALTH and HUMAN SERVICES *v.* Steven MITCHELL and Sarah Mitchell

CA 07-427 263 S.W.3d 574

Court of Appeals of Arkansas
Opinion delivered September 26, 2007

Gray Allen Turner, Office of Chief Counsel, for appellant.

Glen Hoggard, for appellee.

Sharron P. Glaze, attorney ad litem, for the minor children.

KAREN R. BAKER, Judge. DHHS has appealed from an order of the Izard County Circuit Court dismissing its petition to have the three children of appellees Steven Mitchell and Sarah Mitchell declared to be dependent-neglected. We affirm.

E.M. was born in May 2002, J.D.M. in April 2004, and C.M. in December 2006. Steven was a schoolteacher who was charged with sexual offenses against some of his students, seventeen-year-old males. On August 23, 2005, the Izard County Circuit Court entered a judgment and disposition order based on a negotiated plea of guilty, finding that Steven was guilty of two counts of sexual assault in the second degree with a victim under the age of eighteen. He was required to register as a sex offender.

On December 29, 2006, Steven and Sarah agreed to a safety plan created by DHHS. Steven agreed not to babysit any child, including his own children; not to assist any child in any hygiene process; and not to hold any position in the community that allowed him unsupervised contact with any minor. The safety plan also stated that Steven would be supervised at all times while in the presence of a child and that, if appellees failed to follow the plan, the children would be placed into foster care. It also stated: "Mrs. Sarah Mitchell will ensure that Mr. Steven Mitchell is not left alone with any of the children unless there is another adult present and that adult must know about Mr. Mitchell's past child sexual abuse history."

On January 2, 2007, DHHS filed a petition for an emergency order finding the children to be dependent-neglected because they were at substantial risk of serious harm. It asked for an ex parte order to provide "specific appropriate safeguards for the protection of the juveniles if the alleged offender has a legal right to custody or visitation with the juveniles or a property right allowing access to the home where the juveniles resides [sic]." Attached to the petition was an affidavit by Michael Fitch, a DHHS employee, alluding to Sarah's alleged failure to protect the

children. That same day, the circuit court entered an ex parte order finding probable cause to believe that the children were dependent-neglected. The court set a probable-cause hearing on January 3, 2007, and an adjudication hearing on February 7, 2007.

In their responses to DHHS's requests for admissions, Steven and Sarah admitted that he had pled guilty to two counts of sexual assault in the second degree with a victim under the age of eighteen and that he was ordered to register as a sex offender. They also admitted that, after Steven informed Sarah that he had negotiated the guilty plea, Sarah had allowed Steven to be alone with the parties' children.

At the February 7, 2007 hearing, DHHS chose to stand on the pleadings and did not call any witnesses (including Fitch) or present any evidence. DHHS's attorney, David Fuqua, summed up his case as follows:

> I sent requests for admissions out to both Mr. and Mrs. Mitchell and I think the substance of the admission[s] are that Mr. Mitchell is a convicted sex offender. Mrs. Mitchell knew of that and after knowing of that she allowed him unsupervised contact with their children. And I think that's the facts of the case. So the department is asking the court to find that Mrs. Mitchell is guilty of failure to properly supervise the children by allowing them to be in the unsupervised custody of a convicted sex offender, their father.

Fuqua argued that the children were at substantial risk of harm as a result of sexual abuse or sexual exploitation and that Sarah had failed to take reasonable action to protect them. He asked for a finding of dependency-neglect against Sarah with a safety plan ordering that Steven not have unsupervised contact with the children. Steven's criminal file was not made a part of this record.

An attorney ad litem appeared at the hearing on behalf of the children. She stated that she was bothered by the lack of proof and was unaware of any statute providing that a child is automatically dependent-neglected whenever they are living in the home with a registered sex offender.

After the trial court denied appellees' motion for directed verdict, Sarah testified. She said that she believed that her children were safe while in the care of Steven and that, because they were her first priority, she would leave him immediately if she thought they were in harm's way. She said that, since August 2005, as a

condition of the plea agreement, Steven had been in counseling. Sarah said that Steven told her that he did nothing to the students and that she believed him. She stated that she and her husband decided that he should accept the plea agreement so that he would not go to prison and would be there to help her raise their children. She also said that, after a jury had been seated in his criminal trial, she and Steven had been informed that there were jurors who had already decided that he was guilty. Sarah discussed in great detail the close relationship that she, Steven, and the children have with the children's grandparents. She said:

> My children are absolutely the most important thing in my life. I will do everything in my ability to protect my children. My parents and my husband's parents are vigilant and caring grandparents. If they thought anything was happening to their grandchildren I feel like I have a relationship with them such that they would come to me and say "we believe this, this is strange. This child is doing this."

Sarah was adamant about her children being safe and said that she considered herself a vigilant parent; that she had seen nothing to indicate that Steven was molesting her children; and that, if she did see such signs or if her children told her, she "would be out of that house immediately." Sarah stated that she had signed the safety plan only to prevent having her children taken from her. She testified that, although the safety plan had made her life "hell," she had followed it "to a tee" so that her children could stay in her home.

Elizabeth Cooper, a DHHS worker in Izard County, testified that she had been assigned to this case and had visited appellees' home. She stated that she believed Sarah's statement that she would leave Steven if the children were in danger. She said that, when she was at their house, E.M. said "Daddy doesn't do diaper duty," which indicated that they were following the plan. She stated that she believed that appellees were doing everything that DHHS had asked of them since the safety plan was put in place, even though it was a hardship. She stated that she had not removed the children from their parents' care because she did not have grounds to do so.

At the conclusion of the hearing, appellees renewed their motion to dismiss. The attorney ad litem stated that she was not in a position to make a recommendation as to whether the court should find dependency-neglect because Fitch, who signed the

affidavit, did not testify. The court found that DHHS did not meet its burden of proving by a preponderance of the evidence that the children were in imminent danger merely because Steven had been convicted of two sexual offenses and was a registered sex offender. On February 12, 2007, the court entered a dismissal order directing DHHS to close its case. DHHS filed a notice of appeal.

DHHS argues on appeal that the trial court erred in refusing to find that the children were dependent-neglected because they were, as a matter of law, at substantial risk of harm because their mother had left them in the care of their father, who had pled guilty to sexual assault of teenage boys.[1] The juvenile code requires proof by a preponderance of the evidence in dependency-neglect proceedings. Ark. Code Ann. § 9-27-325(h)(2)(B) (Supp. 2007). On appeal from a trial court's ruling in a dependency-neglect case, we will not reverse unless the trial court's findings are clearly erroneous, giving due regard to the trial court's opportunity to judge the credibility of the witnesses. *Ark. Dep't of Human Servs. v. McDonald*, 80 Ark. App. 104, 91 S.W.3d 536 (2002). In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Maxwell v. Ark. Dep't of Human Servs.*, 90 Ark. App. 223, 205 S.W.3d 801 (2005). Additionally, in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Id.*

A dependent juvenile is defined in part as "any juvenile who is at substantial risk of serious harm as a result of . . . (ii) Sexual abuse; . . . (iv) Sexual exploitation . . . ." Ark. Code Ann. § 9-27-303(18)(A) (Supp. 2007). "Neglect" includes a parent's failure to take reasonable action to protect the juvenile from sexual abuse or sexual exploitation when the existence of this condition was known or should have been known. Ark. Code Ann. § 9-27-303(36)(A)(iii) (Supp. 2007).

DHHS's entire case is premised on the assumption that it conclusively established that Steven assaulted the teenagers because he accepted a plea agreement and that this fact, in and of itself, requires a finding that the children are dependent-neglected because Sarah left them in their father's care before the safety plan

[1] DHHS appears to argue that the children should have been found to be dependent-neglected as to *both* parents. However, at the hearing, DHHS focused only on Sarah.

was implemented.[2] Even if we were to agree that Steven's guilty plea conclusively established that he assaulted the teenagers, we decline to hold that this fact alone is sufficient to establish that the trial court erred in finding that DHHS had not met its burden of proof. DHHS argues that, because, as a group, sex offenders are more likely than any other type of offender to be re-arrested for a new sexual assault, Sarah's children are, as a matter of law, dependent-neglected as a result of having been left alone with Steven, citing *Ark. Dep't of Human Servs. v. Bixler*, 364 Ark. 292, 219 S.W.3d 125 (2005). We disagree.

In that case, the offender, the children's step-grandfather, had been convicted of sexually abusing a family member (his niece), and DHHS put on evidence that one of the children had exhibited unusual behavior that cast suspicion on the offender; the agency did not simply rely on a legal conclusion. DHHS also cites *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005), in which the supreme court affirmed the termination of the mother's parental rights because, among other things, she married a convicted sex offender who, as a condition of his parole, could not have unsupervised contact with minors. Again, that case was fully litigated, and the mother's marriage was only one of many factors considered by the court. Here, other than appellees' admissions that Steven pled guilty, DHHS offered no evidence that appellees' children are dependent-neglected. In fact, Steven's judgment and commitment order, and rules of probation, which DHHS could have provided, are not in the record.[3]

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[2] DHHS's assumption is faulty, in light of the current state of Arkansas law as to the collateral-estoppel effect of a guilty plea in a subsequent civil proceeding. In *Zinger v. Terrell*, 336 Ark. 423, 985 S.W.2d 737 (1999), the supreme court overruled prior case law and held that the criminal conviction of a life-insurance beneficiary of first-degree murder of the insured following a trial collaterally estopped the retrial of certain issues in a later civil trial concerning the disposition of the proceeds of the insurance policy. The court cautioned that it did not address the issue of collateral estoppel for criminal convictions other than murder and that it did not overrule *Washington National Insurance Co. v. Clement*, 192 Ark. 371, 91 S.W.2d 265 (1936) (holding that a judgment in a criminal prosecution for DWI did not bar a subsequent civil proceeding founded on the same facts).

[3] In its statement of the case, DHHS states: "The Mitchells did not comply with the safety plan." Also, DHHS says in its brief that "Sarah knowingly violated this safely [sic] plan agreement." We find no support in the record for these assertions. Although Sarah admitted

The circuit court was correct in holding that DHHS did not meet its burden of proof.

Affirmed.

MARSHALL and MILLER, JJ., agree.

Bernard BURGESS *v.* Don FRENCH & Coretta French

CA 06-1394 263 S.W.3d 578

Court of Appeals of Arkansas
Opinion delivered September 26, 2007

Michael U. Sutterfield, for appellant.

Gordon, Caruth & Virden, PLC, by: *Edward Allen Gordon*, for appellees.

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having left the children with Steven after his guilty plea and before the implementation of the safety plan, she adamantly denied having done so afterward.

BRIAN S. MILLER, Judge. Bernard Burgess is seeking reversal of an order issued by the Van Buren County Circuit Court denying his claims of fraud and constructive fraud against Don and Coretta French. We agree with the trial court's finding that Burgess failed to show that his reliance on the Seller Property Disclosure form was reasonable and therefore we affirm.

The Frenches purchased a house in Bee Branch, Arkansas, in 1996. After leasing the house to Rick and Marie Martens from 1997 until October 2003, the Frenches listed it for sale in 2004 and executed a Seller Property Disclosure form on July 27, 2004. In the disclosure form, they verified, among other things, that (1) there had been no damage to the house prior to or during their ownership; (2) there were no known defects in the mechanical or electrical systems; (3) there had never been a problem with the roof or with any of the improvements to the house, such as "defective shingles, damaged shingles, leaking or otherwise" and that they were not aware of any "possible" problems that could occur in the future with the roof or with any of the improvements to the property; (4) they were unaware of any facts, circumstances or events on or around the property that could adversely affect the value or desirability of the property; (5) there had never been any past or present water intrusion. The disclosure form also provided that the Frenches would notify the agent if any of the answers to the disclosure became untrue and that the disclosure was not a substitute for inspections.

Burgess, who was looking for a fixer-upper to restore and sell, was shown the property by Rita Collums, the real estate agent, on December 18, 2004. At the time the house was shown to Burgess, there was only one room in the entire house that was completely finished. All other rooms were in obvious need of repair. For example, the sheetrock was missing from most of the rooms and the electric wiring and insulation were exposed. Burgess signed a contract on the house the same day and personally viewed it on at least three occasions prior to closing on January 17, 2005.

The contract of sale between the parties contained an "as is" clause, which stated in pertinent part:

> Buyer agrees to accept the Property "as is". . . . Buyer is declining to Inspect the Property as offered in paragraph 15(B). The Buyer further agrees to hold the Seller(s) and the Listing Agent Firm and Selling Agent Firm involved in this Real Estate Contract harmless

> of any problems relative to the mechanical or structural defect or failure in any of the components of the Property that may exist or be discovered (or occur) after closing.

Burgess also executed a Buyer's Disclaimer of Reliance, which provided in pertinent part that:

> BUYER CERTIFIES BUYER HAS PERSONALLY INSPECTED OR WILL PERSONALLY INSPECT, OR HAS HAD OR WILL HAVE A REPRESENTATIVE INSPECT, THE PROPERTY AS FULLY AS BUYER DESIRES AND IS NOT RELYING AND SHALL NOT HEREAFTER RELY UPON ANY WARRANTIES, REPRESENTATIONS OR STATEMENTS OF THE SELLER . . . REGARDING THE AGE, SIZE . . . QUALITY, VALUE OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION ALL IMPROVEMENTS, ELECTRICAL OR MECHANICAL SYSTEMS, PLUMBING OR APPLIANCES, OTHER THAN THOSE SPECIFIED HEREIN (INCLUDING ANY WRITTEN DISCLOSURES PROVIDED BY SELLER AND DESCRIBED IN PARAGRAPH 16 OF THIS REAL ESTATE CONTRACT), IF ANY, WHETHER OR NOT AN EXISTING DEFECTS (sic) IN ANY SUCH REAL OR PERSONAL PROPERTY MAY BE REASONABLY DISCOVERABLE BY BUYER OR A REPRESENTATIVE HIRED BY THE BUYER.

Approximately one week after closing on the purchase of the house, Burgess noticed several problems with the roof and the electrical system. He called Ms. French, who informed him that Mr. French had recently made repairs to the roof. Burgess called Ms. French again the next day and was informed that Mr. French had made repairs to the roof on at least two occasions prior to Burgess purchasing the house.

Relying on the information provided in the real estate disclosure form, Burgess sued the Frenches for fraud. At trial, Burgess testified that the disclosure form was "very important" to him and that he relied on it in determining the condition of the roof and electrical system. He also testified that he knew the house was incomplete but that, prior to closing, he was able to look through the house all he wanted and that he felt that the house was adequate. He stated that he once worked as a real estate agent and that he did not think that it was necessary to have the house inspected by an independent home inspector prior to closing.

Collums testified that, when she showed the house to Burgess, she told him that she had seen a "big puddle" of water on the living room floor in the fall of 2004 and that the Frenches fixed the leak. She stated that the leak occurred after the Frenches executed the disclosure form and that she could have updated the disclosure form but that she "personally disclosed that the house was leaking" to Burgess before he signed the contract of sale. She encouraged Burgess to get the home inspected but he told her that he conducted inspections for a living and that he would inspect the house himself.

Heidi Meyers, Burgess's daughter, testified that she and Burgess visited the house once while it was raining and that there was no evidence of a leak. She confirmed that, prior to closing, the agent notified Burgess of the puddle of water on the floor, but that the agent did not say that the puddle was the result of a leak in the roof.

The trial court determined that the lynchpin issue in Burgess's fraud and constructive fraud claims was whether he was justified in relying on the disclosure form in light of all of the other information given to him and available to him regarding the poor condition of the house. The trial court found that Burgess was not justified in relying on the disclosure form because he entered into an "as is" contract of sale, disclaimed all warranties, and purchased a house that was in obvious need of major repair. This appeal followed.

We review equity cases de novo; however, the trial court's findings of fact will not be reversed unless they are clearly erroneous. *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003). A finding is clearly erroneous when, even though there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Id.*

To establish a fraud claim, Burgess was required to prove (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; (5) damage suffered as a result of the reliance. *Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005). Unlike actual fraud, constructive fraud is simply a breach of a legal or equitable duty, which, irrespective of the moral guilt of the fraud-feasor, the law declares to be fraudulent because of its

tendency to deceive others. *Beatty v. Haggard*, 87 Ark. App. 75, 184 S.W.3d 479 (2004). Although in *Beatty* we stopped short of specifically holding that all of the fraud elements must be shown to prove a constructive fraud claim, we pointed out that almost all cases analyze the proof using these elements. *Id.* (citing *Knight v. Day*, 343 Ark. 402, 36 S.W.3d 300 (2001)).

The denial of Burgess's fraud and constructive fraud claims was correct because Burgess failed to show that it was reasonable for him to rely on the disclosure form when (1) he knew the home was unfinished and in obvious disrepair; (2) he agreed to purchase it "as is"; (3) he disclaimed all warranties, including those specifically created by the disclosure form; (4) the electrical wiring in the walls was exposed; (5) the real estate agent told him about the leak and advised him to have an independent home inspection performed. Burgess also had an affirmative obligation to make further inquiry when he noticed the exposed electrical wiring throughout the house and when he was placed on notice of the puddle of water in the living room. *See Vaught v. Satterfield*, 260 Ark. 544, 542 S.W.2d 502 (1976). His failure to do so precludes him from claiming fraud or constructive fraud against the Frenches. For these reasons, we affirm the trial court's ruling.

Affirmed.

PITTMAN, C.J., and HART, J., agree.

MILLWOOD SANITATION & PARK CO., INC., et al. *v.* J.E. MATTINGLY and P.R. Prince

CA 07-134 264 S.W.3d 566

Court of Appeals of Arkansas
Opinion delivered October 3, 2007

Vickery & Carroll, P.A., by: *Ian W. Vickery*; *Hurst, Morrissey & Hurst, PLLC*, by: *Travis J. Morrissey*, for appellants.

Owen, Farnell & Garner, by: *Ray Owen, Jr.* and *Lance B. Garner*, for appellees.

JOSEPHINE LINKER HART, Judge. Appellants are lot holders in the Millwood Subdivision of Hot Springs. They appeal from a decree of the Garland County Circuit Court that quieted title in Lot 10 of that subdivision in appellees J.E. Mattingly and P.R. Prince (now Mattingly) and concomitantly extinguished the appellants' right of common usage in the parcel. Appellees Mattingly and Prince acquired their interest in Lot 10 through a quitclaim deed pursuant to

a tax sale and by redemption deed issued by the State of Arkansas.[1] On appeal, the appellants argue that the trial court erred in ruling that the common-use restrictions granted to the other lot holders in the Millwood Subdivision were extinguished by the failure of the title-holder of record to pay taxes. We agree and reverse and remand.

On January 29, 1960, the survey and plat for the Millwood Subdivision, along with an amended Bill of Assurance, was filed for record in Garland County. The subdivision is located on Lake Hamilton in Hot Springs. Thirty lots were laid out on the plat. Twenty-nine were designated as residential lots and one, Lot 10, was designated "Park." Only Lot 10 and four other lots had direct access to Lake Hamilton. However, included in the Amended Bill of Assurance were two provisions that stated:

> 10. That the lot designated "Park," as shown on the attached amended plat, shall forever be restricted for the use and benefit of the owners of the lots and blocks of the residences of MILLWOOD SUBDIVISION as a picnic area and boat launching site and recreation area.
>
> 11. (a) The provisions as aforesaid shall run with and bind the land and shall inure to the benefit of and be enforceable by any owner of land included and shown on said amended plat, their respective legal representatives and assigns forever.

In 1964, the owners of Lot 10, W.D. Austin Smith and Dorothy Smith, deeded it to the Millwood Sanitation and Park Company, Inc. The Birchwood Bay Sewer Improvement District No. 20 acquired the lot by eminent domain. The improvement district subsequently constructed and maintained a sewage lift station on a portion of the lot.

Appellee J.E. Mattingly, a retired director of the Hot Springs Utility Company, had become familiar with Lot 10 in the course of his duties. He obtained a quitclaim deed from the Birchwood Sewer Improvement District when Lot 10 was auctioned off at a chancery court sale. The deed gave him ownership of the portion of Lot 10 that did not include the sewer treatment plant. Mattingly subsequently paid the back taxes from 1987 until 1994, and he received a redemption deed from the Arkansas Commissioner of

[1] We are not asked in this appeal to pass on the validity of either conveyance.

Lands in May 1996. He continued to pay the property taxes on Lot 10 from that time forward. Mattingly admitted in the hearing that he purchased Lot 10 without researching the bill of assurance, and he never disputed the validity of the recorded documents that pertained to the Millwood Subdivision.

On November 21, 2005, Mattingly and Prince filed a petition to quiet title in Lot 10. The appellants were named as respondents. After a hearing, the trial judge entered an order that quieted title in Mattingly and Prince, and "extinguished" the appellants' rights to use the property. The trial judge reasoned that the failure to pay taxes constituted an abandonment of the common-usage restrictions.

The appellants argue that the trial court erred in extinguishing the common-use restrictions regarding Lot 10 of the Millwood Subdivision based upon the failure to pay taxes. They assert that easements are not assessed and taxes are not paid on easements, and therefore, assuming that the tax sale was valid, the purchaser of the property at a tax sale acquires only the interest that was assessed and does not acquire the severed interest. Appellants concede that there is no Arkansas law directly on point, however they cite several cases from foreign jurisdictions, and they urge us to extrapolate from "principles" applied in "parallel situations." Citing *Huffman v. Henderson Co.*, 184 Ark. 278, 42 S.W.2d 221 (1931), appellants assert that severed timber or mineral interests are not included in a tax sale if the severance occurs prior to the assessment for taxation. Further, they cite *Powell v. Coggins*, 204 Ark. 739, 164 S.W.2d 891 (1942), for the proposition that if an interest in real estate is not subject to taxation, it cannot be lost as part of a tax deed pertaining to a separate interest in the same property. Appellants concede that the owners of real property are not excused from paying property taxes; they assert, however, that the common-use provisions and the associated easements should not be extinguished by the non-payment of taxes. We agree.

Quiet title actions have traditionally been reviewed de novo as equity actions. *City of Cabot v. Brians*, 93 Ark. App. 77, 216 S.W.3d 627 (2005). We will not reverse the trial judge's findings in such actions unless the findings are clearly erroneous. *See id.* However, a trial court's conclusions of law are given no deference on appeal. *Akins v. Mofield*, 355 Ark. 215, 132 S.W.3d 760 (2003).

An easement is defined to be "a liberty, privilege, or advantage, which one man may have in the lands of another without profit." *Schuman v. Stevenson*, 215 Ark. 102, 219 S.W.2d

429 (1949). Arkansas law has long recognized that restrictive covenants can create property interests that run with the land. *See, e.g., City of Little Rock v. Sun Building & Developing Co.*, 199 Ark. 333, 134 S.W.2d 582 (1939). The general rule is that a person who takes title to land with notice that it is subject to an agreement restricting its use will not be permitted to violate the restrictions. *See Rickman v. Mobbs*, 253 Ark. 969, 490 S.W.2d 129 (1973); *see also Harbour v. Northwest Land Co.*, 284 Ark. 286, 681 S.W.2d 384 (1984); *Moore v. Adams*, 200 Ark. 810, 141 S.W.2d 46 (1940). If a bill of assurance is properly filed for record, it must be enforced by the courts. *Dillingham v. Kahn*, 188 Ark. 759, 67 S.W.2d 735 (1934).

We find persuasive appellants' argument that the easement created in favor of the lot-holders in the Millwood Subdivision is in the nature of a severed interest that cannot be levied against and, therefore, cannot be extinguished in a tax sale. We therefore hold that the interest that appellees acquired is subject to the same bill of assurance that binds the others, replete with its benefits and liabilities. Accordingly, the trial court is reversed, and this case is remanded for entry of an order consistent with this opinion.

Reversed and remanded.

GRIFFEN and BIRD, JJ., agree.

Edward WILLIAMS *v.* JOHNSON CUSTOM HOMES, et al.

CA 06-1048 264 S.W.3d 569

Court of Appeals of Arkansas
Opinion delivered October 3, 2007

[Rehearing denied November 7, 2007.*]

* BIRD and GRIFFEN, JJ., would grant rehearing.

Frederick S. Spencer, for appellant.

Roberts Law Firm, P.A., by: *Jeremy Swearingen* and *Emily A. Neal*, for appellee Paysource, Inc.

Bill H. Walmsley, for appellees Johnson Custom Homes and Virginia Surety Company.

ROBERT J. GLADWIN, Judge. Appellant Edward Williams appeals the June 21, 2006 decision of the Arkansas Workers' Compensation Commission (Commission) finding that he is estopped under the election-of-remedies doctrine from pursuing a claim under Arkansas workers' compensation law against appellees Johnson Custom Homes and Virginia Surety Company, and further, that the constitutional issues raised by him are without merit. Appellant argues on appeal that the Commission has jurisdiction over this claim and that his voluntary acceptance of benefits under the laws of Ohio does not constitute an election of remedies or prevent him from pursuing a claim under Arkansas workers' compensation law. Further, appellant claims that appellees attempted to improperly and in bad faith avoid liability under Arkansas law by coercing him into signing

an agreement to select the state of Ohio as the state of exclusive remedy. Finally, appellant argues that the evidence he submitted establishes that the Executive Branch of the State of Arkansas and private interests have exerted pressure on workers' compensation administrative law judges (ALJs) and Commissioners, which has infringed upon their decisional independence and resulted in actual bias and the appearance of bias in the decisions of the ALJs and Commissioners. We affirm the decision of the Commission.

Appellant worked as a builder and was hired by Steve Johnson of Johnson Custom Homes in January 2002. Appellant believed he was employed by Steve Johnson. However, appellant admits to signing a W-4 tax-withholding form in early 2004 and other forms relating to his employment showing that Paysource was his employer. The forms specified that any work-related injury would be brought under the exclusive jurisdiction of the Ohio Bureau of Workers' Compensation. Appellant signed and returned these documents after being given time to review them. Appellant's paychecks came from Paysource.

On April 14, 2004, appellant fell from scaffolding while on the job. He injured his wrist and ankle, and he was placed in a leg cast after he sought emergency treatment. Appellant claims that his employer told him that his medical bills would be paid and treatment would be provided. He began receiving workers' compensation benefits from Ohio, but only after he made several telephone calls and provided forms to the Ohio Bureau by facsimile. He testified that he always talked to a certain woman in Ohio, Kristin, whenever he had a question regarding his coverage. When his doctor encouraged him to add his back and left knee to his workers' compensation claim, the employer denied coverage, and after a hearing in which appellant did not participate, the Ohio Bureau denied coverage. Appellant did not appeal that decision. He claims he did not know that he was required to travel to Ohio for hearings. He admits to having an attorney ready to represent him in Ohio.

On August 24, 2004, four months after appellant's injury, a Cease and Desist Order was filed by Mike Pickens, the former Insurance Commissioner for the State of Arkansas, wherein he found that Paysource had engaged in "illegal activities." Pickens found that Paysource was not licensed as a professional employer organization in violation of Arkansas Code Annotated section 23-92-315(20) (repealed July 16, 2003) and Arkansas Code Annotated section 23-92-404(a) (effective July 16, 2003); that Paysource was in arrears in payment of unemployment taxes; and that

for at least one of its Arkansas clients, Paysource had not obtained workers' compensation coverage from an insurance carrier licensed in Arkansas. Paysource was ordered to desist the writing of new employee leasing activities in this state, and to cease and desist all marketing activities in the State of Arkansas.

Appellant filed a claim with the Arkansas Commission asserting his entitlement to benefits as a result of the on-the-job injury. The parties stipulated that appellant's injuries would be compensable under Arkansas workers' compensation law. The ALJ determined that appellant was not estopped under the election-of-remedies doctrine from pursuing a claim under Arkansas workers' compensation law. Because appellant received what he was seeking from the ALJ, the ALJ did not address appellant's constitutional-law arguments.

On appeal, the Commission reversed the ALJ's decision, finding that appellant made an election of remedies by knowingly receiving benefits pursuant to the workers' compensation laws of the State of Ohio. Further, the Commission determined that all of appellant's constitutional arguments raised by appellant's attorney had been addressed in *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007), *Plummer v. Wal-Mart Stores, Inc.*, Workers' Compensation Commission F209057 (Oct. 10, 2005), *Edwards v. Galloway Sand & Gravel*, Workers' Compensation Commission F109737 (Oct. 11, 2005), and *Bland v. Baxter Regional Medical Center*, Workers' Compensation Commission F204378 (Aug. 16, 2005). The Commission found that the constitutional arguments were without merit and dismissed them. This appeal follows.

In appeals involving claims for workers' compensation, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *See Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, 366 Ark. 297, 235 S.W.3d 499 (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005). As our law currently stands, the Commission hears workers' compensation claims de novo on the basis of the record before the ALJ pursuant to Ark. Code Ann. § 11-9-704(c)(2) (Repl. 2002), and this court has stated that we defer to the Commission's authority to disregard the testimony of any witness, even a claimant, as not credible. *See Bray v. Int'l Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006).

A state's legitimate interest

All states having a legitimate interest in an injury have the right to apply their own law, either separately, simultaneously, or successively, to the same injury. *Missouri City Stone, Inc. v. Peters*, 257 Ark. 917, 521 S.W.2d 58 (1975); *Robinson v. Ed Williams Constr. Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992). The voluntary payment of compensation under the laws of one state, which is accepted by the appellant, does not affect the appellant's statutory right to an award of compensation in another state unless the laws of that state prohibit such a claim. *Missouri City Stone, supra.* This is true, although there can be no double recovery; only the difference by which the second award is greater than the first may be recovered. *Id.*

Appellant contends that Arkansas is the only state with a legitimate interest in the injury he sustained. Appellant claims that Ohio's only connection is the sham employment relationship that appellees contend exists between appellant and Paysource. Appellant argues that he has no relationship with Paysource whatsoever. He argues that Steve Johnson and Paysource entered into a contractual relationship that does not involve appellant, and that they did this without his knowledge and with the intent of avoiding the laws of this state.

Appellant argues that even though he accepted benefits from Ohio, he is not prevented from pursuing a claim here. He cites *Missouri City Stone, supra*, stating that payment of benefits from one state does not bar him from asserting a subsequent claim under Arkansas workers' compensation law. In *Missouri City Stone*, the claimant was working in Oklahoma where he sustained injuries that included a crushed face and severed spine. He received some benefits from Oklahoma, but later filed a claim in Arkansas because the benefits were higher under Arkansas workers' compensation. Appellant argues that, like the instant case, this state in *Missouri City Stone* had a legitimate interest in the welfare of its citizens and found that the claimant was entitled to pursue benefits under Arkansas workers' compensation law. However, in the case at hand, appellant signed an agreement entitled "Agreement to Select the State of Ohio as the State of Exclusive Remedy," wherein it states that his rights under the laws of the State of Ohio shall be the exclusive remedy against the employer on account of injury. *Missouri City Stone* does not address a contractual agreement regarding exclusive remedies, and therefore, we hold that it can be distinguished from the instant case.

Election of remedies

Appellant admits that jurisdiction is properly denied when an appellant makes a previous election of remedies by actively initiating proceedings or knowingly receiving benefits pursuant to the laws of another state. *Biddle v. Smith & Campbell, Inc.*, 28 Ark. App. 46, 773 S.W.2d 840 (1989); *see also*, *Houston Contracting Co. v. Young*, 267 Ark. 322, 590 S.W.2d 653 (1979). In *Biddle*, this court held that the claimant therein had elected her remedy by knowingly receiving benefits pursuant to Louisiana workers' compensation law based upon evidence that appellant received her benefit checks from Louisiana in the mail; the employer's office manager testified that she telephoned the claimant after the injury to get information to file the report in Louisiana, and that she told the claimant she was doing so; and a rehabilitation worker from Louisiana had visited the claimant in her home on more than one occasion.

Appellant contends that this court has also found that no election of remedies should be found to bar a claim if the employer or insurance carrier improperly or in bad faith channeled the claim into the other state. *Biddle, supra*. Appellant herein tries to distin-

guish his case from the facts in *Biddle* by arguing that his claim was submitted to Ohio without his knowledge or any action on his part. He claims that he was later advised that his benefits were being paid under Ohio law, but not until benefits had been initiated. Further, he contends that after he learned that his benefits were paid from Ohio, he immediately took action to pursue his claim in the proper forum in Arkansas. He makes this same argument to distinguish *Elliot v. Maverick Transportation*, 87 Ark. App. 118, 189 S.W.3d 62 (2004), where this court held that the claimant was precluded from seeking benefits in Arkansas where he actively initiated and participated in proceedings in Illinois by signing papers sent to him by his Illinois counsel and agreeing to file his claim in Illinois, and he knowingly received benefits pursuant to the laws of Illinois.

Under Arkansas case law, the election-of-remedies doctrine is a clean, two-part test: (1) whether the appellant actively initiated a claim for benefits in the state; or (2) whether the appellant knowingly received benefits pursuant to that state's law. *Biddle, supra.* Appellee Paysource argues that it was only after disagreeing with the decision of the Ohio Bureau that appellant tried to seek another bite at the apple to gain benefits from the State of Arkansas.

Paysource states that under *International Paper Company v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971), the factors in determining jurisdiction include considering the place whose statute the parties expressly adopt by contract. Paysource claims it is undisputed that three other factors that are considered favor Arkansas as having jurisdiction: Appellant resides in Arkansas; appellant was injured in Arkansas; and appellant contracted to work in Arkansas. However, appellant also signed an agreement adopting the law and procedures of the State of Ohio respecting worker's compensation injuries. He received documentation that Paysource was his employer, out of Ohio, and his paychecks came from Paysource's Ohio account. He did not object to submitting claims for benefits under Ohio law or receiving those benefits. Under *Elliot, supra,* when two or more states have sufficient contacts for both to have jurisdiction, a dispositive factor is whether the appellant has elected his remedy in one of the states.

The substantial weight of the evidence supports the Commission's finding that appellant elected his remedy in Ohio because he actively initiated a claim for benefits and then knowingly received benefits through Ohio. This court has stated, "A claimant

should be held to his affirmative acts and the resulting consequences of making an election of remedies." *Biddle*, 28 Ark. App. at 48, 773 S.W.2d at 841.

The instant case can be distinguished from *Towery v. High Speed Electrical Company*, 75 Ark. App. 167, 56 S.W.3d 391 (2001), where this court held that jurisdiction in Tennessee was not proper because the claimant had not actively initiated proceedings there, nor had he knowingly received any benefits under Tennessee law. In the instant case, appellant filed paperwork in Ohio and received benefits from Ohio. Appellant initiated conversations regarding coverage with "Kristin" in Ohio, and applied to have further injuries covered by the Ohio Bureau.

Finally, we hold that *Elliot, supra*, is controlling. In *Elliot*, the claimant was an Oklahoma resident employed with an Arkansas company, but was injured in Illinois. His employer filed a claim in Arkansas and paid benefits under Arkansas law. He later filed a claim in Oklahoma and received benefits there before his case was dismissed by the Oklahoma Commission for lack of jurisdiction. The claimant filed a claim in Illinois and subsequently received benefits under Illinois law. This court held that the claimant had elected his remedy in Illinois because he actively initiated proceedings in Illinois and knowingly received benefits under Oklahoma and Illinois law. Because he elected his remedy in Illinois, this court held that Arkansas did not have jurisdiction.

Likewise, the appellant herein actively pursued his claim in Ohio. He communicated with the owner and secretary at his employment about submitting documentation to the Ohio Bureau, using the fax machine at work to do so. He admitted to contacting a representative of Paysource and the Ohio Bureau about the status of his claim there. He contacted his claims representative in Ohio and figuratively "lit a fire" to get his benefits caught up and regular payments commenced. We hold that these actions are tantamount to initiating a claim for benefits in Ohio, and pursuant to *Biddle*, *Tidwell*, and *Elliot*, appellant made an election of his remedies in the state of Ohio.

Coercion and bad faith

Appellant argues that the document he was allegedly coerced into signing was nothing but an effort by appellees to avoid Arkansas workers' compensation law. He claims that under Ark. Code Ann. § 11-9-108(a) (Repl. 2002), no agreement by an

employee to waive his right to compensation shall be valid. Here, appellant argues that appellees tried to contractually relieve themselves of liability under Arkansas law by coercing him into signing the agreement to select Ohio as the state of exclusive remedy. He argues that by coercing him into signing the agreement, appellees in bad faith channeled the claim through the laws of Ohio instead of through Arkansas, which is the only state with a legitimate interest in this claim. He argues that he only received benefits from Ohio because appellees, in trying to avoid liability under Arkansas workers' compensation law, illegally channeled the claim through the Ohio Bureau.

Paysource argues that it did not improperly channel claims through the State of Ohio. Appellant signed and dated the agreement wherein he adopted the law and procedures of the State of Ohio respecting the pursuit of compensation for work injuries. Paysource contends that appellant is presumed to have knowingly and purposefully entered into the employment contract and to have bound himself by the choice-of-forum and choice-of-law provisions. Paysource argues that it is the court's duty to construe the contract in accordance with the plain meaning of the language used. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). Further, Paysource points out that the Arkansas Supreme Court has consistently held that choice-of-forum and choice-of-law clauses in contracts are binding. *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005).

Parties are presumed to have read and understood their contract. *See McCaleb v. Nat'l Bank of Commerce*, 25 Ark. App. 53, 752 S.W.2d 54 (1988). In Arkansas, the general rule is that if a person signs a document, he is bound under the law to know the contents of the document. *Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002). One who signs a contract, after an opportunity to examine it, cannot be heard to say that he did not know what it contained. *Dodson v. Abercrombie*, 212 Ark. 918, 208 S.W.2d 433 (1948).

Appellant is literate, educated, and worked in management. He admitted that he held the agreement for several days before signing it and returning it to the secretary. He had plenty of time to ask questions before signing. We hold that even had appellant failed to read the document, he made an election of remedies in Ohio by taking affirmative steps to pursue benefits from the Ohio Bureau. Further, the question of bad faith is ultimately a fact question to be determined by the Commission.

We hold that the Commission's decision is supported by substantial evidence. In considering all the facts, including the Cease and Desist Order filed against Paysource, we are convinced that fair-minded persons with the same facts before them could have reached the conclusions arrived at by the Commission.

Constitutional-law arguments

Finally, appellant makes a number of constitutional arguments. Specifically, he alleges that the executive branch and private interests have exerted pressure on the Commission and the ALJs to the point where the pressure has infringed on the independence of the Commission and resulted in biased decisions. Appellant contends that such procedures violate the separation-of-powers doctrine established by the Constitution of the State of Arkansas and the due-process rights of the parties appearing before the Commission. However, we rejected these same arguments in *Long v. Wal-Mart Stores, Inc., supra.* There is no reason to review these arguments again.

Accordingly, we affirm the Commission's decision, holding that appellant elected his remedy from the State of Ohio and that he was not coerced into doing so. We do not address the constitutional-law arguments made by appellant, as those arguments have been addressed by this court in recent prior opinions.

Affirmed.

MARSHALL, VAUGHT, and HEFFLEY, JJ., agree.

BIRD and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. The majority has held that appellant, an Arkansas worker, "elected" Ohio as a "remedy" when he received workers' compensation benefits pursuant to Ohio law from an Arkansas employer for an injury that occurred in Arkansas. In so holding, it turns a blind eye on the bad faith actions of the employer, which led to appellant pursuing his workers' compensation claim in a forum where he had no legitimate contacts. Because I consider such bad-faith actions contrary to the public policy upon which the workers' compensation system is based and fundamentally unconscionable, I must dissent.

The majority opinion omits several essential facts. While emphasizing that appellant signed forum-selection documents, including the one entitled "Agreement to Select the State of Ohio

as the State of Exclusive Remedy," the majority opinion somehow avoids reference to evidence of bad faith by the employer. For instance, the majority opinion states that appellant thought that he was being employed by Steve Johnson. However, it fails to reveal that appellant obtained this belief after asking Johnson about PaySource and after Johnson told appellant that he (Johnson) was the employer. The majority opinion also omits appellant's testimony that Johnson's secretary told him (appellant) that he had to sign the forum-selection documents by the following week *in order to receive paychecks*. Another co-worker, Rick Stetka, also testified that he was told that he had to sign the documents in order to be paid.

Both the Commission and the majority erroneously state that this is an election-of-remedies case. The election-of-remedies doctrine bars more than one recovery on inconsistent remedies (*e.g.* a tort remedy versus a contract remedy). *Pro-Comp Mgmt, Inc. v. R.K. Enterprises, LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006). The purpose of the doctrine is to prohibit more than one recovery for the same injury. *Regions Bank v. Griffin*, 364 Ark. 193, 217 S.W.3d 829 (2005). However, appellant is not seeking to pursue any remedy other than workers' compensation. He is exercising his right to pursue his workers' compensation claim under the laws of the state of Arkansas, which the majority concedes is the only state that has a legitimate interest in his compensable injury. The issue is not election of remedies at all, but election of the forum for appellant's claim. While precedent from this court has inaccurately referred to this as an election-of-remedies issue, *see Elliot v. Maverick Transp.*, 87 Ark. App. 118, 189 S.W.3d 62 (2004),[1] the issue is accurately framed as whether appellant made a valid election to pursue his workers' compensation remedy in Ohio rather than before the Arkansas Workers' Compensation Commission.

All states having a legitimate interest in a compensable injury may apply their own laws in adjudicating the claim. *Robinson v. Ed Williams Construction Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992). Claims for compensation may be instituted in any state having jurisdiction over the claim. *Id.* The receipt of benefits under the laws of one state does not preclude the receipt of benefits under

[1] I am not advocating that this court overrule *Elliot* or any other precedent of this court. However, the court misspoke in *Elliot* when it referred to the issue as an election-of-remedies problem.

another state unless the first state so declares. *Missouri City Stone, Inc. v. Peters*, 257 Ark. 917, 521 S.W.2d 58 (1975). Several statutes establish Arkansas's public policy of making employers responsible for injuries suffered in the course and scope of one's employment. *See* Ark. Code Ann. §§ 11-9-103(a) (Repl. 2002) (binding every employer and employee in the state to the workers' compensation code); 11-9-105(a) (Repl. 2002) (establishing workers' compensation as the exclusive remedy for injured employees); 11-9-108(a) (Supp. 2007) (rendering void any agreement by an employee to waive liability under the workers' compensation code, unless otherwise provided in the chapter); 11-9-401(a)(1) (Repl. 2002) (mandating that every employee compensate its employees for disabilities and deaths from compensable injuries without regard to fault as a cause of injury); 11-9-1001 (Repl. 2002) (stating that the purpose of the workers' compensation code is to provide for disability benefits for injured workers, to pay reasonable and necessary medical expenses, and return the workers to the workforce). Therefore, any action which operates to divest an employee of rights under Arkansas workers' compensation law should be viewed with extra scrutiny.

In *Missouri City Stone*, our supreme court affirmed the claimant's pursuit of benefits in Arkansas even after the employer paid benefits under Oklahoma law. The claimant in that case was an Arkansas resident injured in Oklahoma. The majority now claims that the instant case is distinguishable because *Missouri City Stone* did not involve a forum-selection clause. Under *Missouri City Stone*, an employee who receives benefits from a foreign jurisdiction is not precluded from maintaining a claim under Arkansas law. That holding cannot be avoided by pointing to an agreement that was entered into in bad faith. It follows, therefore, that the decision in that case is controlling and factually on point.

In the instant case, the Arkansas employer required appellant to sign a forum-selection clause regarding a forum where neither the employer nor appellant had legitimate contacts. Arkansas courts enforce forum-selection clauses, *see Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005), but only if there is a substantial connection between the contract and the forum state. *Nelms v. Morgan Portable Bldg. Corp.*, 305 Ark. 284, 808 S.W.2d 314 (1991) (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957)). As stated in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471 (1985) (citations and internal quotes omitted), "The Due Process Clause protects an individual's liberty interest in not

being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." In enforcing a forum-selection clause, the constitutional touchstone remains whether the party has purposefully established "minimum contacts" with the forum state. *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)). Even the majority notes that the analysis under *Elliot* would apply "when two or more states have sufficient contacts for both to have jurisdiction." One does not establish those contacts merely by signing a forum-selection clause. Rather, jurisdiction becomes proper when those contacts proximately result from actions by the party that create a substantial connection with the forum state. *Rudzewicz, supra.*

This court should be focused on whether appellant, voluntarily and without bad faith on the part of the employer, pursued benefits in a foreign jurisdiction. However, under the guise of a bad-faith analysis, the majority merely undertakes a contract analysis without an in-depth analysis of the actions of the employer.[2] True, parties are presumed to have read and understood their contract, and parties are bound under the law to know the contents of the documents they sign. *See Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002); *McCaleb v. Nat'l Bank of Commerce*, 25 Ark. App. 53, 752 S.W.2d 54 (1988). However, the notion that a party is presumed to know the contents of the document he signs does not bind that party to agreements that are unconscionable or against public policy, such as the "agreement" in this case. The majority opinion stands for the proposition that an employer may channel workers' compensation claims to any state by using coercive action to secure a worker's assent to a forum-selection clause, even if the employee otherwise has *no* legitimate connections to that state. If this does not constitute bad faith, then one will be hard-pressed to find circumstances that do.[3]

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[2] The Commission also glossed over appellant's bad-faith claim, devoting only one sentence to the issue in its opinion.

[3] The majority writes, "Appellate is literate, educated, and worked in management. He admitted that he held the agreement for several days before signing it and returning it to the secretary. *He had plenty of time to ask questions before signing.*" (Emphasis added.) This should beg the question of whether the average worker is in a good position vis-a-vis an employer to make inquiries when told to sign a document in order to continue receiving paychecks. It also disregards the fact that appellant obtained no consideration for "electing" to have his workers' compensation benefits adjudicated under Ohio law in Ohio despite having no contacts with that state.

The majority's analysis also operates to abrogate *Missouri City Stone*, which this court is bound to follow. *See, e.g., Smith v. Aluminum Co. of America*, 78 Ark. App. 15, 76 S.W.3d 909 (2002) (noting that the court of appeals is bound by the decisions of the supreme court). Our supreme court has declared that the receipt of benefits under the laws of one state does not preclude the receipt of benefits under another state unless the first state so declares. But under the majority's holding, once someone receives benefits under the law of one state, he cannot receive benefits under the laws of this state. In effect, the majority has eviscerated the holding in a supreme court case.

It is inconsistent with both due process and the public policy of the State of Arkansas to enforce a coerced "agreement" whereby an Arkansas employee is forced to pursue workers' compensation benefits from an Arkansas employer for a compensable Arkansas injury in a different state with which the employee has no connections. Such an agreement violates public policy, deprives Arkansas workers from the protection of Arkansas workers' compensation laws, and is patently unconscionable. It perverts fairness to hold that employers can meet due process requirements for minimum contacts by coercing employees to sign unconscionable agreements that deprive Arkansas employees of the right to prosecute their claims for Arkansas injuries before the Arkansas Workers' Compensation Commission.

I respectfully dissent and am authorized to state that Judge Bird joins this opinion.

Ruben SMITH *v.* ARKANSAS DEPARTMENT of HEALTH and HUMAN SERVICES

CA 07-335 264 S.W.3d 559

Court of Appeals of Arkansas
Opinion delivered October 3, 2007

Therese M. Free, for appellant.

Gray Allen Turner, Office of Chief Counsel, for appellee.

Merry Alice Hesselbein, attorney ad litem.

JOHN B. ROBBINS, Judge. Appellant Ruben Smith appeals the termination of his parental rights to his daughter, JS (born 7-31-05). He argues that: 1) the trial court erred in allowing the Arkansas Department of Health and Human Services (DHHS) to amend the termination petition on the day of the termination hearing; 2) there was insufficient evidence to terminate his parental rights; 3) the trial court's termination order improperly referred to evidence presented at prior hearings. We affirm.

Factual Background

Our factual recitation is taken from the court's termination order and other matters in the record, which Smith designated on appeal to include all pleadings, motions, reports, exhibits, orders, and case plans from October 13, 2005 (the date of the probable-cause order), to January 9, 2007 (the date of the termination order).

On October 7, 2005, JS, then less than three months old, tested positive for cocaine at Arkansas Children's Hospital. Within days, DHHS removed the child from the custody of her mother, Katrina Harden, and on October 13, 2005, the trial court entered a probable-cause order continuing custody in DHHS. The court directed that paternity be established as to JS and two other of Ms. Harden's children, and an adjudication hearing was set for December 5, 2005.

Smith acknowledged paternity of JS, and he appeared at the December 5 adjudication hearing. JS was found dependent/neglected based on her testing positive for cocaine and her mother's drug use.[1] The court, having already entered orders pertaining to Ms. Harden, ordered Smith to obtain stable housing, employment,

[1] Between October 2005 and December 2005, Ms. Harden repeatedly tested positive for cocaine, marijuana, or both.

and income; to keep DHHS informed of his address, telephone numbers, and employment; to have random drug screens; and to undergo a drug and alcohol assessment. Smith was also referred for a GED. Supervised visitation was established for both parents. The goal of the case was reunification, with a review hearing set for March 29, 2006.

A report prepared by DHHS for the review hearing shows that Smith had not started working on his GED; was living with his aunt; had obtained temporary employment at a video store; had visited JS; and continued to test positive for drugs. After the hearing, the court continued custody in DHHS and suspended visitation until the parents could comply with the court's orders. A permanency-planning hearing was set for September 20, 2006.

On August 14, 2006, DHHS filed a petition to terminate Smith's and Ms. Harden's parental rights. The petition alleged that returning JS to her parents was not in her best interest and was contrary to her health, safety, and welfare; that returning her to her parents could not be accomplished in a reasonable period of time as viewed from her perspective; that JS was found dependent/neglected "as the result of neglect and/or abuse that could endanger [her life] which was perpetrated by the juvenile's mother"; that other factors or issues arose subsequent to the filing of the original dependency-neglect petition demonstrating that returning JS to the custody of her parents was contrary to her health, safety, and welfare; and that, despite the offer of appropriate family services, the parents manifested the incapacity or indifference to remedy the subsequent issues or rehabilitate their circumstances.

The permanency-planning hearing proceeded on September 20, 2006. Smith and Ms. Harden tested positive for drugs on that date. A DHHS report stated that Smith had not started working on his GED and that the caseworker could not tell if Smith was employed. Further, visitation with JS remained suspended. The trial court found that neither Smith nor Ms. Harden was in compliance with court orders or the case plan, and the goal of the case was changed to termination of parental rights. A termination hearing was set for November 20, 2006.

Smith did not appear at the termination hearing but was represented by counsel. At the beginning of the hearing, counsel objected when DHHS moved to amend its termination petition to add that JS had "been in the Department's custody for twelve

months or longer." The trial court allowed the amendment, stating that all participants in the case were aware that JS had been in DHHS custody for over a year.

The hearing went forward with testimony from adoption specialist Monica Spencer that the likelihood of adoption for JS and the other children was "very possible." DHHS caseworkers testified that they had experienced difficulty maintaining contact with Smith since September 2006. Caseworker Linda Marshall testified that, when visitation with JS was allowed, Smith's visits were inconsistent. She also said that he continually tested positive for drugs; that he did not follow up on recommendations after receiving a drug-and-alcohol assessment; and that he was not working, as far as she knew. Marshall said further that JS had remained in DHHS custody since October 2005, and she recommended termination of parental rights. The ad litem attorney introduced into evidence certified copies of the court's probable-cause and adjudication orders. The court also made a finding of reasonable efforts by DHHS without objection by Smith.

On January 9, 2007, the court entered an order terminating Smith's parental rights to JS.[2] The court recited a detailed history of its prior orders and the evidence adduced at the termination hearing and mentioned some evidence from prior hearings. It found that Smith had been inconsistent in visiting JS; that he failed to appear at the termination hearing; that he had multiple, positive drug tests; and that he failed to "engage in the simplest of services." Under those circumstances, the court said, reunification would be unlikely even if services continued. The court also noted that, despite court-ordered services and intervention, Smith did not maintain meaningful contact with JS and did not rehabilitate himself to the point where reunification was a viable option. Further, the court said, JS had been in foster care since October 2005; she was "young and adoptable"; and she should not have to "languish" in foster care due to the "inaction of the adults in this case." The court then concluded that it was in JS's best interest to terminate Smith's parental rights. Smith filed a timely notice of appeal.

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[2] The court also terminated Ms. Harden's parental rights to JS and two other children and terminated the parental rights of the putative fathers of those children. The only termination at issue in this appeal is the termination of Smith's parental rights to JS.

Preliminary Argument by DHHS

We first address DHHS's argument that "the appeal should be dismissed because the record is deficient." DHHS refers to the fact that Smith's addendum does not contain all relevant pleadings, orders, and exhibits.

In support of its argument, DHHS cites *Busbee v. Arkansas Department of Health & Human Services*, 369 Ark. 416, 255 S.W.3d 463 (2007), where our supreme court dismissed an appeal in a termination-of-parental-rights case because the appellant, proceeding under the relatively new Ark. Sup. Ct. R. 6-9, failed to include in the record various orders that preceded the termination order. However, *Busbee* applies only to the failure to include relevant orders in the *record*, which is not an issue here; all relevant orders are included in Smith's record. The deficiencies that DHHS points to in the present case concern Smith's *addendum*. Therefore, *Busbee* is not on point.

Nevertheless, we agree with DHHS that Smith's addendum is lacking. Arkansas Supreme Court Rule 6-9(e)(2)(E) provides that an addendum shall include, among other things, "relevant pleadings, documents, or exhibits essential to an understanding of the case . . . ." From a record containing over 800 pages of orders, pleadings, exhibits, and testimony — much of which was relevant to the trial court's findings and essential to our understanding of the case — Smith has addended only the notice of appeal, the termination order, and the termination petition. However, Rule 6-9 allows an appellee to supplement the appellant's addendum if the appellee considers it defective or incomplete. Ark. Sup. Ct. R. 6-9(f)(2)(C). Supplemental addenda were filed in this case by DHHS and the attorney ad litem, and they include some of the relevant exhibits and orders. We therefore rely on those supplements. Additionally, we see nothing in Rule 6-9 that prohibits us, in the course of our de novo review, from going to the record to affirm. *See generally Mobley Law Firm v. Lisle Law Firm*, 353 Ark. 828, 120 S.W.3d 537 (2003). Accordingly, we decline DHHS's request to dismiss the appeal, and we turn to the arguments presented by Smith.

Amendment To Petition

Smith argues that the trial court violated his due-process rights when it allowed DHHS to amend the termination petition on the day of the termination hearing. DHHS sought permission

to amend its petition to reflect that the children had been in DHHS custody for twelve months or longer, which is a component of two grounds for termination under our statute:

> That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent; and
>
> That the juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile.

Ark. Code Ann. §§ 9-27-341(b)(3)(B)(i)(*a*), (ii)(*a*) (Supp. 2005).

We find no reversible error. Under Ark. R. Civ. P. 15(a), with certain exceptions not applicable here, a party may amend his pleadings at any time without leave of the court, unless, upon motion of an opposing party, the court determines that prejudice would result or disposition of the cause would be unduly delayed. *See Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005). If prejudice or undue delay is demonstrated, the court may strike the amended pleading or grant a continuance. *See id.* The trial court has broad discretion in allowing or denying amendment of the pleadings. *Id.* Where neither a continuance is requested nor a demonstration of any prejudice resulting from an amendment is shown, the amendment should be allowed. *Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997).

[redacted] Smith did not request a continuance to meet the substance of the amendment. Nor did he demonstrate prejudice. The amendment added a factual matter that all parties knew or should have known: that JS had been in DHHS custody for more than twelve months. Moreover, in terminating Smith's parental rights, the trial court cited a ground that does not depend on the child's being out of the parent's custody for twelve months — that there is little likelihood that services to the family will result in successful reunification. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*B*)(*i*) (Supp. 2005). Based on these factors, we affirm on this point.

Sufficiency of the Evidence to Support Termination

Termination of parental rights is an extreme remedy and in derogation of the natural rights of parents, but parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Meriweather v. Ark. Dep't of Health & Human Servs.*, 98 Ark. App. 328, 255 S.W.3d 505 (2007). Grounds for termination of parental rights must be proven by clear and convincing evidence. *Id.* Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. *Id.* When the burden of proving a disputed fact is by clear and convincing evidence, the appellate inquiry is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

The goal of our termination statute is to provide permanency in a child's life in circumstances where returning the child to the family home is contrary to the child's health, safety, or welfare and the evidence demonstrates that a return to the home cannot be accomplished in a reasonable period of time as viewed from the child's perspective. Ark. Code Ann. § 9-27-341(a)(3) (Supp. 2005). Parental rights may be terminated if clear and convincing evidence shows that it is in the child's best interest. Ark. Code Ann. § 9-27-341(b)(3) (Supp. 2005). Additionally, one or more statutory grounds must be shown by clear and convincing evidence. *Meriweather, supra.*

We cannot say that the trial court clearly erred in this case. In its adjudication order, the court directed Smith to obtain stable housing, employment, and income; to keep DHHS informed of his address, telephone numbers, and employment; to have random drug screens; and to undergo a drug-and-alcohol assessment. The court also established visitation with JS and referred Smith for a GED. Yet, the evidence shows that Smith persistently failed to comply with the court's order and failed to take advantage of the family services being offered. He was inconsistent in his visitation of JS. In fact, his visitation was eventually suspended and never reinstated because of his disobedience of court orders. He tested positive for drugs throughout the case, including on the date of the permanency-planning hearing,

and did not follow up on recommendations resulting from a drug-and-alcohol assessment. Further, he was not working or pursuing his GED. Additionally, he was generally unavailable to DHHS workers, and he failed to appear at the termination hearing. Considering these factors, along with Ms. Spencer's testimony that adoption of JS was "very possible," we do not believe that the trial court clearly erred in finding that termination of parental rights was in JS's best interest.

We also find no clear error in the trial court's determination that reunification would be unlikely even if services continued. Arkansas Code Annotated section 9-27-341(b)(3)(B)(ix)(*a*)(*3*)(*B*)(*i*) (Supp. 2005) establishes a ground for termination where the parent is found by a court to have subjected any juvenile to "aggravated circumstances." The term "aggravated circumstances" includes the following definition:

> A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, *or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification.*

(Emphasis added.) This type of aggravated circumstance can occur where a parent is not following through with offers of assistance; is not completing basic goals of the case plan, such as obtaining appropriate jobs and housing; and there is a lack of significant progress on the parent's part. *See, e.g.*, *Davis v. Ark. Dep't of Human Servs.*, 98 Ark. App. 275, 254 S.W.3d 762 (2007). This describes Smith's conduct in this case quite accurately.

Moreover, in our de novo review, we could hold alternatively that other grounds for termination were met. *See Johnson v. Ark. Dep't of Human Servs.*, 78 Ark. App. 112, 82 S.W.3d 183 (2002). Arkansas Code Annotated section 9-27-341(b)(3)(B)(vii)(*a*) provides as a ground for termination:

> That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

Smith's behavior in the months following the filing of the dependency-neglect petition matches up well with this statutory language. Despite DHHS's provision of reasonable services, he engaged in continuous drug use throughout the case and took no steps to remedy his problem; exhibited a lack of cooperation; was apathetic toward the outcome of the termination hearing; and was indifferent to complying with court orders.

In light of the foregoing, we cannot say that the trial court's termination of Smith's parental rights was clearly erroneous.

Trial Court's Consideration of Evidence From Prior Hearings

Smith argues that, because the termination order "contains evidence not presented at the termination hearing," it violates Ark. Sup. Ct. R. 6-9. The relevant portion of that rule reads:

> The record for appeal shall be limited to the transcript of the hearing from which the order on appeal arose, any petitions, pleadings, and orders relevant to that hearing, and all exhibits entered into evidence at that hearing.

Ark. Sup. Ct. R. 6-9(c)(1).

The trial court's order does in fact refer to prior orders and evidence from earlier proceedings. However, we find no error. In *Osborne v. Arkansas Department of Human Services*, 98 Ark. App. 129, 252 S.W.3d 138 (2007), the appellant argued that the trial court erred in relying on evidence from prior hearings in a termination case. We disagreed and stated:

> The process through which a parent or parents travel when a child is removed from their home consists of a series of hearings — probable cause, adjudication, review, no reunification, disposition, and termination. All of these hearings build on one another, and the findings of previous hearings are elements of subsequent hearings.

Id. at 136, 252 S.W.3d at 143 (quoting *Neves da Rocha v. Ark. Dep't of Human Servs.*, 93 Ark. App. 386, 219 S.W.3d 660 (2005)).

■ We recognize that the termination order in *Osborne* was entered before the effective date of Rule 6-9, but we see no reason to depart from its holding. Rule 6-9 governs "appeals in

dependency-neglect cases." It contains provisions pertaining to appealable orders, notices of appeal, the record on appeal, the parties' petitions and responses, and other appellate forms and procedures. It does not state that it governs a trial court's manner of deciding dependency-neglect proceedings. In particular, we find nothing in the rule that dictates what evidence may be considered by a trial court in termination proceedings. We therefore reject Smith's argument.

Conclusion

For the reasons stated, we affirm the trial court's termination of Smith's parental rights to JS.

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.

KENNEDY FUNDING, INC. *v.* Virgil W. SHELTON

CA 06-1035 264 S.W.3d 555

Court of Appeals of Arkansas
Opinion delivered October 3, 2007

Cross, Gunter Witherspoon & Galchus, P.C., by: *David B. Vandergriff*, for appellant.

Welch & Kitchens, LLC, by: *Richard C. Madison* and *Morgan E. "Chip" Welch*, for appellee.

SAM BIRD, Judge. This appeal arises out of an order of the Pulaski County Circuit Court interpreting and clarifying a foreclosure decree five years after it was entered. Appellant, Kennedy Funding, Inc., argues on appeal that the circuit court had no authority under Rule 60 of the Arkansas Rules of Civil Procedure to enter an order modifying the foreclosure decree more than ninety (90) days after the decree was filed. Appellee, Virgil Shelton, responds, contending that the circuit court did not modify the decree but merely interpreted and corrected an ambiguity in the decree, which it had inherent power to do. We agree with appellee and affirm the decision of the circuit court.

In 1992, appellee sold to Will and Rita Acklin certain real property in Pulaski County on which he operated a cemetery (hereinafter designated "the Rest in Peace Cemetery Property").

Appellee provided owner financing, and the Acklins executed a promissory note and mortgage in favor of appellee. The mortgage was duly recorded on December 9, 1992, with the Pulaski County Circuit Clerk. In 1999, the Acklins borrowed money from appellant, executing a promissory note in favor of appellant on January 9, 1999. The Acklins also executed mortgages on several parcels of real property, including the Rest in Peace Cemetery Property, which were duly filed of record in February 1999.

On October 6, 2000, appellant initiated foreclosure proceedings against the Acklins, serving the Acklins, appellee, and various other defendants who held mortgages on the real property made the subject of the foreclosure action. The foreclosure complaint included four parcels of land: the Club Manor Drive Property, the Funeral Home Property, the Haven of Rest Cemetery Property, and the Rest in Peace Cemetery Property. The circuit court entered a foreclosure decree on January 17, 2001, awarding judgment against the Acklins and various entities owned by them, and judgment in rem against all four parcels of land in favor of appellant. An amended foreclosure decree was filed on August 8, 2001, to correct a scrivener's error in the legal description of the Rest in Peace Cemetery Property. Herein, we will refer to the original foreclosure decree, as amended, as the decree.

The decree indicated that appellant had a first lien on the Haven of Rest Cemetery Property and the Funeral Home Property and a second lien on the Club Manor Drive Property and the Rest in Peace Cemetery Property. With regard to the Rest in Peace Cemetery Property, Paragraph 39 of the decree stated that "Virgil W. Shelton may claim an interest in the Rest In Peace Cemetery Property by virtue of a Mortgage dated December 8, 1992 . . . and filed for record on December 9, 1992 . . . ." Paragraph 40 stated that the "interest of Virgil W. Shelton is superior to that of Kennedy." The decree then provided in Paragraph E: "The Plaintiff Kennedy Funding, Inc.[,] has a second lien in the Rest in Peace Cemetery Property, more particularly described as follows: . . . subject to the noted interest in favor of Virgil W. Shelton." However, without mentioning any of the foregoing paragraphs designating appellee's interest in the property as superior to that of appellant, Paragraph O provided that "[u]pon sale of the property and the confirmation of such sale by the Court, all of the right, title and equity of the Defendants in and to such property shall be and is hereby foreclosed and forever barred." In its final sentence, the foreclosure decree stated that the "Court

retains control of this cause for such further orders as may be proper to enforce the rights of the parties hereto, and the rights of such as may hereafter become parties to this action by proper proceedings."

The Rest in Peace Cemetery Property remained in receivership until the receiver scheduled a judicial sale of the property for March 23, 2006. On March 21, 2006, appellee filed a motion to stay the foreclosure sale or in the alternative to amend the foreclosure order, contending that the paragraph in the foreclosure decree identifying him as having a superior interest to appellant in the Rest in Peace Cemetery Property seemed to conflict with Paragraph O, purporting to extinguish all "right, title and equity of the Defendants in and to such property." He requested a stay of the sale pending "clarification" by the court regarding "who and what interests" were to be foreclosed by a sale in light of the ambiguity in the decree. The circuit court entered an order staying the sale pending a hearing.

Appellant argued that the court had no power to modify its decree unless the error was considered to be a clerical mistake. Citing *First National Bank of Lewisville v. Mayberry*, 368 Ark. 243, 244 S.W.3d 676 (2006), appellant argued that the failure of the decree to have appellee's mortgage remain as a first priority lien against the property was not a clerical mistake. On May 22, 2006, the circuit court entered an order finding that it had continuing jurisdiction over the parties and subject matter until the sale was confirmed and the period of redemption had expired; that, based on Paragraphs 39 and 40 of the decree, the interest of Virgil Shelton was superior to that of Kennedy Funding; that, based upon language in Paragraph E, Kennedy Funding had a second lien on the cemetery property subject to the superior mortgage interest of Virgil Shelton; that the case involved "enforcing the rights of the parties rather than modification or amendment of the original or amended foreclosure decree under Rule 60 of the Arkansas Rules of Civil Procedure"; that, based upon a reading of the decree, some lien holders were superior to Kennedy Funding, not inferior, and thereby grouping all defendants together in Paragraph O was impossible; that it was clear from testimony and the foreclosure decree's specific terms that Virgil Shelton did not bargain for an inferior lien or agree to take subject to Kennedy Funding after any subsequent judicial sale; and that, therefore, Virgil Shelton's superior mortgage interest was controlling and was not disturbed by Paragraph O. Finally, the court determined that the foreclosure

decree should not be amended and entered an order "enforcing the rights and obligations of the parties consistent with its original orders." Appellant filed this appeal from the circuit court's order.

Appellant contends that the issue before the court is whether a trial court has the authority under Rule 60 of the Arkansas Rules of Civil Procedure to enter an order amending its decree more than ninety days after the decree was filed. Appellant argues that the trial court's order of clarification was not authorized by Rule 60 because Paragraph O was not a "clerical mistake" arising from oversight or omission but in the nature of negligence by appellee's attorney, which the supreme court held was not subject to correction under Ark. R. Civ. P. 60(b). *See Mayberry, supra.*

In *Mayberry*, the Bank filed a motion to vacate documents related to a foreclosure sale two months after the sale had taken place and the circuit court had entered an order confirming the sale and approving the commissioner's deed. The Bank claimed that neither its president, who acted as commissioner in advertising and selling the property, nor its attorney caught the error in the amount of the bid — the documents stated that the Bank bid $86,534.90 for the property instead of $26,534.90, which the Bank claimed that it bid. *Id.* at 246, 244 S.W.3d at 679. The supreme court affirmed the circuit court's denial of the Bank's motion to vacate the documents and held that the mistake was not a "clerical error" within the meaning of Ark. R. Civ. P. 60(b). The court reasoned that there was no Arkansas law allowing resort to Rule 60 for errors made by counsel and stated that the circuit court specifically found testimony bearing on the alleged clerical mistake to be unbelievable. *Id.* at 251, 244 S.W.3d at 683.

Appellee responds to appellant's arguments, claiming that neither *Mayberry* nor Rule 60 is applicable to this case. Appellee points to the foreclosure decree pursuant to which the circuit court "retained control of this cause for such further orders as may be proper to enforce the rights of the parties hereto[,]" arguing that the circuit court merely interpreted its potentially ambiguous foreclosure decree in order to enforce the rights of the parties. Appellee cites *Abbott v. Abbott*, 79 Ark. App. 413, 90 S.W.3d 10 (2002); *Sims v. First State Bank of Plainview*, 73 Ark. App. 325, 43 S.W.3d 175 (2001); and *McGibbony v. McGibbony*, 12 Ark. App. 141, 671 S.W.2d 212 (1984), as authority for the circuit court's actions. These cases hold that "a trial court . . . has inherent power to enter an order for the purpose of correcting a judgment to

ensure that the judgment is truthful and that it accurately reflects the court's original ruling." *Abbott*, 79 Ark. App. at 421, 90 S.W.3d at 15; *Sims*, 73 Ark. App. at 332, 43 S.W.3d at 180 (citing *McGibbony*, *supra*). In each of these cases, the court held that Rule 60 was not applicable and did not abrogate the court's "inherent power" to "accurately reflect its original ruling or to interpret its prior decision." *Abbott*, 79 Ark. App. at 421, 90 S.W.3d at 15.

We agree with appellee. Neither Rule 60 nor the supreme court's decision in *Mayberry* is applicable to the facts of this case. Unlike in *Mayberry*, the foreclosure sale has not yet taken place in this case. The court in this case did not correct an error made by an attorney after the sale was conducted and confirmed; rather, the court interpreted *its own* foreclosure decree *before* any such sale could take place to insure that the rights of the parties were clear to any prospective purchaser.

As a general rule, judgments are construed like any other instrument; the determinative factor is the intention of the court as gathered from the judgment itself and from the record. *Abbott*, 79 Ark. App. at 421, 90 S.W.3d at 15. We will not reverse the circuit court's interpretation of its own decree unless its findings of fact are clearly erroneous. *Id.* at 422, 90 S.W.3d at 16. In this case, the circuit court examined the record and the decree, held a hearing on appellee's motion to amend the decree, and determined that the intention of the foreclosure decree was to foreclose the subordinate interest of appellant in the Rest in Peace Cemetery Property while preserving appellee's superior interest in the property.

We first note that the law allows a court to offer at a judicial sale only such title as is held by the person or estate whose interest is being sold. *Bohra v. Montgomery*, 31 Ark. App. 253, 257, 792 S.W.2d 360, 362 (1990). The purchaser takes subject to outstanding liens. *Id.* In this case, the circuit court's foreclosure decree affected four different parcels of land. In its foreclosure decree, the circuit court stated that appellant held a first lien in two of the parcels and a second lien in two of the parcels. Appellee had an interest in only one of those parcels of land: the Rest in Peace Cemetery Property. In addition to appellee and appellant, there were four other defendants who held an interest in the Rest in Peace Cemetery Property. The circuit court clearly recognized in Paragraphs 39 and 40 of the decree that appellee's interest was superior to that of appellant. Paragraph E of the decree then stated that "Kennedy Funding, Inc.[,] has a second lien in the Rest in Peace Cemetery Property, more particularly described as follows:

. . . subject to the noted interest in favor of Virgil W. Shelton." Appellant admitted at the hearing on appellee's motion to amend that appellee had a first lien on the property and that it was superior to that of appellant. Appellant argued simply that, because the circuit court had no jurisdiction under Rule 60 to amend the decree, appellee must bear the cost of the ambiguity caused by Paragraph O of the circuit court's foreclosure decree, which purported to extinguish his first lien along with the liens of all of the other defendants in the various properties.

Appellant then argued that appellee agreed to subordinate his lien to that of appellant, although it offered no evidence of this alleged agreement. The attorney for the Arkansas Cemetery Board, who was present at the hearing and had been involved in the foreclosure proceedings, testified that it was his understanding that appellee had a first lien on the property and that he had no knowledge of any agreement subordinating appellee's lien. In light of the law, the decree itself, and the testimony before the circuit court, we cannot say that the circuit court's interpretation of its own foreclosure decree was clearly erroneous.

Affirmed.

HART and GRIFFEN, JJ., agree.

John David RAWE, Jr. *v.* Christa S. RAWE

CA 06-1063 264 S.W.3d 549

Court of Appeals of Arkansas
Opinion delivered October 3, 2007

DeeNita D. Moak, for appellant.

Teresa L. Hughes, for appellee.

DAVID M. GLOVER, Judge. The parties in this case met over the internet. Appellant, David Rawe, is from Arkansas and appellee, Christa Rawe, is from Australia. The parties were married on November 16, 2002, in Arkansas. Christa became pregnant, and she and David traveled to Australia to visit her family. Christa was required to sponsor David so that he could enter Australia because he had a thirteen-year-old felony conviction. Complications in her pregnancy arose while in Australia that prevented Christa from traveling, and the couple's son, Jake, was born in Bendigo, Australia, on October 19, 2003. Jake is a dual citizen of Australia and the United States. The parties returned to Arkansas in February 2004 and moved in with David's parents in El Paso, Arkansas. Christa sought permanent residency status in the United States, which was granted in July 2004.

On July 20, 2004, telling David that she was going shopping, Christa took Jake and never returned home. David searched to no avail for his wife and son, and he then filed for divorce on July 22, 2004. David eventually located Christa and Jake in Australia in September 2004, and he finally was able to talk to Jake in November 2004. After protracted legal proceedings, an Australian court ordered Jake to be returned to the United States; Christa returned with Jake, and David began exercising visitation on December 15, 2005.

At the hearing on January 6, 2006, Christa testified that she left David because of his alcohol problems, his temper, and his violence. Several of her friends, from both Australia and Arkansas, testified regarding David's problem with alcohol and his temper. David, his parents, and two of his friends testified that David was sober and did not have a temper problem. Christa testified that she left in the manner she did because she did not have a place to go where she felt safe in the United States. In defense of her actions in not notifying David of his son's whereabouts for almost two months, she stated that she had removed her son from what she considered to be an unsafe environment. She also testified that she

never intended to make Arkansas her home for the rest of her life; she only filed for permanent residency in the United States to make it easier to travel through customs. Christa requested custody of Jake as well as permission to return to Australia.

The trial court granted the decree of divorce and awarded Christa custody of Jake after the January 6, 2006 hearing, but reserved the issues of relocation, visitation, and child support. On February 6, 2006, an in-chambers conference was held on these outstanding issues. The trial court granted Christa permission to return to Australia with Jake, set forth a visitation schedule, and ordered child support to be paid at a reduced rate of seventy-seven dollars per week beginning February 10, 2006. The trial court also denied Christa's request for child support retroactive to the date David filed for divorce.

The trial court's grant of Christa's petition to relocate with Jake to Australia allowed them to immediately leave for Australia, but the trial court granted David visitation with Jake from 5:00 p.m. on February 6 to 8:00 a.m. on February 8. The trial court also noted that Christa and Jake had been in Arkansas for sixty-two days and that David had received visitation. The trial court ordered that neither party was required to travel for visitation in 2006, but that David could travel to Australia for visitation with Jake as set forth in the visitation order. The terms of visitation, set forth in the supplemental decree to establish visitation and support, provided:

> [Christa] has testified that she will receive two weeks paid vacation a year once she obtains employment in Australia. In 2007 and 2008, [Christa] will come to Arkansas with Jake during her vacation. [Christa] shall give [David] a minimum of sixty (60) days notice of her anticipated arrival and departure dates in Arkansas. [David] will be entitled to visit with Jake a minimum of four hours a day Monday through Thursday with Jake being returned to the care of [Christa] at night. [David] will further be entitled to weekend visitation with Jake from 6:00 p.m. Friday until 6:00 p.m. Sunday along with any other reasonable visitation which can be arranged by mutual agreement between the parties.
>
> In 2007 and 2008, [David] shall travel to Australia to visit with Jake for a minimum of two weeks. [David] shall give [Christa] a minimum of sixty (60) days notice of his anticipated arrival and departure in Euchua. [Christa] [sic] will be entitled to visitation with Jake each day that Jake is not in school from 8:00 a.m. until 6:00 p.m. and for two hours per day when Jake is in school. [David] will

further be entitled to weekend visitation with Jake from 6:00 p.m. Friday until 6:00 p.m. Sunday along with any other reasonable visitation which can be arranged by mutual agreement between the parties. If [David] should stay longer than six (6) weeks in Euchua, Australia, then weekend visitation shall be on alternate weekends after the sixth week.

Beginning in 2009 and continuing in odd numbered years thereafter, [Christa] shall be released from her obligation to travel to Arkansas for two weeks. [David] shall be entitled to annual visitation during Jake's long break from school (Christmas break). In 2009, Jake shall visit with [David] in Arkansas during his six week break from school, with said visitation period to include transportation to and from the United States. Said visitation is conditioned upon [David] having had significant contact with Jake via telephone and/or webcam and [David] having traveled to Australia to visit with Jake for a minimum period of two weeks each year in 2007 and 2008. Further, given the young age of Jake and the length of this visitation period, visitation may be amended upon good showing by [Christa]. If [Christa] is able to arrange to be in Arkansas during all or a portion of the visitation period, [Christa] shall be entitled to telephone contact and "visitation" with Jake. The parties shall arrange visitation to transition Jake into extended time with [David].

Beginning in 2010 and continuing in even numbered years thereafter, the minor child shall be with [Christa] for Christmas Eve and Christmas Day in Australia. The parties shall arrange [David's] visitation with Jake so that [David] receives the maximum number of days of visitation in the United States with Jake during the six week Christmas break, taking into account [Christa's] right to Christmas Eve and Christmas Day visitation with Jake in Australia and travel time to and from the United States.

Beginning in 2009, [Christa] shall bring the minor child to the United States to begin visitation. Unless [Christa] intends to travel to Arkansas with the minor child, visitation exchange shall be in Los Angeles, California, or any other U.S. city designated at the child's site of entry into the U.S. It shall be the responsibility of [David] to return Jake to Melbourne, Australia to the care and custody of [Christa]. If [David] should elect to remain in Australia to visit with Jake, [David] shall be entitled to reasonable visitation with the minor child.

> [David] shall be entitled to telephone contact or internet contact via webcam with Jake twice a week, on the holidays of Easter, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day, and Jake's birthday. [David] shall contact Jake at 8:30 p.m. Australian time pursuant to the time zone at Jake's home or location. [Christa] shall notify [David] if Jake will not be available at 8:30 p.m. on any of the aforesaid days and arrange a different day and/or time to contact Jake. Within forty-five (45) days of the date of her return to Australia, [Christa] shall establish an internet account and purchase a webcam so as to be able to receive internet contact by webcam from [David].

On appeal, David argues that the trial court erred (1) in awarding Christa custody of Jake; (2) in allowing Christa to relocate to Australia; and (3) in allowing him only limited visitation with Jake. Christa cross-appeals, arguing that the trial court erred in failing to award her child support from the date David filed for divorce until the entry of the divorce decree and by deviating from the family support chart by decreasing David's child-support obligation. We affirm in part and dismiss in part on direct appeal, and we dismiss the cross-appeal.

Cases sounding in equity are reviewed *de novo*, and the appellate court will reverse a trial court's findings only if they were clearly erroneous or clearly against the preponderance of the evidence; a finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002). Due deference is given to the trial court's superior position to determine witness credibility and the weight to be given their testimony. *Id.* Great deference is given in child-custody cases to the trial court's findings, and the best interest of the child is the polestar in custody cases — all other considerations are secondary. *Id.*

Custody

David's first point of appeal is that the trial court erred in awarding custody of Jake to Christa. We are unable to reach the merits of this argument because of procedural deficiencies. In his notice of appeal, which was faxed to the courthouse and filed on June 23, 2006, and followed by the hard copy, which was filed on June 26, 2006, David specifically appeals only from the Supplemental Order and the Supplemental Decree to Establish Visitation

and Support, both entered on May 26, 2006. However, the award of Jake's custody to Christa was given in the divorce decree, filed of record on February 6, 2006.

Rule 3(e) of the Rules of Appellate Procedure – Civil provides, "A notice of appeal . . . shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from; and shall designate the contents of the record on appeal." In *Arkansas Department of Human Services v. Shipman*, 25 Ark. App. 247, 253, 756 S.W.2d 930, 933 (1988), this court held

> that a notice of appeal must be judged by what it recites and not what it was intended to recite. It must state the parties appealing and the order appealed from with specificity, and persons not named as parties to the notice and orders not mentioned in it are not properly before the appellate court.

Here, David made no mention in his notice of appeal of the divorce decree; because the notice of appeal does not designate the divorce decree, in which the trial court granted custody of Jake to Christa, as one of the orders appealed from, this court does not have jurisdiction to entertain David's argument pertaining to custody.

Relocation

David next argues that the trial court erred in allowing Christa to relocate to Australia with Jake. In support of this argument, he cites *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). *Hollandsworth* established a presumption in favor of relocation for custodial parents with primary custody, holding that the custodial parent no longer was required to prove a real advantage to them and the children in relocating, and that it was the noncustodial parent's burden to rebut the presumption to relocate. Our supreme court held that the polestar in making relocation decisions was the best interest of the child, and it set forth five matters to be considered in making a relocation decision:

> (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location where the custodial parent and children will relocate; (3) visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; and

> (5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.

353 Ark. at 485, 109 S.W.3d at 663-64.

In this case, Christa wanted to relocate because she was an Australian citizen and her only tie to Arkansas was David. She had a job in Australia, and she owned real and personal property in Australia. Christa wanted to return to Australia after her marriage failed. There was no testimony that the educational opportunities were deficient in Australia, and in fact, there was favorable testimony with regard to the health care. Jake was too young to express a preference as to where he lived; for that reason, the fifth factor had no bearing in this case. While it is true that David's extended family, especially his parents, would no longer be able to see Jake on a regular basis, a relationship with grandparents is not sufficient to rebut the presumption to relocate. *See Blivin v. Weber*, 354 Ark. 483, 126 S.W.3d 351 (2003). Christa's parents live several hours from her in Australia, so Jake would have some extended family near him. Applying the *Hollandsworth* factors, we hold that the trial court's decision to allow Christa to relocate to Australia with Jake was not clearly erroneous.

Visitation

David's last point of appeal is that the trial court erred in granting him limited visitation. We disagree. We believe that the trial court did the best it could in a very unfortunate situation. In this case, the parties do not merely live in different cities or different states, but rather they live on different continents. Although in his argument David classifies the visitation as "minimal to the point of being negligible," the visitation schedule, set forth above, allows David to have substantial periods of visitation with Jake, both in Australia and in Arkansas. David argues that the visitation schedule is not in Jake's best interest because it provides only limited contact between father and son. However, due to the circumstances of this case, a standard visitation schedule was not feasible and visitation logically was limited to several expanded blocks of time, in addition to telephone and computer visitation. This is not an ideal situation because the parties live on separate continents and the noncustodial parent will necessarily have less

frequent face-to-face visitation as a result of that fact. On these facts, we hold that the trial court's visitation schedule is not clearly erroneous.

Cross-appeal

Christa has filed a cross-appeal, arguing that the trial court erred in refusing to order David to pay child support retroactively from July 22, 2004, and in deviating in a downward manner from the amount of child support indicated in the Family Support Chart. The cross-appeal is untimely and is dismissed.

David's notice of appeal was first filed by fax on June 23, 2006, and the hard copy notice of appeal was filed three days later, on June 26, 2006, from two orders entered on May 26, 2006. Christa's notice of cross-appeal was not filed until August 28, 2006. Rule 4(a) of the Rules of Appellate Procedure – Civil provides that "a notice of cross-appeal shall be filed within ten (10) days after receipt of the notice of appeal, except that in no event shall a cross-appellant have less than thirty (30) days from the entry of the judgment, decree or order within which to file a notice of cross-appeal." In the June 26 notice of appeal, David's attorney certified that a copy of the notice of appeal was sent via facsimile and/or in the mail to Christa's attorney on June 23, 2006. In the notice of cross-appeal, Christa's attorney stated that notice of David's appeal was not obtained until August 17, 2006, and the notice of cross-appeal was filed on August 28.

In this case, other than Christa's attorney's statement, we have no proof with which to determine whether the cross-appeal was timely. Jurisdiction is a matter this court can raise on its own accord, and we simply cannot determine that we have jurisdiction to hear a cross-appeal based upon a bare assertion by an attorney. The notice of appeal was filed on June 23, 2006. Christa made no showing that she did not receive David's notice of appeal within ten days of filing her cross-appeal. Therefore, we have no proof before us that the notice of appeal was not received until August 17, and we dismiss the cross-appeal as untimely. *See Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001).

Affirmed in part and dismissed in part on direct appeal; cross-appeal dismissed.

HEFFLEY, J., agrees.

VAUGHT, J., concurs.

LARRY D. VAUGHT, Judge, concurring. Although I agree with the reasoning and results contained in the majority opinion, I write separately to bring attention to an often overlooked rule of appellate procedure. Rule 3(f) of the Arkansas Rules of Appellate Procedure – Civil requires that "[a] copy of the notice of appeal or cross-appeal *shall* be served by counsel for appellant or cross-appellant upon counsel for all other parties *by any form of mail which requires a signed receipt.*" (Emphasis added.) In this case, the litigants — both the appellant and cross-appellant — failed to serve their notices by signed-receipt mail as required by our rules. While their non-compliance does not impact the validity of the appeal, it does complicate our determination of jurisdiction to hear the cross-appeal.

Here, had the notice of appeal been served by signed-receipt mail, we would know definitively when appellee received her copy of the notice. We would then apply Rule 4(a) of the Rules of Appellate Procedure – Civil and require that the notice of cross-appeal be filed within "ten (10) days after receipt of the notice of appeal." Without compliance with Rule 3(f), it is extremely difficult to engage in a jurisdictional determination that is dependent on the "receipt" of a notice. As such, we encourage the bar to take note of this rule, and we use the complications surrounding the cross-appeal in this case as evidence of the rule's utility.

TEXARKANA SCHOOL DISTRICT *v.*
Ronnie R. CONNER

CA 06-1211 264 S.W.3d 579

Court of Appeals of Arkansas
Opinion delivered October 3, 2007

[Rehearing denied October 31, 2007.*]

* GRIFFEN and VAUGHT, JJ., would grant rehearing.

Betty J. Hardy, for appellant.

Moore & Giles, LLP, by: *Gregory R. Giles*, for appellee.

D.P. MARSHALL JR., Judge. A gate fell on Ronnie Conner, a custodian for the Texarkana School District, and broke his leg in two places. He sought medical and temporary total disability benefits. The Administrative Law Judge found that Conner failed to prove by a preponderance of the evidence that he sustained a compensable injury because, at the time of his injury, he was not providing employment services to the District. The Workers' Compensation Commission reversed the ALJ's decision, and the District appeals.

I.

Conner has worked as a custodian for the District for more than twenty-five years. His primary duties at Texarkana High School included emptying trash cans, cleaning bathrooms, and cleaning the cafeteria. As part of his work, Conner carried a walkie-talkie and keys to all the locks at the school, including the locks on the gates outside the school.

Conner generally worked from 7:00 a.m. to 4:00 p.m. and took a lunch break from 11:30 a.m. to 12:30 p.m. He was not required to stay on campus during his lunch hour. But if he did, Conner generally ate lunch in the cafeteria and was "on-call" to clean up any spills or messes that occurred. His lunch break was unpaid time.

On the day of his injury, Conner left the school at the beginning of his lunch hour to go to the bank. When he returned to the school about fifteen minutes later, a truck was blocking the main entrance to the lot in which he normally parked. The school had other parking areas, but Conner preferred to park in that particular lot because it was close to his work area. This lot has two entrances: the main entrance, where a guard shack is located, and a back entrance closed by a locked, iron gate. After seeing that the front entrance was blocked by the truck, Conner drove to the back entrance and unlocked the gate. When the gate opened, it fell on

Conner, breaking his leg in two places. Conner could not work for more than seven months as a result of his serious injury.

II.

The District contested Conner's request for workers' compensation benefits, asserting that he was not performing employment services at the time of his injury. The ALJ agreed and found Conner's injury not compensable. The ALJ found that Conner was not advancing his employer's interest because: (1) no one else was attempting to enter or leave the parking lot when he opened the gate; and (2) his employer would probably rather have had the back gate closed for security reasons, given that a guard shack was located only at the front gate. The ALJ also found that Conner was outside the time and space boundaries of his employment when he was injured and that, in the many years that Conner had worked for the District, he had never been asked to unlock this gate — that was the guard's job.

The Commission reversed the ALJ's decision. It concluded that, at the time of his injury, Conner had returned to his employer's premises and was providing a service to his employer by allowing access to the parking lot. The Commission also concluded that Conner was "on-call" because he was on the school grounds, carrying his walkie-talkie, and subject to being required to do work for the District even though he was on his lunch break.

III.

This case turns on whether Conner was performing employment services when he was injured during a break. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences therefrom in the light most favorable to the Commission's findings, and we affirm if substantial evidence supports the decision. *Arkansas Methodist Hospital v. Hampton*, 90 Ark. App. 288, 293, 205 S.W.3d 848, 852 (2005). Substantial evidence exists if reasonable minds could reach the same conclusion as the Commission. *Ibid.* Because substantial evidence does not support the Commission's decision, we reverse.

A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed . . . ." Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 2005). An employee is performing employment services when he or she is doing something generally required by his or her employer. *Ark. Methodist Hosp.*, 90 Ark. App.

at 294, 205 S.W.3d at 853. Conner was performing employment services if his injury occurred within the time and space boundaries of the employment when he was carrying out the District's purposes or advancing its interests directly or indirectly. *Collins v. Excel Specialty Products*, 347 Ark. 811, 817, 69 S.W.3d 14, 18 (2002).

Under our prior law, Conner's injury would have been compensable under the premises exception to the going-and-coming rule. Under that exception, although an employee was injured before he reached the place where he worked, the injury was sustained in the course of his employment if he was on the employer's premises. *Wentworth v. Sparks Regional Medical Center*, 49 Ark. App. 10, 13, 894 S.W.2d 956, 957 (1995). We have made clear, however, that Act 796 of 1993 eliminated the premises exception to the going-and-coming rule. *Hightower v. Newark Public School System*, 57 Ark. App. 159, 164, 943 S.W.2d 608, 610 (1997). We therefore turn to the precedents dealing specifically with employees injured during breaks.

Our cases seem to point in different directions. On one hand, we and the supreme court have held injuries compensable when the employee is required to stay on his or her employer's premises and perform duties, if the need arises, during the break. *E.g.*, *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999); *Wallace v. West Fraser South*, 365 Ark. 68, 225 S.W.3d 361 (2006). In these cases, the employee's presence and availability advanced the employer's interest. On the other hand, we have held injuries not compensable when the employer receives no benefit from the activity being performed during the break or when the activity is not inherently necessary for the performance of the employee's job, even though his or her presence or action benefits the employer. *E.g.*, *McKinney v. Trane Co.*, 84 Ark. App. 424, 429, 143 S.W.3d 581, 585 (2004); *Smith v. City of Fort Smith*, 84 Ark. App. 430, 435, 143 S.W.3d 593, 596-97 (2004). We must explore these precedents in some detail to decide where Conner's case fits.

The Commission found this case similar to *Ray v. University of Arkansas*. There, this court held that a cafeteria worker was performing employment services when she slipped in the cafeteria during a fifteen-minute break. Ray was required to remain on her employer's premises during breaks, was paid for her breaks, and was required to assist students during her breaks if the need arose. 66 Ark. App. at 180-82, 990 S.W.2d at 560-62. Thus Ray's employer gleaned benefits from her being present in the cafeteria and available to help students during her breaks. *Ibid.* Here the

Commission found that, like in *Ray*, Conner "at the time of his injury, had returned to the employer's premises and was, once again, on-call and subject to being required to carry out all of his employment duties."

An injury suffered by an employee while on a break is compensable if the employer has imposed some duty or requirement to be fulfilled by the employee during the break. *E.g.*, *Moncus v. Billingsley Logging and American Ins. Co.*, 366 Ark. 383, 390, 235 S.W.3d 877, 883 (2006). In *Moncus*, although the employee was not engaged in the activity for which he was primarily employed when he was fatally injured, he was carrying out the express directions of his employer by following the employer to a job site to begin working. *Ibid.* Similarly, in *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002), Sands suffered a compensable injury when she was returning her purse to her locker on her way back from a scheduled break. For security reasons, Wal-Mart required employees to place their belongings in their locker before returning to work. 80 Ark. App. at 55, 91 S.W.3d at 95. Finally, in *Wallace v. West Fraser South*, our supreme court held that an employee suffered a compensable injury when he fell while walking over a board — a board placed by his employer across a ditch for employees to use as a bridge — when returning from a break. 365 Ark. at 70-75, 225 S.W.3d at 364-68. Wallace was advancing his employer's interest during the break because he remained on the clock, was not allowed to leave the premises, and could be called back to work. *Wallace*, 365 Ark. at 75, 225 S.W.3d at 367-68.

Further, our supreme court recently drew a bright-line rule for "residential employees." *Economy Inn & Suites v. Jivan*, 370 Ark. 414, 260 S.W.3d 281 (2007). In *Economy Inn*, a hotel manager who lived on the premises and was "on-call" twenty-four hours a day suffered a compensable injury while she was changing clothes in her bathroom to go to the gym. In so ruling, the supreme court employed an increased-risk analysis and held that "[Jivan's] presence on the premises during the fire exposed her to a greater degree of risk than someone who did not live on the premises. . . . Thus, [she] indirectly advanced her employer's interests, even while remaining on the premises during the fire." *Ibid.* (Conner's case has remained under submission for so long because of the need for *en banc* consideration and because we hoped the supreme court's decision in *Economy Inn* would consider and reconcile all the cases in point. It did not.)

In contrast, an injury suffered by a non-residential employee is not compensable where the employee is performing an activity merely for the purpose of attending to his personal needs. In *Cook v. ABF Freight Systems, Inc.*, 88 Ark. App. 86, 194 S.W.3d 794 (2004), a truck driver who was "off the clock" but "on-call" in a motel room provided by his employer was injured while turning on the lights in the bathroom. We held that he was not performing employment services because there was no evidence that his going into the bathroom was for any reason other than to attend to his own personal needs. 88 Ark. App. at 90-91, 194 S.W.3d at 797.

The activity being performed at the time of the injury must also be inherently necessary for the performance of the employee's job. For example, in *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004), we affirmed the Commission's denial of benefits for an injury that occurred within normal working hours, on the employer's premises, and while he was advancing the employer's interest because the activity was not inherently necessary for Smith's job. He worked as a truck driver for Fort Smith at the city dump. The city allowed employees to remove debris from the dump for their own personal use, which, in turn benefitted the city. Smith was injured removing gravel for his own use. We rejected compensability because loading gravel for one's own use was not inherently necessary for the performance of Smith's job as a dump-truck driver. 84 Ark. App. at 435, 143 S.W.3d at 596-97.

Finally, the employer must get some benefit from the activity being performed at the time of the injury. *McKinney v. Trane Co.*, 84 Ark. App. 424, 429, 143 S.W.3d 581, 585 (2004). McKinney was injured when he jumped over some tube-sheet buckets to get a soda on his way to a smoke break. Though McKinney argued that he was obligated to take care of anything askew that he might observe during his break, this court concluded that he was involved in nothing generally required by his employer and was doing nothing to carry out the employer's purpose. Thus the employer gleaned no benefit from his activities on break and the injury was not compensable. 84 Ark. App. at 429, 143 S.W.3d at 585.

IV.

We must now determine where Conner's injury fits within our cases and whether substantial evidence supports the Commission's finding of compensability. The District argues that Conner's activity at the time he was injured was similar to the personal

activities that were being performed in *McKinney* and *Smith*. Conner contends, however, that his situation more closely resembles the facts in *Ray* and *Wallace* because he was "on-call," on the District's premises, and advancing the District's interest at the time of his injury.

First, we believe the Commission's reliance on *Ray* was misplaced. Unlike Ray, Conner was required to be available during his lunch break only if he decided to stay on the school campus. He was not required to stay on campus during breaks. The District did not pay Conner for time on his lunch break. And when this accident happened, he was returning from a personal errand. Unlike in *Wallace* — where the employer placed a board over a ditch for employees to use while crossing it — Conner was injured while opening a gate that the District kept locked. He had never unlocked this gate for the District, was not asked by the District to do so on the day of his accident, and this task was not part of his job. Unlike in *Sands*, Conner's employer did not require him to park in that particular lot or use this gate. Unlike in *Moncus*, Conner was not required to do anything during his lunch break unless he chose to stay on the school grounds. And unlike the employee in *Economy Inn*, Conner was not a residential employee.

Though it is a close question, Conner probably was within the time and space boundaries of his employment when he was injured. He had returned to the District's premises and was headed to the cafeteria to eat lunch. Conner was "on-call," though not being paid for this break time. We must therefore consider whether what Conner was doing at the time of the injury was inherently necessary for Conner's performance of his job as a District custodian. It was not. In his then twenty-six years as a custodian, Conner had never before opened that gate. That task was someone else's job. Conner conceded that he did not have to open the gate to return to work on the day of his injury; there were other places to park at the school. No District employee asked Conner to open the gate.

We hold that *Smith*, *McKinney*, and *Cook* govern this case. Like in *Smith*, the activity that Conner was performing when he was injured was not inherently necessary to perform his job. Like in *McKinney*, Conner was involved in nothing required by his employer and was doing nothing to carry out his employer's purpose or benefit his employer. Like in *Cook*, he was attending to a personal need — parking in a convenient location of his choice.

Therefore, because Conner was not performing employment services for the District at the time of the accident, substantial evidence does not support the Commission's decision to award benefits.

Reversed.

PITTMAN, C.J., BIRD, and HEFFLEY, JJ., agree.

GRIFFEN and VAUGHT, JJ., dissent.

LARRY D. VAUGHT, Judge, dissenting. The workers' compensation laws were created to provide fast, reliable, and predictable coverage for injured employees. The laws also provide protection for employers from the almost unlimited liability of the tort system. In this case, the Texarkana School District elected to waive this protection and deny coverage to a twenty-five-year employee because he chose to park in a lot more convenient to his work area. Reversing the ALJ's denial of benefits, the Commission crafted a well-reasoned opinion that relies on precedents from both our court and the supreme court. However, I believe that under our stringent standard of review, we are compelled to affirm. Therefore, I dissent.

The majority opinion ably surveys and summarizes the case law applicable to the issue of what constitutes performance of employment services in relation to an on-the-job injury. If a litigant, attorney, or the Workers' Compensation Commission is looking for a bright line to answer the question, the majority opinion shows that, if nothing else is settled, certainly we can say there is no bright line. However, what we do know for sure is that the question of whether the employee is performing employment services at the time of injury is a question of fact, and on questions of fact we defer to the Commission to determine the credibility of witnesses. *Williams v. L&W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004). Our case law also clearly instructs an appellate court to affirm if, taking the evidence in the light most favorable to the Commission's decision, there is substantial evidence to support it. *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003). If we disagree with the factual determinations of the Commission, or if the evidence would support a contrary finding, we still must affirm if reasonable minds could reach the Commission's conclusion. *Linton v. Ark. Dep't of Corr.*, 87 Ark. App. 263, 190 S.W.3d 275 (2004).

With this in mind, I note that we affirm the Commission with great regularity on issues that we likely would have decided

the opposite way if we had been the fact finders. I also note that until very recently our court has never reversed a Commission decision finding that an employee *was* performing employment services at the time of his injury. The exceptions are *Economy Inns & Suites v. Jivan*, 97 Ark. App. 115, 253 S.W.3d 4 (2007), which was reversed by the supreme court in *Jivan v. Economy Inns & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007), and this case.

Here, the school district argues, and the majority holds, that *Cook v. ABF Freight Systems, Inc.*, 88 Ark. App. 86, 194 S.W.3d 794 (2004); *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004); and *McKinney v. Trane Co.*, 84 Ark. App. 424, 143 S.W.3d 581 (2004), govern the decision in this case. In each of these cases our court affirmed the Commission's ultimate *denial* of benefits based on a factual finding that the claimant had not been performing employment services at the time of his injury. I agree that if the Commission had analyzed this case under these precedents and applied the facts of this case to those precedents, it might have reached a conclusion that I could have voted to affirm. However, there is no bright line, and the appellate courts of Arkansas have supplied ample authority for the Commission to have broad discretion in its interpretation. As such, we must affirm if the Commission relies on that authority and renders a cogent decision based on the evidence.

The Commission relied on and analyzed the facts in the instant case using both *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999) (affirming Commission's finding of employment services), and *Wallace v. West Fraser South*, 90 Ark. App. 38, 203 S.W.3d 646 (2005) (reversing Commission's finding of no employment services).[1] The Commission properly cited *Ray*, because Conner was "on call" at the time of his injury; the Commission properly cited *Wallace*, because Conner was returning to work after a break. These are both factual determinations that are supported in the evidence; *Ray* and *Wallace* therefore are both reliable appellate authority.

As easily as the majority attempted to distinguish *Ray* and *Wallace*, so can I distinguish *Smith*, *McKinney*, and *Cook*. In *Smith*, the employee was hauling debris from his employer's dump for his own use. Certainly Conner was not doing anything for his own use

[1] Our decision was affirmed by the supreme court in *Wallace v. West Fraser South*, 365 Ark. 68, 225 S.W.3d 361 (2006).

here; he was returning to work after a break. In *McKinney*, the employee was injured on his way to get a soda during his smoke break. Conner was finishing his break and returning to work. Finally, in *Cook* the employee, a truck driver, was in a motel room, after work hours, going to the bathroom; a factual scenario that has no relevance to this case at all.

How the majority decision in this case instructs the bar and the Workers' Compensation Commission is also of note. It surveys the case law on this issue and concludes that there are several cases with similar facts and conflicting conclusions. It encourages one to choose wisely and to anticipate (and apply) the precedent that the appellate court will apply. Until our precedent is consistent and coherent, I am satisfied to let the Commission do the picking and choosing and to affirm when the evidence supports its decision.

I am authorized to state that Judge Griffen joins in this dissent.

Timothy BAYSINGER *v.* Kendall BIGGERS

CA 07-99 265 S.W.3d 144

Court of Appeals of Arkansas
Opinion delivered October 10, 2007

Patterson Law Firm, P.A., by: *Jerry D. Patterson,* for appellant.

Cooper & Bayless, P.A., by: *Mark F. Cooper,* for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellee filed this lawsuit alleging that he had an easement by prescription over a road on land owned by appellant and requesting an injunction to require appellant to widen a gate that he had constructed so as to permit easy access by large pickup trucks. After a hearing, the trial court granted a temporary injunction requiring the gate to be widened until a final decision. After briefs were submitted, the trial judge rendered a decision based on the evidence taken at the temporary injunction hearing and found that appellee had established an easement by prescription. On appeal, appellant contends that the trial court erred in so finding. We agree, and we reverse.

Our standard of review in equity cases is well settled:

> We review chancery cases de novo on the record, and we will not reverse a finding of fact by the chancery court unless it is clearly erroneous. *McWhorter v. McWhorter*, 351 Ark. 622, 97 S.W.3d 408 (2003); *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999). In reviewing a chancery court's findings, we give due deference to that court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* Disputed facts and determinations of witness credibility are within the province of the fact-finder. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Owners Assoc. of Foxcroft Woods v. Foxglen*, 346 Ark. 354, 57 S.W.3d 187 (2001); *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). It is this court's duty to reverse if its own review of the record is in marked disagreement with the chancery court's findings. *Dopp v. Sugarloaf Mining Co.*, 288 Ark. 18, 702 S.W.2d 393 (1986) (citing *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); *Walt Bennett Ford v. Pulaski County Special School District*, 274 Ark. 208, 624 S.W.2d 426 (1981)).

Carson v. Drew County, 354 Ark. 621, 624-25, 128 S.W.3d 423, 425 (2003).

Use of property may ripen into an easement by prescription, even if the initial usage began permissively, if it is shown that the usage continued openly for the statutory period after the landowner knew that it was being used adversely, or under such circumstances that it would be presumed that the landowner knew it was adverse to his own interest. *Manitowoc Remanufacturing, Inc. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991); *Fields v. Ginger*, 54 Ark. App. 216, 925 S.W.2d 794 (1996). The determination of whether the use of a roadway is adverse or permissive is a question of fact. *Stone v. Halliburton*, 244 Ark. 392, 425 S.W.2d 325 (1968).

Here, the evidence established that appellee had continuously used the roadway for a period in excess of seven years. However, there was no evidence, other than length of use, to establish that appellant knew or should have known that the use was hostile. The only evidence at trial was that appellee began using the road to access his property in 1961 and that there had been no objection. One other nearby landowner, Mr. Tuttle, testified that he had used the road since 1970. Significantly, even appellee did not testify that his use was adverse, hostile, or under a

claim of right: the testimony at the emergency hearing was exclusively directed to the extent of the use rather than the nature of it. Appellee's attorney himself stated at the beginning of the hearing that, when a full trial was held, appellee could prove that there were conditions putting appellant on notice that the initially permissive use had ripened into an adverse use. But no further proceedings were held, and no additional evidence was taken.

Time alone will not suffice to transform permissive use into legal title. *McGill v. Miller*, 172 Ark. 390, 288 S.W. 932 (1926). There must be some circumstance in addition to length of use to show that the use was adverse, and it was appellee's burden to show that such circumstances existed. Several cases have found evidence of use by the general public to constitute such a circumstance. In *McGill*, this was found on the basis of the nature of the alleyway, which was marked by "the fences and a barn along the south side, which constituted an invitation to the public to use it as an alley." *Id.* at 393-94, 288 S.W. at 934. Here, the way in question was over forested lands and was described as an old timber road. Easements were found to exist on such a road in *Kimmer v. Nelson*, 218 Ark. 332, 236 S.W.2d 427 (1951), and in *Fullenwider v. Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954). In *Kimmer*, however, there was evidence that the roadway had been in general public use to such an extent to support an inference that "those who utilized the way believed they had a right to do so, and their actions were open, notorious, and adverse." 218 Ark. at 335, 236 S.W.2d at 428. Likewise, in *Fullenwider*, there was extensive evidence of use by the general public based on the testimony of a half-dozen witnesses who testified as to their own use of the road and that of the general public dating back to the days of travel by wagon and buggy. There is nothing in the record before us to support a finding of generalized public use for a long period of time or any "other circumstance" in addition to length of use that would satisfy appellee's burden of showing that the use was adverse. Consequently, we reverse and remand for further consistent proceedings.

Reversed and remanded.

GLADWIN and ROBBINS, JJ., agree.

Candelario M. SIERRA *v.* GRIFFIN GIN,
AG-Comp SIF Claims

CA 07-152 265 S.W.3d 129

Court of Appeals of Arkansas
Opinion delivered October 10, 2007

[Rehearing denied November 7, 2007.]

The Law Firm of White & White, PLC, by: *J. Mark White*, for appellant.

Betty J. Hardy, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, the employee claimant, contends that the Arkansas Workers' Compensation Commission erred in its calculation of his average weekly wage as the basis for compensation. Additionally, appellant, who appeared pro se before the administrative law judge (ALJ), asserts that because the parties never raised the issue of attorney's fees, the Commission should have vacated rather than reversed the ALJ's award of attorney's fees for appellant. We reverse and remand on the first point and affirm the latter.

This claim was heard on the stipulated facts that an employer-employee-carrier relationship existed on October 3,

2005, when appellant sustained compensable injuries in a fall at work. Further, the parties stipulated that appellant's job with the cotton gin was "seasonal employment" and that at the time of his injury, appellant was earning $1020 per week for nine weeks of work.

The statute governing calculation of weekly wages as a basis for compensation provides in part that "[c]ompensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment." Ark. Code Ann. § 11-9-518(a)(1) (Repl. 2002). The statute, however, provides further that "[i]f, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned." Ark. Code Ann. § 11-9-518(c).

In determining appellant's average weekly wage, the ALJ awarded a weekly compensation rate in the amount of $466. The ALJ arrived at this amount by multiplying appellant's stipulated weekly wage of $1020, which the ALJ determined was appellant's average weekly wage, by 66 2/3%, for a total of $680, and awarded a weekly compensation rate of $466 — the maximum payable for injuries occurring in 2005. *See* Ark. Code Ann. § 11-9-501(b) (Repl. 2002); Ark. Code Ann. § 11-9-519(a) (Repl. 2002).

Applying Ark. Code Ann. § 11-9-518(c), the Commission reversed the ALJ, holding that "this claim represents an 'exceptional circumstance,' that does not fall squarely within the confines of prior case law" because appellant "was under contract to work for nine weeks, versus an unlimited number of weeks throughout the year depending on the weather or other factors, or pursuant to a yearly, renewable contract." The Commission concluded that it would be "unjust and unfair" to award a rate of $466, because appellant was not a regular employee but was instead a seasonal employee contracted to work for nine weeks. In arriving at his weekly compensation rate, the Commission stated that appellant was contracted to earn $9180 over a nine-week period, which averaged $1020 per week. The Commission divided the $9180 by fifty-two weeks, which equaled $176.54 per week. This amount was multiplied by 66 2/3% for a weekly compensation rate of $118 per week.

The Commission observed that if it awarded a rate of $466 per week, as the ALJ did, then over fifty-two weeks, appellant would receive $24,232, an amount that the Commission stated "far exceeds what the claimant was contracted to earn while working for the respondent employer," while a weekly rate of $118, over a year, "fairly represents" 66 2/3% of appellant's contracted wages. Further, the Commission wrote that "it can be logically assumed that the claimant was employed elsewhere throughout the year," and found persuasive appellees' "argument that it would be inappropriate to find that the claimant earned an average weekly wage of $1,020.00 year round, as this could require consideration of other income the claimant earned at other jobs he might hold throughout the year," and that "would place an unfair burden on [appellees] to pay compensation based on his yearly combined income, rather than on the wages he earned at the job at which he was injured."

We reverse and remand the Commission's decision. Here, there were no "exceptional circumstances" requiring application of Ark. Code Ann. § 11-9-518(c). While the Commission urged that appellant would earn more in fifty-two weeks than his contracted amount, this is merely speculative. There is simply no evidence in the record regarding appellant's past or prospective annual earnings with this — or any other — employer. *See Chapel Gardens Nursery v. Lovelady*, 47 Ark. App. 114, 885 S.W.2d 915 (1994) (stating that while the employer contended that payment of benefits would exceed her annual income, the limited amount of time employee had been employed made any projection of her expected income necessarily speculative). Furthermore, at least in the absence of other evidence regarding his yearly wages, spreading a seasonal wage over a whole year for the purpose of determining the employee's weekly wage would be tantamount to legislating policy against seasonal employment. *See Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984). Consequently, this case is not one amenable to treatment under subsection (c) of the statute.

As noted above, it was stipulated that appellant was earning $1020 a week. Applying Ark. Code Ann. § 11-9-518(a)(1), this amount was appellant's average weekly wage under the contract of hire in force at the time of the accident. The case of *Magnet Cove School District v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003), provides guidance. In *Magnet Cove*, a teacher was

under a contract of hire for thirty-nine weeks. Considering the application of Ark. Code Ann. § 11-9-518(a)(1), we affirmed the Commission's decision to divide the teacher's contract salary of $26,500 by thirty-nine, and not fifty-two weeks, as sought by the employer. Similarly, dividing appellant's total wages, $9180, by the term of the contract, nine weeks, results in an average weekly wage of $1020. Accordingly, the Commission's decision is reversed and remanded.

In his second point on appeal, appellant notes that the ALJ ordered appellees to pay "their proportionate share of attorney's fees." In its opinion, the Commission noted that appellant was not represented by counsel. The Commission concluded that the ALJ erred in directing appellees to pay attorney's fees, and ordered that "this award should be and hereby is reversed."

Appellant argues that because the parties never raised the issue of attorney's fees before the ALJ, the Commission should have vacated rather than reversed the award. He asserts that "[b]y reversing rather than vacating the [ALJ's] award of attorney's fees, the Commission has prejudiced [appellant] by potentially denying him an award of attorney's fees for this appeal should he raise and litigate the issue of attorney's fees at a later date." We, however, conclude that the premise of appellant's argument is not well founded. The Commission's reversing of the award of attorney's fees prescribed by Ark. Code Ann. § 11-9-715(a) (Repl. 2002), rather than vacating the award, has no bearing on whether appellant is entitled to attorney's fees on appeal, which is governed by Ark. Code Ann. § 11-9-715(b). Moreover, an argument for appellant's entitlement to attorney fees in the future is simply not before us, and appellant has presented neither convincing argument nor authority indicating that he may be precluded from receiving attorney's fees at some future date.

Reversed and remanded in part; affirmed in part.

PITTMAN, C.J., and ROBBINS, GLOVER, BAKER, and MILLER, JJ., agree.

Ronnie HOUSELY and Thereisa Housely *v.* Danna HENSLEY, Executrix of the Estate of Mabel Housely, Deceased

CA 07-111 265 S.W.3d 136

Court of Appeals of Arkansas
Opinion delivered October 10, 2007

Jerry D. Patterson, for appellants.

Morgan Law Firm, P.A., by: *M. Edward Morgan*, for appellee.

ROBERT J. GLADWIN, Judge. Appellants Ronnie and Thereisa Housley bring this appeal challenging the judgment in favor of appellee Danna Hensley, Executrix of the Estate of Mabel Housley, in the total amount of $120,798.30. The lawsuit stems from appellants' default on a promissory note and security agreement previously executed in favor of Mrs. Mabel Housley. On appeal, appellants challenge the circuit court's findings of fact as clearly erroneous and claim that the award was in excess of what appellee was entitled. We affirm.

Appellant Ronnie Housley (Ronnie) was a relative of Mrs. Mabel Housley's husband, Robert. Ronnie assisted the Housleys on their farm, and after Mr. Housley died in 1992, he continued to assist Mrs. Housley on the property, as well as taking her to doctors' appointments, providing other transportation, and generally doing things for her around the house and farm. Sometime after her husband's death, Mrs. Housley decided to sell all of the cattle and farm equipment she owned to Ronnie for $112,700. He paid $6,000 down, leaving a balance owing of $106,700. On January 20, 1993, appellants executed a promissory note payable to the order of Mrs. Housley in the sum of $106,700, due in nine annual installments of $6,000, plus accrued interest at five percent, beginning on January 30, 1994. The note also contained a provi-

sion that stated the entire principal balance and all accrued interest became due and payable in one balloon payment on January 30, 2004.

There is a dispute regarding the installment payments, specifically whether they were tendered in a timely manner, as alleged by appellants, but either refused in whole or in part by Mrs. Housley; however, the parties agree that the following amounts were actually paid and received against the indebtedness:

Principal Payment	Interest	Principal Payment
07/28/1994	$5,300	$5,000
05/01/1995	$5,000	$5,000
12/23/1996	$4,000	$-0-
07/08/1997	$-0-	$5,000
12/05/1998	$5,000	$-0-
01/30/1999	$-0-	$-0-
01/30/2000	$4,750	$5,000
01/30/2001	$-0-	$-0-
01/30/2002	$-0-	$-0-
01/30/2003	$-0-	$-0-
01/30/2004	$-0-	$-0-

Ronnie contends that he provided a number of services to Mrs. Housley that she accepted in lieu of payment of the amounts due under the note and that, at her direction, monies were reinvested in the farm in lieu of making payment of legal tender to her.

Appellee filed a complaint against appellants on January 3, 2006. Appellants responded that all amounts that were due and payable before January 3, 2001, were not recoverable as they are barred by the applicable five-year statute of limitations. The circuit court determined that the statute of limitations did not begin to run until January 30, 2004, the date upon which the balloon payment became due and payable, and awarded a total of $120,798.30 to appellee. The letter judgment was entered on September 25, 2006, and appellants requested the circuit court issue written findings of fact and conclusions of law. On November 1, 2006, the circuit court issued those findings and conclusions, and appellants filed a petition for relief from judgment on the same day. The circuit court never ruled on the petition, and appellants

filed a notice of appeal of the judgment on November 27, 2006, contending that the most that could have possibly been awarded to appellee is $58,700, an amount consisting of the three installments of $6,000 that became due and owing on January 30, 2001, 2002, and 2003, plus their interpretation of the final balloon payment of $40,700 that became due and owing on January 30, 2004.

The standard of review for bench trials is whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Smith v. Eisen*, 97 Ark. App. 130, 245 S.W.3d 160 (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hodge v. Hodge*, 97 Ark. App. 217, 245 S.W.3d 695 (2006). We give special deference to the superior position of the trial judge to evaluate the credibility of witnesses and their testimony; however, we give no deference to the trial judge's conclusions on questions of law. *Id.*

We note initially that several of appellants' arguments are not properly preserved because appellants stipulated prior to trial that the only defense they were trying the case on was accord and satisfaction. This occurred at a hearing on appellee's motion for summary judgment regarding an alleged cancellation of the debt, which was granted. Although appellants point to references to their other affirmative defenses, such as forgiveness of the obligations, payment or release, statute of limitations, and accord and satisfaction that were addressed by the circuit court in its findings of fact and conclusions of law issued at appellants' request, appellee argues that the appellants were required to raise before the circuit court the *precise* defenses and arguments to be relied upon on appeal to ensure that there is an opportunity for them to be fully developed. *See Lee v. Hot Springs Vill. Golf Schs.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997). We agree. A party may not wait until the outcome of a case to assert a legal argument, *see Foundation Telecomm., Inc. v. MoeStudio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000), nor can he change the grounds for an objection on appeal and is bound by the scope and nature of the objections presented at trial. *Id.*

I. Tender of Payments

Arkansas Code Annotated § 4-3-603 (Repl. 2001) deals with tenders of payment as follows:

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an endorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

Appellants cite *First State Bank of DeQueen v. Gamble*, 14 Ark. App. 53, 685 S.W.2d 173 (1985), for the premise that because of the wrongful refusal of tender, they were discharged from further interest accruing on the note, at least as to those installment payments that had been tendered. They assert, without providing specific examples, that there was ample evidence of Ronnie having tendered the payments to Mrs. Housley at various times, which she refused during her lifetime. They contend that for each of the installments he tendered, the accrual of the interest stopped upon the tender and only the principal amount could still be due and owing.

As to the alleged tender of the remainder of the payments, there was no testimony as to exactly what amounts were tendered or when. Given the inconsistencies of the actual payments that were paid and received, which appellants do not dispute, we will not assume that all of the full payments were actually tendered in a timely fashion. Even had this argument been properly preserved, we hold that appellants have failed to meet their burden on this particular defense.

II. Tender & Payment

Appellants discuss various definitions and meanings for the term "payment" and state that, in a restricted sense, it is (1) the

discharge of an obligation in whole or in part; (2) by the actual or constructive delivery; (3) of money *or its equivalent*, such as property or *services*; (4) by the obligor or someone for him; (5) to the obligee; (6) for the purpose of extinguishing the obligation in whole or in part; (7) its acceptance as such by the obligee. (Emphasis added by appellants.) 60 Am. Jur.2d *Payment*, § 1 at 611. They point out that payment is largely a question of intention between the obligor and the obligee. The question of whether the transfer of money, or something else, is to operate as payment is ordinarily determinable by the intention of the parties to the transaction and the substance of the transaction itself. Appellants state that the only essential difference between a tender and a payment is that a tender is not accepted and a payment is.

Appellee points out that the only evidence of the tender of payments and provision of services in lieu of payment was Ronnie's testimony; his wife Thereisa was never called as a witness to verify that testimony. There is, however, documentary evidence that conflicts with the testimony, including the note itself. The note was discovered intact after Mrs. Housley's death with no indication that the terms had been forgiven or satisfied without payment. Multiple witnesses, including appellee, who was Mrs. Housley's tax advisor, testified that Mrs. Housley had never stated that the terms of the obligation had been satisfied. There was testimony that she always referred to the obligation as outstanding, and that she told individuals that Ronnie owed her the money and would pay it even after she was gone.

Appellee also points out that the agreement for the sale of cattle and farm equipment, to be performed over a ten-year period, falls under the statute of frauds, and accordingly, any modification to the original terms would have to be in writing. *See* Ark. Code Ann. § 4-59-101(a)(6) (Repl. 2001). Any agreement such as alleged by the appellants to substitute services for money owed is a material modification. In order to be effective, the modification would have had to be in writing. It is undisputed that appellants have produced no such writing, and therefore, have failed to meet their burden of proof.

Additionally, appellee asserts that whether there was a partial payment on the amount owing is dependent upon whether such an agreement existed between appellants and Mrs. Housley, and that is a question of fact completely within the province of the finder of fact. *See Taylor v. Hinkle*, 360 Ark. 121, 200 S.W.3d 387

(2004). Again, there is no evidence before us, other than Ronnie's self-serving testimony, that supports appellants' defenses of tender and/or payment. There was sufficient evidence before the circuit court that conflicted with appellants' account to satisfy this court that the circuit court's ruling was not clearly erroneous.

III. Accord & Satisfaction

An accord and satisfaction is a settlement in which one party agrees to pay and the other to receive different consideration or a sum less than the amount to which the latter believes he is entitled. *Glover v. Woodhaven Homes, Inc.*, 346 Ark. 397, 57 S.W.3d 211 (2001). Accord and satisfaction is an affirmative defense, and the party asserting it must prove the following elements: (1) proper subject matter; (2) competent parties; (3) an assent or meeting of the minds; (4) consideration. *Id.* Appellants allege that Ronnie provided a number of personal services to Mrs. Housley and that she accepted such as payment of the amounts due under the note. They further contend that, at her direction, monies were reinvested into the farm in lieu of making payment in legal tender to her, as required by the note and security agreement. Ronnie points out that appellee admitted that Mrs. Housley told her how much she appreciated the things Ronnie did for her. He maintains that the only testimony that disputes this defense was that Mrs. Housley never specifically told appellee that she had forgiven cash payments or accepted services in lieu of the cash.

In *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000), this court discussed accord and satisfaction and stated that there must be a disputed amount involved and a consent to accept less than the amount in settlement of the whole before acceptance of the lesser amount can be an accord and satisfaction. *See also Hardison v. Jackson*, 45 Ark. App. 49, 871 S.W.2d 410 (1994); *Mademoiselle Fashions, Inc. v. Buccaneer Sportswear, Inc.*, 11 Ark. App. 158, 668 S.W.2d 45 (1984). The validity of an accord and satisfaction is dependent upon the same basic factors and principles that govern contracts generally, *Inge, supra*, and the burden of proving the agreement is simply the burden of proving a contract: offer, acceptance, and consideration. *Id.* The defense of accord and satisfaction presents an issue of fact, and appellants had the burden of proving accord and satisfaction. They failed to do so.

We agree with appellee that the trial court correctly applied the rule of law regarding accord and satisfaction, and that appellants simply failed to meet their burden of proof with respect

to this issue. Appellants have simply failed to show any objective evidence that Mrs. Housley ever agreed to accept either (1) less money for full payment of the indebtedness evidenced by the promissory note, or (2) other services performed by Ronnie, or monies reinvested in the farm in lieu of the payments called for in the note. There was no testimony as to the amount or frequency of services performed or the value of such services. Similar questions exist regarding the alleged improvements made to the farm. There was no objective indicator of agreement that any smaller sum was to operate as a full satisfaction of the debt as set out in *Fort Smith Service Finance Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990). Likewise, appellants failed to present evidence of any consideration for such an agreement. There is simply no evidence of tender of payment, forgiveness of debt, or accord and satisfaction through his "provision of services."

IV. Statute of Limitations

Arkansas Code Annotated § 4-3-118 (Repl. 2001) deals with the applicable statute of limitations for negotiable instruments and states that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within five (5) years after the due date or dates stated in the note or, if a due date is accelerated, within five (5) years after the accelerated due date." Additionally, Arkansas Code Annotated § 16-56-111(a) (Repl. 2005) states that actions to enforce written obligations, duties, or rights shall be commenced within five years after the cause of action shall accrue. Appellants cite *Karnes v. Marrow*, 315 Ark. 37, 864 S.W.2d 848 (1993), and *Riley v. Riley*, 61 Ark. App. 74, 964 S.W.2d 400 (1998), regarding appellate court rulings stating that when a debt is payable in installments, the statute of limitations runs against each installment from the time it becomes due. Appellants point out that it is undisputed that the complaint in this case was filed on January 3, 2006, so the "look-back period" would go back to January 3, 2001, five years earlier. They maintain that any amounts that were due and payable before that time are not recoverable because they are barred by the statute of limitations. Rather than looking to the installments that had previously become due and payable, the circuit court looked to the term of the note that provided for a balloon payment on January 30, 2004, of "the entire principal balance and all accrued interest." Appellants argue that the fact that there was a balloon payment at the end

of the note does not preclude the application of the statute of limitations to those installments that had become due and payable prior to January 3, 2001.

Appellee initially notes that this defense has been waived; however, she clarifies what she deems a fundamental inaccuracy in appellants' argument with respect to this issue. Appellants claim that the circuit court did not correctly apply the law in regard to the statute of limitations claim with respect to the installment payments, but appellee says this creates a false impression that the circuit court actually ruled on this defense. She explains that the circuit court did not rule on the claim because it was not raised by motion prior to the trial on the merits, and in fact, appellants stipulated just prior to trial that the only defense they were relying upon was accord and satisfaction. She asserts that the issue was waived and cannot be resurrected on appeal at this late juncture.

Even if we were to consider the argument, there is no merit to the defense under these facts. Appellee acknowledges that, under Ark. Code Ann. § 16-56-111, the statute of limitations on a promissory note to be paid in installments runs against each installment from the time it becomes due. *See Karnes, supra.* However, she urges us to look at the terms of the agreement to determine when the payment "becomes due." The complaint was filed on January 3, 2006, and clearly she was able to recoup payments going back on installments for five years, or January 3, 2001, but *Karnes* and *Riley* can be distinguished from the instant case due to the provision that states "[t]he entire principal balance and all accrued interest shall be due and payable in one balloon payment on 30th day of January, 2004." We agree with the circuit court's interpretation of the provision to mean that the final payment, due on January 30, 2004, was to be a balloon payment of any unpaid balance on the note. Accordingly, the term "principal balance" would include everything that remained unpaid on the date the last balloon payment came due; therefore, the damage claim includes everything that remains unpaid throughout the course of the note. We hold that the circuit court's finding that the claim is not barred by the statute of limitations was proper.

There is evidence that Mrs. Housley was a meticulous record keeper and very careful with money; also, Ronnie possessed experience in the field of banking. The parties evidenced the indebtedness with a promissory note and security agreement, with advice from legal counsel, yet there is no indication that there

was any type of writing attempting to release appellants from the obligations evidenced by those documents. There is no indication, beyond Ronnie's testimony, that Mrs. Housley simply forgave the obligation, and he was never named a beneficiary of her estate. There is neither evidence of the alleged tender of payments beyond Ronnie's testimony nor other witnesses to those conversations between Ronnie and Mrs. Housley. Ronnie admitted that he helped Mrs. Housley because she was a ninety-year-old lady who needed help and that there was no agreement that he was providing the services as repayment of the debt. Although he contends he was the only relative Mrs. Housley could trust, she chose another relative, her nephew Ted Moore, to write checks from her personal account the last ten months of her life. We hold that the circuit court's findings were not clearly erroneous or clearly against the preponderance of the evidence. Accordingly, we affirm.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.

OFFICE of CHILD SUPPORT ENFORCEMENT *v.* Amanda BURROUGHS

CA 07-116 265 S.W.3d 132

Court of Appeals of Arkansas
Opinion delivered October 10, 2007

G. Keith Griffith, Office of Child Support Enforcement, for appellant.

Streett Law Firm, by *Alex G. Streett*; *Susan Walker Allen Law Firm, P.A.*, by: *Susan Walker Allen*, for appellee.

JOHN B. ROBBINS, Judge. Appellee Amanda Burroughs and Larry Kendall have two children out of wedlock: James, d/o/b 5-10-97 and Hannah, d/o/b 7-6-98. Until 2003, Mrs. Burroughs had custody of both children and Mr. Kendall was paying court-ordered child support. On October 20, 2003, an agreed order was entered that provided for joint custody, with Mr. Kendall having primary physical custody and Mrs. Burroughs having liberal and reasonable visitation. The agreed order awarded no child support. On March 10, 2006, appellant Office of Child Support Enforcement (OCSE) filed a motion to set child support against Mrs. Burroughs. In her response to the motion, Mrs. Burroughs asserted, "The motion for support should be denied in that the current status is joint custody with limitations on the [appellee's] time with the children. The [appellee] would never have agreed to joint custody and giving up child support had she in turn been ordered to pay child support." After a hearing, the trial court entered an order denying OCSE's motion for child support on the basis that OCSE failed to show a material change of circumstances sufficient to modify the prior agreed order that provided no child support. OCSE now appeals from that order, arguing that the trial court clearly erred in failing to find a material change in circumstances. We agree, and we reverse and remand.

The only witness to testify at the hearing was Mr. Kendall. There was also some discussion between the parties' attorneys and the trial court, wherein it was established that Mrs. Burroughs had remarried in June 2005 and is currently employed at Hardee's earning $213 per week. Mrs. Burroughs' counsel represented at the hearing that the October 20, 2003, agreed order was technically not an order of joint custody because Mr. Kendall was awarded primary physical custody. However, Mrs. Burroughs'

counsel contended that no child support should be awarded because there had been no material change in circumstances since the prior order.

Mr. Kendall testified:

> I am the father of Hannah and James. They are in my custody. In the order when I agreed to the joint custody arrangement and no support, it was because Amanda was going to be moving to Texas and would be without a job. And because she had been unstable at that point in time. I am asking for support because since that time she has married, got a steady job and I'm receiving no help and the kids are getting more expensive as far as buying clothes for and taking care of.
>
> . . . .
>
> Amanda never did move to Texas. I wasn't going to ask for support while she was in Texas because I figured with her driving back and forth, it would just help out on gas to hopefully be able to see the kids on every other weekend. She is now employed at Hardee's, West Main. As far as I know, she hasn't left there. She was employed there when we went into the agreed order of custody which gave me primary physical custody of James and Hannah. That was the one in which I said no child support. She was working at Hardee's at that time.

OCSE's argument on appeal is that the trial court erred in failing to award child support because there has been a material change in circumstances since the October 2003 agreed order was entered. Specifically, OCSE points to Mr. Kendall's testimony where he stated that the agreed order was based on Mrs. Burroughs' anticipated move to Texas, where she would be unemployed and forced to incur travel expenses to exercise visitation. Because these events did not occur and Mrs. Burroughs has remarried and remained gainfully employed in Arkansas, OCSE maintains there has been a material change in circumstances and child support should be awarded pursuant to the chart. OCSE cites *McKinney v. McKinney*, 94 Ark. App. 100, 226 S.W.3d 37 (2006), for the proposition that when support is based on an expectation of circumstances, and the expected circumstances change, there can be a material change of circumstances. In that case we affirmed a reduction in child support where, although the father was unemployed and receiving no income both at the time of divorce and

when he petitioned for a reduction, at the time of divorce he had been approved for monthly unemployment benefits of $1000 per month, and those benefits subsequently began to be received but expired prior to the filing of his petition.

Arkansas Code Annotated section 9-14-107(c) (Supp. 2005) provides:

> (c) An inconsistency between the existent child support award and the amount of child support that results from application of the family support chart shall constitute a material change of circumstances sufficient to petition the court for modification of child support according to the family support chart after appropriate deductions unless:
>
> (1) The inconsistency does not meet a reasonable quantitative standard established by the State of Arkansas in accordance with subsection (a) of this section; or
>
> (2) The inconsistency is due to the fact that the amount of the current child support award resulted from a rebuttal of the guideline amount and there has not been a change of circumstances that resulted in the rebuttal of the guideline amount.

Subsection (a) of the statute provides:

> A change in gross income of the payor in an amount equal to or more than twenty percent (20%) or more than one hundred dollars ($100) per month shall constitute a material change in circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support chart after appropriate deductions.

OCSE asserts that the October 2003 agreed order that provided no support was the result of a rebuttal of the guideline under subsection (c)(2) above. However, because there has been a material change since then (*i.e.* appellee's failure to relocate to Texas), and this anticipated circumstance was the reason the chart amount was initially rebutted, OCSE contends that child support should now be awarded against Mrs. Burroughs.

It is axiomatic that a material change in circumstances must be shown before a trial court can modify an order for child support, and a trial court's finding in this regard is subject to a

clearly erroneous standard of review. *See Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005). We hold that the trial court clearly erred in denying OCSE's petition for child support on the basis that there had been no material change in circumstances.

In the October 2003 order that provided for no child support, there were no specific written findings that the chart amount was inappropriate as is required by law. *See Akins v. Mofield*, 355 Ark. 215, 132 S.W.3d 760 (2003). Because Mrs. Burroughs was employed at that time, child support of zero was clearly a deviation from the chart, and neither party appealed from that order. More than two years later, Mr. Kendall testified that he agreed to no child support at that time because he thought Mrs. Burroughs would be moving to Texas and would be without a job.

There was a statutory change of circumstances in this case under section 9-14-107(c) because when applying the chart to appellee's income the result is obviously something greater than zero. Mr. Kendall could not forever waive his children's right to child support, and there is no legal basis why Mrs. Burroughs should not now be ordered to pay support for her children, who are in Mr. Kendall's primary custody. From the October 2003 order, it is not clear why there was a deviation from the chart amount. Perhaps it was due to Mrs. Burroughs' anticipated move to Texas. But whatever the case, Mrs. Burroughs did not move to Texas and there appears to be no existing justification for deviating from the chart and continuing to allow Mrs. Burroughs to avoid supporting her children. Neither of the two exceptions set forth in section 9-14-107(c) are applicable to this case. Because there has been a material change in circumstances and the trial court clearly erred in finding otherwise, we reverse and remand for the trial court to set an appropriate amount of child support.

Reversed and remanded.

GLADWIN, GRIFFEN, GLOVER, and VAUGHT, JJ., agree.

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. In this case, the trial court was presented with only two facts to consider in determining whether to modify the 2003 order: first, that Ms. Burroughs was working at Hardee's when the 2003 order was entered and was still working there making the same amount of money at the time of the hearing on OSCE's motion to modify; and second, that

Mr. Kendall testified that, at the time the 2003 order was entered, he expected Ms. Burroughs to move to Texas. Based on this testimony the majority concludes that there was a material change in circumstances and that the trial court erred in finding otherwise, and it reverses and remands the case for the trial court to set an appropriate amount of child support. In so holding, the majority shows no deference to the trial court. *See Tucker v. OCSE*, 368 Ark. 481, 247 S.W.3d 485 (2007) (stating that in child-support cases, we give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony; and in a child-support determination, the amount of child support lies within the sound discretion of the trial court, and the lower court's findings will not be reversed absent an abuse of discretion).

In support of its holding, the majority restates OCSE's interpretation of the holding in *McKinney v. McKinney*, 94 Ark. App. 100, 226 S.W.3d 37 (2006), *implying* that *McKinney* held that when a party's expectations are not met a material change in circumstances has occurred. That was not the holding in *McKinney*. The court in *McKinney* held that it was not clearly erroneous for the trial court to consider the change in anticipated income as a factor in determining whether a material change in circumstances had occurred. It is clear from the record in this case that the trial judge did consider the fact that Mr. Kendall thought Ms. Burroughs was planning to move to Texas, and determined that this fact was not sufficient to establish a change in circumstances allowing modification of the 2003 order.

In reversing the trial court, the majority opinion addresses OCSE's argument from their appellate brief that the 2003 order was a deviation from the amount that would have been presumed correct from the proper application of Administrative Order No. 10. This argument was not made to the trial court. The majority opinion also addresses OCSE's argument that the October 2003 order that provided no support was the result of a rebuttal of the guidelines under Ark. Code Ann. § 9-14-107. Neither was this argument made to the trial court. Because OCSE did not raise or contend before the trial court either of these arguments, the majority opinion improperly addresses the issues. *See McKinney*, 94 Ark. App. at 107, 226 S.W.3d at 42 n.3 (stating that we occasionally discern issues in appeals that might have merit but were either not preserved for review by raising it before the trial court or by not arguing the matter on appeal, or both; yet, we would violate basic appellate jurisprudence if we began raising and addressing the

merits of unappealed issues). Even under our *de novo* standard of review, we examine the record to determine whether the trial court had the opportunity to consider a particular argument and erred in addressing the issue presented. *See Thompson v. Fischer*, 364 Ark. 380, 220 S.W.3d 622 (2005) (where nothing appears in the record reflecting that a particular argument was formulated before the trial court, or that any ruling was given, the appellant has waived review of that issue).

Even had OCSE argued below that the 2003 order was an unsupported deviation from the child-support chart, the 2003 order was not appealed. The majority's decision effectively allows OSCE to challenge an order entered almost four years earlier and to do so without making the argument to the trial court.

Accordingly, I dissent.

Hugh Owen WINN et al. *v.* WINN ENTERPRISES, LIMITED PARTNERSHIP, et al.

CA 06-1375 265 S.W.3d 125

Court of Appeals of Arkansas
Opinion delivered October 10, 2007

Burbank Dodson & Barker, PLLC, by: *Don B. Dodson*, for appellants.

Harrell, Lindsey & Carr, P.A., by: *Paul E. Lindsey*, for appellees.

DAVID M. GLOVER, Judge. This appeal involves a dispute over the valuation of a family limited partnership when some of the members of the partnership withdrew. The circuit court

determined the partnership's value and then applied discounts for lack of marketability and for being a minority interest to the withdrawing partners' proportionate interests to arrive at the amount due the withdrawing partners. The partnership assets include 880 acres of timberland in Union County, together with oil and gas royalty interests and cash on hand. The withdrawing partners appeal, challenging the application of the discounts. The partnership and the remaining partners cross-appeal, arguing that the circuit court should have adopted the lower asset valuation suggested by one of the partnership's expert witnesses. We reverse on direct appeal and affirm on cross-appeal.

Appellants Hugh Winn, Nancy Winn, Bonnie Winn, Frank Winn, Jean Roland, and the Joan W. Culver Revocable Trust and appellees Lawrence Lyle, James Winn, Debbie Snyder, Mary Winn, Darrell Winn, Donald Winn, Deanne Prellwitz, and the Illa F. Winn 1999 Trust are the members of appellee Winn Enterprises Limited Partnership (the partnership). Lyle serves as the general partner, and the rest are limited partners. Hugh Winn, Nancy Winn, Bonnie Winn, and Frank Winn each have a 5.392857143% interest in the partnership, while Roland and the Joan Culver Revocable Trust each have a 3.595238095% interest. The partnership's timberland was originally acquired by James Russell Winn in 1848 by a federal land grant. The partnership was formed in 1984 for the express purpose of keeping the land in the Winn family. The original members of the partnership at the time of its formation were the sole owners of the 880 acres.

The partnership agreement provides that a partner may withdraw upon six months' notice to the partnership and the other partners. Upon withdrawal, the withdrawing partner "shall be entitled" to receive the "fair value" of that partner's interest in the partnership as of the date of withdrawal. The partnership agreement was amended in October 2002 to provide that the partnership shall have a "right of first refusal" if a partner desires to sell his or her interest to someone outside the family.

On December 13, 2004, appellants filed their complaint seeking payment of the "fair value" of their interests. In the alternative, appellants sought judicial liquidation of the partnership. Appellees denied the material allegations of the complaint and noted that the 880 acres are ancestral land.

The matter was tried to the bench in January 2006. Jeff Neill, a certified general real-estate appraiser and a registered

forester, testified for appellants and valued the timber at $1,900,000. He said that he adjusted his appraisal to account for a timber sale that occurred after he completed his fieldwork for the appraisal. He added on redirect that a discount was not part of the scope of his work because he was determining the value of the entire tract. Peter Emig, a certified appraiser, testified that the partnership's royalty interest was worth $29,000 as of May 3, 2004.[1] He was not asked to apply a discount, nor did he think one was appropriate.

Hugh Winn testified that the withdrawing partners disagreed with the management of the partnership because they (the withdrawing members) wanted to convert the partnership to a limited liability company. He valued his interest as being $105,644.95, based on his proportionate interest of the values established by Neill and Emig. He said that he valued the interests of the Culver Trust and Jean Roland at $70,430.56 each. On cross-examination, he said that a discount was not appropriate because he was not attempting to sell his interest to a third party. He also observed that appellees' interest will increase once appellants withdraw.

Lawrence Lyle, the general partner of the limited partnership, had no objection to Emig's valuation of the royalty interest at $29,000. He gave an opinion that a discount was customary and appropriate. On cross-examination, Lyle acknowledged that his interest in the partnership would be enlarged with appellants' withdrawal. The testimony of Donald Robinson, another member of the partnership, was to the same effect.

Mike Nolan, a forester and a certified appraiser, testified on behalf of the partnership. He valued the land and timber at $1,498,000, excluding the April 2004 timber sale. On cross-examination, he admitted that he did not apply a discount to his valuation in the present case because it was not part of his assignment. He also said that his appraisal did not comply with state appraisal guidelines.

Appellees also presented the testimony of their valuation expert, Ted Duncan, a certified public accountant. He said that he had reviewed the appraisals of Neill, Emig, and Nolan, as well as other financial documents and records as part of his valuation

[1] He also proffered an updated report showing the value of the royalty interest to be $59,000 as of the date of trial.

process. Duncan used Emig's valuation of the royalty interest and Nolan's appraisal of the timber interest, together with cash on hand to arrive at a valuation of $1,633,859 for the partnership's assets. He said it was common for discounts to be applied in valuing a minority interest in a limited partnership. Accordingly, Duncan applied a 30% discount for lack of control and a 15% discount for lack of marketability. His ultimate "fair market valuation" of the 5.392857143% interest was $52,231, while his fair market value of the 3.595238095% interest was $34,954. Although acknowledging that the partnership agreement called for the withdrawing partners to receive the "fair value" for their interests, it was Duncan's opinion that it was the same as the "fair market value" in this case. He also said that there could be circumstances where the term "fair value" could be interpreted differently, and he gave as an example the case of a dissenting shareholder. On cross-examination, he said that, if "fair value" and "fair market value" were interpreted differently, it would require different methods of valuation.

The circuit court issued a letter opinion in which it found Neill's testimony to be more credible and persuasive. The court adopted his valuation of the timber and land of $1,900,000 as part of the court's overall valuation of the partnership assets of $2,035,859. The circuit court then noted that it was persuaded by the testimony of Ted Duncan that the total should be discounted by 30% due to lack of control and by 15% for lack of marketability. This resulted in Hugh Winn, Nancy Winn, Bonnie Winn, and Frank Winn each having their interests valued at $60,445.44 while the interests of Jean Roland and the Jean W. Culver Revocable Trust were each valued at $40,256.69. A written order memorializing the court's decision was entered on May 26, 2006. This appeal and cross-appeal followed.

Appellants' sole point on appeal is that the circuit court erred by applying discounts for lack of control and for lack of marketability in determining the value of their interests in the partnership. We hold that the circuit court erred in applying the discounts.

Appellants primarily rely on our supreme court's decision in *General Securities Corp. v. Watson*, 251 Ark. 1066, 477 S.W.2d 461 (1972), a case involving dissenting shareholders objecting to a merger and seeking payment of the "fair value" for their shares under what is now Ark. Code Ann. § 4-26-1007 (Repl. 2001). There, the court recognized that there is no set standard or formula

to determine the "fair value" of stock and cited with approval a Maryland case holding that discounts were not appropriate in determining the "fair value" for a dissenting shareholder. *Id.* (citing *American Gen. Corp. v. Camp*, 171 Md. 629, 190 A. 225 (1937)).

Appellants also rely on the Eighth Circuit's decision in *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486 (8th Cir. 2001), another case involving dissenting corporate shareholders. There, the court reviewed decisions from Missouri, New Jersey, Delaware, Maine, South Dakota, Oregon, and Kansas wherein the courts rejected application of discounts. Based on the reasoning of those courts, the *Swope* court concluded:

> The marketability discount is incompatible with the purpose of the appraisal right, which provides dissenting shareholders with a forum for recapturing their complete investment in the corporation after they are unwillingly subjected to substantial corporate changes beyond their control. . . .
>
> . . . .
>
> We conclude that the market for minority stock in a dissenting shareholders' appraisal proceeding, absent extraordinary circumstances, is not a relevant fact or circumstance to consider when determining fair value.

Swope, 243 F.3d at 493-94.

Even though *Watson* and *Swope* both involved dissenting shareholders in corporations, they are instructive here because, contrary to Ted Duncan's testimony, a withdrawing partner under Ark. Code Ann. § 4-43-604 is in a position analogous to a corporation's dissenting shareholders. Sections 4-26-1007 and 4-43-604 both use the term "fair value" to describe what is to be paid to the dissenting shareholder or the withdrawing partner for his or her interest. In both instances, the individual (whether a dissenting shareholder or a withdrawing partner) is exercising a statutory right to withdraw from the entity and the entity is absorbing that interest. If discounts are applied, the entity obtains the withdrawing shareholder or partner's interest for less than that interest would be worth in the hands of the withdrawing shareholder or partner. Further, because the two situations are analogous and the General Assembly used the term "fair value" in both

statutes to specify the type of value the withdrawing partner or shareholder is to receive for his or her interest, we hold that the "fair value" provided for in section 4-43-604 does not include discounts for lack of control or lack of marketability. On similar facts, a Maryland court used the same analysis to conclude that discounts were not applicable in the determination of "fair value" under a statute identical to Ark. Code Ann. § 4-43-604. *East Park Ltd. P'ship v. Larkin*, 167 Md. App. 599, 893 A.2d 1219 (2006). The American Law Institute and various commentators are also in agreement that discounts should not be applied in determining the "fair value" of a dissenting shareholder's or withdrawing partner's interest.[2]

As noted above, Ark. Code Ann. §§ 4-26-1007 and 4-43-604 both provide for "fair value" not "fair market value." Neither statute defines the term "fair value." Ted Duncan testified that, in the circumstances of this case, they are the same. We disagree. *Black's Law Dictionary*, 1549 (7th ed. 1999) defines fair market value as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction[.]" On the other hand, "fair value" is determined by ascertaining all assets and liabilities of the business and the intrinsic value of its stock rather than merely appraising its market value. *See American Gen. Corp., supra.* In the case of dissenting shareholders or withdrawing partners, there is no sale on the open market; their situation is more akin to a forced sale. *East Park, supra.* The difference between "fair market value" and "fair value" also serves to distinguish the present case from the line of cases that determine the value of stock in a divorce because our divorce code, Ark. Code Ann. § 9-12-315, specifically requires the use of "fair market value" in the valuation of stock in a divorce. *See, e.g., Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003); *Crismon v. Crismon*, 72 Ark. App. 116, 34 S.W.3d 763 (2000).

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[2] *See* Am. Law Inst., *Principles of Corporate Governance: Analysis and Recommendations* § 7.22(a) (Standards for Determining Fair Value) & cmt. e (1994); Harry J. Haynsworth IV, *Valuation of Business Interests*, 33 Mercer L. Rev. 457, 459 (1982); Joseph W. Anthony & Karlyn V. Boraas, *Betrayed, Belittled . . . But Triumphant: Claims of Shareholders in Closely Held Corporations*, 22 Wm. Mitchell L. Rev. 1173, 1186 (1996); and Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 Duke L.J. 613, 636-37 (1998).

Because the circuit court erred in applying the discounts, we reverse and remand with directions that the circuit court determine the value of appellants' interests without application of discounts.

Appellees raise one point on cross-appeal and argue that the circuit court erred in adopting the valuation fixed by appellants' expert instead of the valuation suggested by their own expert. The strength or lack of strength of the evidence on which an expert's opinion is based goes to the weight and credibility, rather than to the admissibility, of the opinion in evidence. *Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990). Where the testimony shows a questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact-finder, rather than a question of law. *Id.* Here, Nolan admitted that his appraisal did not adhere to state standards for appraisals. The circuit court made a specific finding that Neill's appraisal was more credible, and we defer to that assessment.

Reversed and remanded on direct appeal; affirmed on cross-appeal.

VAUGHT and HEFFLEY, JJ., agree.

RYMOR BUILDERS, INC. *v.*
TANGLEWOOD PLUMBING COMPANY, INC.

CA 06-1430 265 S.W.3d 151

Court of Appeals of Arkansas
Opinion delivered October 10, 2007

[Rehearing denied November 14, 2007.]

Frances Morris Finley, for appellant.

Matthews, Sanders & Sayes, by: *Doralee I. Chandler* and *Gail O. Matthews*, for appellee.

D.P. MARSHALL JR., Judge. This contract case asks two important procedural questions: in a bench trial, how should a circuit court evaluate a defendant's motion for dismissal after the plaintiff rests? And when must an appellant make its arguments on appeal for the appellate court to decide those arguments on the merits? Here, the circuit court erred by evaluating the witnesses' credibility prematurely. But the appellant waived this error because it failed to argue the point until its reply brief.

I.

Rymor Builders, Inc. and Tanglewood Plumbing Co. made three contracts about the plumbing work on three houses. All went well on the first stage of each project. And Rymor paid Tanglewood the agreed 70% of each contract price for this rough-in work. Things fell apart, however, when it came time for Tanglewood to trim-out these jobs — finish them by installing all the fixtures. According to Rymor, Tanglewood dragged its feet on doing the work. According to Tanglewood, Rymor refused to sign the necessary change orders about the fixtures to be installed. Rymor eventually hired other plumbers to trim-out the plumbing in the three houses and then sued Tanglewood, alleging breach of the parties' contracts.

At the bench trial, Rymor called Tanglewood's owner (Troy Wilkins) as its first witness. At the conclusion of Rymor's examination of Wilkins, Tanglewood's lawyer said, "I'll just go ahead and put on my case-in-chief, your Honor, since you've heard that part of it[,]" and examined Wilkins further. Then Rymor's two principals testified. All of the material documents about these transactions seem to have been admitted into evidence

during the testimony of these three witnesses. It was a classic swearing match: Rymor's witnesses denied refusing to sign any requested change orders and blamed all the problems on Tanglewood; Tanglewood's owner, however, said that Rymor had unreasonable scheduling expectations and ignored every single request to confirm a change order in writing, contrary to the parties' contracts.

After Rymor rested, Tanglewood moved for a directed verdict. It argued that, because the change orders were never agreed upon, the parties had no contracts about the trim-out work. Rymor also moved for a directed verdict. Rymor contended that it had proved its case through the documents and testimony and was entitled, as a matter of law, to recover what Rymor had to pay other plumbers to finish these jobs. The circuit court recessed to consider the motions.

After returning to the bench, the circuit court granted Tanglewood's motion. The court said:

> All right. With respect to [Tanglewood's] motion, I'm going to grant it. There's really not an easy way to say this. I simply didn't find the testimony of the plaintiffs credible in this case.
>
> I think there's an absence of tying the damages that have been alleged to the proof; that just because they wrote checks, that that necessarily means that they're rational and reasonably related.
>
> But that's not the real problem, [counsel]. I didn't find their testimony credible. I just didn't find it credible. So motion for directed verdict is granted.
>
> All right. Thank you.

The circuit court eventually entered its judgment, which Tanglewood had written. The judgment recited that "the Court after hearing the evidence adduced by [Rymor] granted [Tanglewood's] Motion for a directed verdict." The day after the court filed its judgment, Rymor moved pursuant to Rule of Civil Procedure 52(b) for findings of fact and conclusions of law. The court obliged and entered findings and conclusions that same day. Rymor filed a timely notice of appeal.

II.

We begin with a note about terminology. The bench and bar often refer to a "directed verdict" during a non-jury case. This is a misnomer. Because no jury is in the box, no verdict will

be given. The proper motion to challenge the sufficiency of an opponent's evidence in a non-jury case is a motion to dismiss. Ark. R. Civ. P. 50(a).

But there is truth in this common misnomer because the circuit court must use the same legal standard in evaluating a motion to dismiss as it would in evaluating a motion for a directed verdict. The court must decide "whether, if it were a jury trial, the evidence would be sufficient to present to the jury." *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 264, 61 S.W.3d 835, 838 (2001). If the non-moving party has made a *prima facie* case on its claim or counter-claim, then the issue must be resolved by the finder of fact. *Swink v. Giffin*, 333 Ark. 400, 402, 970 S.W.2d 207, 208 (1998). In evaluating whether the evidence is substantial enough to make a question for the fact-finder, however, the circuit court may not assess the witnesses' credibility. *First United Bank v. Phase II*, 347 Ark. 879, 902, 69 S.W.3d 33, 49 (2002); *Swink*, 333 Ark. at 403, 970 S.W.2d at 209.

Here, the circuit court ruled for Tanglewood because it "simply didn't find the testimony of the plaintiffs credible in this case." This was not an off-hand comment; it was the theme of the circuit court's bench ruling, as well as its later findings of fact and conclusions of law. The court erred. The credibility of Rymor's witnesses was a matter for the court as the finder of fact, not a matter for the court in evaluating whether Rymor made a *prima facie* case on its breach-of-contract claim. *Swink, supra.* Rymor presented substantial evidence of a breach. Therefore, the circuit court should have called on Tanglewood to present any additional evidence in its defense, given Rymor the opportunity to offer rebuttal, and then resolved the disputed issues of fact by deciding the breach issue as the finder of fact.

We can see why the circuit court got ahead of itself. Tanglewood had put on most, and perhaps all, of its defense during Rymor's case. The record contains no indication that Tanglewood had any other witnesses to offer. All the documents were probably in evidence. And a bench trial is often a less formal proceeding than a jury trial. We cannot say, however, that everyone knew all the proof was in and the circuit court was really deciding this case as the fact-finder. The record is absolutely clear that this case was decided at the motion stage. Both parties sought a "directed verdict"; the court granted Tanglewood's motion; and the court's judgment confirmed that it ended the case as a matter of law by

granting Tanglewood's motion. This ruling was error under *First United Bank*, *Swink*, and a long line of our cases. We make this point not to criticize the able circuit judge, but to emphasize for the bench and bar the important rules governing motions to dismiss in bench trials.

III.

Rymor's choices on appeal, however, mean that there will be no new trial. Rymor's opening brief does not seek reversal based on the circuit court's premature assessment of the witnesses' credibility. Rymor states one point on appeal: "The ruling of the court is clearly against the preponderance of the evidence." Rymor's seventeen-page argument covers the testimony and documents in detail, contending that the weight of the evidence supports the conclusion that Tanglewood broke the parties' contracts. In a couple of places, Rymor notes that the circuit court rejected its claim because the court did not find Rymor's witnesses credible. At no point in its opening brief, however, does Rymor argue that the circuit court's assessment of the witnesses' credibility at the close of Rymor's case was a reversible error.

Rymor's reply brief tries to fill this gap. There, Rymor argues from *Swink* and like cases, stating that the circuit court erred by dismissing the case based on the credibility of Rymor's witnesses. Even at this point in the briefing, however, Rymor's main point is that the evidence — especially the documents — so favor its claim of breach that it was and is entitled to judgment as a matter of law.

Rymor has waived the circuit court's error. An argument made for the first time on reply comes too late. *Coleman v. Regions Bank*, 364 Ark. 59, 64, 216 S.W.3d 569, 573 (2005). "A litigant wanting to challenge the core of the [circuit] court's holding must do so in its opening brief and not hold its fire until after the appellee has filed its only brief." *Horn v. Transcon Lines, Inc.*, 7 F.3d 1305, 1308 (7th Cir. 1993).

Fairness, and our adversary system, dictate this principle of appellate procedure. Unless the appellant opens the briefing with all its arguments for reversal, the appellee has no opportunity to respond to those arguments in writing. The appellate court needs the benefit of the arguments on both sides of every issue to make a fully informed decision. Here, for example, we do not know what arguments Tanglewood might make in support of what looks

to us like an erroneous weighing of credibility too early in the case. Perhaps the error we see was harmless. Or perhaps the record contains alternative grounds to support the circuit court's actions. As this case was briefed, however, Tanglewood did not have the opportunity to make any argument on these issues. The appellant deserves and receives the last written word on appeal. But the reply brief is the place for rebuttal, not entirely new arguments for reversal.

IV.

We are left, then, with Rymor's strongly pressed argument that the circuit court's decision was clearly erroneous or clearly against the preponderance of the evidence. *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 320, 34 S.W.3d 360, 362 (2001). Rymor is mistaken. This record does not entitle it to judgment as a matter of law. Whether Rymor or Tanglewood made the first material breach of their contracts turns on whether one credits the testimony supporting the builder or the plumber. *Jocon, Inc. v. Hoover*, 61 Ark. App. 10, 15-16, 964 S.W.2d 213, 217 (1998). The evidence, documentary and oral, would adequately support a judgment for either party. In this situation, we cannot reverse the circuit court's judgment for Tanglewood. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Affirmed.

BAKER and MILLER, JJ., agree.

Bill BALDRIDGE *v.* Susan L. BALDRIDGE

CA 06-1453 265 S.W.3d 146

Court of Appeals of Arkansas
Opinion delivered October 10, 2007

Harvey Harris, for appellant.

Todd Turner, for appellee.

BRIAN S. MILLER, Judge. This appeal arises from a divorce decree entered by the Faulkner County Circuit Court

equally dividing, as marital property, twenty acres of land between appellant Bill Baldridge and appellee Susan Baldridge. We affirm.

It is undisputed that Susan and Bill Baldridge were married on May 5, 1989, and separated in December 2005. During their marriage, they lived in a mobile home that Bill had purchased before they were married. The mobile home was placed on approximately twenty acres in Faulkner County that was owned by Bill's father, William Baldridge. It is also undisputed that William executed a quitclaim deed on November 3, 2004, conveying the twenty acre tract to Bill and that this deed was recorded the same day.

In dispute is a quitclaim deed executed by William on March 8, 2002, conveying the same twenty acres to both Bill and Susan, as husband and wife. The March 8, 2002 deed was recorded on February 3, 2006. At trial, William testified that he gave the twenty acres to Bill and intended for Bill to own it. He also stated that he did not remember signing or ever seeing the March 8, 2002 deed.

Bill testified that he had never seen the March 8, 2002 deed and that he did not know where Susan got it. He stated that, in an effort to divest all of his property, William gave him the twenty acres and gave his sisters other, income-producing, real estate. Finally, he stated that Susan cared for his ill mother prior to her death.

Susan testified that Bill knew about the March 8, 2002 deed but that they did not file it because "Bill wanted to make sure his dad knew we weren't trying to take the farm away from him." She became aware of the March 8, 2002 conveyance during the time that William was divesting all of his property. She added that she provided care to William, in addition to caring for Bill's mother before her death.

The trial court held that the twenty acre tract was marital property because both deeds were executed during the course of the marriage. The court further held that, although there was a question raised as to the delivery of the March 8, 2002 deed there was insufficient evidence showing that it was not delivered. Therefore, the property was equally divided.

We view divorce cases de novo on the record and we will not reverse the trial court's finding of fact unless it is clearly erroneous. *Taylor v. Taylor*, 369 Ark. 31, 250 S.W.3d 232 (2007).

Id. We defer to the superior position of the circuit court to judge the credibility of the witnesses. *Id.* A trial court's decision will be upheld if the court reached the right result, even if it did not enunciate the right reason. *Crowder v. Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990).

On appeal, Bill first argues that there was insufficient evidence to conclude that the March 8, 2002 deed was delivered. Consequently, Bill argues, the court must give effect to the November 3, 2004 deed which gifted the twenty acres to him.

As a general rule, the requisites of a valid deed are that there be competent, identifiable parties and subject matter; a valid consideration; effective words expressing the fact of transfer or grant; and formal execution and delivery. *Harrison v. Loyd*, 87 Ark. App. 356, 192 S.W.3d 257 (2004). A deed is inoperative unless there is a valid delivery. *Wilson v. McDaniel*, 247 Ark. 1036, 1038, 449 S.W.2d 944, 946 (1970). Further, a presumption of a valid delivery attaches when a deed is recorded. *Corzine v. Forsythe*, 263 Ark. 161, 163, 563 S.W.2d 439, 440 (1978). This presumption, however, is not conclusively established when there is proof of other factors pertaining to the deed which may rebut the presumption. *Crowder, supra.* It has been consistently held that, in a proceeding to cancel a solemn deed, on the theory of non-delivery or otherwise, the quantum of proof required must rise above a preponderance of the testimony; it must be clear, cogent, and convincing. *Simmons v. Murphy*, 235 Ark. 519, 522, 360 S.W.2d 765, 766 (1962).

The trial court did not err in finding that the March 8, 2002 deed was delivered. It was presumed delivered because it was recorded, and Bill had the burden of rebutting the presumption of delivery. The trial court properly reviewed and weighed the evidence and then found that Bill failed to meet his burden. For these reasons, we affirm the trial court's finding that the March 8, 2002 deed was delivered. We also affirm its finding that the twenty acres was subject to equitable division because it was marital property.

Bill's second argument is that the twenty acre tract is not marital property because it was gifted to him pursuant to the November 3, 2004 deed. We do not address this argument because we affirm the trial court's ruling that the March 8, 2002 deed was delivered, thereby conveying ownership in the twenty acre tract to Bill and Susan.

Affirmed.

PITTMAN, C.J., and ROBBINS, GLOVER, and BAKER, JJ., agree.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. I respectfully submit that we should not have affirmed this case for two reasons. First, William Baldridge, as owner of the disputed property, was an indispensable party without whom complete relief could not be granted, and therefore the trial court's proceeding violated Rule 19 of the Arkansas Rules of Civil Procedure. Second, the majority has misapprehended our law regarding how the manifest intent of the grantor is an essential element for a valid conveyance of real estate.

Rule 19 of the Arkansas Rules of Civil Procedure provides in pertinent part:

> (a) Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party.

Here, Williams lives on the property and continues to exercise all rights of ownership. Accordingly, it is clear that "complete relief" cannot be afforded Bill and Susan, in that the parties will not be able to divide the farm without pursuing a quiet title or ejectment action. Moreover, as the majority notes in its citation of *Harrison v. Loyd*, 87 Ark. App. 356, 192 S.W.3d 257 (2004), one of the requisites of a valid deed is "competent" parties. This element was not tested in the proceedings below as William was not a party. Likewise, William's intention relative to executing the deed and whether there was undue influence exerted by parties were also not tested. These omissions would not exist if William had been made a party to this proceeding. I am concerned that through his testimony on behalf of his son, William, who may well have been under duress or undue influence, may have compromised his case when either Susan or Bill subse-

quently petition to take possession of William's property or when he petitions to set aside the deed or deeds.

I recognize that the Rule 19 issue was not raised by the parties, but I am aware that in at least three cases our supreme court has found that the trial court has failed to join an indispensable party, and it reversed and remanded the case to the trial court to join the omitted party. *See Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2005), *Yamauchi v. Sovran Bank/Central South*, 309 Ark. 532, 832 S.W.2d 241 (1992), and *Harrison v. Knott*, 219 Ark. 565, 243 S.W.2d 642 (1951). I would likewise reverse and remand this case to the trial court with instructions to join William as a party to this action.

Assuming that we should have proceeded despite the procedural defect that I have just discussed, I believe that we should reverse. I find merit in Bill's argument that the trial court erred in finding that there was not sufficient evidence to conclude that a deed purporting to transfer title of his father's farm to Bill and his ex-wife Susan L. Baldridge "had *not* been delivered." He concedes that presumption of delivery attaches when a deed is recorded; however, he asserts that the presumption may be rebutted by evidence that the grantor did not intend to give up dominion over the property.

In the first place, I question whether the presumption of delivery should apply to the 2002 deed. It was uncontraverted that the deed was not recorded for several years after its purported execution and was only filed by Susan when she was in the process of obtaining a divorce, and her estranged husband had already filed a deed making him the sole grantee. While I do not suggest that the mere passage of time is sufficient to overcome the presumption of delivery that attaches upon recording, our case law in a very similar situation has required more evidence than the mere fact that the deed was recorded. *See McCord v. Robinson*, 226 Ark. 350, 289 S.W.2d 893 (1956). Yet, in the instant case, no one, not Susan, not Bill, and least of all, William can shed any real light on the facts of the alleged delivery of the deed.

Even assuming that the presumption of delivery arose in this case, I find Bill's reliance on *Corzine v. Forsythe*, 263 Ark. 161, 563 S.W.2d 439 (1978), and *Crowder v. Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990), for the proposition that the presumption may be rebutted to be eminently sound. As Bill notes, William testified that he did not even remember the deed, that he intended for Bill

to have the property, and that William lived on the property as he had for *forty-seven* years. Furthermore, neither Bill nor Susan testified that the property tax was an expense that "they had incurred, or were currently incurring."

In *Parker v. Lamb*, 263 Ark. 681, 967 S.W.2d 99 (1978), the supreme court stated that "an essential element of a valid delivery is the grantor's intention to pass the title *immediately*." (Emphasis supplied.) In the instant case, I cannot find in any witness's testimony that William ever manifested such an intention. In fact, it is apparent from the testimony that William believed he had *not* relinquished his land, even though he acknowledged that he gave the 2004 deed to his son. Of course, it is axiomatic that we must defer to the superior position of the trial judge to determine the credibility of the witnesses. However, even if we assume that Susan was more credible than either Bill or William regarding the execution and delivery of the 2002 deed, the proof is clear and unambiguous that William did not relinquish the farm and that Bill and Susan did not make any effort to exercise dominion over the property. It is well-settled law that continued occupancy and use of the land in a manner that is inconsistent with the transfer stated in the provisions of the deed is sufficient to rebut the presumption of valid delivery. *Smith v. Van Dusen*, 235 Ark. 79, 357 S.W.2d 22 (1962); *see Burmeister v. Richman*, 78 Ark. App. 1, 76 S.W.3d 912 (2002).

Finally, unlike the majority, I would reach Bill's second argument, that he was entitled to the farm because it was non-marital property as contemplated by Arkansas Code Annotated section 9-12-315 (Repl. 1997). However, I would reject this argument for the same reasons that I found his first argument persuasive. I do not believe that William manifested the requisite present intent to transfer his property to his son. I would hold that the farm was not the property of either Bill or Susan.

Barbara J. PAMBIANCHI *v.* Robert HOWELL, et al.

CA 06-1239 265 S.W.3d 788

Court of Appeals of Arkansas
Opinion delivered October 24, 2007

Sara Sawyer Hartness, for appellant.

Laser Law Firm, P.A., by: *Alfred F. Angulo, Jr.*, and *Brian A. Brown*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. This is an appeal from the dismissal of a tort action on the grounds that it was barred by the statute of limitations. Appellant argues that the trial court erred in dismissing her claims *sua sponte* and in determining that the statute of limitations had expired. We affirm.

The appellant was injured in a multi-vehicle accident on June 9, 2000, that was caused by appellee Howell's negligent burning of field stubble, which created a great deal of smoke and obscured the roadway. Appellant was represented by counsel at all

times except for a three-day period after she discharged her second attorney and before she retained her third attorney in February 2002. During this three-day period, appellant settled her claim against Howell, executing a release and obtaining $46,763.88 from his insurance carrier, Southern Farm Bureau. More than a year after executing the release, appellant filed a tort claim against all the alleged tortfeasors except Howell. Although appellant had been represented by counsel for more than a year since executing the release, Howell was not sued along with the others, and appellant did not allege that the release she executed was invalid. The three-year limitation period for suit against Howell expired on June 9, 2003.

More than one year afterward, appellant filed suit against Howell for negligence, and against the insurers and their agents alleging that the release was procured by fraud because an agent obtained appellant's consent to the release when she was under the influence of medication, and because the agent "advised her of her legal right and expected recovery from other potential claimants in her claim." Appellees raised the statute of limitations as a defense. After requesting briefs, the trial judge ruled that the expiration of the statute of limitations mooted her claim of fraud and dismissed.

We do not agree that the trial court erred in dismissing appellant's claims in the absence of a formal motion to dismiss by appellees. Appellees raised the defense of statute of limitations, which would present an absolute bar to appellant's claims, and because the complaint, on its face, was filed outside the statute of limitations, the trial court at a pretrial hearing requested briefs on that issue. After considering the briefs, the trial court found that the claims were barred and dismissed them. This situation is factually indistinguishable from that presented in *Generation Products Co. v. Van Hoye*, 24 Ark. App. 81, 748 S.W.2d 353 (1988), where we held it was within the trial court's authority to dismiss a complaint on its own motion on the basis of affirmative defenses after his review of the pleadings and in-chambers statements of counsel showed that those defenses barred the complaint.

When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense, as was done in the present case; moreover, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of

limitations was in fact tolled. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003). Fraudulent concealment suspends the running of the statute of limitations, but the suspension remains in effect only until the party having the cause of action discovers the fraud or should have discovered it by the exercise of due diligence. *Id.*; *see Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (2000); *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999). In order to toll the statute of limitations, a plaintiff is required to present evidence creating a fact question related to some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. *Meadors v. Still*, 344 Ark. 307, 40 S.W.3d 294 (2001). Furthermore, if the plaintiff, by the exercise of reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it. *Curry v. Thornsberry, supra.*

Appellant argues that the release was fraudulently procured, thus tolling the statute of limitations. As noted above, the appellant's argument that the release was procured by fraud and was thus invalid was premised on the factual assertions that an agent of appellee insurers obtained appellant's consent to the release when she was under the influence of medication, and that this agent "advised her of her legal right and expected recovery from other potential claimants in her claim." Clearly, appellant failed to allege facts that would avoid the statute of limitations defense raised by appellee.

Even assuming appellant's factual allegations to be true, she could not justifiably have relied upon the agent's alleged misrepresentations to her detriment because, within three days of her execution of the release, she was again represented by counsel who were aware of the release at the time suit was filed, as evinced by their failure to sue Howell along with the other alleged tortfeasors. Appellant could have brought this suit against Howell within the time period allowed by the statute of limitations simply by arguing that the release instrument should be cancelled as fraudulently obtained, or by countering a defense of release with the counter-defense of invalidity by virtue of fraudulent inducement. It is only concealed fraud that suspends the running of the statute of limitations, and the suspension remains in effect only until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002).

Appellant, represented by counsel, should by reasonable diligence have discovered any of the assertedly fraudulent statements of law or likely outcomes within the period of more than one year that elapsed between appellant's execution of the release and the timely commencement of her action against the other tortfeasors.

Likewise, it is clear that no independent action for the tort of fraud or deceit against the insurers and agents would lie, even if filed within three years of the alleged fraudulent statements. The essential elements of deceit are: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; (5) damage suffered as a result of the reliance. *Aon Risk Services v. Mickles*, 96 Ark. App. 369, 242 S.W.3d 286 (2006). Even assuming that appellee's agent misrepresented the law to appellant, this would not constitute a false representation of a material fact:

> As a general rule, fraud cannot be predicated upon misrepresentations as to matters of law, nor upon opinions on questions of law based on facts known to both parties alike, nor upon representations as to what the law will not permit to be done, especially when the representations are made by the avowed agent of the adverse interest. Reasons given for this rule are that every one is presumed to know the law, both civil and criminal, and is bound to take notice of it, and hence has no right to rely on such representations or opinions, and will not be permitted to say that he was misled by them.

Adkins v. Hoskins, 176 Ark. 565, 575, 3 S.W.2d 322, 326 (1928) (citation omitted).

The only other fraudulent statements alleged to have been made by the agent consisted of apprising appellant of her "expected recovery from other potential claimants in her claim." However, appellant's "expected recovery" is a future event, and fraud cannot be predicated on a prediction of a future event:

> In the context of negotiating a contract, a misrepresentation sufficient to form the basis of a deceit action may be made by one prospective party to another and must relate to a past event, or a present circumstance, but not a future event. An assertion limited to a future event may be a promise that imposes liability for breach of contract or a mere prediction that does not, but it is not a misrepresentation of that event.

South County, Inc. v. First Western Loan Co., 315 Ark. 722, 727-28, 871 S.W.2d 325, 327 (1994).

Finally, as we stated in our discussion of fraud or concealment as a defense to formation of the release contract, appellant had more than ample time and opportunity after she should by reasonable diligence have discovered the asserted fraud to bring suit against Howell and to counter the defense of release with the present allegation that it had been fraudulently obtained. Consequently, appellant cannot show that she was damaged by that fraud, and false representations not resulting in injury are not actionable. *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002).

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Brian HUFFMAN and Brandy Huffman *v.*
LANDERS FORD NORTH, INC.

CA 07-157 265 S.W.3d 783

Court of Appeals of Arkansas
Opinion delivered October 24, 2007

Owings Law Firm, by: *Steven A. Owings* and *Tammy B. Gattis*, for appellants.

Watts, Donovan & Tilley, P.A., by: *David M. Donovan* and *Deborah S. Denton*, for appellee.

ROBERT J. GLADWIN, Judge. Appellants Brian Huffman and Brandy Huffman bring this appeal challenging the circuit court's granting a directed verdict on their claim for punitive damages in a conversion case, as well as the court's vesting title to the converted property in appellee Landers Ford North, Inc. Landers cross-appeals from the denial of a directed verdict on the Huffmans' conversion claim and on its counterclaim for breach of contract. We affirm on direct appeal and on cross-appeal.

On May 11, 2005, the Huffmans were interested in purchasing a new vehicle. They went to Landers's showroom to look at various vehicles and decided to test-drive a Ford Freestyle. After the test-drive and discussions with a Landers salesman, Brian Huffman signed a "Retail Buyer's Order Form" that contains the following provision labeled "Sales Conditions":

> In compliance with the Federal law pertaining to the truth in lending, I hereby authorize Landers to check my credit and employment history and submit application to any bank or finance company authorized to do business in Arkansas. *"Buyer's rights to possession of the vehicle described herein is contingent upon execution of a contract by Landers and Buyer and upon approval and acceptance of such contract by the providers of Buyer's financing."* APPLIES TO FINANCED PURCHASES ONLY!

(Emphasis in the original.) The "Retail Buyer's Order Form" also contained an integration clause, stating that it was the parties' entire agreement and superseded any prior agreement. Brandy Huffman also signed a power of attorney, authorizing Landers to sign any certificate of title or other supporting papers necessary to register or transfer title to their vehicle, a 1996 Taurus.

With Landers's approval, the Huffman's drove the Freestyle home and left their Taurus with Landers. The next day, Brandy Huffman was involved in an at-fault accident while driving the Freestyle. She reported the accident to Landers and was told by the general sales manager, John Roberts, that she had bought the Freestyle. Landers refused to return the Taurus to the Huffmans.

The Huffmans filed suit on May 25, 2005, alleging that the "Retail Buyer's Order Form" was not a binding contract and that Landers had converted their vehicle. They sought both compensatory and punitive damages. Landers answered, asserting that the "Retail Buyer's Order Form" was a binding contract and that the

Huffmans had signed all documentation necessary to transfer title of the Taurus to Landers. Landers also asserted a counterclaim for breach of contract, misrepresentation, and negligence.

The case was tried to a jury. The Huffmans had received pre-approved financing through their bank and were planning on using that source to finance their purchase. They asserted, however, that they did not inform Landers that they already had a check. According to the Huffmans, they were not prepared to purchase the vehicle that night because, among other things, they still had personal possessions in the Taurus and did not bring the title to the Taurus with them. When they did not get a chance to take a full test-drive because the Freestyle was almost out of fuel, salesman Vernon Allen had the Huffmans sign some paperwork so they could take the vehicle home overnight to determine if it met their needs. Included in this paperwork were the "Retail Buyer's Order Form" and the power of attorney. The Huffmans did not believe that they were entering into a contract to purchase the Freestyle because they had not yet determined if it met their needs. According to both of the Huffmans, this was a condition before they would agree to the purchase of the Freestyle.

The Huffmans testified that they made it clear to Allen that they were only interested in test-driving the Freestyle but that neither Allen, Landers's used-car sales manager Bobby Farrow, nor Landers's finance officer Patrick Elrod told them that Brian Huffman's signing the "Retail Buyer Order Form" meant that they had purchased the vehicle. The Huffmans also commented on the amount of paperwork they were signing for just an overnight test-drive. That night, after taking the Freestyle home, the Huffmans determined that the Freestyle would not meet their needs and that they did not like its layout. The next morning, Brandy Huffman called Landers to inform Landers that the vehicle did not meet their needs. While on her way to Landers's showroom, she was involved in the accident.

The day after the accident, the Huffmans went to Landers to obtain copies of the documents they had signed, and John Roberts again advised them that they had bought the Freestyle and needed to bring their bank draft to pay for the vehicle. They did not ask for the return of their Taurus at that time because they were still trying to determine whose insurance was going to pay for the damages to the Freestyle. When they did ask for their vehicle a few days later, Roberts ordered that it be blocked so that they could not remove it from Landers's lot.

Vernon Allen testified that the Huffmans told him that they wanted to buy the Freestyle but did not tell him that they wanted to test-drive it overnight. He could not recall which of the Huffmans told him they wanted to purchase the vehicle. Allen, John Roberts, and Patrick Elrod each described the transaction as a cash deal because it was not financed through Landers and that the "Retail Buyer's Order Form" supported this interpretation by showing a cash price for the Freestyle. Roberts testified that the "Retail Buyer's Order Form" would not have been filled out for an overnight test-drive because there were other forms for that purpose.

Roberts and Elrod said the "Sales Conditions" clause in the "Retail Buyer's Order Form" did not apply to the Huffmans because they were obtaining their own financing, while Allen opined that the clause did apply to the Huffmans. Both Elrod and Roberts stated that the "Retail Buyer's Order Form" obligated the Huffmans to purchase the Freestyle, contingent upon approval of their financing. They also stated that the power of attorney authorized Landers to take title to the Taurus.

At the close of the Huffmans' case, Landers moved for a directed verdict on all of the Huffmans' claims on the basis of the reasons in their motion in limine and their motion for summary judgment. At the close of all of the evidence, Landers renewed its prior motion for directed verdict on the Huffmans' claims, as well as their own counterclaim for breach of contract. The Huffmans also moved for a directed verdict on Landers's breach-of-contract claim. The circuit court granted the motion with respect to the Huffmans' punitive damages claim, but otherwise denied the motions.

The circuit court submitted the case to the jury on a series of interrogatories. The first interrogatory asked whether the Huffmans breached a contract to purchase the Freestyle and trade in the Taurus. The jury answered in the negative. The second interrogatory asked whether Landers committed an act of conversion over the Taurus. The jury answered in the affirmative and assessed damages at $6500. The third interrogatory asked whether Brandy Huffman was negligent in her operation of the Freestyle and, if so, whether that negligence was the proximate cause of the damage to the Freestyle. Nine members of the jury answered in the affirmative and assessed damages in the amount of $12,240. The circuit court entered a net judgment against the Huffmans in the amount of $5740. The circuit court also found that Landers was the owner

and entitled to possession of both the Taurus and the Freestyle. The Huffmans filed a timely notice of appeal, and Landers cross-appealed.

The Huffmans first argue that the circuit court erred when it granted Landers's motion for a directed verdict on their punitive-damages claim. In reviewing an order granting a motion for directed verdict, the appellate court views the evidence in the light most favorable to the party against whom the verdict was directed; if any substantial evidence exists that tends to establish an issue in favor of that party, then a jury question is presented, and the directed verdict should be reversed. *Trotter v. Bowden*, 81 Ark. App. 259, 101 S.W.3d 264 (2003).

The Huffmans rely on the supreme court's decision in *Walt Bennett Ford, Inc. v. Keck*, 298 Ark. 424, 768 S.W.2d 28 (1989), in support of their argument that the trial court should have submitted the issue of punitive damages to the jury. However, the more relevant precedent is *City National Bank v. Goodwin*, 301 Ark. 182, 783 S.W.2d 335 (1990). In that case, the bank had one customer named Larry K. Goodwin and another named Larry J. Goodwin. Larry K. Goodwin had two loans in default, and the bank decided to exercise its right to setoff the funds in his account against the overdue loans. However, the bank inadvertently took the money from Larry J. Goodwin's account. Mrs. Larry J. Goodwin then received notice that four checks had been returned for insufficient funds. Mrs. Goodwin requested that the bank call the merchants that had been affected and explain the situation, as well as apologize to her. The bank ultimately took these actions, but several checks were still returned for insufficient funds. The Goodwins sued the bank for wrongful dishonor and wrongful conversion of their checking and savings accounts. The trial court awarded the Goodwins $10,000 in compensatory damages and $40,000 in punitive damages.

On appeal, the supreme court held that the trial court should have granted the bank's motion for a directed verdict on the issue of punitive damages. The court held that:

> Punitive damages are not recoverable in a conversion action simply because the defendant intentionally exercised control or dominion over the plaintiff's property. Simply put, the act of conversion in itself will not support an award of punitive damages. Instead, the plaintiff must show that the defendant intentionally

> exercised control or dominion over the plaintiff's property for the purpose of violating his right to the property or for the purpose of causing damages.

301 Ark. at 188, 783 S.W.2d at 338. The supreme court then went on to distinguish the facts in that case from those in *Keck*. Here, although Landers exercised dominion and control over the Taurus, it did so under a claim of right based on its belief that there was a valid contract and the power of attorney. The Huffmans do not point to any evidence tending to show that Landers was intending to violate their rights or cause them damage. Therefore, the circuit court correctly directed a verdict on the punitive damages claim.

The Huffmans next argue that the circuit court erred in awarding title of the Taurus to Landers. They do not cite any cases on the issue of whether a judgment in a conversion case vests title in the defendant. However, two early Arkansas cases appear to follow the majority rule that the recovery of a judgment for conversion and satisfaction thereof would have, as a matter of law, vested the title to the converted property in the defendant. *Meyer Bros. Drug Co. v. Davis*, 68 Ark. 112, 56 S.W. 788 (1900); *Dow v. King*, 52 Ark. 282, 12 S.W. 577 (1889). We cannot find that the issue has been raised in Arkansas since *Meyer Brothers* was decided. The reason behind the rule is that a successful conversion action amounts to a forced sale. *See* RESTATEMENT (SECOND) OF TORTS § 222A, Comment c (1965). This is because a conversion action seeks recovery for the value of the converted property, as opposed to a replevin action that seeks recovery of the property itself. *JCBC, LLC v. Rollstock, Inc.*, 22 S.W.3d 197, 203 (Mo. App. 2000); *see also France v. Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987) (distinguishing between the two causes of action). It is therefore proper for a judgment to provide that, upon satisfaction of the judgment, title of the converted property shall pass to the defendant. *See Fox v. Am. Propane, Inc.*, 508 S.W.2d 426, 429 (Tex. Civ. App. 1974). The judgment in the present case awarded Landers title and possession of the vehicle immediately. This was proper because the judgment for the conversion in the Huffmans' favor had been satisfied by being set off against the judgment in favor of Landers for negligence in damaging the Freestyle.

As its first point on cross-appeal, Landers argues that the circuit court erred in not directing a verdict in its favor on the breach-of-contract claim. We review the denial of a motion for

directed verdict to determine if the jury verdict is supported by substantial evidence. *D'Arbonne Constr. Co., Inc. v. Foster*, 354 Ark. 304, 123 S.W.3d 894 (2003).

The jury was not asked specifically to determine whether the parties had a valid contract. From the jury's answer to the first interrogatory, we cannot tell whether the jury found that there was no valid contract or whether there was no breach by the Huffmans. However, when we look at the answers to the first and second interrogatories together, it becomes clear that the jury found that there was no contract. Landers argues that the "Retail Buyer's Order Form" was a complete contract and, citing *Walt Bennett Ford, Inc. v. Dyer*, 4 Ark. App. 354, 631 S.W.2d 312 (1982), further argues that parol evidence cannot be introduced to vary the terms of an integrated contract. However, Landers's argument presupposes the validity of a contract and whether a contract exists or not is for the trier of fact to determine. *Clark v. Ridgeway*, 323 Ark. 378, 914 S.W.2d 745 (1996). Landers does not argue that the jury's verdict on this point is not supported by substantial evidence. The parol-evidence rule has no application where there is a question of whether the parties entered into a contract in the first instance. *Farmers Co-op Ass'n Inc. v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970). Further, Landers had the burden of proof on this issue, and it is rare to direct a verdict in favor of the party with the burden of proof. *McGrath v. Carson*, 79 Ark. App. 269, 86 S.W.3d 415 (2002).

Landers next argues that the circuit court erred in denying its motion for a directed verdict on the Huffmans' conversion claim because the power of attorney allowed it to sign documents regarding the Taurus. Again, this argument assumes the existence of a valid contract, and the efficacy of the power of attorney depends upon the validity of the contract for the sale of the Freestyle because, without that contract, the Huffmans would not need to give Landers a power of attorney to transfer title to the Taurus.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.

Lori (Morehouse) LAWSON *v.* James E. MOREHOUSE

CA 06-1386 265 S.W.3d 768

Court of Appeals of Arkansas
Opinion delivered October 24, 2007

Carol Rogers Nadzam, for appellant.

Mary Lile Broadaway and *Angela B. Gray*, for appellee.

JOHN B. ROBBINS, Judge. This is the third appeal in this child-support dispute between appellant Lori (Morehouse) Lawson and appellee James E. Morehouse. In *Morehouse v. Lawson*, 90 Ark. App. 379, 206 S.W.3d 295 (2005)(*Morehouse I*), we rejected Morehouse's argument that the parties' December 20, 1999, divorce decree should be set aside, thus affirming the monthly child support award of $8333.00 for the two children as set out in the decree. On February 4, 2004, while the appeal in *Morehouse I* was pending, Morehouse filed a petition to modify the decree, asserting that there had been a material change in circumstances warranting a reduction in child support. After a hearing, the trial court found that Morehouse's income had decreased since entry of the divorce decree and that there had been a material change in circumstances, and decreased his monthly child support obligation to $7607.75. Morehouse appealed from that decision arguing that the trial court erred in failing to further reduce the child support, and Lawson cross-appealed arguing that the reduction in child support was erroneous because the award was inconsistent with the support chart and there were no findings to justify deviation from the chart.

In *Morehouse v. Lawson*, 94 Ark. App. 374, 231 S.W.3d 86 (2006)(*Morehouse II*), we affirmed on direct appeal but reversed and remanded on Lawson's cross-appeal because the trial court misapplied the support chart and failed to make specific findings supporting a deviation. Upon remand, the trial court concluded that it is unjust and inappropriate to require Morehouse to pay twenty-one percent of his net monthly income as child support in accordance with the support chart. Relying on the insurance provided to the children by Morehouse and the actual needs of the children, the trial court deviated from the chart amount ($8350.00) and reduced the child support to $6237.32 per month. Lawson now brings this third appeal, arguing that the trial court's decision to modify the original child-support award of $8333.00 was an abuse of discretion, violated the law-of-the case doctrine, and was precluded by *res judicata*. We affirm the trial court's decision to deviate downward from the support chart, but modify the monthly award from $6237.32 to $7607.75.

At the hearing on Morehouse's petition to reduce child support, Morehouse introduced evidence that his net income had been reduced from $540,217.00 to $477,139.00. Also at that hearing, Lawson testified that she has remarried; that she is a homemaker and her husband earns $30,000.00 per year; that she has $280,000.00 on deposit in banks and savings institutions; that she has saved about $70,000.00 for the benefit of the children; and that she had owned a $200,000.00 home free of debt but sold that house and purchased another for $387,000.00, incurring a mortgage of $187,000.00.

On appeal from the most recent order by the trial court, Lawson initially argues that the trial court abused its discretion in reducing the child support and in deviating from the support chart. We disagree. A party seeking modification of a child-support obligation has the burden of showing a material change in circumstances. *Morehouse II, supra.* In this case, Morehouse's decrease in income demonstrated a material change in circumstances, and the trial court's deviation from the support chart was properly based on the deviation considerations set out in Administrative Order No. 10, section V, which provides in pertinent part:

> a. *Relevant factors.* Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:
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> 1. Food;
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> 2. Shelter and utilities;
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> 3. Clothing;
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> 4. Medical expenses;
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> 5. Educational expenses;
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> 6. Dental expenses;
>
> 7. Child care (includes nursery, baby sitting, daycare or other expenses for supervision of children necessary for the custodial parent to work);
>
> 8. Accustomed standard of living;

9. Recreation;

10. Insurance;

11. Transportation expenses; and

12. Other income or assets available to support the child from whatever source.

b. *Additional factors.* Additional factors may warrant adjustments to the child support obligations and shall include:

1. The procurement and maintenance of life insurance, health insurance, dental insurance for the children's benefit;

2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g., orthopedic shoes, glasses, braces, etc.);

3. The creation or maintenance of a trust fund for the children;

4. The provision or payment of special education needs or expenses of the child[.]

In particular, the trial court took into account the fact that Morehouse was providing life, health, and dental insurance for the children, and found that the reasonable financial needs of the children under subsection (a) above were less than that prescribed by the support chart. Moreover, the trial court found that Morehouse is required to support his children, but not Lawson and her husband. Citing *Smith v. Smith*, 341 Ark. 590, 19 S.W.3d 590 (2000), the trial court further stated that child support is not to provide for the accumulation of capital by children, but is to provide for their reasonable needs. Lawson correctly asserts that the trial court also relied on additional factors (3) and (4) as set out in the Administrative Order, and urges that these factors do not weigh in favor of decreasing the support amount given that there was no evidence that Morehouse was paying any medical expenses not covered by insurance, and that expenses for any special needs of the children were paid by Lawson out of the child support. However, we note that under the orders of the trial court Morehouse was responsible for one-half of the medical expenses not covered by insurance, and it appears that the trial court relied on additional factor (4) to increase his calculation regarding the reason-

able needs of the children. On remand the trial court made the requisite specific findings to support a deviation from the chart, and we hold that its decision to deviate was not clearly erroneous.

Nor are we persuaded by Lawson's contention that a modification of the original support amount is barred by *res judicata.* Initially, we note that Lawson failed to raise this argument in the prior appeal to this court. Moreover, it has long been settled that no order for child support is final given that such orders may be modified based on changed circumstances. *See Clifford v. Danner,* 241 Ark. 440, 409 S.W.2d 314 (1966). In the present case, Morehouse established a change of circumstances warranting modification of the original award based on the relevant factors.

However, we agree with Lawson's argument that the trial court's child-support award of $6237.32 runs afoul of the law-of-the-case doctrine, although not to the extent argued by Lawson. The doctrine provides that a decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon appellate review. *Clemmons v. Office of Child Support Enforcement,* 345 Ark. 330, 47 S.W.3d 227 (2001). The decision of the first appeal is conclusive of every question of law or fact decided in that appeal. *Id.*

Lawson submits that the trial court was duty bound to apply the support chart on remand based on the statement we made in our opinion addressing the direct appeal in *Morehouse II* that "the trial court committed no abuse of discretion in finding that Morehouse failed to rebut the presumption that the chart amount was proper." *Morehouse II,* 94 Ark. App. at 379, 231 S.W.3d at 89. However, that statement was tailored to Morehouse's argument on direct appeal, which was premised on Morehouse's, as well as the trial court's, mistaken belief that the chart amount had been correctly applied by the trial court to Morehouse's income. In effect, we did not say that the trial court was duty bound to apply the chart on these facts, but only that its failure to deviate downward would not be an abuse of discretion, if that was the trial court's decision. We noted in Lawson's cross-appeal that the trial court did in fact deviate downward from what the support chart prescribed. In addressing Lawson's cross-appeal, we held that the trial court's decision to deviate was not supported with specific written findings as required by law. We remanded the case to the trial court to clarify its decision and either properly apply the chart or give reasons for its deviation. The trial

court chose the latter, which was authorized pursuant to our directions on remand. However, our prior opinion limited the trial court to either increasing the child support to the chart amount or making written findings to justify the $7607.75 it previously awarded. Our directive did not entirely reopen the issue such that the trial court could further deviate from the chart based on the same facts that were previously before the court. Therefore, we modify the monthly child support award to $7607.75 as previously awarded by the trial court, and subsequently justified by its specific findings on remand.

Affirmed as modified.

PITTMAN, C.J., and GLADWIN, J., agree.

Alfred Lavorice BROWN *v.* STATE of Arkansas

CA CR 06-1374 265 S.W.3d 772

Court of Appeals of Arkansas
Opinion delivered October 24, 2007

Wright & Van Noy, by: *Herbert T. Wright, Jr.*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Alfred L. Brown appeals his conviction for second-degree sexual assault and argues that the trial court erred in denying his motion for a directed verdict and in denying his request for a continuance that was made due to a witness's inability to appear. We hold that the trial court abused its discretion in denying appellant's request for a continuance because

the denial deprived him of the opportunity to present relevant, exculpatory, and noncumulative evidence that the State failed to make available to him. Accordingly, we reverse and remand for a new trial.

Appellant was charged with two counts of rape and one count of second-degree sexual assault concerning his biological daughter, A.B. The jury acquitted him of the rape charges but found him guilty of second-degree sexual assault, which the State alleged to have occurred between January 1, 2003, and December 31, 2004.[1]

On March 3, 2006, appellant requested and received a continuance until May 10, 2006, because the doctor who performed the physical examination on A.B. was not available and because the State amended the information the week before. On March 7, 2006, appellant requested another continuance because Investigator Lenore Paladino of the Arkansas State Police was unavailable to appear at the scheduled trial. In his written motion, appellant asserted that Paladino was an essential witness because she investigated one of the rape allegations in 2004, and thus, could testify regarding the inconsistencies in A.B.'s statement given at that time. After a hearing on the issue, the trial court denied appellant's motion and all subsequent renewals thereof.

A.B. was eleven years old at the time of the trial; she was approximately ten years old when the alleged abuse took place. During this time, appellant and A.B.'s mother were separated and A.B. and her two brothers "bounced" back and forth between their parents' residences. A.B. testified that the abuse occurred when she and her two brothers lived with appellant in a two-bedroom duplex in North Little Rock. Appellant's girlfriend, her son, and her daughter, D.A., also lived with appellant at that time. During the latter part of 2004, A.B.'s half brother, A.N., also lived with them. Appellant and his girlfriend slept in one bedroom; the boys slept in the other bedroom; and A.B. and D.A. slept on the couch in the living room.

At the trial, A.B. described several incidents of abuse, including appellant rubbing her buttocks, touching her "front" private part with his finger, and attempting to penetrate her anally.

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[1] He was also charged with the rape of another girl, D.A., but was acquitted of that charge.

She also testified that after the abuse, she had difficulty going to the bathroom and experienced back pain, so much so that her grandmother took her to the doctor. D.A., the other alleged victim in this case, testified that A.B. told her what appellant was doing to her.

A.B.'s testimony was, in some respects, inconsistent with what she told the investigating officers. For example, she did not remember telling the officers that appellant put his private into her behind or put his finger into her vagina. A.B. admitted that she falsely reported that her foster mother had struck her because the foster mother refused to allow A.B. to use the telephone. A.B. also admitted that she was not happy about her parents' separation but she denied that she was fabricating the abuse allegations to "get back" at her father.

A.B. was examined by Dr. Becky Latch, a pediatrician at Arkansas Children's Hospital. Dr. Latch was recognized at trial as an expert on child abuse. She examined A.B. in January 2005 and found normal results, meaning no physical signs of sexual abuse. However, Dr. Latch explained that even in cases where the perpetrator has admitted to abuse, as many as 90% of the children have normal exams because the anal and vaginal tissue heal very quickly.

Dr. Latch also explained that bowel trouble and back pain can result from anal abuse because the trauma of putting something into the anus can damage the nerves to the extent that a child will not recognize that they need to have a bowel movement. This leads to constipation, which, in turn, leads to back pain.

Detective Phil Lowery, who interviewed appellant, testified that appellant repeatedly denied abusing A.B. However, during this interview, appellant also admitted that he was addicted to methamphetamine, crack, "pills," and alcohol during that same time-period. At one point during the interview, appellant said, "Man, she's got to be making that up, man. I was under the influence a lot, man but wasn't under it that darn much." However, when Lowery asked appellant if A.B. would be lying if she said appellant touched her with his private part, appellant responded, "I don't know, man. It just depend [sic] on how I was when I was, you know, I was on drugs." When asked if the abuse could have happened while he was under the influence, appellant responded, "Man, when I was doing drugs, anything's possible, man."

Appellant testified, admitting his history of alcohol and drug abuse, but denying that he ever touched A.B. in a sexual way. Appellant said that, when he made the "anything's possible" statement, he was not referring to sex. He insisted that, when he was high, sex was "the farthest thing from my mind."

Appellant said A.B. admitted to him that she was not happy living with "all the boys" and that she made the allegation because she wanted to live with her mother or grandmother. He also said that she made the allegation the day after he "moved her back into the house" from her mother's house.

Norvella Watson, appellant's mother, testified that, while A.B.'s parents were separated, A.B. made a sexual allegation against appellant, which was investigated by Investigator Paladino. According to Watson, A.B. retracted the statement and admitted to Watson that she lied because her Aunt Kimmie (A.B.'s mother's friend) told A.B. that, if she made the allegation, she would be allowed to live with her mother.

Watson further testified that on one occasion A.B. falsely accused her brother of hitting her and pushing her down. Watson said that she watched A.B. throw herself to the ground and deliberately hit her head on the floor because she wanted a toy that her brother had.

A.N., appellant's son and A.B.'s half-brother, testified regarding the layout of the duplex, explaining that the duplex was small and that the view of the living room was unimpeded once a person stepped out of the bathroom or the bedrooms. He also said that he never saw appellant act inappropriately toward A.B. and that appellant did not take drugs in front of the children.

At the close of the State's evidence, appellant moved for a directed verdict on the second-degree sexual assault charge, asserting that the testimony regarding sexual contact was inconsistent. The trial court denied that motion and the subsequent renewal of the motion. The jury found appellant guilty of second-degree sexual abuse and sentenced him as a habitual offender to serve twenty-three years in prison.

I. Sufficiency of the Evidence

A defendant's right to be free from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *See Flowers v. State*, 362 Ark. 193, 208 S.W.3d

113 (2005). Thus, we first examine the trial court's denial of appellant's motion for a directed verdict. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *See Geer v. State*, 75 Ark. App. 147, 55 S.W.3d 312 (2001). We view the evidence in the light most favorable to the State and consider only evidence that supports the verdict. *See Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). We affirm if substantial evidence supports the verdict. *Id.* Substantial evidence is evidence that is forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *See id.*

A person commits sexual assault in the second degree if the person, being eighteen years of age or older, engages in sexual contact with another person, who is less than fourteen years of age and who is not the person's spouse. Ark. Code Ann. § 5-14-125(a)(3) (Repl. 2006). Sexual contact means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female. Ark. Code Ann. § 5-14-101(9) (Repl. 2006).

Appellant argues that the trial court erred in denying his motion for a directed verdict because the evidence regarding sexual contact was so clearly unbelievable that reasonable minds *could differ* thereon (emphasis added). He points to the fact that A.B. falsely accused her foster mother of striking her because A.B. was angry at her foster mother, that appellant denied the abuse, that Antonio testified it would have been impossible for appellant to have abused A.B. without being seen, and that A.B. gave one officer "a different story" than she described at trial.

Appellant's argument fails for several reasons. First, he misstates and misapplies the law concerning inconsistent testimony. Where inconsistent testimony has been given credence by the trier-of-fact, this court will not reverse a credibility determination unless the testimony is inherently improbable, physically impossible, or so clearly unbelievable that reasonable minds could *not* differ thereon. *See Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980). Thus, by appellant's own admission that "[T]he testimony of A.B. Brown is clearly so unbelievable that reasonable minds *could differ* thereon," appellant concedes that the trial court properly submitted the issue to the jury.

Second, A.B.'s testimony that appellant touched her vagina with his finger and rubbed her buttocks constitutes substantial evidence to support appellant's conviction for second-degree

sexual assault. A victim's testimony, alone, may constitute substantial evidence to support a conviction. *See Ellis v. State*, 364 Ark. 538, 222 S.W.3d 192 (2006). Thus, the fact that there was no physical evidence of trauma did not prevent the jury from finding appellant guilty, especially in light of Dr. Latch's testimony explaining that the lack of physical findings is not unusual, even where the offender admits to penetration.

Third, the jury was not required to believe appellant's testimony, as he is the person most interested in the outcome of the trial. *See Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003). Fourth, appellant mischaracterizes A.N.'s testimony. A.N. described what apparently is a small duplex, which has an unblocked view of the living room once a person exits a bedroom or the bathroom. However, he did *not* testify that the abuse could not have occurred in the house without someone else seeing it.

Finally, appellant maintains that the jury did not believe A.B.'s allegations that he raped her, so it obviously found her not to be a credible witness. In fact, we do not know why the jury failed to convict appellant on the rape charges. However, even if the jury found A.B.'s testimony regarding the rape to be not credible, it was not precluded from giving credence to her testimony regarding the sexual assault. Inconsistencies in the testimony of a rape victim are matters of credibility for the jury to resolve, and it is within the province of the jury to accept or reject testimony as it sees fit. *See Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998). Accordingly, we hold that the trial court did not err in denying appellant's motion for a directed verdict.

II. Continuance

Nonetheless, we reverse and remand this case for a new trial because we hold that the trial court abused its discretion in denying appellant's motion for a continuance. We review the grant or denial of a motion for continuance under an abuse-of-discretion standard. *See Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005). An appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance but also must show prejudice that amounts to a denial of justice. *Id.*

A court shall grant a continuance "only upon a showing of good cause and only for so long as necessary, taking into account not only the request or consent of the prosecuting

attorney or defense counsel, but also the public interest in prompt disposition of the case." Ark. R. Crim. P. 27.3. Factors a trial court should consider in deciding a continuance motion include (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of the witness in the event of a postponement; and (4) the filing of an affidavit that states not only what facts the witness would prove but also that the appellant believes them to be true. *See Stenhouse, supra.*

In addition, a party requesting a continuance due to the absence of a witness must submit an affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to obtain it. Ark. Code Ann. § 16-63-402(a) (1987). The affidavit must show 1) what facts the affiant believes the witness will prove and may not merely show the effect of the facts in evidence; 2) that the affiant himself believes them to be true; 3) that the witness is not absent by the consent, connivance, or procurement of the party asking the postponement. *See* Ark. Code Ann. § 16-63-402(a) (1987).

Appellant attached an affidavit to his motion for a continuance from his counsel, asserting that Paladino was unavailable to testify on May 10 and 11; that she was unavailable for trial; that she was an essential witness because she investigated a rape allegation made by A.B. in 2004, which she determined to be unsubstantiated; and that Paladino would testify regarding the inconsistencies and untruths in A.B.'s statement at that time.

At the March 24 hearing on appellant's motion, appellant's counsel explained that Paladino found the 2004 abuse allegation by A.B. to be unsubstantiated and that Paladino's report was not part of the State's case file but had been uncovered by her own investigation.[2] She asserted that Paladino was an essential witness because Paladino could testify about inconsistencies in A.B.'s 2004 statement, about the fact that there was no penetration alleged, and about some falsehoods regarding other incidents. Counsel also indicated appellant's willingness to the try the case the week before or after May 10-11.

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[2] At the first hearing in this case, held in August 2005, appellant was originally represented by a public defender who also represented A.B.'s mother, because both parents had been charged with permitting the abuse of a child. In January 2006, the public defender was allowed to withdraw, citing a conflict. Another public defender was appointed to represent appellant, and she discovered Paladino's statement.

The State conceded that it would not be prejudiced by a continuance, particularly if the trial was moved forward, but noted that on May 22, the nine-month period for trying a case involving a victim under fourteen would elapse. The court stated that it did not appear that it could accommodate appellant's request. Appellant countered that the court could hold the trial beyond that date but that it would merely be required to explain in writing why the defendant had not been tried within the nine-month period.[3]

The court then asked why Paladino could not appear. Counsel explained that Paladino was going to be out-of-state but did not know why. The court responded, "Well, the court is still not inclined to continue it until I hear from her as to why she can't do this." Counsel further explained that Paladino was going to Florida but did not know whether it was for personal or business reasons. The court responded, "The court's just not going to move it at this point and see if you can rely upon her to be here." Counsel reminded the court that the case was transferred to her in January, that she found Paladino's report by her own investigation, and that she did not know "why it wasn't investigated earlier."

The court replied:

> I understand. . . . I just think you need to subpoena her and *it's up to her to make a request to have the subpoena quashed and that she has a valid reason.* If it's something that's really dire that she can't get out of, then the court might reconsider, but at this point, the Court's going to leave it where it is and it's up to her to be here pursuant to her subpoena.

(Emphasis added.)

Appellant's counsel again raised the issue at the omnibus hearing held on April 11, 2006. She again asked to reschedule for the week before or after the scheduled trial date. The court asked if Paladino was an indispensable witness. Counsel again explained that Paladino was indispensable, that Paladino was unavailable to

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[3] Pursuant to Ark. Code Ann. § 16-10-130 (Repl. 1999), barring extraordinary circumstances, a trial court shall give precedence to criminal trials in which the alleged victim is under fourteen years old. When a case affected by § 16-10-130 is not tried within nine months following arraignment, Administrative Order No. 5 requires the circuit judge to inform the Administrative Office of the Courts in writing of the reason for the delay.

testify on May 10 and 11, and again explained the basis of Paladino's testimony. Counsel further offered Paladino's affidavit, which was marked for identification as Defendant's Exhibit Number 1.[4] The court again denied the motion, suggesting that appellant's counsel videotape Paladino's testimony.

At the beginning of the trial, counsel renewed her motion for a continuance, reminding the court of the nature of Paladino's expected testimony. She further explained that Paladino had been subpoenaed. By this time, counsel had obtained Paladino's 2004 report and proffered it as Defendant's Exhibit 1. The State, for the first time, objected that Paladino's testimony would violate Arkansas's Rape Shield Law, but the trial court did not rule on that objection. The trial court again denied appellant's motion but accepted Paladino's 2004 report as proffered.

The State now argues that, because a party may not choose a course of action that it knows will invite a claim of error, *see McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997), appellant is not entitled to complain on appeal because he did not attempt to have Paladino's subpoena quashed and did not attempt to obtain Paladino's video testimony. It also argues that appellant has failed to demonstrate prejudice amounting to a denial of justice because Paladino's testimony would be cumulative. The State notes that the jury was informed about A.B.'s history of making false accusations against her father, her foster mother, and her brother. It further notes that the jury was specifically informed that Paladino had investigated a sexual-abuse claim by A.B. against her father but determined that the claim was unsubstantiated because A.B. continued to periodically live with her father after the investigation.[5]

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[4] Appellant did not include Paladino's affidavit in his brief. However, the substance of this affidavit is apparent from the proceedings that were abstracted and from the parties' arguments. In fact, in its brief, the State concedes that in her affidavit, Investigator Paladino explained that she had investigated a sexual abuse allegation by A.B. against appellant for which Paladino made "no report" due to a lack of evidence; stated that she was subpoenaed to testify and could not attend the trial on May 10 and 11 because she would be gone on an out-of-state trip that had been paid in full; and asserted that her inability to make the trip would cause an undue hardship on her and her family.

[5] The State also argues that Paladino's testimony regarding A.B.'s false claim of sexual abuse was inadmissible under Arkansas's Rape Shield Law. *See* Ark. Code Ann. § 16-42-101(b) (Repl. 1999). However, as the trial court has not yet ruled on the admission of Paladino's testimony, the issue is not ripe for appellate review. *See State v. Jones*, 338 Ark. 781, 3 S.W.3d 675 (1999); *Rose v. State*, 72 Ark. App. 175, 35 S.W.3d 365 (2000).

We disagree. We recognize that the abuse of discretion standard is a high threshold that does not simply require error in the trial court's decision but requires that the trial court must have acted improvidently, thoughtlessly, or without due consideration. *See Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004). However, as discussed further herein, this is a rare case in which each of the factors a trial court is to consider when granting a continuance weighs in the defendant's favor and, further, the denial of appellant's request for a continuance denied him the opportunity to present relevant, exculpatory, noncumulative evidence that the State failed to make available to him. If reversal is not warranted here, then we cannot discern when reversal would ever be appropriate pursuant to the abuse-of-discretion standard.

A. Diligence of the Movant

Appellant did all that a defendant is required to do to secure a continuance — even the State does not argue that he was dilatory in filing his motion. To begin, he made a timely request for a brief continuance for either the week before or after the trial. Appellant's counsel timely notified the trial court of the problem by moving for a continuance sixty-four days prior to trial and by providing the necessary affidavits. Appellant also took diligent measures to secure Paladino's presence; he did subpoena her. He also repeatedly and thoroughly informed the trial court of the substance of her expected testimony. In short, appellant's diligence weighed in favor of granting him a continuance.

Yet, in spite of appellant's diligence, the trial court denied the request for a reasonable and brief continuance. A defendant is not required to show that his *witness* attempted to have the *witness's subpoena* quashed — in fact, we do not understand how a *defendant* could force a *witness* to have the witness's subpoena quashed. Although the appellant was indigent, the trial court reasoned that he could videotape Paladino's testimony.

B. Probable Effect of the Testimony at Trial

Additionally, appellant amply demonstrated the probable effect of the testimony at trial. Via his motion for a continuance, his arguments to the court, and his affidavits, appellant repeatedly informed the court that Paladino was an essential witness because she found a prior complaint of sexual abuse by A.B. against appellant to be unsubstantiated due to inconsistencies in A.B.'s statement.

Moreover, appellant also demonstrated prejudice that amounted to a denial of justice because he was denied the opportunity to present relevant, exculpatory, noncumulative evidence that the State failed to make available to him. Paladino's testimony was relevant because it was necessary to enable the jury to properly assess A.B.'s credibility. *See, e.g.*, *Hice v. State*, 11 Ark. App. 184, 668 S.W.2d 552 (1984)(reversing and remanding where the trial court excluded testimony about a police officer's alleged refusal to administer a breathalyzer test and his subsequent charge against the appellant for refusal to take the test, holding that was evidence the jury should have been allowed to consider as bearing on the officer's credibility).

Here, Paladino's testimony was especially crucial given that the allegation she investigated (that appellant touched A.B.'s vagina), if supported, would have resulted in the *same charge* for which appellant was ultimately convicted — second-degree sexual assault. Thus, Paladino would have testified that A.B. had previously *falsified the same charge* against appellant based on the *same conduct* (plus the additional conduct of touching her buttocks).

Moreover, Paladino's testimony would not have been merely cumulative. Watson (appellant's mother and A.B.'s grandmother) testified that while A.B.'s parents were separated, A.B. made a sexual allegation against appellant, which was investigated by Paladino. According to Watson, A.B. admitted to Watson that she lied because her mother's friend told A.B. that if she made the allegation, she would be allowed to live with her mother.

Nonetheless, testimony that the victim admitted to her grandmother that she made a prior false accusation of sexual abuse differs starkly from an *independent conclusion reached by a police investigator* that the victim's allegation was unsubstantiated. That is, Paladino's report and testimony would not be cumulative because they would be based on her *own* observations, not on any statement that A.B. made to her grandmother or anyone else, and because Paladino *alone* would have testified as to the *basis for her conclusion* — that is, exculpatory evidence that Watson did not provide, that was not otherwise made known to the jury, and that was essential for the jury to determine whether A.B. was a credible witness. *See, e.g.*, *Stephens v. State*, 98 Ark. App. 196, 254 S.W.3d 1 (2007) (holding that an officer's hearsay statement was not cumulative to the eyewitness's testimony where the officer's statement provided

the only evidence of a possible motive for the shooting and where the officer's statement was based on his own observations, not the eyewitness's observations).

C. Other Factors

The other factors a trial court should consider also weigh in favor of granting appellant's motion for a continuance. Appellant subpoenaed Paladino and obtained her affidavit, in which she alleged that she would not be available the week of May 10-11. The State does not allege that appellant failed to comply with the affidavit requirement or that he failed to show the likelihood that Paladino would appear as a witness if the trial was rescheduled.

Appellant also demonstrated that the continuance was requested for good cause after his own counsel independently discovered Paladino's report, which was not part of the State's discovery file. Although appellant does not allege a discovery violation, the point is that the reason for the delay was not within appellant's control or due to his failure to investigate his case.

As for the public interest in prompt disposition of the case, the State, in a rare move, conceded that it would not be prejudiced by a continuance. While the trial court was properly concerned with running afoul of the nine-month "deadline" for trying cases in which the victim is younger than fourteen years old, the court would merely have been required to submit a letter to the Administrative Office of the Courts explaining the reason for the delay. *See* Admin. Order No. 5. This minor administrative concern pales in comparison to the probative value of Paladino's anticipated testimony or the defendant's right to a fair trial.

III. Conclusion

In sum, it is undisputed that appellant was diligent in requesting a continuance and in informing the trial court of the basis thereof, which, also undisputedly, was a matter that was beyond his control. Appellant indicated his willingness to try the matter the week before or after the scheduled trial, so he did not ask for a lengthy continuance. In any event, the State conceded it would not be prejudiced by a continuance. In denying appellant's motion for a continuance, the trial court held him to a higher standard than is normally required to obtain a continuance and denied him the opportunity to present relevant, exculpatory, noncumulative evidence that was discovered by his counsel's own

investigation. On these facts, we hold that the trial court abused its discretion in denying appellant's motion for a continuance, and reverse and remand this case for a new trial.

Reversed and remanded.

HART, MARSHALL, HEFFLEY and MILLER, JJ., agree.

PITTMAN, C.J., GLADWIN, BIRD and VAUGHT, JJ., dissent.

LARRY D. VAUGHT, Judge, dissenting. Although I am in agreement with the majority as to the rigid review standard that we must apply to allegations of error flowing from a trial court's denial of a continuance request, I cannot agree with its ultimate disposition of this case. Therefore, I dissent.

It is well-settled law that whether a motion for continuance should be granted lies within the discretion of the trial judge, and the judge's decision will not be overturned unless the court abused that discretion by acting arbitrarily or capriciously, *Roe v. Dietrich*, 310 Ark. 54, 835 S.W.2d 289 (1992). Further, an appellant must not only demonstrate that the trial court abused its discretion by denying the motion for a continuance but also must show prejudice that amounts to a denial of justice. *See Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002). As such, I believe that there was no error in denying Brown's motion for a continuance because the record does not show arbitrary or capricious action by the trial judge or that Brown was denied justice.

At the outset, I note that the majority makes much ado over Brown's vigorous pursuit of witness Paladino's testimony. For purposes of my dissent, I will concede Brown's diligence in relation to the continuance, despite it being less than perfect — Brown made no attempt to procure (as suggested by the trial court) the video-taped testimony of a seemingly accommodating state-employee witness. Further, I agree with the majority that the trial-court's continuance denial cannot be affirmed solely on the State's theory that Paladino's testimony is cumulative to that offered by the child's grandmother. Although testimony from the child's blood-relative of close consanguinity that the child had a history of making false accusations appears to me to be far more damning than the "independent" conclusion that "due to lack of evidence" Paladino made "no report," it cannot be overlooked that, in addition to being the child's grandmother, Watson is also the mother of the defendant.

In light of these disclaimers, I concentrate my discussion on the probable effect and the relevance of the absent testimony. First, I note that the affidavit outlining the testimony Paladino would present at trial was not included in Brown's brief to our court, yet the majority manages to recount the substance of the affidavit in a footnote. Rule 4-2(a)(6) of the Rules of the Arkansas Supreme Court requires that an appellant present us with an abstract of those parts of the record that are necessary to an understanding of the issues presented for decision. Clearly, the burden is on an appellant to bring up a record sufficient to demonstrate reversible error. *Cox v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999). As our supreme court has succinctly stated, the record on appeal is limited to that which is abstracted. *Allen v. State*, 326 Ark. 541, 932 S.W.2d 764 (1996) (reversing the court of appeals and reinstating a conviction where this court had gone to the record to reverse). To the extent the majority relied on the substance of Paladino's affidavit to support its reversal of Brown's conviction, it did so in error.

Second, the actual insight that Paladino was prepared to offer relating to the child-victim's credibility was specious at best. I do not understand how the majority finds resulting prejudice from a witness being denied the opportunity to offer testimony that would likely be inadmissible. Our supreme court has specifically stated that it is error for the court to permit an expert, in effect, to testify that the victim of a crime is telling the truth. *Hill v. State*, 337 Ark. 219, 224, 988 S.W.2d 487 (1999). In *Logan v. State*, 299 Ark. 255, 773 S.W.2d 419 (1989), our supreme court reversed where it concluded that answers to hypothetical questions resulted in doctors informing the jury that in their opinion the victim was telling the truth. In *Johnson v. State*, 292 Ark. 632, 732 S.W.2d 817 (1987), the court stated that a doctor improperly conveyed to the jury his opinion that the victim was telling the truth when the doctor opined that an act had occurred that was detrimental to the victim and that opinion was based only on the victim's statements to the doctor. Finally, in *Russell v. State*, 289 Ark. 533, 712 S.W.2d 916 (1986), the court held that a psychologist improperly testified that a victim's statements were consistent with a child who had suffered sexual abuse.

Following this line of supreme court cases, in *Cox v. State*, 93 Ark. App. 419, 220 S.W.3d 231 (2005), our own court adopted a strict position on an expert offering credibility testimony. In *Cox*, we said that the child-victim's testimony alone was sufficient to support the rape conviction, but that the case had to be reversed

because the trial court allowed a well-trained social worker to repeatedly testify about the victim's high level of credibility.

In this case, we know that Paladino was prepared to testify that because the victim's allegation against Brown contained inconsistencies, "no report" was filed. However, I can find no mention — either in the abstract or the majority opinion — of the actual substance of these "inconsistencies." It does not matter whether you classify this expert's potential testimony as either a bald-face conclusion or an "independent" opinion as to the victim's lack of veracity — it would have been error to allow it into evidence. There is nothing in Paladino's report (or omitted affidavit) to establish a pattern of perjury or empirical proof (even in minute measure) that the crime did not occur.

As such, I cannot agree that the trial court acted both arbitrarily and capriciously by refusing to grant Brown's continuance. The trial court's ability to control its own calendar is insulated from appellate review — as prescribed in our review standard — except in the most extreme cases of abuse. This is not such a case. Considering the lack of relevance and probable effect of this potential testimony coupled with the extraordinarily high threshold of prejudice Brown had to demonstrate — the majority's decision to require that this convicted rapist receive a new trial confounds me.

PITTMAN, C.J., GLADWIN and BIRD, JJ., join.

Brian Keith MISENHEIMER *v.* STATE of Arkansas

CA CR 07-79 265 S.W.3d 764

Court of Appeals of Arkansas
Opinion delivered October 24, 2007

Dustin Daniel Dyer, for appellant.

Dustin McDaniel, Att'y Gen., by: *Leaann J. Irvin*, Ass't Att'y Gen., for appellee.

D.P. MARSHALL JR., Judge. Brian Misenheimer stole a Ford F-350 dually pick-up truck from the parking lot of an Exxon station in Pulaski County. Two days later, while he was high on methamphetamine, Misenheimer drove the truck to Walgreens. When he left the store, a police car was partially blocking the parking-lot exit. Misenheimer drove the truck over the front-end of the police car and led police officers on a high-speed chase through Little Rock, during which one officer's car ran into a retaining wall. Misenheimer eventually drove to the airport, where he knocked down a gate and drove onto the airport grounds. The chase then continued into Saline County. Misenheimer was apprehended there after a head-on collision that severely injured a state trooper.

Misenheimer was charged with various felonies in both Pulaski County and Saline County. He first pleaded guilty to five felony charges in Pulaski County and was sentenced by the circuit court there. The prosecutor in Saline County then amended his information and sought to sentence Misenheimer as an habitual offender under Ark. Code Ann. § 5-4-501 (Supp. 2007). Misenheimer pleaded guilty to the Saline County charges, while objecting to the application of the sentencing enhancement. The Saline County circuit court rejected Misenheimer's arguments. He was sentenced as an habitual offender to 125 years in prison to be served concurrently with his Pulaski County sentence. Misenheimer now appeals his sentence. We review this question of statutory interpretation *de novo*. *State v. Sola*, 354 Ark. 76, 84, 118 S.W.3d 95, 99 (2003).

I.

Misenheimer makes three arguments why Ark. Code Ann. § 5-4-501 should not apply to what he describes as his continuous criminal episode stretching across two counties. Two of Misenheimer's arguments fail at the threshold.

First, we have doubts about whether he preserved his due-process point in the circuit court. He had two sentences about

it in his trial brief, and did not mention it during his oral argument to the circuit court. *Compare Standridge v. State*, 357 Ark. 105, 118, 161 S.W.3d 815, 822 (2004). Even assuming that the point is preserved, we affirm on it. Misenheimer had more than two months' notice — from the amended information — of the State's intention to seek the enhancement before he pleaded guilty in Saline County. And for the reasons explained later, we discern no fundamental unfairness in the application of the enhancement statute here.

Second, Misenheimer cannot be heard to complain in this appeal that the Pulaski County circuit court did not advise him before his guilty plea that his conviction might subject him to an enhanced sentence on the pending Saline County charges. Misenheimer was represented by counsel in both counties. He chose not to appeal his conviction in Pulaski County. He cannot belatedly assert error in his Pulaski County plea in this Saline County case.

II.

Coming to the hub of the case, Misenheimer argues that he is not an habitual criminal in the ordinary sense of the word "habitual." He committed, he maintains, one continuous series of connected crimes, and thus the circuit court should not have enhanced his sentence. The purpose of Ark. Code Ann. § 5-4-501 is to punish repeat offenders severely. Original Commentary to Ark. Code Ann. § 5-4-501 (Repl. 1995). We must give the words of Ark. Code Ann. § 5-4-501 their ordinary meaning. *Benson v. State*, 86 Ark. App. 154, 157, 164 S.W.3d 495, 496 (2004). When applying a criminal statute, we must also follow the rule of lenity: we strictly construe the statute and resolve any doubt about its meaning in Misenheimer's favor. *Boveia v. State*, 94 Ark. App. 252, 257, 228 S.W.3d 550, 554 (2006). Under the governing statute and precedent, we conclude that § 5-4-501(b) applies to the convictions arising from Misenheimer's two-county, multi-act episode.

Misenheimer first argues from the statute's title: "§ 5-4-501 Habitual Offenders — Sentencing for felony[.]" We agree that the title ill fits what happened here. But the title does not control, as our cases make plain. *Baker Refrigeration Systems, Inc. v. Weiss*, 360 Ark. 388, 400-01, 201 S.W.3d 900, 907 (2005). The statute's words control. The introductory section states: "A defendant

meeting the following criteria may be sentenced [to an enhanced penalty]." Ark. Code Ann. § 5-4-501(b)(1). The criteria applicable to Misenheimer are:

> (A) A defendant who:
>
> (i) Is convicted of a felony other than a felony enumerated in subsections (c) and (d) of this section committed after June 30, 1993; and
>
> (ii) Has previously been convicted of four (4) or more felonies or who has been found guilty of four (4) or more felonies;
>
> . . . .
>
> (C) A defendant who:
>
> (i) Is convicted of any felony enumerated in subsection (d) of this section committed after June 30, 1997; and
>
> (ii) Has previously been convicted of four (4) or more felonies not enumerated in subsection (d) of this section or who has been found guilty of four (4) or more felonies not enumerated in subsection (d) of this section.

Ark. Code Ann. § 5-4-501(b)(1)(A)(i)-(ii) & (C)(i)-(ii).

This statute is unambiguous. *Cf. Benson*, 86 Ark. App. at 158, 164 S.W.3d at 497 (2004) (so holding as to Ark. Code Ann. § 5-4-501(d)). Thus we have no need to resort to the rules of statutory interpretation. 86 Ark. App. at 157, 164 S.W.3d at 496. And Misenheimer met the statutory criteria: he was convicted in Saline County of first-degree battery — a listed felony — after June 30, 1997, and theft-by-receiving, fleeing, and criminal mischief — non-listed felonies — after June 30, 1993. He had "previously been convicted" of four or more non-listed felonies in Pulaski County. Because Misenheimer's convictions satisfied the criteria, the statute applied to him even though the statute's title describes a class of persons that does not seem to include him.

Our decision is guided by *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989) and *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003), where our supreme court addressed similar issues.

Misenheimer argues that *Tackett* governs his situation. We are persuaded, however, that *Smith* is more in point.

Tackett's vehicle struck another vehicle, causing it to crash. *Tackett*, 298 Ark. at 24-25, 766 S.W.2d at 411. One passenger died instantly. Tackett was charged and convicted of manslaughter for this death and of leaving the scene of an accident. After lingering in a coma, another passenger died several years later. Tackett was then charged with a second count of manslaughter. Our supreme court rightly rejected the State's attempt to apply the habitual-offender statute during the prosecution for the second death because all the crimes arose out of Tackett's single act of recklessly crashing his vehicle. 298 Ark. at 25-26, 766 S.W.2d at 412-13. The court held that "there is nothing habitual about the commission of a single criminal act resulting in multiple charges and convictions." *Ibid.*

In *Smith*, our supreme court distinguished *Tackett* and upheld a § 5-4-501 enhancement for multiple convictions arising from a crime spree. Smith committed an aggravated robbery in Desha County, then drove to Drew County, where he committed kidnapping, rape, and other felonies. 351 Ark. at 470-72, 95 S.W.3d at 802-03. He was convicted of the Drew County crimes first. He was then convicted of the robbery in Desha County and was sentenced there as an habitual offender. *Ibid.* Smith appealed, cited *Tackett*, and argued that "because these 'prior' convictions arose out of the same course of conduct as the aggravated robbery, . . . the Drew County convictions could not be used to enhance his sentence." *Smith*, 351 Ark. at 477, 95 S.W.3d at 806. Our supreme court rejected this argument. The court held that the circuit court did not err in sentencing Smith as an habitual offender because "Smith's multiple criminal acts were not a 'continuing course of conduct,' nor did they arise out of the same transaction." 351 Ark. at 478-79, 95 S.W.3d at 807 (quoting Ark. Code Ann. § 5-1-110(a)(5)).

Smith, not *Tackett*, controls here. First, two days separated Misenheimer's theft of the pick-up truck and his crimes during the chase from Walgreens. Second, though Misenheimer's acts on the day of the chase may have been a continuous series of crimes, they were not "a continuing course of conduct." That phrase is a statutory term of art. Ark. Code Ann. § 5-1-110(a)(5) (Repl. 2006). The crimes to which it applies are self-defined as continuing offenses; therefore, a person may not be convicted of more than one offense even though he commits what seem like multiple

criminal acts. *Smith v. State*, 296 Ark. 451, 454, 757 S.W.2d 554, 555-56 (1988). By statute, Misenheimer's crimes are not defined as continuing crimes. Ark. Code Ann. §§ 5-13-201, 5-36-106, 5-38-204 (Repl. 2006) and 5-54-125 (Repl. 2005). Finally, unlike in *Tackett*, we do not face a single act that resulted in two crimes.[1]

Like in *Smith*, Misenheimer's crimes involved multiple acts; his crimes harmed different people; and his crimes occurred at different locations in different counties. His theft, moreover, occurred two days before his other crimes. That all but one of Misenheimer's crimes arose from a continuous series of events is not dispositive. The determining factor is the multiplicity of acts, victims, and locations. *Smith*, 351 Ark. at 478, 95 S.W.3d at 807. We are bound to follow *Smith*, and we do so. The Saline County circuit court therefore made no error in sentencing Misenheimer as an habitual offender.

Affirmed.

BAKER and MILLER, JJ., agree.

[1] This court has also called into question the continued viability of *Tackett* in light of a post-decision amendment to the statute. *Benson*, 86 Ark. App. at 160, 164 S.W.3d at 498 (2004). Because that amendment changed part of § 5-4-501 that is not involved in this case, we do not rest our application of *Tackett* on the statutory change.

Bryan K. SMITH *v.* Danny THOMAS
& Sandra Thomas

CA 06-1343 266 S.W.3d 226

Court of Appeals of Arkansas
Opinion delivered October 31, 2007

[Rehearing denied December 5, 2007.]

Shiela F. Campbell, for appellant.

Coplin & Heuer, by: *Sam T. Heuer* and *Jocelyn A. Stotts*, for appellee.

JOSEPHINE LINKER HART, Judge. Bryan K. Smith, the natural father of a minor child, BS, appeals from an order of the Faulkner County Probate Court denying his petition to terminate the guardianship held by the maternal grandparents, Danny and Sandra Thomas, over the child. On appeal, Smith argues that the trial court's decision to deny his petition was clearly erroneous and violated his due-process rights. We affirm.

BS was born out of wedlock on July 31, 2003. Apparently, Smith and BS's mother, Dandra Thomas, did not live together at the time of the child's birth or at any time thereafter. When BS's mother died on December 27, 2003, Danny and Sandra Thomas almost immediately petitioned to be appointed BS's guardians. The Thomases actually served Smith with the guardianship petition at their daughter's funeral. Smith counter-petitioned for custody. At the time, however, Smith was a college student who had availed himself of only limited contact with his child. The Thomases were granted a permanent guardianship on January 9, 2004. The trial court specifically found that Smith could not "provide the stability which is needed for this child at this point in his life."

The parties returned to court mere months later pursuant to the Thomases' petition to limit Smith's visitation. They based their petition on Smith's failure to show them sufficient "respect." Smith counter-petitioned to terminate the guardianship. After a hearing, the trial court again found that Smith could not provide BS with "stability," noting that he was still a full-time student while he was employed full-time. The trial court ordered that

Smith be "ready next summer to do what you have to do." The trial court also ordered that Smith attend parenting classes as the Thomases had requested.

On March 9, 2006, Smith again petitioned to terminate the guardianship. By this time, he had married, established a household, was no longer a student, and had secured full-time employment. He also completed some parenting classes and had regularly visited his child. The child, however, was thriving in the care of his guardians. Relying on *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005), the trial court found that, even though Smith was "qualified" to parent his child, best interest dictated that BS remain with his guardians.

Smith first argues that the trial court's decision to deny his petition to terminate the guardianship was clearly erroneous. Citing Arkansas Code Annotated section 28-65-204 (Repl. 2004), he notes that, having found him to be a person "qualified" to be BS's guardian, the trial court erred in failing to give him the statutory preference afforded natural parents. He notes further that, since the last hearing, he has "discharged his duties and obligations as a parent," driven more than 28,800 miles to exercise his visitation, become gainfully employed with the Arkansas Department of Human Services as a family-support specialist, and married, which would afford BS a two-parent household. Furthermore, Smith contends that this case is distinguishable from *Freeman v. Rushton, supra*, the authority relied on by the trial court, in that Freeman did not have the same level of contact with his child that he has had with BS. Finally, citing Arkansas Code Annotated section 28-65-401 (Repl. 2004) and *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000), Smith acknowledges that the best interest of the child standard applies to the termination of guardianships. Nonetheless, he argues, in essence, that the guardianship can also be terminated when it is no longer necessary, as in this case. We do not find these arguments persuasive.

This court reviews probate proceedings de novo, but we will not reverse a decision of a trial court unless it is clearly erroneous. *Id.* The primary consideration in deciding whether to terminate the guardianship of a minor child pursuant to Arkansas Code Annotated section 28-65-401, is best interest of the child. *Crosser v. Henson*, 357 Ark. 635, 187 S.W.3d 848 (2004).

■ We are unwilling to say that the trial court's refusal to terminate the guardianship was clearly erroneous. First, the instant case does not involve the initial selection of a guardian. Accord-

ingly, the natural-parent preference stated in Arkansas Code Annotated section 28-65-204(a) is inapplicable. *Crosser v. Henson, supra.* Second, and more importantly, our case law has equated the termination of a guardianship to a change of custody among natural parents. *See In re Guardianship of Markham*, 32 Ark. App. 46, 795 S.W.2d 931 (1990); *see also Crosser v. Henson, supra.* Accordingly, we note that it is undisputed that BS has been well taken care of by his guardians and has thrived in that environment. Under those circumstances, we hold that it was not clearly erroneous for the trial court to refuse to terminate the guardianship.

We are mindful that, while this case was pending but before we took it under submission, our supreme court handed down *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007). In *Devine* the supreme court stated that "it is not in a child's best interests to take custody from a natural parent who has rectified all issues relating to his or her fitness." While this holding seems to equate best interest of the child with his or her return to a natural parent who has rectified unfitness issues, we decline to apply this holding to the case at bar. In the first place, *Devine* involved the initial preference in establishing a guardianship, not the termination of a guardianship of substantial duration as in the case at bar. Secondly, although the trial court pronounced Smith "qualified" to parent his child, at the same time it expressed reservations about his credibility. Much of Smith's case depended upon his testimony concerning how he would be able to care for his child, which would count for naught without the trial court finding him credible.

For his second point, Smith argues that his due-process rights were violated when the trial court refused to terminate the guardianship. He asserts that giving custody of BS to grandparents destroys "any pretense of a normal parent-child relationship and eliminates nearly all of the natural incidents of parenthood." However, it is not apparent from Smith's brief that he actually raised this argument to the trial court. Accordingly, we decline to consider this point because it is settled law that we will not address arguments, even those with a constitutional dimension, for the first time on appeal. *Hooks v. Pratte*, 53 Ark. App. 161, 920 S.W.2d 24 (1996).

Affirmed.

BIRD and GRIFFEN, JJ., agree.

Terry WILLIAMS *v.* STATE of Arkansas

CA CR 07-197 266 S.W.3d 213

Court of Appeals of Arkansas
Opinion delivered October 31, 2007

Robinson & Associates, P.A., by: *Luke Zakrzewski*, for appellant.

Dustin McDaniel, Att'y Gen., for appellee.

ROBERT J. GLADWIN, Judge. Appellant Terry Williams appeals the November 30, 2006 judgment and commitment order filed in Pulaski County Circuit Court imposing a six-year prison sentence upon him for possession of marijuana. Appellant contends that the circuit court erred by sentencing him contrary to this court's mandate. We affirm and direct our clerk to reissue the mandate according to the substituted opinion of May 24, 2006.

In July 2005 appellant was convicted by a Pulaski County jury of the offenses of possession of firearms by certain persons and second-offense possession of a controlled substance — marijuana.

He was sentenced to forty-years' imprisonment for the firearm-possession conviction and six-years' imprisonment for possession of marijuana. Appellant had previously been convicted of possession of cocaine, which is a Schedule II drug; therefore, the trial court increased his possession-of-marijuana charge to a second offense, making it a Class D felony.

Appellant appealed, and on March 15, 2006, this court reversed the firearm-possession conviction and reduced his conviction for possession of marijuana from a Class D felony to a Class A misdemeanor. The State then filed a petition for rehearing in this court and a petition for review in the Arkansas Supreme Court, contending in both that this court utilized Arkansas Code Annotated section 5-64-401(c)(2) (Supp. 2005) when sentencing appellant for his marijuana-possession conviction, but should have sentenced appellant in accordance with the statute in effect at the time of the commission of the crime, which was 2004. Because our opinion incorrectly relied upon the 2005 replacement of the statute, this court issued a substituted opinion on May 24, 2006, that analyzed the applicable 2003 statute, and affirmed the trial court's imposition of six-years' imprisonment, holding that appellant's conviction for possession of marijuana is a Class D felony under the 2003 statute. *Williams v. State*, 94 Ark. App. 440, 236 S.W.3d 519 (2006). Appellant subsequently filed a petition for review with the Arkansas Supreme Court, arguing that this court's initial opinion was correct.

By letter dated September 7, 2006, the clerk of this court advised both appellant and the State that the Arkansas Supreme Court had disposed of both parties' petitions for review, declaring one moot and denying the other. Also on September 7, 2006, this court issued a mandate, which refers to the opinion issued on March 15, 2006, rather than the substituted opinion dated May 24, 2006. The mandate states that it was this court's decision that appellant's case be reversed and dismissed in part, affirmed as modified in part, and remanded for resentencing. However, the substituted opinion of May 24, 2006, *Williams v. State, supra*, does not remand the matter for resentencing and simply affirms without modifying in part.

At the resentencing hearing held in circuit court on October 31, 2006, appellant argued that strict compliance with the mandate was necessary, notwithstanding this court's substituted opinion of May 24, 2006. The circuit court imposed a six-year prison

sentence and stated that appellant would be in a posture to appeal and allow this court to clarify its order. This appeal follows.

The mandate is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to have the appellate court's judgment duly recognized, obeyed, and executed. *Johnson v. State*, 366 Ark. 390, 235 S.W.3d 872 (2006). A lower court is bound by the judgment or decree of a higher court as law of the case and must carry the decision of the higher court into execution pursuant to the mandate issued by that court. *Smith v. AJ & K Operating Co.*, 365 Ark. 229, 227 S.W.3d 899 (2006). The lower court may not vary the decision or judicially examine it for any purpose other than execution. *Id.* A lower court may not vary the relief granted in the mandate and may not intermeddle even where there is apparent error in the mandate. *Id.* An inferior court has no power or authority to deviate from the mandate, and it must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. *Johnson, supra.* However, the courts have recognized some exceptions that might allow a matter to be revisited. They are (1) the availability of new evidence; (2) an intervening change of controlling law; (3) the need to correct a clear error or prevent manifest injustice. *Turner v. Northwest Ark. Neurosurgery Clinic*, 91 Ark. App. 290, 298, 210 S.W.3d 126, 134 (2005).

Appellant argues that the circuit court erred by imposing a sentence inconsistent with the mandate this court issued on September 7, 2006, which refers to its March 15, 2006 opinion. He acknowledges that the circuit court's decision to sentence him within the Class D felony range for the maximum six-year sentence very likely comported with this court's intentions. However, he maintains that the mandate rule requires exact compliance and therefore dictates reversal. He asserts that due to the magnitude of the liberty interest at stake, he seeks this court's ruling on whether the mandate rule applies herein, thus allowing the circuit court to sentence him as per the March 15, 2006 order, utilizing the 2005 replacement statute, rather than utilizing the statute in effect at the time of the commission of the crime. He notes that it is possible that this court could have intended to remand for the imposition of any sentence within the Class D felony range to permit consideration of the fact that when the circuit court imposed the maximum six-year sentence, he had just been found

guilty of the felon-in-possession-of-a-firearm charge that this court later reversed and dismissed.

Assuming the mandate in fact remanded the case for resentencing under the original opinion of March 15, 2006, the State maintains that appellant was properly sentenced to a term of six-years' imprisonment.[1] The State admits that the lower court may not vary the relief granted in the mandate and may not intermeddle even where there is apparent error in the mandate. *See Pro-Comp Mgmt., Inc. v. R. K. Enterprises, LLC*, 366 Ark. 463, 237 S.W.3d 20 (2006). The State claims, and we agree, that the trial court was aware that the remanded portion of the case was overturned by the substituted order and that the drug conviction had been affirmed. The remarks by the circuit judge at the close of the resentencing hearing illustrate his understanding. Thus, the judge was required to implement the mandate in light of the substituted opinion, which did not remand the case for any purpose. Therefore, no reversible error occurred and the trial court is affirmed.

We further direct our clerk to reissue the mandate in this case, correcting it pursuant to *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001). In *Dawson*, our supreme court determined that Arkansas Rule of Civil Procedure 60 may be applied in theory to criminal cases. The court stated:

> Regardless of whether the current Rule 60(a) or (b) has been or ever could be applied to criminal cases, the theory behind the rule has been applied to criminal cases. *See, e.g., McCuen v. State*, 338 Ark. 631, 999 S.W.2d 682 (1999); *Lovett v. State*, 267 Ark. 912, 591 S.W.2d 683 (Ark. App.1979); *McPherson v. State*, 187 Ark. 872, 63 S.W.2d 282 (1933); *Richardson v. State*, 169 Ark. 167, 273 S.W. 367 (1925). . . . Exceptions to the ninety-day time limit [set

[1] The State asserts that appellant's failure to include the mandate at issue in the record on appeal or in his addendum prevents appellate review. The State argues that the mandate is the most crucial document at issue, and it is appellant's burden to produce a record sufficient to show that reversible error has occurred. *Bullock v. State*, 353 Ark. 577, 111 S.W.3d 380 (2003). However, Arkansas's appellate courts have taken judicial notice of their own actions in the past. *E.g., Shoemate v. State*, 339 Ark. 403, 404, 5 S.W.3d 446, 446 (1999) ("[W]e take judicial notice of the fact that we returned and declined to file a partial record submitted by appellant because appellant's notice of appeal was not filed by a licensed attorney or by appellant.") Therefore, this court is free to reach the merits of appellant's argument.

> forth in Rule 60(a)] are noted in Rule 60(b) and Rule 60(c). Rule 60(b) allows "clerical errors" in "judgments, decrees, orders, or other parts of the record and errors therein arising from oversight or omission" to be corrected at any time or with permission of the appellate court if the appeal is pending. In *McCuen*, for example, this court upheld a trial court's modification of an order over a year and a half after the original judgment had been filed and mandate had issued. The correction in *McCuen*, however, was made to include language in the judgment reflecting a fine levied against *McCuen* in open court but which was omitted in the written order. Such a correction is one that is specifically allowed under the current Rule 60(b) to correct a "clerical error" to make "the record speak the truth, but not to make it speak what it did not speak but ought to have spoken." *Lord v. Mazzanti*, 339 Ark. 25, 29, 2 S.W.3d 76 (1999), 339 Ark. at 29, 2 S.W.3d 76, 79 (1999).

Id., 343 Ark. at 690, 38 S.W.3d at 323. Therefore, in order to make this court's record speak the truth, we direct our clerk to reissue the mandate correcting it to include the date and order contained in the substituted opinion of May 24, 2006.

Affirmed, and our clerk is directed to reissue the mandate according to the substituted opinion of May 24, 2006.

BIRD and HEFFLEY, JJ., agree.

FIRESTONE TUBE COMPANY and Gallagher Bassett Services *v.* Steve POTTS, Second Injury Fund, and Death & Permanent Disability Trust Fund

CA 07-406 266 S.W.3d 223

Court of Appeals of Arkansas
Opinion delivered October 31, 2007

Friday, Eldredge & Clark, by: *Betty J. Hardy*, for appellants.

Martin & Kieklak, by: *Aaron L. Martin*, for appellee Steve Potts.

Judy W. Rudd, for appellee Death & Permanent Total Disability Trust Fund.

David L. Pake, for appellee Second Injury Fund.

JOHN B. ROBBINS, Judge. Appellant Firestone Tube Company brings this appeal from a decision of the Workers' Compensation Commission that appellant is responsible for an attorney's fee to claimant Steve Potts after an appeal to the Commission by appellee Second Injury Fund. Firestone contends that the Commission's assessment of attorney's fees is not supported by substantial evidence and is contrary to applicable law. We agree, and we reverse.

It was stipulated that Mr. Potts sustained a compensable neck injury while working for Firestone on February 27, 2004. Firestone paid benefits for the claim, including medical expenses, temporary total disability benefits through April 8, 2005, and benefits for a five-percent anatomical impairment. While Firestone maintained that it was not responsible for any further benefits, Mr. Potts claimed that he was entitled to additional temporary total disability benefits through August 8, 2005, as well as permanent and total disability benefits. Because Mr. Potts had sustained two prior cervical injuries resulting in impairment ratings of ten percent and seven percent, Second Injury Fund was joined as a party to the case.

After a hearing, the administrative law judge found that Mr. Potts proved entitlement to additional temporary total disability benefits through May 5, 2005. The ALJ further found that Mr. Potts's prior impairments combined with his compensable injury to produce a seventeen-percent permanent partial disability, for

which Second Injury Fund is liable. Finally, the ALJ directed both Firestone and Second Injury Fund to "hold in reserve for a period of five years a sum equal to the potential subrogation claims regarding the claimant's pension plan payments subject to offset under Ark. Code Ann. § 11-9-411."

Firestone took no appeal from the ALJ's order. However, Second Injury Fund appealed to the Commission, arguing that the ALJ erred in finding that Mr. Potts proved entitlement to permanent wage-loss disability benefits, and further erred in his interpretation of Ark. Code Ann. § 11-9-411. The Commission affirmed the seventeen-percent disability award against Second Injury Fund, but vacated the ALJ's directive that each respondent hold sums in reserve for five years. The Commission awarded an attorney's fee of $500 to the claimant's attorney for prevailing on appeal, but the order was silent as to who was responsible for the fee. Subsequently Second Injury Fund filed a motion for clarification and reconsideration, arguing that the Commission erred in awarding wage-loss disability benefits, and asking the Commission to designate which party or parties is responsible for the attorney's fee. The Commission denied the motion to reconsider, and ordered Second Injury Fund to pay the $500 attorney's fee. Second Injury Fund then filed another motion for clarification and reconsideration, contending that it should not be responsible for the claimant's attorney's fee. In response to that motion, the Commission entered an order requiring Firestone and Mr. Potts to equally pay the attorney's fee. It is from that order that Firestone now appeals.

The statute applicable to this case is Ark. Code Ann. § 11-9-715 (Repl. 2002), which provides in relevant part:

> (a)(1)(A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.
>
> (B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee. Attorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a)(4) of this section.
>
> (2)(A) Whenever the commission finds that a claim against the Treasurer of State, as custodian of the Second Injury Trust Fund or

as custodian of the Death and Permanent Total Disability Trust Fund, has been controverted, in whole or part, the commission shall direct that fees for legal services be paid from the fund, in addition to compensation awarded, and the fees shall be allowed only on the amount of compensation controverted and awarded from the fund.

(B)(i) In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (½) by the employer or carrier in addition to compensation awarded; and one-half (½) by the injured employee or dependents of a deceased employee out of compensation payable to them.

(ii) The fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded.

. . . .

(b)(1) If the claimant prevails on appeal, the attorney for the claimant shall be entitled to an additional fee at the full commission and appellate court levels in addition to the fees provided in subdivision (a)(1) of this section, the additional fee to be paid equally by the employer or carrier and by the injured employee or dependent of a deceased employee, as provided above and set by the commission or appellate court.

(2) The maximum fees allowable pursuant to this subsection shall be the sum of five hundred dollars ($500) on appeals to the full commission from a decision of the administrative law judge and the sum of one thousand dollars ($1,000) on appeals to the Court of Appeals or Supreme Court from a decision of the commission.

We agree with Firestone's argument that the above provision does not entitle the claimant's attorney to a fee from his employer under the circumstances of this case. In *Furman v. Second Injury Fund*, 336 Ark. 10, 983 S.W.2d 923 (1999), our supreme court held that § 11-9-715(b)(1) does not authorize attorney's fees to be paid to a claimant by Second Injury Fund where a claimant prevails against the Fund in an appeal. The supreme court wrote:

On reading this statute, it is clear that this subsection does not mention the Second Injury Fund, nor can it be construed so as to be

> included definitively within the terms "employer or carrier." We reject Furman's argument to interpret the statute to hold the Fund liable for attorney's fees on appeal in deference to our long-standing rule that attorney's fees cannot be awarded unless specifically provided for by statute. *Arkansas Okla. Gas Corp. v. Waelder Oil & Gas, Inc.*, 332 Ark. 548, 966 S.W.2d 259 (1998).
>
> We respectfully invite the General Assembly to consider this matter and enact such legislation as may be appropriate to address the discrepancy in section 11-9-715, which currently provides for attorney's fees from the Fund at the hearing level, but makes no similar provision for such fees on appeal.

Id. at 11, 983 S.W.2d at 923-24. Despite the supreme court's invitation, the discrepancy identified in *Furman, supra,* has not as of yet been addressed by our legislature.

However, the Commission in the instant case erroneously found that the *Furman* holding requires attorney's fees to be assessed against Mr. Potts's employer. There was no indication in *Furman* that any fees were or could be assessed against the employer; only that they could not be assessed against the Fund. In the case at bar, as in *Furman*, the appeal was between the claimant and the Second Injury Fund. Firestone did not appeal the ALJ's decision and did not contest the ALJ's award, and was not a party to the appeal before the Commission. While Mr. Potts did prevail in that appeal as contemplated by § 11-9-715(b)(1), in order for the employer to be responsible for an attorney's fee under that subsection, the employer at a minimum must have been a party to the appeal. In its opinion the Commission correctly stated that one of the purposes of the attorney fee statute is to put the economic burden of litigation on the party that makes litigation necessary. *See Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). However, whatever additional expense may have been caused by the appeal to the Commission, this expense was not made necessary by Firestone, who paid substantial benefits to the claimant and then prevailed before the ALJ on its claim that any permanent disability benefits to which Mr. Potts was entitled was not its responsibility but rather the responsibility of the Second Injury Fund.

Reversed and remanded.

VAUGHT and BAKER, JJ., agree.

James William KING *v.* STATE of Arkansas

CA CR 06-1487 266 S.W.3d 205

Court of Appeals of Arkansas
Opinion delivered September 12, 2007
[Rehearing denied October 31, 2007.*]

William R. Simpson, Jr., Public Defender, *Don Thompson*, Deputy Public Defender, by: *Clint Miller*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

D.P. MARSHALL JR., Judge. James King appeals his conviction for theft of property from his former employer, Harbor Freight Tools. King argues one point: that this brief record does not contain substantial evidence supporting his conviction.

* Originally not designated for publication when delivered September 12, 2007, this opinion was redesignated for publication by the Arkansas Court of Appeals on October 31, 2007.

The State had to prove that King knowingly took, or exercised unauthorized control over, a crane and two winches with the purpose of depriving Harbor Freight of its property. Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2003). We will affirm King's conviction if substantial evidence supports it. Substantial evidence compels a conclusion without any need to speculate. *Ross v. State*, 346 Ark. 225, 230, 57 S.W.3d 152, 156 (2001). To implement our standard of review, we consider only the evidence that supports the conviction. *Lukach v. State*, 310 Ark. 119, 122, 835 S.W.2d 852, 853 (1992).

Viewed in the light most favorable to the State, here is the record. Belinda Strickland testified that she worked with King at Harbor Freight Tools on the day of the alleged theft. She and King's best friend were working at the cash registers. King was working as the stock person, retrieving large items for customers from the back of the store. Near the end of the day, Strickland went to the restroom at the back of the store. When she returned, she "noticed something strange. . . . [T]he register is supposed to be on, . . . [and] I noticed the monitor was off, and [King] had just came up with a shop crane. . . . [T]hen a few minutes later, [King] pushed it out the door." Strickland testified that the normal store procedure called for customers to show a receipt so the cashier will know that they paid for their purchase. She gave no testimony about whether a customer was present when King took the crane out; the reasonable inference from all her testimony about the crane, however, is that she saw no customer. She did not hear King or the other cashier ring up the crane.

Later, while the managers were in the back of the store, Strickland saw King push two winches out the door. She did not hear anyone ring up the winches on the cash register. She did not see any customers inside the store, nor did she see a receipt for the tools. She testified: "They wasn't checked out. . . . And there wasn't even a person there to get it. He just put — unless they was waiting on them outside the door, they wasn't there, he just pushed it out." Strickland reported what she had seen to her manager the next day. Sitting as the finder of fact, the circuit court convicted King of theft.

The State argues first that King did not preserve his sufficiency argument. We hold, however, that King's motions for a directed verdict were specific enough. Ark. R. Crim. P. 33.1(b) and (c). Among other things, he argued:

> Your Honor, I'm going to make a motion that the Court dismiss this on a directed verdict. I don't believe that they have presented proof that would say that this employee of the store had stolen any merchandise. She doesn't even say she saw him putting it anywhere. There was something that he was pushing outside, and there weren't even any customers outside.
>
> . . . .
>
> Nothing that the State has presented would offer proof, especially beyond a reasonable doubt, that Mr. King did something that he wasn't supposed to do while he was working at his job on July 7th of 2005.
>
> . . . .
>
> We'll rest, and I'll again renew my motion for a directed verdict that the State hasn't presented proof beyond a reasonable doubt from anybody at the store that could document what was removed, if anything, that wasn't supposed to be taken from the store other than a witness that worked there who is not sure because she couldn't say for certain whether or not property was stolen. She hadn't taken an inventory, she doesn't know if anything was missing.
>
> . . . .
>
> We're asking the Court to find that there's been no evidence that would convince the Court beyond a reasonable doubt that this man stole something from a store, especially of having any particular value that they're alleging in this information.

His motions apprised the circuit court that King challenged the sufficiency of the State's proof that King took or exercised unauthorized control over his employer's equipment, which he routinely moved around. *Williams v. State*, 325 Ark. 432, 435-36, 930 S.W.3d 297, 298 (1996). The court denied both motions. King may therefore question on appeal the sufficiency of the evidence.

On the merits, the evidence against King is circumstantial. We recognize that circumstantial evidence has great probative value. *Ross*, 346 Ark. at 230, 57 S.W.3d at 156. Moreover, circumstantial evidence can be substantial enough to sustain King's conviction if it excludes every other reasonable hypothesis except guilt. *Ibid.* Here it does not. We conclude that the circuit court had to speculate to convict King.

One of King's jobs for Harbor Freight was to move large equipment. Strickland is not a store manager, nor is she in charge of the inventory. No manager or other store employee testified against King. The State presented no evidence, documentary or oral, of merchandise actually missing from the store's inventory. Strickland acknowledged the possibility that there may have been a customer waiting outside the store for the winches. On this record, there are at least two reasonable hypotheses: King stole the crane and winches or this equipment was sold outside Strickland's presence and she did not see the customers outside the store. The fact-finder had to speculate to choose between these reasonable hypotheses. *Wortham v. State*, 5 Ark. App. 161, 163-64, 634 S.W.2d 141, 142-43 (1982).

The State did not present substantial evidence that King committed theft. We therefore reverse the judgment and dismiss the case.

BIRD and HEFFLEY, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF PETITION FOR REHEARING

Clint Miller, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan*, Deputy Att'y Gen., for appellee.

D.P. MARSHALL JR., Judge. In an earlier opinion, this court reversed James King's theft conviction because it was not supported by substantial evidence. *King v. State*, CACR 06-1487 (Ark. App. 12 September 2007) (unpublished). The State now petitions for a rehearing to correct an alleged error of law in our decision. It asserts that the determination of whether circumstantial evidence excludes every other hypothesis consistent with the appellant's guilt was solely for the fact-finder to decide. *Carmichael v. State*, 340 Ark. 598, 602, 12 S.W.3d 225, 227 (2000). And citing *Martin v. State*, 346

Ark. 198, 203, 57 S.W.3d 136, 139-40 (2001), the State argues that, as an appellate court, we were not permitted to second-guess the fact-finder's decision.

Indeed, both *Martin* and *Carmichael* have statements that seem to immunize a fact-finder's determination about the sufficiency of the evidence from appellate review. We are grateful to the State for exposing this murkiness in our law. Nevertheless we deny the State's petition for rehearing because, after careful review, we conclude that settled law supports our decision in this case. There is a long line of precedent in which our courts have discussed the appellate standard for reviewing the judgment in a criminal case when the evidence is entirely circumstantial. We take this opportunity to confirm that standard of review.

I.

First, we note that *Martin* is about corroborating an accomplice's testimony with circumstantial evidence. This is a different issue from the one we face in this case where no alleged accomplice testified. *Martin's* issue, however, is related to the issue here. *Martin* relies on *Johnson v. State* for the proposition that an appellate court may not consider whether the evidence excludes every other reasonable hypothesis but that of guilt. 303 Ark. 12, 17, 792 S.W.2d 863, 865 (1990). That point of law comes from *Cassell v. State*, which correctly recites the substantial-evidence standard for reviewing a conviction based entirely on circumstantial evidence. 273 Ark. 59, 62, 616 S.W.2d 485, 486-87 (1981).

Cassell's holding is good law. It follows the special rule we have for circumstantial-evidence convictions:

> In order to sustain a conviction based solely on circumstantial evidence, the circumstances must be consistent with the guilt of the accused and inconsistent with his innocence, and incapable of explanation on any other reasonable hypotheses than that of guilt. When the circumstances are of such a character as to fairly permit an inference consistent with innocence, they cannot be regarded as sufficient to support a conviction.

Ayers v. State, 247 Ark. 174, 176-77, 444 S.W.2d 695, 696-97 (1969). This standard for reviewing convictions is long-standing and sound:

> In questioning the sufficiency of the proof counsel rely upon the rule, . . . that circumstantial evidence must be consistent with guilt and inconsistent with any other reasonable conclusion. That rule, . . . is usually for the jury (or for the trial judge in a non-jury case),

> the test in this court being the requirement of substantial evidence. . . . It is only when circumstantial evidence leaves the jury, in determining guilt, solely to speculation and conjecture that we hold it insufficient as a matter of law.

Brown v. State, 258 Ark. 360, 361, 524 S.W.2d 616, 616-17 (1975) (George Rose Smith) (citation omitted).

Though clear in its inception, this oft-repeated standard has been clouded by slight modifications in the language of the opinions over time. Cases such as *Carmichael*, on which the State now relies, correctly state the part of the standard identifying the fact-finder's role, but they do not refer to the appellate court's role in reviewing the judgment. These cases include phrases like: "Once a trial court determines the evidence is sufficient to go to the jury, the question of whether the circumstantial evidence excludes every hypothesis consistent with innocence is for the jury to decide." *Gregory v. State*, 341 Ark. 243, 248, 15 S.W.3d 690, 694 (2000); *see also Carter v. State*, 324 Ark. 395, 398, 921 S.W.2d 924, 925 (1996); *Abbott v. State*, 256 Ark. 558, 561-62, 508 S.W.2d 733, 735 (1974); AMI–Crim. 106. This is a correct, but incomplete, statement of our law.

■ *Carmichael* and like cases do not include the important nuance that describes the appellate court's role. A full statement of the standard of review must recognize both parts of the inquiry, the fact-finder's role at trial and the appellate court's role on appeal. In many opinions, the appellate court's role is signaled by using the word "usually" when describing the fact-finder's role. *Brown, supra*; *Cristee v. State*, 25 Ark. App. 303, 306, 757 S.W.2d 565, 567 (1988) ("whether circumstantial evidence excludes every other reasonable hypothesis is *usually* a question for the jury")(emphasis added); *see also Deviney v. State*, 14 Ark. App. 70, 74, 685 S.W.2d 179, 181 (1985); *Murry v. State*, 276 Ark. 372, 378, 635 S.W.2d 237, 241 (1982); *Smith v. State*, 264 Ark. 874, 880, 575 S.W.2d 677, 681 (1979). In other opinions, however, the second part of the standard is simply omitted, implying that the fact-finder's decision in a circumstantial evidence case is essentially immune from review. That is not the law. Our original standard of review remains intact.

II.

■ On appeal, the question is this: when the evidence is viewed in the light most favorable to the State, does substantial

evidence support the judgment? When the State's case is made of entirely circumstantial evidence, if it leaves the fact-finder to speculation and conjecture, then the evidence is insufficient as a matter of law. *Deviney*, 14 Ark. App. at 74, 685 S.W.2d at 181; *Cristee*, 25 Ark. App. at 306, 757 S.W.2d at 567; *Abbott*, 256 Ark. at 561-62, 508 S.W.2d at 735; *Ledford v. State*, 234 Ark. 226, 230, 351 S.W.2d 425,427-28 (1961); *Scott v. State*, 180 Ark. 408, 412, 21 S.W.2d 186, 188 (1929). Two equally reasonable conclusions about what happened raise only a suspicion of guilt. On appeal, we may consider whether the record — viewed in the light most favorable to the State — presents this situation, and thus required the fact-finder to speculate to convict the defendant. This is the same question the circuit court faces in deciding whether to send the case to the fact-finder at trial. In asking this question we are not doing the fact-finder's job. Instead, like the circuit court, we are weighing whether the evidence was strong enough to put the case in the fact-finder's hands for decision. And we must set aside any judgment based upon evidence that required the fact-finder to rely on speculation and conjecture. *Gregory v. State*, 341 Ark. at 248, 15 S.W.3d at 694; *Carter*, 324 Ark. at 398, 921 S.W.2d at 925; *Smith*, 264 Ark. at 880, 575 S.W.2d at 681.

III.

In King's case, we followed this standard of review. We did not consider any proof that supported King's innocence. We recited the record in the light most favorable to the State. That record was simply insufficient. The State proved only that a co-worker saw King moving the store's hardware out the front door. King's job at the store, however, was to move hardware. Without more, the co-worker's testimony does not prove that King was guilty of exercising unauthorized control over any store item with the purpose of permanently depriving the store of it. Ark. Code Ann. § 5-36-103(a)(1) (Supp. 2003). The circuit court, as the finder of fact, therefore had to speculate to find King guilty. This it may not do.

We stand by our reversal of King's conviction. Petition denied.

PITTMAN, C.J., HART,' BIRD, HEFFLEY and MILLER, JJ., agree.

Valda STOKAN, et al. *v.*
ESTATE OF MARJORIE CANN, et al.

CA 06-996 266 S.W.3d 210

Court of Appeals of Arkansas
Opinion delivered October 31, 2007

Timothy Denison and *David O. Bowden*, for appellants.

Haught & Wade, LLP, by: *John Cogan Wade* and *William D. Haught*, for appellees.

D.P. MARSHALL JR., Judge. This case involves Arkansas's intestacy statutes. Marjorie Cann, a retired schoolteacher, died in 2005. She left no spouse, no descendants, no will, and an estate worth approximately $700,000.00. Her many cousins disagreed about how they should share Cann's estate. After several hearings and briefing, the probate division of the circuit court entered an order distributing Cann's estate. Five of Cann's paternal first cousins, once removed — we will refer to them collectively as "the paternal cousins" — have appealed that distribution. Our review is *de novo*. *Wells v. Estate of Wells*, 325 Ark. 16, 18, 922 S.W.2d 715, 716 (1996). The question of law presented is whether Judge Brantley correctly applied several provisions of our probate code about intestate succession to the interesting and undisputed facts of this case. She did.

I.

Before it divided Cann's estate among her extended family, the circuit court had to determine the members of Cann's inheriting class — the persons entitled to take from her estate. To do so, the court looked to our table of descent. Ark. Code Ann. § 28-9-214 (Repl. 2004). The provision relevant to Cann's estate states:

> [I]f the intestate is survived by no descendant, then in respect to such portion of his or her heritable estate as does not pass under subdivisions (2)-(5) of this section, the inheriting class will be the surviving grandparents, uncles, and aunts of the intestate. . . . If any uncle or aunt of the intestate shall predecease the intestate, the descendants of the deceased uncle or aunt will take, per capita or per stirpes according to §§ 28-9-204 and 28-9-205, the share the decedent would have taken if he or she had survived the intestate[.]

Ark. Code Ann. § 28-9-214(6).

When she died, Cann's closest living relatives were her sixteen maternal first cousins. Seven of Cann's first cousins had predeceased her — leaving children (Cann's first cousins, once removed) and other descendants. Under § 28-9-214(6), the circuit court held that Cann's inheriting class consisted of her grandparents, uncles and aunts (who were all deceased) and their living descendants — including Cann's first cousins and the descendants of her deceased first cousins. *Cf.* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 2.4 (1999).

After the circuit court determined the members of Cann's inheriting class, the next question was how much of the estate each

class member would receive. To answer that question, the court referred, as it was directed to do by § 28-9-214, to the code provisions about distribution. Ark. Code Ann. § 28-9-204 (Repl. 2004) explains how Cann's heirs were to take their shares from her estate:

> (1)(A) If all members of the class who inherit . . . from an intestate are related to the intestate in equal degree, they will inherit . . . in equal shares and will be said to take per capita.
>
> . . . .
>
> (2) If the members of the inheriting class are related to the intestate in unequal degree, those in the nearer degree will take per capita or in their own right, and those in the more remote degree will take per stirpes or through representation as provided in § 28-9-205.

Section 204(1)(A) did not apply because Cann's inheriting class included both her surviving first cousins and the descendants of her deceased first cousins. Therefore, the circuit court turned to Ark. Code Ann. § 28-9-205 (Repl. 2004) to divide Cann's estate.

Arkansas Code Annotated § 28-9-205 explains when and how to divide an estate per stirpes. Its formula directed the circuit court to divide Cann's estate into as many equal shares as there were surviving heirs in the nearest degree of kinship to Cann and deceased heirs of the same degree of kinship who had surviving descendants. Ark. Code Ann. § 28-9-205(a)(2)(A) & (B). This provision applied to Cann's sixteen living first cousins and to the seven first cousins who had predeceased Cann, but left descendants who survived her. It did not apply, as the paternal cousins argue, to the deceased aunts, uncles, and grandparents — they were deceased members of the inheriting class, and thus only their living descendants took their shares of the estate. Ark. Code Ann. § 28-9-205(a)(2)(A) & (B). Each of Cann's surviving first cousins was to take per capita, receiving one full share. The descendants of each predeceased first cousin were to take per stirpes, dividing one share proportionally among them. Ark. Code Ann. § 28-9-205(a)(3).

Following Ark. Code Ann. § 28-9-205(a)(2), the circuit court divided Cann's estate into twenty-three equal shares. Each of her living first cousins got 1/23 of her estate. The descendants of Cann's deceased first cousins — including her paternal cousins

who have appealed — took their representative share of their deceased parents' 1/23 share. One of these first cousins, once removed, predeceased Cann, and his five living children received his share per stirpes pursuant to § 28-9-205(b).

II.

On appeal, the paternal cousins argue that the circuit court misread and misapplied Ark. Code Ann. § 28-9-214(6). Cann's estate, they say, should have been divided per capita at the grandparent/aunt/uncle level of kinship, with a per stirpes distribution to the cousins from there. The paternal cousins assert that "[t]he fact that the statute omits a clause stating that if *all* of the aunts, uncles and grandparents predecease the estate, the descendants shall take per stirpes or per capita means the only reasonable interpretation [is] that the estate was to be divided at the level of aunt and uncle." (Emphasis added.) Otherwise, they say, the estate should escheat to the county of Cann's residence under Ark. Code Ann. § 28-9-215(3).

We disagree. We may not focus exclusively, as the paternal cousins' argument does, on one part of our probate code. Instead, we must consider and apply all the relevant provisions of the code in harmony. *Atkinson v. Knowles*, 82 Ark. App. 224, 227, 105 S.W.3d 818, 819 (2003). And the paternal cousins' argument fails to acknowledge the relationship between Ark. Code Ann. §§ 28-9-204 & 205 and Ark. Code Ann. § 28-9-214.

These other applicable statutes make plain that the "any" in § 28-9-214(6) is capacious enough to include the situation here: Cann's grandparents, aunts, and uncles predeceased her but left descendants living at the time of Cann's death. That circumstance fixed the inheriting class at the surviving-first-cousin level.

We acknowledge that the words of § 28-9-214(6) will bear another interpretation. It is possible to read the introductory phrase — "the inheriting class will be the surviving grandparents, uncles, and aunts of the intestate[ ]" — as a condition that one of these named individuals must survive Cann before this section of the code applies. But this interpretation does not get the paternal cousins where they want to go — a per capita distribution from the grandparent/uncle/aunt level. The paternal cousins note this interpretation but do not strongly press it. They see that it would lead to an escheat of Cann's estate to Pulaski County.

We reject this interpretation of § 28-9-214(6) for two reasons. First, it would require us to read the words "but not all of them" into the last sentence of § 28-9-214(6): "If any uncle or aunt of the intestate *but not all of them* shall predecease the intestate, the descendants of the deceased uncle or aunt will take . . . ." We may not, however, add words to the statute. *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 568, 42 S.W.3d 443, 451 (2001). Again, we must give effect to and harmonize all the statute's terms if possible. *Ford v. Keith*, 338 Ark. 487, 494, 996 S.W.2d 20, 24-25 (1999). Second, this alternative reading would defeat the manifest purpose of our intestacy statutes: to prescribe a default rule for equitably dividing the intestate's estate among her family, with escheat as the last resort.

Reading a condition of survivorship into the introductory phrase of § 28-9-214(6) would lead to the escheat of Mrs. Cann's estate to the county of her residence at death. She would have no surviving heir under § 28-9-214(6) (grandparents, uncles, and aunts) or § 28-9-214(7) (great grandparents, great uncles, great aunts), and her estate would pass pursuant to § 28-9-214(8) and § 28-9-215(3) to Pulaski County. Considered as a whole, our intestacy statutes disfavor escheats. This sound policy echoes the common law. 30A C.J.S. *Escheat* § 1 (2007). Faced with two permissible readings of § 28-9-214(6), we adopt the one that is more consistent with all the words in this section and our law's preference for Cann's albeit distant kin over Pulaski County.

The modified per stirpes intestacy scheme in Arkansas is unusual. Restatement § 2.4 cmt. i. And it is complex. Illuminated by all the provisions about intestacy, our statutes are clear nonetheless. Under these statutes, the per capita distribution is at the first level at which the intestate has surviving heirs, § 28-9-205(a)(2), regardless of what level was used to determine the inheriting class under § 28-9-214. Because all of Cann's aunts, uncles, and grandparents had predeceased her, the circuit court correctly made the per capita distribution of Cann's estate at the first-cousin level.

Affirmed.

BAKER and MILLER, JJ., agree.

MBNA AMERICA BANK, N.A. *v.* Jack G. GILBERT

CA 06-1324 266 S.W.3d 229

Court of Appeals of Arkansas
Opinion delivered October 31, 2007

Law Office of Stephen P. Lamb, by: *Mac Golden*, for appellant.

Jenkins Law Firm, PLLC, by: *Kevin R. Holmes*, for appellee.

LARRY D. VAUGHT, Judge. After an arbitrator awarded $10,816.95 in favor of appellant MBNA America Bank and against pro se appellee Jack G. Gilbert, MBNA filed a petition and application to confirm the arbitration award in the Circuit Court of Crawford County. Following a hearing, the trial court entered an order denying MBNA's petition, from which MBNA appeals. We reverse the trial court's denial of the confirmation and remand to confirm the award.

The dispute between the parties concerns Gilbert's failure to arbitrate any future dispute on his MBNA credit card. MBNA alleges that Gilbert was required to arbitrate any future dispute based upon a mailed amendment to the original credit-card agreement. The relevant language of the amendment states:

> As provided in you Credit Card Agreement and under Delaware law, we are amending the Credit Card Agreement to include an

Arbitration Section. Please read it carefully because it will affect your right to go to court, including any right you may have to have a jury trial. Instead, you (and we) will have to arbitrate claims. You may choose not to be subject to this Arbitration Section by following the instructions at the end of this notice. This Arbitration Section will become effective on February 1, 2000. This Arbitration Section reads:

Arbitration: Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration Section or the validity of the entire Agreement or any prior Agreement, shall be resolved by binding arbitration.

The arbitration shall be conducted by the National Arbitration Forum ("NAF"), under the Code of Procedure in effect at the time the claim is filed. . . . Any arbitration hearing at which you appear will take place within the federal judicial district that includes your billing address at the time the Claim is filed. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). Judgment upon any arbitration award may be entered in any court having jurisdiction. . . .

THE RESULT OF THIS ARBITRATION SECTION IS THAT, EXCEPT AS PROVIDED ABOVE, CLAIMS CANNOT BE LITIGATED IN COURT, INCLUDING SOME CLAIMS THAT COULD HAVE BEEN TRIED BEFORE A JURY, AS CLASS ACTIONS OR AS PRIVATE ATTORNEY GENERAL ACTIONS.

If you do not wish your account to be subject to this Arbitration Section, you must write to us at MBNA America, P.O. Box 15565, Wilmington, DE 19850. Clearly print or type your name and credit card account number and state that you reject this Arbitration Section. You must give notice in writing; it is not sufficient to telephone us. Send this notice only to the address in this paragraph: do not send it with a payment. We must receive your letter at the above address by January 25, 2000 or your rejection of the Arbitration Section will not be effective.

After the dispute over payment arose, MBNA submitted a claim to arbitration, and on June 29, 2004, the arbitrator awarded MBNA $10,816.95. On September 28, 2005, MBNA filed a petition with the circuit court seeking to confirm the award. Gilbert responded, alleging among other things that he never entered into an arbitration agreement with MBNA. MBNA subsequently filed a motion for summary judgment.

At the hearing on MBNA's motion for summary judgment, MBNA argued that it was entitled to judgment as a matter of law pursuant to Arkansas Code Annotated section 16-108-211, which provides that the trial court shall confirm an arbitration award unless the defendant has filed a petition to vacate, modify, or correct the award within ninety days of its issuance. Ark. Code Ann. § 16-108-211 (Repl. 2006). Because it is undisputed that Gilbert received notice of the arbitration award and did not file such a petition within the applicable time period, MBNA argued, the trial court should confirm the award. In response, Gilbert contended that there was no written arbitration agreement, that he never agreed to arbitration, and that he did not attend the arbitration. Following the hearing, the circuit court entered an order denying MBNA's petition to confirm the arbitration award. On appeal, MBNA requests reversal of the trial court's decision with a remand directing entry of a judgment confirming the award.

MBNA's appeal of the trial court's order denying the petition to confirm the arbitration award is appealable under Rule 2(a)(12) of the Rules of Appellate Civil Procedure and Arkansas Code Annotated section 16-108-219. Therefore, we have jurisdiction to address MBNA's argument.

The case at bar is the third in a series of cases recently presented to Arkansas's appellate courts involving MBNA and their efforts to have arbitration awards entered pursuant to a mailed amendment[1] to an original credit-card agreement confirmed in circuit court. *See Danner v. MBNA Am. Bank*, 369 Ark. 435, 255 S.W.3d 863 (2007); *MBNA Am. Bank v. Blanks*, 100 Ark. App. 8, 262 S.W.3d 618 (2007).

In *Danner*, MBNA petitioned the trial court seeking to confirm an arbitration award, arguing that Danner had failed to timely challenge the award. *Danner*, 369 Ark. at 437, 255 S.W.3d at 865. In response, Danner admitted that she did not timely

[1] *Danner*, *Blanks*, and the case at bar discuss the identical arbitration amendment.

challenge the award, but she alleged that she was not required to do so because she disputed the existence of the arbitration agreement and did not participate in arbitration. *Id.* The trial court granted summary judgment in MBNA's favor and confirmed the award. *Id.*

On review, our supreme court first noted that the Arkansas Uniform Arbitration Act did not apply, but rather the Federal Arbitration Act applied because the transaction involved interstate commerce. *Id.* The court then cited to section 2 of the FAA, which provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000). The court next cited to section 12 of the FAA, which provides: "Notice of a motion to vacate, modify, or correct an [arbitration] award must be served upon the adverse party or his attorney within three months after the award if filed or delivered. . . ." 9 U.S.C. § 12 (2000).

Based on these statutes, our supreme court held that the time limit imposed by section 12 of the FAA is not triggered unless there is a written agreement to arbitrate.[2] *Danner*, 369 Ark. at 441, 255 S.W.3d at 868. "If there is no [arbitration] agreement, the actions of the arbitrator have no legal validity." *Id.* Our supreme court further held that there was an issue of fact as to whether such an agreement existed between Danner and MBNA, and therefore, the trial court erred in granting summary judgment in favor of MBNA. *Id.* Accordingly, the *Danner* court reversed and remanded

[2] The *Danner* court also relied heavily upon a decision handed down by the First Circuit Court of Appeals, *MCI Telecommunications Corp. v. Exalon Indus., Inc.*, 138 F.3d 426 (1st Cir. 1998), which held that the time limits provided by section 12 of the FAA, regarding the vacation, modification, or correction of an award, do not prevent a party who did not participate in an arbitration proceeding from challenging the validity of the award at the time of its enforcement on the basis that no written agreement to arbitrate existed between the parties.

the case to the trial court to determine whether a written agreement to arbitrate existed between the parties. *Id.*

The facts of *Blanks* are nearly identical to those in *Danner*. At the trial-court level, MBNA sought confirmation of an arbitration award against Blanks. Blanks, like Danner, did not challenge the arbitration award until after the FAA's three-month time period lapsed but argued that she was not required to make such a challenge because she did not enter into a written arbitration agreement with MBNA and she did not participate in the arbitration hearing. *Blanks*, 100 Ark. App. at 11. The trial court denied MBNA's petition to confirm the arbitration award, and MBNA appealed.

On review, our court held that *Danner* was controlling and because MBNA did not present evidence of a written agreement to arbitrate between MBNA and Blanks (only a document that purported to amend a credit-card agreement to require arbitration), the three-month time limit to file a motion to vacate, modify, or correct an award under 9 U.S.C. § 12 was not triggered. *Blanks*, 100 Ark. App. at 13. Accordingly, we held that the trial court did not err in denying MBNA's petition to confirm the arbitration award and affirmed. *Blanks*, 100 Ark. App. at 14.

The facts in the case at bar are very similar to those in *Danner* and *Blanks*. In the instant case, like Danner and Blanks, Gilbert admitted that he did not formally challenge the arbitrator's award within three months of its issuance. Also, like Danner and Blanks, Gilbert has consistently maintained that he did not enter into a written agreement to arbitrate with MBNA. Indeed, there is no written agreement to arbitrate (signed by the parties) in the record. MBNA's sole point of proof was the amendment to the original card-holder's agreement.

However, one critical factual distinction between the instant case and *Danner* and *Blanks* is that Danner and Blanks both contended that they did not participate in the arbitration, and there was no evidence to the contrary. Here, there is evidence that Gilbert, who represented himself throughout these proceedings, participated in arbitration. Gilbert stated in his response to the petition to confirm the arbitration award that he filed a written response to the arbitrator. Also, the arbitration award stated that Gilbert "filed a response with the Forum and served it on the Claimant." While Gilbert's response is not in the record, it is

apparent that he did participate in the arbitration, at least to the extent that he was on notice of the proceeding.[3]

What we are left with is a record that reflects that Gilbert participated in arbitration; that the arbitration award was sent to Gilbert on June 29, 2004; and that Gilbert acknowledged receipt of the award by sending a letter on July 21, 2004, to MBNA objecting to it. The record further reflects that Gilbert did not petition the court to set aside the award within ninety days as required by section 12 of the FAA. Because Gilbert failed to comply with section 12 and because the participated in arbitration, he thereby waived any defenses he may have had. *See MCI Telecommunications*, 138 F.3d at 430-31 (stating that "it seems reasonable to conclude that participation in the litigation of the merits of a controversy before an arbitration panel, at the very least binds the party to the procedural requirements [i.e., the time requirements of section 12 of the FAA] that emanate from that process."). Accordingly, based on the record before us now, we hold that the arbitration award was valid on its face, that Gilbert participated in the arbitration, that he failed to challenge the award within ninety days, and that the trial court erred by denying confirmation of the award. We therefore reverse the trial court's order denying MBNA's petition and application to confirm the arbitration award. We further direct that, on remand, the trial court grant MBNA's petition.

Reversed and remanded.

GLOVER and HEFFLEY, JJ., agree.

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[3] Gilbert argued below and repeats here that he raised the issue of lack of an arbitration agreement to the arbitrator; that he had no voice in the selection of the arbitrator; and that he was not permitted to attend the arbitration in person. These objections/defenses to arbitration may have been considered by the arbitrator; however, without Gilbert's response in the record neither the trial court nor this court can actually ascertain what Gilbert argued. All we have to look to is the arbitration award, which stated that the "Parties have had the opportunity to present all evidence and information to the Arbitrator." More importantly, it failed to address any of Gilbert's alleged objections/defenses.

Marvin I. RIPPE *v.* DELBERT HOOTEN LOGGING
and American Interstate Insurance Co.

CA 06-1277 266 S.W.3d 217

Court of Appeals of Arkansas
Opinion delivered October 31, 2007

Frederick S. Spencer, for appellant.

Michael E. Ryburn, for appellees.

KAREN R. BAKER, Judge. Appellant appeals from a decision by the ALJ finding that appellant failed to prove the elements necessary to establish that he had an organic brain injury. The Commission affirmed the decision by the ALJ. Appellant has several arguments on appeal. First, he argues that the Commission's finding that he failed to establish by a preponderance of the evidence the elements necessary to establish a compensable organic brain injury was not supported by the evidence. Second, he argues that the evidence submitted by him establishes that the Executive Branch of

the State of Arkansas and private interests have exerted pressure on workers' compensation administrative law judges and Commissioners that has infringed upon their decision independence and resulted in actual bias and the appearance of bias in the decisions of the administrative law judges and Commissioners. Within his second point, appellant has two sub-points. His first sub-argument is that an administrative quasi-judicial procedure that does not provide safeguards to protect the decisional independence of hearing officers violates the separation-of-powers doctrine established by the Constitution of the State of Arkansas. His second sub-argument is that external pressure exerted by political and private interests upon the quasi-judicial administrative decision makers violates the due-process rights of the parties appearing before the agency and invalidates and renders void adjudicative procedure of the agency. We hold that the Commission properly found that appellant failed to prove the elements necessary to establish an organic brain injury, and we further hold that appellant's constitutional arguments, as presented in this case, have no merit. Accordingly, we affirm.

On March 15, 2004, appellant was working at Hooten Logging when he sustained a scalp laceration and elbow injury. The injury occurred when a tree fell from a logging truck, striking him and knocking him to the ground. On that particular day, appellant's boss was running a machine that "reaches out and grabs the log to put it on the truck." When his boss gave him the signal, he was expected to use a chain saw to trim the brush off the logs. Appellant explained that he was standing in the "safe zone" when his boss gave him the expected signal, and at that point he reached over to pick up the chain saw. "The next thing I knew, I was spitting dirt out of my mouth." Appellant did not remember that he had fallen to the ground, but he described the feeling of a severe headache and the feeling that his arm had been "ripped off [his] body." When he attempted to get up, he fell to the ground again. His boss directed him get into the pick-up truck so that he could take appellant to the doctor. Appellant stated that it was difficult to get to the truck because "the world was spinning" and he had blood all over his body. His scalp was "split open and flipped over, like [he] had been scalped" and "felt like it was on fire." Because the doctor's office was closed when they arrived, his boss took him to the emergency room at Baptist Health Medical Center in Heber Springs.

Appellant testified that since the injury, he forgets where he is going and has to have help remembering any appointments. He

no longer wants to be around people and has trouble when people are talking all at once around him. He has pain in his left arm, and it "hurts all the time." He also has trouble with his vision. When he turns his head, it is like "my vision's trying to get there." He struggles to read because the "letters move around." He also has trouble remembering what he just read. His ability to communicate has lessened since the injury, and he has trouble communicating his thoughts. He often forgets what he is doing and where he is going. Appellant testified that he has trouble with losing his balance. He stated that he did not have any of these issues before the injury.

He testified that he saw Dr. Blickenstaff , an orthopedic doctor, for treatment of his elbow injury. Dr. Blickenstaff released appellant in June 2004 and reported that he did not have a disability relating to his elbow injury. Appellant also saw an (unnamed) eye doctor whose report noted that appellant did not have any apparent "floaters" and that appellant did not sustain any "ocular injuries." The eye doctor prescribed glasses for appellant, but appellant testified that "they wouldn't get them for me." Appellant also saw Dr. Smith, a neurologist, and the CT Scan of appellant's head was normal.

On August 6, 2004, appellant was also seen by Dr. Vann Smith, a neuropsychologist, for evaluation of perceived cognitive difficulties. Dr. Vann noted at the beginning of his report that appellant's injury "resulted in a Grade III concussion with attendant confusion, spatial and temporal disorientation and affective lability." Dr. Vann ran various tests on appellant and concluded that appellant's test data revealed a number of abnormal findings consistent with the presence of impaired brain function. Dr. Vann diagnosed appellant with Organic Brain Dysfunction, Secondary to TBI; Cognitive Dysfunction, Non-Psychotic, Secondary to OBS; and Organic Brain Dysfunction Secondary to Axis III Condition(s). Dr. Vann recommended the following: referral to neurology and physiatry for additional evaluation and neurocognitive rehabilitation treatment planning; outpatient cognitive retraining/rehabilitation as clinically indicated; repeat neuropsychological test battery in six months to establish a data baseline from which to accurately assess the velocity/severity of any remaining neurocognitive symptoms and the efficacy of treatment; and that patient contact and become involved with Traumatic Brain Injury support groups sponsored by the Arkansas Brain Injury Association in his area.

Several of appellant's friends and former co-workers testified at the hearing. Robert Powell testified that prior to appellant's accident, appellant had worked for him for three years. After the injury, appellant attempted to work for Powell again. However, Powell described how appellant's personality had changed since the accident and that, unlike appellant's personality prior to the accident, appellant had become defensive and "sharp." Before the injury, appellant was able to "do complex things and he would help me figure things out. Now, he can't do any of that." "He can't remember anything, and he cannot focus on the plans."

Richard Lane also testified that after appellant's injury, he had short-term memory problems and was unable to understand what he was supposed to do at any given time. He testified that since the injury, appellant was depressed and felt like he had no purpose. Appellant became easily aggravated. He described appellant as having difficulty concentrating and unable to perform much physical activity. He stated that his condition had gotten consistently worse since the injury.

Another of appellant's co-workers, Doug Rouse, testified that appellant lived with Rouse and his family immediately following the injury, and during that time, appellant complained of problems with his arm, neck, head, back and massive body aches. He described appellant before the accident as a very hard working, very outgoing, easy to get along with, and friendly person. Since the accident, Rouse testified that appellant had suffered from memory problems and was not able to perform physical work. Appellant "is not the same person" since the accident. He was depressed and unhappy and did not do well in a crowd.

Jenna Jean Verdusco also testified that she saw a noticeable difference in appellant after the injury. Specifically, she testified that his memory was failing, and that he often could not remember things he told her. He lost his ability to "go from A to Z on a project." She stated that "[h]e can get something taken apart, but he can't get it put back together." She also recognized the fact that appellant's equilibrium was "off" and that he lost his balance often. She explained that after the injury, appellant moved away from other people and had isolated himself from his friends. She testified that she thought appellant was no longer employable.

After all the testimony and evidence presented at the hearing, the ALJ concluded that appellant's constitutional challenge was without merit and that appellant had failed to establish his

alleged organic brain injury by medical evidence supported by objective findings. The Commission affirmed the ALJ's findings, and appellant appeals the Commission's decision.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, its decision must be affirmed. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). Normally, we only review the findings of the Commission and not those of the ALJ. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). However, when the Commission adopts the conclusions of the ALJ, as it is authorized to do, we consider both the decision of the Commission and the decision of the ALJ. *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

To receive workers' compensation benefits, a claimant must establish (1) that the injury arose out of and in the course of the employment, (2) that the injury caused internal or external harm to the body that required medical services, (3) that there is medical evidence supported by objective findings establishing the injury, and (4) that the injury was caused by a specific incident and identifiable by the time and place of the occurrence. Ark. Code Ann. § 11-9-102(4) (Supp. 2007). As the claimant, appellant bears the burden of proving a compensable injury by a preponderance of the credible evidence. *See* Ark. Code Ann. § 11-9-102(4)(E)(i) (Supp. 2007). Compensation must be denied if the claimant fails to prove any one of these requirements by a preponderance of the evidence. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). Questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001).

Appellant asserts that the Commission's finding that he failed to establish by a preponderance of the evidence the elements necessary to establish a compensable organic brain injury was not

supported by the evidence. A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Supp. 2007); *Crawford v. Single Source Transp. Fidelity & Cas. Ins. Co.*, 87 Ark. App. 216, 189 S.W.3d 507 (2004). Objective findings are those findings which cannot come under the voluntary control of the patient, *Crawford, supra*, and are only necessary to establish the existence and extent of an injury, *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

In the case before us, appellant relies primarily on Dr. Vann Smith's diagnosis of organic brain injury, which was based on neuropsychological testing performed on August 6, 2004. He also relies on his own testimony of his numerous symptoms, as well as the testimony of his long-time friends that he has suffered from numerous mental and cognitive problems since he was injured in 2004. However, neuropsychological testing, without more, is not adequate to establish organic brain injury by "objective findings" within the meaning of Ark. Code Ann. § 11-9-102(4)(D). *See Watson v. Tayco, Inc.*, 79 Ark. App. 250, 86 S.W.3d 18 (2002) (holding that the results of neuropsychological testing standing alone is not enough to establish a compensable injury); *but see Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001) (where we found that, in addition to the neuropsychological testing, there was other objective evidence of a brain injury, which included medical testimony besides that of the neuropsychologist that attributed the appellant's injury to her work-related accident). Such symptoms could clearly come under the voluntary control of the appellant and therefore, by statutory definition, do not constitute objective findings. *See* Ark. Code Ann. § 11-9-102(16)(A)(i) (Supp. 2007).

Here, the only evidence suggesting that appellant sustained a compensable closed-head injury was found in the results of the neuropsychological testing and appellant's own testimony regarding his symptoms. There was no other *objective* evidence establishing an organic brain injury.[1] The results of the neuropsychological testing standing alone is not enough to estab-

[1] While we recognize appellant's dilemma in attempting to prove objectively a condition for which no objective test is currently available, nevertheless Ark. Code Ann. § 11-9-102(4)(D) requires a compensable injury be established by medical evidence supported by objective findings. We see no way for this dilemma to be addressed other than by legislative action.

lish a compensable injury; therefore we affirm the Commission's finding that appellant failed to prove the elements necessary to establish that he had an organic brain injury.

For his second argument on appeal, appellant makes several constitutional arguments. He contends that the evidence submitted by him establishes that the Executive Branch of the State of Arkansas and private interests have exerted pressure on workers' compensation administrative law judges and Commissioners which has infringed upon their decision independence and resulted in actual bias and the appearance of bias in the decisions of the administrative law judges and Commissioners. He further contends that an administrative quasi-judicial procedure that does not provide safeguards to protect the decisional independence of hearing officers violates the separation-of-powers doctrine established by the Constitution of the State of Arkansas and that external pressure exerted by political and private interests upon the quasi-judicial administrative decision makers violates the due-process rights of the parties appearing before the agency and invalidates and renders void adjudicative procedure of the agency. However, this court previously rejected identical arguments in *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007) and in *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007). As in *Long* and *Murphy*, we find no merit to appellant's constitutional arguments. Thus, we affirm the Commission's decision.

ROBBINS, J., concurs.

GLOVER, J., agrees.

JOHN B. ROBBINS, Judge, concurring. Our court sought to certify this appeal to the Supreme Court because of a perceived inconsistency in the decisions of the Court of Appeals and because of the constitutional issues raised by the claimant. Certification was attempted notwithstanding the appeal was from an order of the Workers' Compensation Commission and such appeals have historically been decided initially by the Court of Appeals. This was so even if the appeal was postured as a second or subsequent appeal of a case previously decided by the Supreme Court. *See Houston Contracting Co. v. Young*, 271 Ark. 455, 609 S.W.2d 895 (1980) (holding the second or subsequent appeal rule inapplicable to appeals from the Workers' Compensation Commission). However, this past year the

Supreme Court accepted two appeals directly from the Commission. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006); *Johnson v. Bonds Fertilizer, Inc.*, 365 Ark. 133, 226 S.W.3d 753 (2006). I thought that the adoption of a new judicial article in the Arkansas Constitution may have been viewed by the Supreme Court as altering the former practice of requiring Workers' Compensation Commission appeals to pass through the Court of Appeals before review by the Supreme Court. The Supreme Court denied certification. Consequently, our panel decided this appeal, and I agree with the rationale of the majority's decision affirming the Commission's conclusion that appellant failed to prove by objective evidence that he suffered an organic brain injury. While I cannot say there is no merit to appellant's constitutional arguments, I am constrained to concur and affirm inasmuch as other panels of our court previously rejected identical arguments.

Timothy Leron HESTER *v.* STATE of Arkansas

CA CR 07-250 267 S.W.3d 623

Court of Appeals of Arkansas
Opinion delivered November 7, 2007

William R. Simpson, Jr., Public Defender, *Sandra S. Cordi*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Dustin McDaniel, Att'y Gen., by: *Carolyn Boies Nitta*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant Timothy Leron Hester was convicted in a bench trial of first-degree battery, and was sentenced as a habitual offender to thirty years in prison. Mr. Hester's sole argument on appeal is that the trial court erred in denying his request to withdraw his waiver of his right to be tried by a jury. We agree, and we reverse and remand.

On June 21, 2006, the State charged Mr. Hester with first-degree battery committed against Keith Cooley. A pretrial hearing was held on September 11, 2006, where the following exchange transpired:

> THE COURT: It looks like we're here for omnibus. Any motions?
>
> DEFENSE COUNSEL: No motions except waive a jury trial.
>
> THE COURT: Raise your right hand, Mr. Hester.
>
> THE COURT: Did you sign this jury waiver?
>
> APPELLANT: Yes, sir.
>
> THE COURT: You understand that you have a right to trial by jury and that by signing this document, you're waiving that right and electing to have a bench trial?
>
> APPELLANT: Yes, sir.
>
> THE COURT: You understand that I will determine both the facts and the law of the case and whether you're guilty or not guilty. And if I find you guilty, I will fix your sentence.
>
> APPELLANT: Yes, sir.
>
> THE COURT: Are you under the influence of alcohol or drugs?

APPELLANT: Pardon me?

THE COURT: Are you under the influence of alcohol or drugs?

APPELLANT: No, no, sir.

THE COURT: Have you read everything in this document and are you voluntarily waiving your right to a jury trial?

APPELLANT: Yes, sir.

THE COURT: Okay.

DEFENSE COUNSEL: I read that to him verbatim. One thing I'd like to state on the record is that I did advise him to keep his jury trial, but he wanted a judge trial.

THE COURT: Jury waived; bench trial date?

TRIAL ASSISTANT: October 13th.

THE COURT: At?

TRIAL ASSISTANT: Nine o'clock.

THE COURT: Okay, thank you.

DEFENSE COUNSEL: Your Honor, he's now telling me he wants to leave it as a jury trial.

THE COURT: I think at this point it's discretionary with me after I read him all that stuff and done all that. So I'm not giving him a jury trial. He waived it. Thank you.

The bench trial was held as scheduled on October 13, 2006. The State called three witnesses, which included the victim and two investigating officers. The victim, Mr. Cooley, testified that he was friends with Mr. Hester but that on May 18, 2006, Mr. Hester got angry with him because Mr. Hester wanted a ride home and Mr. Cooley refused to give him a ride. According to Mr.

Cooley, Mr. Hester stabbed him with a "kitchen steak knife," resulting in collapsed lungs and two days' hospitalization. The defense did not call any witnesses.

Mr. Hester argues on appeal that the trial court abused its discretion by not allowing him to withdraw his waiver of jury trial. A criminal defendant may waive his right to a jury trial if there is compliance with Ark. R. Crim. P. 31.2, which provides:

> Should a defendant desire to waive his right to trial by jury, he may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury in person or through counsel shall be made and preserved.

Mr. Hester concedes that his initial waiver of his right to be tried by a jury was valid. However, he contends that he should have been permitted to withdraw the waiver pursuant to Ark. R. Crim. P. 31.5, which provides:

> A defendant may not withdraw his voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of trial.

Mr. Hester notes that he made his request to withdraw his jury-trial waiver a month before the scheduled trial date, and only moments after the waiver was accepted by the trial court. Under these circumstances, appellant submits that his request for withdrawal was not made in bad faith or for purposes of delay, and that there was no showing that granting his request would have delayed the start of the trial or inconvenienced the State's witnesses.

A denial of a request to withdraw the waiver of a jury trial will be affirmed absent an abuse of discretion. *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001). An abuse of discretion occurs when the trial court makes a judgment call that is arbitrary and groundless. *Smith v. State*, 90 Ark. App. 261, 205 S.W.3d 173 (2005). In the present case we hold that the trial court abused its discretion in denying Mr. Hester's motion to withdraw his waiver.

This case is unlike *Scates and Blaylock v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968), where our supreme court affirmed when the motion to withdraw the jury-trial waiver was not made until

the date on which the trial was set, and the trial court denied the motion as being too late. In a more recent case, *Maxwell v. State*, *supra*, this court stated that the trial court should consider such matters as the timeliness of the motion to withdraw and whether delay of the trial will impede justice or inconvenience witnesses. In that case, we held that the trial court abused its discretion in denying Maxwell's motion to withdraw her waiver in part because her motion was filed more than one month prior to trial, and no inconvenience to witnesses or to the administration of justice was demonstrated.

We are also persuaded by cases from other jurisdictions. In *Thomas v. Commonwealth*, 238 S.E.2d 834, 835 (Va. 1977), the Virginia Supreme Court wrote:

> Whether one accused of crime who has regularly waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court. The rule, as expressed in some cases, is that if an accused's application for withdrawal of waiver is made in due season so as not to substantially delay or impede the cause of justice, the trial court should allow the waiver to be withdrawn.
>
> The authorities are uniformly to the effect that a motion for withdrawal of waiver made after the commencement of the trial is not timely and should not be allowed. Whether a motion for the withdrawal of a waiver of trial by jury made prior to the actual commencement of the trial of the case is timely depends primarily upon the facts and circumstances of the individual case. Where there is no showing that granting the motion would unduly delay the trial or would otherwise impede justice, the motion is usually held to be timely. In some cases, however, it has been held that a motion for withdrawal of a waiver of jury trial, although made prior to the trial, was not timely and was properly denied by the trial court, the decisions in these cases being based primarily upon the ground that granting the motion would have resulted in an unreasonable delay of the trial.

In *People v. Hamm*, 298 N.W.2d 896 (Mich. App. 1980), the appeals court recognized that a waiver should be strictly construed in favor of preservation of the sacred right to a jury trial. Relevant factors for the trial court include evidence of bad faith and the nature or extent of prosecutorial objection. *See People v. Miller*, 566 N.Y.S.2d 429 (N.Y. Sup. Ct. 1990). And in *State v. Cloud*, 393 N.W.2d 123 (Wis. App.

1986), the appellate court stated that the trial court's discretion in deciding a withdrawal motion is not unbridled and should be exercised liberally in favor of granting the defendant's right to a jury trial. Upon reviewing cases from other jurisdictions, that court wrote:

> Generally, the cases hold that if a defendant's motion to withdraw a jury waiver is made sufficiently in advance of trial so as not to interfere with the orderly administration of court business or to result in unnecessary delay, inconvenience to the witnesses, or prejudice to the state, the court should exercise its discretion to allow the defendant to have a jury trial. Decisions upholding the trial court's denial of a withdrawal motion made prior to trial are primarily based on the ground that granting withdrawal would have resulted in unreasonable delay or inconvenience.

Id. at 126 (citations omitted).

In the case at bar, Mr. Hester waived his right to a jury trial and then immediately changed his mind and decided to take his counsel's advice and request a trial by jury. There was no indication of any bad faith, and the prosecutor made no objection to appellant's request to withdraw the waiver. Moreover, given the timeliness of the withdrawal request, there was no indication that this would have caused any delay, inconvenience to witnesses, or prejudice to the State.

The State argues in its brief that because appellant offered no argument or explanation below in support of his request to withdraw the waiver, any supporting arguments raised on appeal are outside the scope of appellate review. We disagree. A trial by jury is perhaps the most basic of rights afforded an accused. *See Bartlett v. U.S.*, 354 F.2d 745 (8th Cir. 1966). A criminal defendant is not required to explain his decision for attempting to exercise this right, and under the circumstances presented before the trial court in this case its decision to deny appellant's withdrawal request was arbitrary and groundless, even in the absence of any accompanying argument by appellant. It appears that the trial court denied the request on the sole basis that there had been a valid waiver, and this was an abuse of discretion.

Reversed and remanded.

VAUGHT and BAKER, JJ., agree.

Susan R. HAMILTON *v.* Dr. D.B. ALLEN, M.D., Individually and Dr. Ken Taylor, M.D., Individually

CA 06-1051 267 S.W.3d 627

Court of Appeals of Arkansas
Opinion delivered November 7, 2007

The Law Offices of W. Kelvin Wyrick, by: *W. Kelvin Wyrick, James E. Keever, M.D., J.D.*, and *Amy Freedman.*

Friday, Eldredge & Clark, LLP, by: *Laura Hensley Smith* and *J. Adam Wells*, for appellees.

SAM BIRD, Judge. In this medical-malpractice case Susan R. Hamilton appeals the circuit court's order granting summary judgment in favor of appellees, Dr. D.B. Allen and Dr. Ken Taylor. Hamilton raises four points on appeal: (1) that appellees' motion for summary judgment did not demonstrate a prima facie case and was improperly granted; (2) that the trial court erred in striking her response to appellees' motion for summary judgment on the basis of untimeliness; (3) that the trial court erred in failing to allow her to supplement the affidavit of her expert witness; and (4) that the trial court erred in dismissing her oral motion for a continuance. We find no error by the trial court in granting summary judgment in favor of appellees, and we affirm.

Hamilton underwent gynecological surgery by Dr. Allen on the afternoon of February 10, 2000. Several hours after the surgery Hamilton's blood pressure decreased and her pulse rate increased, suspected to be the result of post-operative, intra-abdominal bleeding. Consequently, exploratory surgery was performed that same evening by Dr. Allen and Dr. Taylor, and two oozing vessels were identified and ligated. A third surgery was required two days later for additional intra-abdominal bleeding: a third bleeding vessel was found and ligated in this surgery, which was performed by Dr. Allen and Dr. Michael Pollock. Hamilton was discharged from the hospital eight days after what had been originally scheduled as a "day surgery." Her allegations of medical negligence regarded Dr. Allen and Dr. Taylor's treatment of her initial post-operative bleeding.

Procedural History

Before addressing the merits of appellant's argument, we briefly summarize the development of this case before the circuit court. Appellant initially filed suit in February 2002, just before the expiration of the statute of limitations. Appellees took the deposition of Dr. Joseph Hume, who had been identified by appellant as the only medical expert she intended to call as a witness at trial. Appellees filed a motion for summary judgment on January 26, 2005, alleging that Hamilton could not meet her burden of proof through the testimony of her expert witness. At a hearing on February 4, 2005, the trial court treated appellees' motion as a motion *in limine* because it had been filed after a court-imposed

deadline for the filing of dispositive motions. The court denied the motion *in limine*, ruling that Hamilton could call Dr. Hume to testify at trial, that the court would deal at that time with any objections by appellees to Dr. Hume's opinions, and that the court was reserving the right to grant a directed verdict, depending on the evidence presented at trial. The court stated, "So to the extent that the motion for summary judgment can be considered a motion to exclude the testimony of Dr. Hume or some motion *in limine* to that effect as excluding that portion of the testimony, that motion will be denied." On the same day, Hamilton voluntarily non-suited her case as to all defendants.

On July 13, 2005 Hamilton re-filed her complaint against Drs. Allen and Taylor, making essentially the same allegations of negligence on their part as were made in the first suit. After answering and denying all allegations of negligence, appellees filed a motion for summary judgment on October 6, 2005, based upon the same grounds as their motion for summary judgment in the first lawsuit, *i.e.*, that because Dr. Hume's testimony was speculative, it was insufficient as a matter of law to establish the existence of an essential element of her claim of negligence on the part of appellees.

On November 2, 2005 Hamilton filed a paper entitled "Plaintiff's Designation of Expert Witness," which identified Dr. Harold J. Miller as her only expert witness in the case. Attached to the document was Dr. Miller's affidavit: it set forth the standard of care applicable to the surgical procedures performed on Hamilton by appellees, it stated that appellees had deviated from the standard of care, and it described the nature of such deviation. On December 1, 2005 Hamilton filed her response to the motion for summary judgment. She argued, among other things, that appellees' motion was ill-founded to the extent that it relied upon the deposition of Dr. Hume because his deposition was taken in connection with the earlier case that Hamilton had voluntarily non-suited and, therefore, it was not evidence that could be used as a basis for summary judgment in Hamilton's re-filed lawsuit.

Appellees moved to strike Hamilton's response, arguing that its filing was not timely and that, even if timely, Dr. Miller's affidavit did not establish that he was familiar with the applicable standard of care and, like Dr. Hume's testimony, his opinions were based solely upon speculation. Thereafter, Hamilton moved for leave to supplement Dr. Miller's affidavit and appellees responded in opposition to it.

Following a hearing on May 12, 2006, during which Hamilton orally moved that the hearing be continued until after discovery was completed, the trial court announced its findings: that the doctors' motion to strike Hamilton's response to the motion for summary judgment should be granted because the response was not timely filed, that Hamilton's motion to file a supplemental affidavit of Dr. Miller should be denied because the filing of Dr. Miller's initial affidavit was not timely, that Hamilton's oral motion for a continuance should be denied, and that the appellee/doctors' motion for summary judgment should be granted. The court also reiterated that, at the February 2005 hearing on appellees' motion *in limine* in the first case, it had reserved the right to grant a motion for directed verdict by appellees and that "the reason they didn't get their motion for summary judgment is they waited too close to trial to get it heard." The court's decision was memorialized in an order entered on June 1, 2006. Hamilton now appeals, arguing the four points set forth in the first paragraph above.

Grant of Summary Judgment

Summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *Skaggs v. Johnson*, 323 Ark. 320, 915 S.W.2d 253 (1996) (citing Ark. R. Civ. P. 56(c) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Once the moving party has established a prima facie case showing entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Mitchell v. Lincoln*, 366 Ark. 592, 237 S.W.3d 455 (2006). The appellate court determines if summary judgment was appropriate based on whether the evidence presented by the moving party in support of its motion leaves a material fact unanswered. *Id.* The evidence is reviewed in a light most favorable to the party against whom the motion was filed, with all doubts and inferences resolved against the moving party. *Id.*[1]

[1] The dissent does not acknowledge that the purpose of summary judgment is to avoid the waste of time, work, and money involved in requiring the trial of a case when a party cannot produce evidence supporting the existence of a fact necessary to establish his claim or defense. *Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith*, 284 Ark. 418, 683 S.W.2d 601 (1985). The well-recited standard to be applied in summary-judgment cases is whether there is evidence sufficient to raise a fact issue. *See Wallace v. Broyles*, 331 Ark. 58, 66,

In a medical-malpractice action, the *plaintiff* must prove: (1) the applicable standard of care; (2) that the medical provider failed to act in accordance with that standard; and (3) that such failure was a proximate cause of the plaintiff's injuries. *Webb v. Bouton*, 350 Ark. 254, 264, 85 S.W.3d 885, 891 (2002). A medical-malpractice complaint is subject to a motion for summary judgment when the plaintiff fails to present expert evidence of those three elements and the defending party demonstrates that the plaintiff lacks proof on one or more of these essential elements. *Robbins v. Johnson*, 367 Ark. 506, 241 S.W.3d 747 (2006); *Parkerson v. Arthur*, 83 Ark. App. 240, 125 S.W.3d 825 (2003).[2] Here, Hamilton had the statutory burden of proving these three essential

961 S.W.2d 712, 715 (1998) (citing *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995)). Rather, the dissenting opinion seems to suggest that even though Hamilton's expert doctor could not, without speculation, testify that the appellee doctors had violated any standard of care, she should, nonetheless, be given a chance to present that proof at trial because the appellees have not, in their motion for summary judgment, presented affirmative proof that they did not violate any standard of care. The dissent's position ignores Ark. Code Ann. § 16-114-206, which places the burden on the plaintiff to produce expert evidence establishing the essential elements of his or her claim, and Ark. R. Civ. P. 56(c), which mandates the grant of summary judgment where the pleadings, discovery, and affidavits, if any, show that there is no genuine issue as to any material fact.

In any case, medical-malpractice or otherwise, summary judgment is appropriate where the moving party demonstrates that the opposing party will be unable, at trial, to prove an essential element of his or her claim. *See Celotex Corp. v. Catrett, supra* (stating that summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial); *Cantrell-Waind & Associates, Inc. v. Guillaume Motorsports, Inc.*, 62 Ark. App. 66, 968 S.W.2d 72 (1998) (stating that the role of summary judgment is simply to decide whether material questions of fact exist to be resolved at trial).

[2] The dissenting judge cites *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986) and *Cash v. Lim*, 322 Ark. 359, 908 S.W.2d 655 (1995) for the proposition that the defendant/movants had to prove the requisite standard of care and that they had conformed to that standard. However, in *Wolner*, unlike the present case, the defendant doctor/movant filed a motion for summary judgment and attached his affidavit and the affidavit of his consulting physician stating merely that the doctor had not been negligent. Describing these affidavits as mere "conclusory assertions," the supreme court stated, "When *that is virtually all the supporting strength of a motion for summary judgment* then the movant has failed to make a prima facie showing of entitlement to summary judgment and the burden of going forward does not shift to the opposing party." 290 Ark. at 303, 718 S.W.2d at 944 (emphasis added). Likewise, in *Cash*, the proof offered by the defendant/movant in support of his motion for summary judgment was found by the supreme court to be lacking where the deposition testimony of the consulting doctor failed to establish a prima facie case of lack of causation.

elements by expert testimony. *See* Ark. Code Ann. § 16-114-206(a) (Repl. 2006); *Dodd v. Sparks Reg'l Med. Ctr.*, 90 Ark. App. 191, 204 S.W.3d 579 (2005).[3]

In order to demonstrate a genuine issue of material fact, the plaintiff's medical expert must state "within a reasonable degree of medical certainty" that the defendant breached the standard of care and that the alleged breach was a proximate cause of the injury. *Mitchell v. Lincoln, supra*; *Fryar v. Touchstone Physical Therapy, Inc.*, 365 Ark. 295, 229 S.W.3d 7 (2006). A party against whom a claim is asserted "may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Ark. R. Civ. P. 56(c). Burdens of proof for the parties to summary judgment are as follows:

> Rule 56(c) [of the Federal Rules of Civil Procedure] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. . . .
>
> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together

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Unlike the movant/defendants in *Wolner* and *Cash, supra*, here the movants have established in their motion for summary judgment that the deposition testimony of Hamilton's expert medical witness demonstrated that Hamilton lacked proof on an essential element of her claim because Dr. Hume could not state, without speculating, that a third bleeding site existed during the second surgery that Drs. Allen and Taylor should have discovered. Neither *Wolner* nor *Cash* involved a summary judgment in which the movant demonstrated an inability on the part of the plaintiff to prove one of the essential elements required to be proved in a medical-malpractice case.

[3] However, expert testimony is not required when the asserted negligence lies within the comprehension of a jury of laymen, such as a surgeon's failure to sterilize instruments or failure to remove a sponge from the incision before closing it. *Mitchell v. Lincoln*, 366 Ark. at 598, 237 S.W.3d at 460 (citing *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944)).

> with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But . . . we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, if any" . . . suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "with or without supporting affidavits[.]"

Celotex, 477 U.S. at 322-23. Our Rule 56 tracks the federal rule and is to be construed in accordance with federal decisions. *Reporter's Notes* to Ark. R. Civ. P. 56; *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

In their motion for summary judgment, appellees alleged that Hamilton could not meet her burden of proving the elements of negligence and causation because her only expert witness, Dr. Joseph Hume, admitted that speculation was the basis of his opinions regarding the alleged negligence. Appellees attached excerpts from his deposition to their motion. In the deposition Dr. Hume stated that, had there not been a third bleeder at the time of the second surgery, he would have had no criticisms of either appellee. Dr. Hume said that he had no specific criticisms of appellee Dr. Taylor and did not feel "that he had deviated below any standard of care" with which Dr. Hume was familiar. Dr. Hume's criticism of appellee Dr. Allen was that he did not adequately explore the bleeding in the second surgery and had deviated below the standard of care; this was based upon Dr. Hume's opinion that there was a third bleeding site that was not identified. Dr. Hume admitted, however, that he did not know whether there had been a third bleeder at the time of the second surgery and that it would require speculation on his part to say so.

The circuit court based its order of summary judgment upon the following finding: "Defendants have demonstrated that there exists no genuine issue of material fact and that they are entitled to judgment as a matter of law. Plaintiff has failed to meet proof with proof." The trial court did not err in this ruling. Appellees demonstrated their prima facie entitlement to summary judgment by attaching to their motion portions of Dr. Hume's deposition demonstrating that his opinion of negligence on the

part of appellees was speculative, thus rendering his opinion insufficient to satisfy Hamilton's burden of proof.[4]

In affirming the order of summary judgment, we also reject Hamilton's argument that the trial court's granting of summary judgment in her second lawsuit was in error because, prior to the non-suit of her first lawsuit, the court had denied appellees' motion in limine and had ruled that Dr. Hume could testify at trial. Hamilton refers us to no authority for her argument, and we are aware of none. As appellees note, the trial court never addressed the merits of the summary-judgment motion in the first lawsuit because the motion was not timely filed; rather, the court treated it as a motion *in limine* and stated that the court would rule on the merits of appellees' argument after Dr. Hume testified at trial. However, Hamilton non-suited her first lawsuit and it never went to trial. We are unaware of any authority that would preclude a party from filing a motion for summary judgment in a second lawsuit and relying upon the same evidence as was relied upon in a previously non-suited lawsuit, especially where, as here, the allegations in the second lawsuit are the same as those in the first lawsuit.

We take this opportunity to review and clarify the parties' burdens of proof regarding summary judgment when the movant is the defendant in a medical-malpractice action. In *Skaggs v.*

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[4] The dissenting judge misconstrues today's majority opinion as assigning to a plaintiff in a medical-malpractice case a higher burden of proof at the summary-judgment stage than is assigned to a plaintiff in any other type of case. To the contrary, we make no such distinction. Quite simply, in a medical-malpractice case, as in any other type of case, when a party cannot present proof on an essential element of his or her claim, there is no remaining genuine issue of material fact and the party moving for a summary judgment is entitled to judgment as a matter of law. *Irvin v. Jones*, 310 Ark. 114, 832 S.W.2d 827 (1992) (citing *Short v. Little Rock Dodge, Inc.*, 297 Ark. 104, 106, 759 S.W.2d 553, 554 (1988), and *Celotex*, *supra*). *See Sundeen v. Kroger*, 355 Ark. 138, 133 S.W.3d 393 (2003) (affirming summary judgment where plaintiff offered no proof of coercive actions or efforts to extort anything from him in abuse-of-process case against grocery store and its security officer); *Irvin v. Jones*, *supra* (affirming summary judgment because plaintiffs presented no proof of delivery, an essential element of their claim that certificates of deposit were gifts *inter vivos*); *Short v. Little Rock Dodge, Inc.*, *supra* (affirming summary judgment where plaintiffs claiming negligence and strict liability for manufacture and sale of a defective product were unable to produce evidence that a defect in the car or the dealer's negligence in failing to repair it caused the fatal automobile accident; when the summary judgment motion was made, the trial court had before it depositions and responses to requests for admissions and interrogatories).

Johnson, supra, and in *Robson v. Tinnin, supra,* the movants met their burden of proving a prima facie case for summary judgment by showing that the plaintiffs had no expert to testify as to the breach of the applicable standard of care. In *Brumley v. Naples,* 320 Ark. 310, 896 S.W.2d 860 (1995), where the appellant's expert on the issue of informed consent could not offer an opinion as to the proper standard of care, the appellant did not meet her burden of proof and no material issue of fact existed. In *Dodd v. Sparks Regional Medical Center, supra,* summary judgment was appropriate where the affidavit, which offered only a statement of what care should have been provided and an opinion that the health-care providers had failed to exercise due care, did not establish the applicable standard of care. When the defendant demonstrates the plaintiff's failure to produce the requisite expert testimony, the defendant has demonstrated that no genuine issues of material fact exist and is therefore entitled to summary judgment as a matter of law. *Id.*; *Skaggs v. Johnson, supra*; *Robson v. Tinnin, supra*; *Brumley v. Naples, supra*; *Reagan v. City of Piggott,* 305 Ark. 77, 805 S.W.2d 636 (1991). The moving party is not required to support its motion with affidavits or other materials further negating the plaintiff's claim. *See* Ark. R. Civ. P. 56 and *Celotex, supra.*

In *McAdams v. Curnayn,* 96 Ark. App. 118, 239 S.W.3d 17 (2006), a medical-malpractice action against a veterinary clinic and its employees, this court correctly affirmed an order of summary judgment but incorrectly addressed the summary-judgment movants' burden of proof. We summarily, and incorrectly, disposed of their argument that appellant McAdams, the nonmoving party and the plaintiff below, had failed through his expert witness to demonstrate the standard of care and a breach of the standard. Reviewing the proof presented by appellees (the defendant/movants) in their motion for summary judgment, we stated in dicta:

> Appellees did not present affirmative proof of the applicable standard of care required of a veterinarian in the February 14, 2000 visit or affirmative proof that the veterinarian complied with the standard of care. . . . Without proof supporting the motion for summary judgment on the applicable standard or breach thereof, appellant was under no duty to rebut those two aspects of medical negligence.

96 Ark. App. at 123, 239 S.W.3d at 20 (citations omitted). By the opinion we issue today, we acknowledge that insofar as *McAdams*

appears to say that a defendant/summary-judgment movant in a medical malpractice case is required to present affirmative proof of the standard of care and that the defendant's conduct conformed to that standard, *McAdams* is an incorrect statement of the law where the basis of the summary-judgment motion is the plaintiff's case.

Timeliness of Response to the Motion for Summary Judgment

Hamilton contends in her second point on appeal that her response to appellees' motion for summary judgment was timely and, thus, that appellees' motion to strike on the basis of untimeliness should have been denied. In their motion to strike Hamilton's response to the motion for summary judgment, appellees asserted that it was untimely and, further, that Dr. Miller's affidavit failed to establish an issue of material fact. The circuit court found that Hamilton had not responded to the summary-judgment motion within the time prescribed by the Arkansas Rules of Civil Procedure; the court further stated that, had it considered Dr. Miller's affidavit, the court would have found the affidavit insufficient to meet proof with proof.

The adverse party to a motion for summary judgment shall serve a response and supporting materials, if any, within twenty-one days after the motion is served. Ark. R. Civ. P. 56(c)(1). Under Rule 6(d), "Whenever a party has the right . . . to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or commercial delivery company, three (3) days shall be added to the prescribed period."

Hamilton was served with appellees' motion for summary judgment on October 4, 2005. She argues on appeal that she timely responded within the time prescribed by our rules when she sent appellees' counsel a copy of her "Plaintiff's Designation of Expert Witness" designating Dr. Harold Miller as her only expert witness and attaching his affidavit to the notice. Appellees assert that this paper was wholly insufficient as "a response" to the summary-judgment motion as contemplated by our Rules of Civil Procedure. They note that on November 28, 2005 they were served with Hamilton's formal response, entitled "Plaintiff Susan R. Hamilton's Response to Defendant's Motion for Summary Judgment," which addressed the merits of their motion for summary judgment. They contend that this response was untimely and that the court's striking of it was proper because of untimeliness.

We reject Hamilton's argument that the document designating Dr. Miller as her expert witness was a response to the motion for summary judgment. Neither the document nor the attached affidavit addressed the merits of the motion, and nothing in the record indicates that either party treated this paper as a response to the motion before Hamilton served her actual response on November 28, 2005. Appellees' summary-judgment motion was served on Hamilton on October 4, 2005, and, without requesting an extension of time within which to file her response, she did not serve her response until almost eight weeks later. The trial court did not err in finding that Hamilton did not respond within the time allowed by our Rules of Civil Procedure; therefore, there was no error in the striking of her response on the basis of untimeliness.[5]

Supplementation of Dr. Miller's Affidavit

As her third point on appeal, Hamilton contends that the circuit court erred in denying her motion to file a supplemental affidavit of her designated expert witness, Dr. Harold Miller. This motion was submitted to the trial court approximately a month before the scheduled date of the summary-judgment hearing on May 12, 2006. The court denied the motion to supplement at the conclusion of the May 12 hearing.

Hamilton argues that the denial of her motion to supplement Dr. Miller's affidavit was error because service of his original affidavit was timely and appellees would suffer no surprise or prejudice by supplementation of the affidavit. She points out that, under Ark. R. Civ. P. 56(e), the circuit court may permit affidavits to be supplemented by further affidavits. However, as we noted in our discussion of Hamilton's second point on appeal, the paper designating Dr. Miller as Hamilton's expert witness was not

[5] The designation of witness was served on October 27, 2005, twenty-three days after Hamilton was served the summary-judgment motion on October 4. Hamilton argues that, because the motion was served by both fax *and* mail, Rule 6(d) allowed three days for mailing in addition to the twenty-one days prescribed by Rule 56(c)(1), for a total of twenty-four days.

Appellees argue that Hamilton had only twenty-one days from October 4 to serve her response. Because we agree with the trial court that the designation of witness is not a response to the motion, we need not decide this issue.

a response to appellees' motion for summary judgment. Thus, we need not address any argument regarding supplementation of Dr. Miller's affidavit.

Hamilton also argues that a written order of the circuit court, marked with a file date of May 10, 2006, granted "leave to submit supplemental affidavit of Dr. Harold Miller." The order, submitted to the court by Hamilton as a proposed order, was entered without any of the other parties' knowledge, and no mention was made of it at the hearing two days later. At the hearing on May 12, 2006, the court denied Hamilton's motion to supplement Dr. Miller's affidavit, and an order to that effect was entered on June 1, 2006. By written order of June 26, 2006, the court vacated the order of May 10, 2006 and left its order of June 1, 2006 undisturbed. The denial of the motion to supplement was within the discretion given to the trial court by Rule 56(e). Further, Hamilton has demonstrated no prejudice from the mistaken granting of her motion.

Oral Motion for a Continuance

Hamilton contends in her final point on appeal that the trial court erred by denying her oral motion for a continuance at the hearing on May 12, 2006. She argues on appeal, as she did to the trial court, that sufficient discovery had not taken place and that she had not been able to schedule depositions with appellees.

Rule 56(f) allows a party opposing a motion for summary judgment to request a continuance:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Ark. R. Civ. P. 56(f). Under this rule, the decision on whether to grant a continuance is a matter of discretion with the trial court. *Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994).

Hamilton did not submit an affidavit stating the reasons that the trial court should order a continuance to allow further discovery, as is required by Rule 56(f). From her counsel's comments to the trial court during the hearing, it appears that the

additional discovery Hamilton desired was for appellees to take the deposition of Dr. Miller, an offer that appellees' attorney had earlier declined. The trial court acted well within its discretion in denying Hamilton's oral motion for a continuance.

Affirmed.

GLADWIN, MARSHALL, VAUGHT, and MILLER, JJ., agree.

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. If our standard on review of summary judgment is that we actively work to prevent a medical malpractice case from going to trial, then we should clearly state that goal. The reality is that we are not far from that practice now. One study conducted by the U.S. Department of Health and Human Services revealed that only 1.53% of those injured by medical malpractice file a claim. See Kimberly J. Frazier, *Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?*, 57 Ark. L. Rev. 651, 655 & n. 28 (2004). The same study indicated that a mere 8-13% of the claims filed by these injured patients or their survivors proceeded to trial; "and of these only 1.2-1.9% ended with a verdict favorable to the plaintiff." *Id.* nn. 29-30. *See also Examining the Work of State Courts, 2005, A National Perspective from the Court Statistics Project* (2006) at 29 (concluding that in 2004, medical malpractice cases accounted for an average of only four percent of tort cases in 13 states reporting).

Eliminating the threat of a jury trial would have an enormous impact on the handling of malpractice claims. As Neil Vidmar, a professor with Duke University known for his extensive study of medical malpractice litigation, recently explained in testimony to the U.S. Senate, "Without question the threat of a jury trial is what forces parties to settle cases. The presence of the jury as an ultimate arbiter provides the incentive to settle but the effects are more subtle than just negotiating around a figure. The threat causes defense lawyers and the liability insurers to focus on the acts that led to the claims of negligence." Testimony of Neil Vidmar, Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 at 21. (Citations omitted.)

As Professor Vidmar opined, the threat of the jury trial forces those defending to actually examine the acts of the medical care providers. Ordinarily, one might anticipate that a system of justice

would encourage the participants to focus on the facts and circumstances surrounding the allegations of harm. Given that just fractions of a percentage of claims ever come to trial in a medical malpractice case, the courts should be particularly vigilant in adhering to our procedural safeguards.

Instead of adhering to precedents that safeguard these procedures, the majority states the following in its opinion: "We take this opportunity to review and clarify the parties' burdens of proof regarding summary judgment when the movant is the defendant in a medical-malpractice action." The five judges in the majority on this panel then purport to, for lack of a better term, "correct" the five judges in the majority on *McAdams v. Curnayn*, 96 Ark. App. 118, 239 S.W.3d 17 (2006). While I dissented on other grounds in *McAdams*, the majority in *McAdams* did accurately state our supreme court's precedents regarding the standard of review for summary judgment in medical malpractice cases. My dissent in this case is based upon two premises: (1) We have no authority to overrule our supreme court's mandates on the standard of review for summary judgment cases; (2) Our supreme court applies the same standards of proof in a summary judgment case involving medical malpractice as it does in any other case disposed of by summary judgment.

The majority disagrees with each of those premises as it further decrees: "By the opinion we issue today, we acknowledge that insofar as *McAdams* appears to say that a defendant/summary-judgment movant in a medical malpractice case is required to present affirmative proof of the standard of care and that the defendant's conduct conformed to that standard, *McAdams* is an incorrect statement of the law where the basis of the summary-judgment motion is the plaintiff's failure to produce evidence to establish an essential element of the plaintiff's case."[1]

Perhaps the majority has adopted the general premise of the legislature's enactment of The Civil Justice Reform Act of 2003: "The Civil Justice Reform Act of 2003 (hereinafter 'Act 649') transforms the manner in which Arkansas courts must conduct business." Frazier, *supra*. One author, Kimberly Frazier, applied

[1] The statement in *McAdams* to which the majority refers reads as follows: "Without proof supporting the motion for summary judgment on the applicable standard or breach thereof, appellant was under no duty to rebut those two aspects of medical negligence." 96 Ark. App. at 123, 239 S.W.3d at 20 (2007).

Act 649 to *Advocat Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), a case involving negligence of a nursing home, to explain the effect the Act had upon the court's practices:

> Under Act 649, a cause of action with the same facts would have had higher burdens of proof for punitive damages, diminished venue option, no possibility of joint liability, different pleading requirements and a maximum jury award of $1 million dollars (in stark contrast with the $63 million in punitive damages initially awarded in *Sauer*).

Of course, I believe that where the Act infringes upon the court's rules and procedures, our supreme court will reject any such infringement. One example of such a rejection is our supreme court's finding as unconstitutional Act 649's requirement that a trial court dismiss a plaintiff's malpractice case if a plaintiff fails to file an affidavit of reasonable cause within thirty days of filing her complaint, now codified at Ark. Code Ann. § 16-114-209(b) (Repl. 2006). *See Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007). Our supreme court concluded that the mandatory thirty-day requirement for the affidavit of reasonable cause after filing the complaint directly conflicted with Rule 3 of our Rules of Civil Procedure regarding commencement of litigation. *Id.* Accordingly, they reversed and remanded the case for further proceedings. *Id.* In explaining its reasoning, our supreme court quoted with approval a sister court's striking of a similar provision:

> The Oklahoma legislature implemented the Affordable Access to Health Care Act . . . for the purpose of implementing reasonable, comprehensive reforms designed to improve the availability of health care services while lowering the cost of medical liability insurance and ensuring that persons with meritorious injury claims receive fair and adequate compensation. Although statutory schemes similar to Oklahoma's Health Care Act do help screen out meritless suits, the additional certification costs have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs. The affidavit of merit provisions front-load litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price. They also prevent meritorious medical malpractice actions from being filed. The affidavits of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being out of court during discovery. Rather

> than reducing the problems associated with malpractice litigation, these provisions have resulted in the dismissal of legitimately injured plaintiffs' claims based solely on procedural, rather than substantive *grounds.*

Summerville, 369 Ark. at 236-37, 253 S.W.3d at 419 (quoting *Zeier v. Zimmer, Inc.*, 152 P.3d 861, ¶ 21 869 (Okla. 2006)) (emphasis added).

Our supreme court's rejection of this legislative infringement upon court procedures in the management of a medical malpractice action reaffirms the premise that we do not have a different standard of review for orders granting summary judgment in a medical malpractice case. Nor should we. Despite much discussion to the contrary, litigation and the threat of jury trials improves health care in much the same way that litigation in other contexts protects the safety of the citizens of this country:

> In the absence of a comprehensive social insurance system, the patient's right to safety can be enforced only by a legal claim against the hospital. . . . [M]ore liability suits against hospitals may be necessary to motivate hospital boards to take patient safety more seriously. . . . Anesthesiologists were motivated by litigation to improve patient safety. As a result, this profession implemented 25-years-ago a program to make anesthesia safer for patients and as a result, the risk of death from anesthesia dropped from 1 in 5000 to about 1 in 250,000.

George J. Annas, J.D., M.P.H., "The Patient's Right to Safety — Improving the Quality of Care through Litigation against Hospitals," *New England Journal of Medicine*, May 11, 2006.

Under the majority's analysis, a plaintiff in a medical malpractice case has a higher burden of proof at the summary judgment stage of a proceeding than a plaintiff in any other type of case. A plaintiff has to establish through expert testimony that the defendant committed malpractice before a plaintiff is allowed to present that proof to the fact-finder. According to the majority, all a defendant in a medical malpractice case need allege in a motion for summary judgment is that the plaintiff has not yet met, by expert testimony, his burden of proof pursuant to the statutes. No provision in the medical malpractice statutes requires that a plaintiff meet his or her burden of proof prior to trial. Neither has our supreme court adopted that standard:

> Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. This court views evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable persons might reach different conclusions from those undisputed facts.

Rice v. Tanner, 363 Ark. 79, 82, 210 S.W.3d 860, 863 (2005) (citations omitted) (holding that once a movant in a medical malpractice case presents evidence in a summary judgment context establishing the standard of care and that the standard of care was met by the defendant, the nonmoving party must present evidence to create a fact question).

In the context of summary judgment, our duty as a reviewing court is to determine, first and foremost, whether the moving party has presented evidence that establishes that the facts are undisputed and that the *only* conclusion from the undisputed facts is that the movant's actions cannot be the legal basis for recovery. *See id.* The majority's confabulation of our standard by inserting a sufficiency determination in a medical malpractice summary judgment is perplexing. What is even more confusing is the majority's citation to federal procedure and precedent to support this perversion. Not only is our supreme court not bound by federal case law interpreting federal procedural rules regarding summary judgment, but our supreme court has specifically rejected the premise that a trial court considering a summary judgment motion should determine whether the evidence presented at summary judgment is sufficient to sustain a burden of proof at trial:

> Also cited by the petitioners is *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), in which the Supreme Court stated that the summary-judgment standard "mirrors the standard for a directed verdict." That statement was

> repeated by the Supreme Court, although it was not the basis of the holding, in *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), a case we have cited often for other language concerning summary-judgment law but not for the "mirror" concept.
>
> *If it has not been clear heretofore*, we hope this opinion clarifies that, although we follow federal courts' interpretation of the parallel rule, F.R.C.P. 56(c) when possible for the sake of uniformity, *we have never gone so far as to say, much less hold, that we will make a "sufficiency of the evidence" determination when a summary-judgment motion is at issue.* We regard that directed-verdict standard, used in ruling on motions made pursuant to Ark. R. Civ. P. 50, as being somewhat different from the summary-judgment standard.
>
> We have ceased referring to summary judgment as "drastic" remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the *state of the evidence* as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.,* when there is not any genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law.

Wallace v. Broyles, 331 Ark. 58, 194-95, 961 S.W.2d 712, 723-24 (1998) (emphasis added).

Our supreme court admonishes that a "sufficiency of the evidence" determination is not the appropriate standard when a summary-judgment motion is at issue. That specific admonition alone requires reversal of the case before us. In direct contradiction with our supreme court's instruction that sufficiency of the evidence is not our determination, the majority opines: "Appellees demonstrated their prima facie entitlement to summary judgment by attaching to their motion portions of Dr. Hume's deposition demonstrating that his opinion of negligence on the part of appellee was speculative, thus rendering his opinion insufficient to satisfy Hamilton's burden of proof."[2]

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[2] When evaluating an expert opinion regarding the causation aspect of the negligence claim, a trial court should be mindful of the following admonition emphasizing that proximate cause is a jury question: "Arkansas does not require any specific "magic words" with respect to expert opinions, and they are to be judged upon the entirety of the opinion,

Not only does the majority err by applying a sufficiency of the evidence standard to hold that the expert's opinion was insufficient to satisfy Hamilton's burden of proof, but the majority also further compounds that error by completely ignoring the fact that the medical expert is legally incapable of admitting that his testimony is impermissibly speculative. Examining the appellees' motion for summary judgment makes the majority's error painfully clear.

Paragraph two of appellees' motion for summary judgment reads as follows: "Expert testimony is inadmissible if based upon speculation." Paragraph three states the following: "Plaintiff's only liability expert witness, Dr. Joseph Hume, admitted during his deposition that he bases his opinions regarding the issue of negligence (and therefore on the issue of causation) on speculation." Paragraph four continues with this conclusion: "Because plaintiff's theories of negligence and causation are based upon speculation, testimony regarding those theories is inadmissible and thus plaintiff cannot satisfy her burden of proof against Dr. Allen and Dr. Taylor. Where a plaintiff cannot meet her burden of proof on an essential element of her claim, the defendant is entitled to summary judgment."

Appellees' motion for summary judgment characterized the medical expert's testimony as speculation. In their brief in support, appellees cite three cases and proclaim that "the Supreme Court affirmed *directed verdicts* in favor of medical care providers where plaintiffs failed to present expert medical testimony to support their allegations of negligence against medical care providers." (Emphasis added.) Motions for directed verdict and judgment notwithstanding the verdict as to proof of negligence and resulting damages are challenges to the sufficiency of the evidence. *See Callahan v. Clark*, 321 Ark. 376, 386, 901 S.W.2d 842, 847 (1995); *see Conagra, Inc. v. Strother*, 340 Ark. 672, 676, 13 S.W.3d 150, 153 (2000) "motion for JNOV is technically only a renewal of the motion for a directed verdict made at the close of the evidence).

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not validated or invalidated on the presence or lack of 'magic words.' *See Wackenhut Corp. v. Jones*, 73 Ark.App. 158, 40 S.W.3d 333 (2001). Even in medical malpractice cases, proximate cause may be shown from circumstantial evidence, and such evidence is sufficient to show proximate cause if the facts proved are of such a nature and are so connected and related to each other that the conclusion may be fairly inferred. *See Stecker v. First Commercial Trust Co.*, 331 Ark. 452, 962 S.W.2d 792 (1998)." *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004)).

Appellees' entire motion is based upon their claim that Dr. Hume admitted that his opinions were based upon speculation. While that argument may be appropriate in the context of analyzing whether or not a trial court properly directed a verdict in a jury trial, it is inapplicable to our analysis regarding the propriety of an order granting summary judgment. As convenient as the argument may be, it is understandable why appellees failed to include any legal authority regarding any admission by Dr. Hume that his opinion was impermissibly speculative as a matter of law. While there is nothing in the record to indicate that Dr. Hume would have had any insight into the legal significance of impermissible theorizing to reach a conclusion, even if he had testified that he was the foremost legal authority in the country on evidentiary matters with an emphasis on impermissible speculation, his legal opinion as to the admissibility of his testimony would be completely irrelevant. Evidentiary matters regarding the admissibility of evidence are left to the sound discretion of the trial court and rulings in this regard will not be reversed absent an abuse of discretion. *White v. State*, 330 Ark. 813, 958 S.W.2d 519 (1997).[3]

Nothing Dr. Hume might have said could relieve the trial court of its duty to review the "evidence" presented to it to determine whether a factual matter was presented. It was the trial court's duty, not a party's nor a witness's, to determine whether the appellees had established a prima facie case that they were entitled to judgment as a matter of law. The duty of a plaintiff, even in a malpractice case, to present proof prior to trial only arises when the moving party first establishes a prima facie case that judgment is warranted as a matter of law. When the proof supporting a motion for summary judgment is insufficient, there is no duty on the part of the opposing party to meet proof with proof. *See Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995); *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986). Our supreme court has explained the application of this principle in previous malpractice cases:

> In *Wolner,* the plaintiff was in the hospital for prostatic surgery, and following surgery, he rose from a chair, fell, and broke his arm. He sued the hospital and his urologist, and the circuit court granted

[3] Even Rule 701 of the Arkansas Rules of Evidence allowing the opinion of lay persons, rather than experts, has been recognized not as a rule against opinions, but as a rule that conditionally favors them. *Bridges v. State*, 327 Ark. 392, 938 S.W.2d 561 (1997).

summary judgment in favor of both. Our supreme court reversed with respect to the urologist and stated that it was the responsibility of the urologist, as the moving party, to prove the requisite standard of care and that he had conformed to that standard of care before the opposing party was required to present proof of the contrary. This he failed to do.

Similarly, in *Collyard v. American Home Assur. Co., supra*, the issue was whether proof was sufficient to sustain summary judgment in a slip and fall case. The plaintiff (Collyard) gave a deposition in which she stated that she did not know how the water causing her fall got on the floor or how long it had been there. The defendant business (YMCA) where the plaintiff fell moved for summary judgment and attached the plaintiff's deposition in support of the motion. The circuit court granted the motion in favor of the defendant because the plaintiff had not responded to the motion by countervailing proof. This court reversed and stated:

The appellant [Collyard] alleged negligence on the part of the YMCA. The appellee [YMCA] never controverted this allegation by affidavit or other proof. It simply offered the deposition of Collyard that *she* did not know how the water got there or how long it had been there. The appellee and trial judge mistakenly presumed that the burden was on Collyard to come forward with additional proof on this issue. The burden in a summary judgment proceeding is on the moving party; it cannot be shifted when there is no offer of proof on a controverted issue. The object of a summary judgment is not to try the issues but to determine if there are issues of fact. *Ashley v. Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1967).

Whether the YMCA was negligent remained a fact in issue. If appellant had offered proof that the YMCA was not negligent, then Collyard would have had to produce a counter-affidavit or proof refuting the offer. But that was not the case. The appellee based its motion only on the deposition of Collyard, the plaintiff. The allegation in the complaint remained uncontroverted and Collyard should be permitted to present other evidence on that fact. *Collyard*, 271 Ark. at 229-230, 607 S.W.2d at 668.

Cash v. Lim, 322 Ark. 359, 365-66, 908 S.W.2d 655, 658-59 (1995) (reversing and remanding summary judgment award holding that surgeon's deposition, which was attached to defendants' motion for

summary judgment, did not constitute proof of lack of causation that required countervailing proof from plaintiffs).

Applying the principles discussed in *Wolner, supra,* and *Cash, supra,* appellees as the moving party had to prove the requisite standard of care and that they had conformed to that standard of care before appellant was required to present proof to the contrary. Appellees' failure to provide proof that they had met the standard of care precluded the entry of summary judgment and requires reversal in this case.

It may seem axiomatic, from reading our supreme court precedents and our reiteration of those precedents in *McAdams,* that appellees failed to make a prima facie case by failing to first establish conformity with the standard of care. Yet, appellees' based their argument and the majority renders its opinion upon the assumption that appellees only needed to prove that appellant had not yet presented the requisite expert testimony. Rather than presenting evidence that established the standard of care and compliance with that standard, appellees presented evidence that appellant's expert witness had not demonstrated the standard of care and violation of that standard that proximately caused damages to appellant. The argument is convenient for appellees who conducted the deposition of appellant's expert witness and were under no obligation to inquire as to the standard of care and compliance with the standard in questioning appellant's expert.

Even with their complete control of the questioning of appellant's expert, Dr. Hume, the statements by Dr. Hume were not as impermissibly speculative as the majority contends. Dr. Hume testified that the deviation from the standard of care in this case came from the failure to properly identify the cause of the excessive bleeding which would have been identified if Dr. Allen had adequately opened the incision area. Appellees' counsel questioned, "If I understand your testimony, your opinion in this case that Dr. Allen deviated below the standard of care is based upon your opinion that there was a third bleeding site that was not identified?" It is clear from the context that the third site was not identified *by Dr. Allen* because he did not extend the incision enough to visualize the area in question. When appellees' counsel asked, "And it would be speculation to say they would have found anything, correct?", Dr. Hume responded, "Well, no, I still think that there was a bleeder from the first surgery that they didn't get or they tamponaded it just enough when they put those sutures in for the oozers and then it reopened up."

Ironically, the testimony that the appellees and the majority apparently rely so heavily upon regarding speculation surrounds the attempts by counsel to commit Dr. Hume to saying that the excessive bleeding was caused by the two sources of bleeding identified by appellees but that appellees just failed to adequately address the bleeding:

> Q: And you don't have any reason to doubt, as we sit here today, Dr. Allen's testimony concerning how far he opened that up?
>
> A: No. I don't have any — he just didn't go all the way up in the infundibulopelvic retroperitoneal space of the ligament.
>
> Q: So am I correct, do you believe that there was a third bleeding site?
>
> A: Probably. It was artery. And we know he didn't get it because the surgeon found it on the 12th.
>
> . . .
>
> Q: Just to make sure I understand. During the second surgery, meaning the first exploratory surgery, from your review of the records and Dr. Allen's deposition, it's your opinion that there was a third bleeding site?
>
> A: That's correct.
>
> Q: What in your opinion caused that third bleeding site?
>
> A: I think that the vessell retracted.
>
> Q: When did the vessel retract?
>
> A: At the initial surgery, he lost it in the clamp, pulled back. Or it could have torn, depending upon how much tension was placed on it.
>
> Q: Did you see in looking at the operative note from the second surgery, any evidence of continuing bleeding after Dr. Allen had sutured the two bleeding sites he identified?

A: He sutured the two oozing and he didn't feel he saw any other sites. But I think that it was probably tamponaded for a bit and then it opened back up. Since its arterial it will go through spasms.

Q: So in other words, you don't know whether this third bleeding site was actually bleeding at the time of the second surgery?

A: That's correct.

Q: It would be speculation on your part to say that it was bleeding?

A: It would be speculation. But for the amount of blood that she had there, it probably had bled on and off to make the volume up so great.

. . .

A: I feel that the amount of blood there was not — was more than what the two oozes would cause.

Q: Is that based upon your opinion that the sites were both oozing at the time of the second surgery?

A: Right.

Q: So as far as whether they had been bleeding more vigorously before —

A: I have no opinion on that.

Q: So in other words, when you saw the oozing of the two sites Dr. Allen identified during the second surgery, you can't say without speculating that those two sites, or one or the other, wasn't bleeding more vigorously before?

A: I can't say for sure that one of those was bleeding heavy.

Q: So as far as the blood that was actually found during the second surgery, it would be speculation to say that it didn't come from one or both of the two bleeding sites —

A: That's true.

. . .

Q: Is it possible that the bleeding could have started after the second surgery?

A: I doubt it.

Q: But is it possible?

A: It could be possible.

. . .

Q: I take it, if there was not a third bleeder at the time of the second surgery, you would not have had any criticisms of Dr. Allen or Dr. Taylor?

A: No.

Q: Is that correct?

A: That's correct.

Q: As we sit here today —

A: There wouldn't be a second surgery.

. . .

Q: — again, if there was not a bleeding site during that second surgery, that would have served no purpose to go up and look for it further?

A: It would have made sure that there wasn't anything that we were — that he was missing. It's what you do when you have to go back in.

These exchanges show that Dr. Hume examined the surgical notes from the procedures and the deposition of one defendant surgeon to conclude that the standard of care required that the surgeon determine the source of the excessive bleeding by making

a longer incision than that performed by appellees to adequately examine the area. After pages and pages of this type of questioning about matters other than appellees' failure to properly examine the patient, and only pages 94 through 117 of Dr. Hume's deposition were attached to the motion, Dr. Hume's somewhat sharp response in reiterating his criticism is understandable:

> A: Well, no. My criticism is that he didn't open that whole space up so that he could visualize what he was clamping. I mean, when you do that, you basically have skeletonized the vessels so that you know damn good and well that you're grabbing onto the vessel and not a lot of tissue with it.

The majority does not explain how this testimony demonstrates that appellees were entitled to judgment as a matter of law. By their reasoning, an examination of the evidence is unnecessary because once appellees alleged that the evidence was insufficient, appellant had to provide evidence sufficient to meet her statutory burden of proof or her medical malpractice case would be dismissed on summary judgment. Until our supreme court holds that we have a different standard for summary judgment in medical malpractice cases, the majority's approach is not the law. Because the majority's approach clearly violates that standard, this case should be reversed and remanded on appellant's first argument rendering the remaining arguments moot.

Accordingly, I dissent.

VACCARO LUMBER and Jamie Donerson *v.*
Gayla FESPERMAN

CA 07-233 267 S.W.3d 619

Court of Appeals of Arkansas
Opinion delivered November 7, 2007

[Rehearing denied December 19, 2007.*]

Laser Law Firm, by: *Cotten Cunningham*; *Barrett & Deacon*, by: *Kevin W. Cole* and *Brandon J. Harrison*, for appellants.

Law Office of Alvin L. Simes, by: *Alvin L. Simes*, for appellee.

SAM BIRD, Judge. On May 24, 2000, Jamie Donerson, an employee of Vaccaro Lumber Company, accidentally backed a company flatbed delivery truck into Gayla Fesperman's car at a stop sign in Marianna in order to avoid oncoming traffic. In December 2000, Ms. Fesperman filed a complaint against Vaccaro Lumber Company and Jamie Donerson, alleging negligence and requesting $50,000 in compensatory damages and $50,000 in punitive damages.[1] The case went to trial in August 2006, and a jury found that Vaccaro and Donerson were negligent and awarded $50,000 in

* HART, J., would grant rehearing.

[1] The circuit court granted Vaccaro's motion for directed verdict on the issue of punitive damages at trial, finding no evidence to justify such an award.

damages to Ms. Fesperman. Vaccaro filed a post-judgment motion asking the circuit court to grant a new trial or, in the alternative, to order a remittitur because the verdict was excessive. The circuit court denied Vaccaro's motion. Vaccaro and Donerson bring this appeal from the judgment of the court and from the court's order denying Vaccaro's motion for new trial or remittitur. We reverse and remand for a new trial.

After the accident, Ms. Fesperman left the scene to call the police. Officer Walker arrived minutes later and spoke with Mr. Donerson, Mr. Donerson's passenger, and Ms. Fesperman. Officer Walker did not call emergency-medical personnel to the scene. Ms. Fesperman told Officer Walker that she was not injured and then drove her car from the scene.

On the day after the accident, a friend drove Ms. Fesperman to the emergency room, where the treating doctor diagnosed her with "a lower back strain with muscle spasm" and prescribed a muscle relaxant. The emergency-room doctor suggested a heating pad and restricted her to light-duty work for seventy-two hours. Several days later, Ms. Fesperman was treated by Dr. William M. Traylor at Traylor Chiropractic Clinic in Forrest City. From May 30, 2000, until August 14, 2000, Ms. Fesperman made twenty-five office visits to the Traylor Chiropractic Clinic for treatment. On August 14, 2000, the Clinic discharged Ms. Fesperman, stating in its discharge cover sheet: "She's reached maximum improvement, no further scheduled treatment is anticipated." The Clinic did not assign a disability rating and released her without restrictions, indicating that she was "allowed normal activity with continued care." There was no evidence presented at trial that any other doctor treated Ms. Fesperman or prescribed any medication for her. Her medical bills totaled $4,791.50.

While Ms. Fesperman testified that she was off work due to her lower-back problems for about twelve weeks, according to the records of the Traylor Chiropractic Clinic, she was advised not to work for three weeks. Moreover, the evidence indicated that Ms. Fesperman received checks for working three weeks in June 2000, the month after the accident. Ms. Fesperman could not explain the inconsistency.

On appeal, Vaccaro and Donerson do not challenge the jury's finding of liability but only the amount of damages that the jury awarded. They argue that the jury's award of damages is excessive and is not supported by substantial evidence and that the circuit court abused its discretion in refusing either to grant

Vaccaro's motion for new trial or order remittitur. Ms. Fesperman argues that there was substantial evidence to support the verdict, stating that she proved her case through the testimony of Dr. Hayde, a chiropractor employed by the clinic where Ms. Fesperman was treated.

Where an award of damages is alleged to be excessive, this court reviews the proof and all reasonable inferences most favorably to the appellee and determines whether the verdict is so great as to shock the conscience of the court or demonstrates passion or prejudice on the part of the jury. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 43, 111 S.W.3d 346, 353 (2003); *see also Mustang Elec. Servs., Inc. v. Nipper*, 272 Ark. 263, 613 S.W.2d 397 (1981). Remittitur is appropriate when the compensatory damages awarded are excessive and cannot be sustained by the evidence. *Id.* The standard of review in such a case is whether there is substantial evidence to support the verdict. *Id.* We will review a circuit court's denial of a motion for new trial or order of remittitur based on excessive damages for abuse of discretion. *Id.* at 48, 111 S.W.3d at 357.

In determining whether the amount of damages is so great as to shock the conscience of this court, we consider such elements as past and future medical expenses, permanent injury, loss of earning capacity, scars resulting in disfigurement, and pain, suffering, and mental anguish. *Builder's Transp., Inc. v. Wilson*, 323 Ark. 327, 328, 914 S.W.2d 742, 743 (1996). We make this determination on a case-by-case basis with little reliance on prior decisions, as "precedents are of scant value in appeals of this kind." *Id.* (quoting *Matthews v. Rodgers*, 279 Ark. 328, 335, 651 S.W.2d 453, 457 (1983)). With these elements in mind, we turn to the evidence presented in this case.

Ms. Fesperman contended at trial that, as a result of the accident, she suffered an injury to her lower back. On appeal, appellants argue that the evidence presented at trial simply did not support the damages awarded by the jury for Ms. Fesperman's injury. First, appellants claim that Ms. Fesperman did not suffer sufficient physical injury to justify the damages awarded, arguing specifically that the award is more than ten times her medical bills; Ms. Fesperman neither received nor requested medical attention at the time of the accident; she felt well enough to drive away from the accident; she suffered no broken bones, scrapes, bruises, scars, or abrasions in the accident; she has never been hospitalized because of the accident; other than the seventy-two hour, light-duty restriction recommended by the emergency-room doctor the

day after the accident, no medical restrictions have ever been placed on her ability to enjoy daily life because of the accident; she is able to drive, work if she chooses, play with her granddaughter, do housekeeping chores, and garden; and she stopped receiving chiropractic treatments six years before the trial. Moreover, they argue, her medical bills totaled only $4,791.50. They assert further that, aside from the muscle relaxants prescribed by the emergency-room doctor immediately after the accident, Ms. Fesperman has taken no prescription pain medication for any injury caused by the accident. Indeed, appellants note, there was no evidence that she takes any medication at all for pain.

Second, appellants argue that Ms. Fesperman did not suffer sufficient mental or emotional anguish to justify the award. While she did testify that the accident "scared her to death," there was no evidence that Ms. Fesperman needed psychological or pastoral counseling because of the accident. She did not testify that the accident affected her enjoyment of life or that it changed her life in any significant manner. Nor was there any evidence that Ms. Fesperman suffered any permanent disability. In addition, appellants contend that no evidence was presented regarding future medical expenses. Ms. Fesperman has no pending appointments; no medical provider has limited her ability to work or do other activities in the future; she has not and does not take prescription medication; and she was released from her chiropractor's care over six years before the jury deliberated this case. Finally, appellants claim that, while Ms. Fesperman could not explain why her former employer paid her during a time that she said she had not worked, Ms. Fesperman testified that she lost only $685 in wages because of the accident. Therefore, even allowing for deference to the jury's findings of credibility, appellants claim that there simply was not substantial evidence to support a verdict of $50,000.

Ms. Fesperman argues only that she proved her damages through Dr. Hayde's testimony, although she does not point to anything specific in it. Dr. Hayde testified that, at the time of trial, he was a chiropractor employed by Traylor Chiropractic Clinic in Forrest City — the clinic where Ms. Fesperman received treatments from Dr. Traylor after the accident — but that he was not employed by the clinic when Ms. Fesperman was being treated. He stated that he reviewed Ms. Fesperman's records, that she was treated at the clinic between May 30, 2000, and August 14, 2000, for a lumbar sprain and neck pain. Ms. Fesperman has not claimed that her neck pain was caused by the accident. Dr. Hayde testified

that Dr. Traylor recommended that she remain off work for about three weeks. He also testified that the clinic discharged Ms. Fesperman on August 14, 2000, stating that she had reached maximum improvement and that no additional treatment was anticipated. He did not testify about any permanent impairment or future medical expenses.

There was evidence presented in this case to support an award of medical expenses in the amount of $4,791.50 and lost wages in the amount of $685, which together total $5,476.50. The only evidence presented to support an additional award of damages, for either future medical expenses or pain and suffering, was Ms. Fesperman's testimony. She testified that, while she still has pain sometimes and her back has hurt her "just about every day" since the accident, depending upon the activity she is doing, she still carries on with her normal activities and does everything that she did before the accident — that is, driving, housecleaning, taking care of her three-year-old grandchild, and gardening. She admitted that she is not taking medication for her pain and has not seen a doctor for her pain since August 2000. Without more, Ms. Fesperman's testimony simply does not constitute substantial evidence sufficient to support an award of almost ten times the special damages proved in this case.

Determining the proper amount of damages in a personal-injury case is difficult, but, giving the evidence in this case its greatest probative value, as we must, we find that the jury's award of $50,000 was not supported by the evidence. A damages award is not a lottery ticket; the amount of damages must be supported by substantial evidence. If evidence does not support the amount awarded, and the amount is sufficiently excessive in relation to the evidence presented at trial that it shocks the conscience of the appellate court, then we must order remittitur or remand for a new trial. We hold that the circuit court abused its discretion in failing either to grant Vaccaro's motion for new trial or to order remittitur. Therefore, we reverse the judgment and remand for a new trial.

Reversed and remanded.

GLADWIN and HEFFLEY, JJ., agree.

AON RISK SERVICES, INC., of Arkansas *v.*
John MEADORS

CA 06-1231 267 S.W.3d 603

Court of Appeals of Arkansas
Opinion delivered November 7, 2007

[Rehearing denied December 12, 2007.]

Tony L. Wilcox and *Brandon W. Lacy*; *Orr, Scholtens, Willhite & Averitt, PLC*, by: *Chris A. Averitt*; and *Sidley Austin, LLP*, by: *Robert N. Hochman* and *Jason M. Bohm*, for appellant.

Eubanks, Baker & Schulze, by: *J.G. "Gerry" Schulze*; *Welch & Kitchens*, by: *Morgan E. Welch*; and *Cloar Law Firm*, by: *Ralph Cloar*, for appellee.

LARRY D. VAUGHT, Judge. A Pulaski County jury awarded appellee John Meadors $2,509,127.60 on several breach-

of-contract claims against his employer, appellant Aon Risk Services, Inc., of Arkansas ("ARS Arkansas"). In post-trial proceedings, the circuit judge reduced the award to $1,281,930.90. The judge also gave Meadors $150,000 in attorney fees, to be increased to $320,482.72 in the event of an appeal, and declined Meadors's request for prejudgment interest. ARS Arkansas appeals, arguing that the jury's verdict was not supported by substantial evidence and that the trial judge erred in subjecting it to an enhanced attorney-fee award should it decide to appeal. On cross-appeal, Meadors asks us to reinstate the jury's original damage award, grant him prejudgment interest, and reverse several summary judgments that were entered prior to trial. We affirm in part and reverse and remand in part on both direct and cross-appeal.

Background Facts

Meadors is a veteran of the insurance-brokerage industry. On May 1, 1997, he executed a five-year employment contract with ARS Arkansas, a Little Rock insurance brokerage firm whose parent company is Aon Corporation. ARS Arkansas's managing director, Mark Brockington, described Meadors's job as that of a producer, meaning that he was responsible for attracting business and making sales. The contract provided that Meadors would be compensated by a base salary plus an annual bonus calculated on a percentage of new, first-year commissions earned and collected by ARS Arkansas.

For twenty-five to thirty years prior to 1997, Meadors cultivated a business relationship with Dillard's department stores in hopes of brokering insurance benefits for Dillard's employees. His patience was rewarded in the fall of 1999, while he was employed at ARS Arkansas. In August and September of that year, he put Dillard's in touch with Combined Insurance Companies, another subsidiary of Aon Corporation. Combined offered a package called Workplace Solutions in which Dillard's employees could purchase life, disability, and other types of insurance policies through workplace enrollment. Dillard's and Combined ultimately executed a five-year agreement on March 24, 2000, giving Combined access to Dillard's employees for that length of time.

Before the agreement was signed, however, Meadors obtained a copy of what is referred to as the "Interdependency Memo." This document, dated February 9, 2000, was sent by Aon to all Aon Risk Services Managing Directors, including Mark

Brockington at ARS Arkansas. Its intent was to promote "interdependency" among Aon entities, that is, to encourage ARS brokerage offices to place insurance business with Aon-affiliated companies. The Memo recited the following:

> [A] financial rewards system has now been put in place with almost all Aon companies. ARS Management has agreed with the various Aon companies listed on the following page that it will receive from these companies bonus pool monies representing the listed percentage of interdependence revenues generated on new fees and commissions.

(Emphasis in original.) The following page was headlined "Interdependency Compensation Agreements for 2000," and it listed, among others, Combined Insurance Companies. Combined agreed to pay "30% of annualized premium on all life products over 15 year term plus 15% 1st year for all other products to pool." The Memo then explained how the bonus pool would operate:

> Such funds will be paid out in entirety to ARS staffers in the form of annual bonus pool payments under the following conditions:
>
> 1. The Aon Company will credit these monies to the ARS office(s) practice group(s) as appropriate to their involvement in the procurement of revenue.
>
> 2. The credit is made as the income is booked and, if not booked on the accrual method, for 12 full months of income booking.
>
> 3. No formulaic bonus will be accrued to any individual ARS employee.
>
> 4. Each office/practice group will accumulate its "bonus pool" through year end at which time each Managing Director will allocate 100% of the fund balance in the pool to those employees who have been the most responsible for the *professional* production and/or marketing, servicing and/or maintenance of the client accounts generating the bonus pool funds and who have done so in a manner consistent with Aon's stated policies of professional excellence, cooperative behavior, and ethical conduct.
>
> 5. Shared introduction with an office/practice or between and office/practice generates a single payment only. Which may be split as agreed by the MDs [Managing Directors].

> 6. Each Managing Director's recommendation as to the allocation of the bonus funds in the pool is subject to sign off by the President or CEO of ARS Americas for audit purposes, but the Managing Director's recommendation will not be altered without assumed "extreme prejudice." In any case, the entire pool in each office or practice will be paid.
>
> On a quarterly basis we will share the bonus pool figures with ARS professional staff so that employees are aware of the magnitude of the rewards accruing to them from serving client needs via interdependence efforts.

(Emphasis in original.) Additionally, the Memo declared that "local/practice group management is now authorized to make the proper call 'on the ground' as to just how to allocate bonus monies." Managing Directors were asked to "carefully discuss this enhanced compensation structure with all professional staff" and to "share this message as soon as possible."

According to Meadors, when he saw the Memo sometime in February 2000, he was enthused about the program and "absolutely" believed that it would entitle him to compensation over and above his basic employment contract compensation. However, after the Dillard's/Combined agreement was signed in March 2000, Combined placed no monies in the bonus pool based on Dillard's premiums. Mark Brockington explained that, in order for Combined to acquire the Dillard's account, it had to buy out another broker or insurance company for $1.6 million. Thus, Combined told him, it could not pay normal commissions. Following negotiations that lasted well beyond the signing of the Dillard's agreement, Combined and ARS Arkansas agreed to a $240,000 commission, of which Meadors received fifteen percent, or $36,000, as called for in his basic employment contract.

In 2005, Meadors sued ARS Arkansas, Combined, and several other Aon companies, alleging that the Interdependency Memo was a unilateral contract, which was breached when he did not receive bonus-pool monies generated by the Dillard's agreement.[1] Combined and the other Aon entities were dismissed by summary judgment, as were Meadors's claims for unjust enrich-

[1] Meadors first filed suit in 2002. He non-suited his case in 2004 and re-filed it in 2005.

ment, fraud, and breach of contract as a third-party beneficiary. However, the case against ARS Arkansas went to trial. There, Meadors testified that, had the appropriate monies been placed in the bonus pool, he would have received $2,406,522.60 on the Dillard's transaction. The jury awarded him that amount, plus additional damages based on other claims. In post-trial proceedings, the trial judge reduced the Dillard's award by almost fifty percent. This appeal followed.

We begin our discussion of the issues with ARS Arkansas's direct appeal from the jury's verdict pertaining to the Dillard's transaction and Meadors's cross-appeal from the trial judge's reduction of the damages on that same transaction.

I. Formation of Contract

ARS Arkansas argues that the Interdependency Memo did not form a contract because: 1) it was not sufficiently definite to constitute an offer; 2) if it was an offer, Meadors did not accept it; 3) if a contract was created, it was not an agreement between ARS Arkansas and Meadors. ARS presents these arguments in the context of the trial court's denial of its motion for a directed verdict. Our standard of review is therefore whether the jury's verdict was supported by substantial evidence. *Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 363 Ark. 530, 215 S.W.3d 596 (2005). Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Id.* In determining whether there is substantial evidence, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.*

Meadors's theory at trial was that the Interdependency Memo formed a unilateral contract. There are several instances where unilateral contracts commonly appear, such as where a reward is offered, *e.g.*, *Ark. Bankers' Ass'n v. Ligon*, 174 Ark. 234, 295 S.W. 4 (1927), where a contest is announced, *e.g.*, *Mears v. Nationwide Mut. Ins. Co.*, 91 F.3d 1118 (8th Cir. 1996), or where changes are made and disseminated in an employee manual. *See Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991). In those situations, the offeree does not accept the offer by express agreement but by his performance. For example, in the case of a reward, the offeree accepts by performing the particular task, such as the capture of a fugitive, for which the reward is offered. Even though he has not directly communicated his acceptance, a con-

tract is formed as the result of his performance. *See Ligon, supra. See also* JOSEPH M. PERILLO, CORBIN ON CONTRACTS, § 1.23 (Rev. Ed. 1993); 17 C.J.S. *Contracts* § 9 (1999) (recognizing that a unilateral contract is composed of an offer that invites acceptance in the form of actual performance); 17A AM. JUR. 2D *Contracts* § 5 (2d ed. 1991) (stating that, if performance occurs, then the offer has been accepted, and a contract is formed). The performance also constitutes consideration for the contract. 17A AM. JUR. 2D *Contracts* § 5.

A. Definiteness of offer

ARS Arkansas argues first that the Interdependency Memo was not sufficiently definite to constitute an offer for a unilateral contract. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it. *ERC Mtg. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990), *overruled in part on other grounds by Mosley Mach. Co. v. Gray Supply Co.*, 310 Ark. 448, 837 S.W.2d 462 (1992). An offer cannot be accepted so as to form a contract unless the terms are reasonably certain. *Restatement (Second) of Contracts* § 33 (1981); *see also Luper, supra.* Not every utterance of an employer is binding. *Crain Indus., supra* (quoting *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983)). To bind the employer, an offer must be definite in form and must be communicated to the offeree. *See Hardie v. Cotter & Co.*, 849 F.2d 1097 (8th Cir. 1988); *Dumas v. Kessler & Maguire Funeral Home, Inc.*, 380 N.W.2d 544 (Minn. Ct. App. 1986). Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, and not by their subjective intentions. *Hardie, supra.* The principal issue is whether the employer's statements are intended as an offer and accepted as such or are merely statements of policy and practice. *Id.*

ARS Arkansas contends first that, because the trial court determined that the Interdependency Memo was ambiguous in some respects, it was too indefinite to constitute an offer. We disagree that an ambiguous offer is necessarily indefinite. A writing that is indefinite is incomprehensibly vague or incapable of being understood, *see Barnes v. Barnes*, 275 Ark. 117, 627 S.W.2d 552 (1982), and such indefiniteness is an impediment to the formation of a contract. *See Mgmt. Comp. Servs., Inc. v. Hawkins, Ash, Baptie, & Co.*, 206 Wis. 2d 158, 557 N.W.2d 67 (1996). But, ambiguity does not prevent the formation of a contract; rather, it calls for

interpretation of a contract. *See id.* An ambiguous writing may be understood and enforced by applying the rules of contract construction. *See generally Smith v. Farm Bureau Mut. Ins. Co.*, 88 Ark. App. 22, 194 S.W.3d 212 (2004); *see also Shibley v. White*, 193 Ark. 1048, 104 S.W.2d 461 (1937) (recognizing that, while a contract was ambiguous, it was not uncertain). We therefore see no error in the trial court's refusal to grant a directed verdict on this basis.

ARS Arkansas also argues that the Interdependency Memo lacked definiteness, because it merely expressed general concepts of teamwork and provided for judgment calls in the allocation of bonus-pool money. ARS cites several cases in which statements by employers were deemed too indefinite to constitute an offer. *See Hardie, supra* (holding that a statement by the employer's representatives that, if workers voted out the union, the employer would treat them as if a union contract remained in effect, was too indefinite to place restrictions on job terminations); *Crawford v. Gen. Contract Corp.*, 174 F. Supp. 283 (W.D. Ark. 1959) (holding that a promise to "stick by" a person fell short of a promise to finance him for an indefinite period of time without regard to conditions and circumstances); *Mettille, supra* (holding that statements in a company handbook that employment in the banking industry was very stable and that job security was one reason why so many bank employees had five or more years of service were general statements of policy rather than promises of employment for a particular period of time); *Dumas, supra* (holding that a supervisor's statement to an employee that they would "retire together" did not alter the employee's at-will employment status). We believe that the Memo contains terms far more definite than these vague statements. The Memo expressly states that "a financial rewards system has now been put in place." It also sets out specific percentages of amounts to be contributed to the bonus pool by each participating Aon entity, and it contains the precise means by which those pool funds will be distributed to ARS staffers. It is therefore more than a mere statement of policy or a vague promise regarding future events.

ARS also relies heavily on *Martens v. Minnesota Mining & Manufacturing Co.*, 616 N.W.2d 732 (Minn. 2000), but it is also distinguishable. There, the Minnesota court held that a brochure touting equal compensation for technical and administrative employees was too indefinite to constitute an offer. The court noted

that there was no suggestion that an individual would be entitled to specific pay, benefit level, or condition of employment, nor were there any criteria to determine when the rights to any benefits had been breached. Further, the prerogative to make decisions as to individual employee promotions, salaries, and so forth was clearly reserved to management based on an evaluation of the individual. By contrast, the Interdependency Memo in this case does not merely set out general goals and philosophies of compensation. It sets out specific percentages of premiums that will go into the bonus pool as part of an "enhanced compensation structure." And, while no employee is entitled to a "formulaic" bonus and Managing Directors may decide how to allocate the bonus pool among their employees, their discretion is not unfettered. For example, managers cannot withhold payment of the pool amount; the Memo provides that the entire pool must be distributed annually. Thus, the mere inclusion of possible judgment calls by management as to the manner of distribution among its employees does not, under these circumstances, render the Memo too indefinite to operate as an offer for a unilateral contract.

B. Acceptance of offer

ARS Arkansas claims that, even if the Memo constituted an offer, Meadors did not accept it. ARS first cites *MDH Builders, Inc. v. Nabholz Construction Corp.*, 70 Ark. App. 284, 17 S.W.3d 97 (2000), which states that, to create a binding contract, an acceptance must unconditionally agree to all the material provisions of the offer. ARS contends that Meadors did not unconditionally agree to the provisions of the offer because he testified as follows:

> QUESTION: When you received this document [the Memo], did you ever unconditionally agree to its terms?
>
> MEADORS: That was not a conscious thought that I had when I — the first time I looked at that.
>
> QUESTION: And so whether it's when you received it in February or whether you received it in April, that's never a decision you made to unconditionally agree to the terms of [the Memo]?
>
> MEADORS: Not in that, no, I didn't think about that.

ARS's reliance on *MDH* is misplaced. The language in *MDH* does not lend itself to a unilateral contract, which is accepted by performance rather than by express agreement. Additionally,

the point we were making in *MDH* was that an acceptance cannot vary the terms of the offer. There is no claim that Meadors attempted to vary the terms of the Memo. In any event, we believe that ARS reads too much into Meadors's statement that when he first saw the Memo, he simply did not think about whether he unconditionally agreed to its terms.

We turn now to ARS's contention that Meadors could not have accepted the offer in the Interdependency Memo because, by the time he learned of the Memo, he had already performed his brokerage task of referring Dillard's to Combined as a client. A unilateral contract is not formed where a party's performance is not made "on the faith of" the offer or "in consequence of" the offer. *See Ligon, supra.* However, unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance. *See Restatement (Second) of Contracts* § 51 (1981). Meadors contends that, even though he began brokering the deal between Dillard's and Combined before the Memo was in existence, he did not complete performance until after he received the Memo. Thus, he claims, he accepted the Memo's offer. We agree that substantial evidence supported the jury's verdict on this point.

There was evidence at trial that Meadors was aware of the Memo before the Dillard's/Combined deal was finalized in March 2000. ARS managing director Mark Brockington testified that he assumed that he received the Memo on or about February 9, 2000, and he agreed that it directed him to share its message with his eligible professional staff, which would have included Meadors. Meadors testified that he obtained a copy of the Interdependency Memo from Combined Insurance Companies in February 2000, although he did not receive a copy directly from ARS Arkansas until April or May 2000. There was also evidence from which the jury could have concluded that Meadors continued or completed his performance on the Dillard's account after learning of the Interdependency Memo. Combined Insurance Companies executive Heather Gardere said that Meadors played a role in the Dillard's transaction other than the initial referral. She also said that he was involved in the coordination of the overall strategy, the sales process, and was ultimately responsible for the overall relationship. Neil Mayfield, who worked for the enrollment division of Combined, said that Meadors called him after the contract had been signed, asking how the enrollments were going. Moreover,

the Interdependency Memo provided that bonus-pool monies would go to employees who were responsible not only for production of accounts but for servicing and maintaining accounts.

Though the evidence on this point is spare, it was the jurors' prerogative to believe or disbelieve it and to accord it whatever weight and value they deemed appropriate. *See generally Stewart Title, supra.* Our task on appeal is not to substitute our view of the evidence for the jury's but to determine whether the jury's verdict was supported by substantial evidence. *See Rathbun v. Ward,* 315 Ark. 264, 866 S.W.2d 403 (1993). With that standard to guide us, we cannot say that ARS Arkansas was entitled to a directed verdict on this point.

C. Parties to the contract

Finally, ARS Arkansas argues that neither it nor Meadors is named in the Memo and, therefore, the Memo does not constitute a contract between them. However, the Memo imposed certain duties on ARS Arkansas, as it did on all ARS offices, such as accumulating bonus-pool monies and distributing them to deserving employees. And, as already discussed, the Memo was accepted as a unilateral contract by Meadors, thereby making him a party to it. There was, therefore, substantial evidence from which the jury could conclude that Meadors and ARS Arkansas had rights and obligations under the Memo.

II. Breach of Contract

ARS argues next that, assuming the Memo formed a contract, there was no substantial evidence that ARS breached the contract. It points out that no bonus-pool money was sent to it on the Combined/Dillard's deal and, therefore, it had no money to distribute to Meadors. Thus, it could not have committed a breach.

When performance of a duty under a contract is due, any non-performance is a breach. *Restatement (Second) of Contracts* § 235(2) (1981). As the jury was instructed in this case, every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. *Cantrell-Waind & Assocs. v. Guillaume Motorsports,* 62 Ark. App. 66, 968 S.W.2d 72 (1998) (quoting *Restatement (Second) of Contracts* § 205). Moreover, a party has an implied obligation not to do anything that would

prevent, hinder, or delay performance. *See generally Commerical Bank of N. Ark. v. Tri-State Propane*, 89 Ark. App. 272, 203 S.W.3d 124 (2005).

We believe that there was substantial evidence to support the jury's conclusion that a breach occurred. ARS Arkansas knew that Meadors was eligible to participate in the enhanced-compensation program described in the Memo. It was also aware, or should have been aware from reading the Memo, that Combined had agreed to deposit a certain percentage of premiums into the bonus pool and that ARS Arkansas, as a local office, would be obligated to distribute the pool money. Yet, ARS Arkansas negotiated with Combined Insurance Companies to receive a reduced commission, and much of the negotiating process took place long after the Interdependency Memo was issued, into 2001 when the large amount of revenue attributable to the Dillard's account was known. The jury may well have determined that ARS's acceptance of a lesser commission from Combined was a bad-faith hindrance of the bonus-pool process, which prevented money from being placed in the pool and, thus, prevented it from being distributed to Meadors. Again, the presence of substantial evidence means that we cannot say that the trial court was required to grant a directed verdict on this point.

III. Damages—Dillard's Transaction

The jury awarded Meadors $2,406,522.60 with respect to the Dillard's transaction. ARS Arkansas argues that, assuming that a contract was formed and that ARS Arkansas breached the contract, Meadors did not produce competent evidence to support that damage award. Meadors cross-appeals from the trial court's reduction of his Dillard's damages to $1,255.825.90. Although damages other than those attributable to the Dillard's transaction are discussed in Meadors's cross-appeal, for the moment we limit our consideration to the Dillard's award.

Meadors calculated his damages on the Dillard's transaction by using information sent to him by Neil Mayfield of Employee Benefit Services, the enrollment arm of Combined Insurance Companies. Mayfield initially sent Meadors a summary of Dillard's enrollment numbers for 2000 and 2001, broken down by categories of insurance. Later, following a deposition, Mayfield provided Meadors with the same type of calculations for 2002, 2003, and 2004. Using Mayfield's charts, Meadors determined which premi-

ums fell under Combined's thirty-percent obligation in the Interdependency Memo and which fell under the fifteen-percent obligation. He then arrived at $2,406,522.60 as the amount he would have received over the five-year life of the Dillard's/Combined contract had the money been placed into the bonus pool. Regarding the year 2000 in particular, which will be at issue under this point, Meadors relied on Mayfield's figure of $4,174,421 as total premiums for that year and, applying the thirty-percent and fifteen-percent figures, came up with $831,873 owed him for that year.

ARS Arkansas argues first that Meadors did not produce reliable evidence of his damages for the year 2000. It cites Mayfield's deposition testimony that, with regard to the printed summary that he sent to Meadors for the year 2000, he did not know where he got it, he did not know who generated it, and he did not verify its accuracy before sending it to Meadors. The trial court, in a post-trial ruling, agreed with ARS that the 2000 summary sent by Mayfield "should not have been submitted to the jury" and, using a different trial exhibit, reduced Meadors's 2000 damages from $831,873 to $622,694.

We believe that the trial court erred in reducing the damages. Two trial exhibits, other than the chart sent by Mayfield, show year 2000 revenues for Combined (Worksite Solutions) attributable to the Arkansas office in the amount of $4,178,888, which is very close to the $4,174,421 figure contained in Mayfield's chart. Further, Heather Gardere of Combined Insurance Companies testified that the $4,178,888 figure represented the premium written though the Arkansas office for Combined (Worksite Solutions) and that most of it was the Dillard's deal. Additionally, Greg Golden, the Chief Operating Officer of ARS Arkansas, sent a letter to ARS of the Americas in 2002 in which he relied on Mayfield's report to state that year 2000 revenues were $4,174,000 and that, if Meadors were compensated under the Interdependency Memo, he would receive $834,800 for that year, which is very close to the $831,873 calculated by Meadors. Finally, Mayfield, after testifying that he did not know where he got the 2000 summary sheet, agreed that, at the time he sent his communication to Meadors, he believed that everything he was communicating was true and accurate. There is certainly no dispute that Mayfield was, at the time he sent the information to Meadors, an employee of the enrollment division of Combined. Based on these

factors, the jury was within its province in determining that Meadors's year 2000 damage calculation was accurate and reliable.

Further, even if, as ARS contends, Meadors produced only an approximate amount of his damages for the year 2000, the jury obviously believed it was a reasonably good approximation. Arkansas law has never required exactness of proof in determining damages, and, if it is reasonably certain that some loss occurred, it is enough that damages can be stated only approximately. *Bank of Am. v. C.D. Smith Motor Co.*, 353 Ark. 228, 106 S.W.3d 425 (2003). The fact that a party can state the amount of damages he suffered only approximately is not a sufficient reason for disallowing damages if, from the approximate estimates, a satisfactory conclusion can be reached. *Id.*

We consequently conclude that the trial court erred in remitting Meadors's damage award for the year 2000. While remittitur is appropriate when the compensatory damage award cannot be sustained by the evidence, *United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998), a trial court may not substitute its judgment for the jury's when there is a basis in the evidence for the award and when there is no evidence, appropriately objected to, that tends to create passion or prejudice. *Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996). *See also McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994).

ARS argues further that Meadors should have been awarded no damages for the years 2001 to 2004 because the Interdependency Memo states that its agreements apply "only to New Revenue Generated in 2000." There was no trial testimony regarding the meaning of the term "generated," but it ordinarily means to cause to be or to bring into existence. *Webster's Third New Int'l Dictionary* 945 (1993). Given that common-sense definition, we cannot say that the jury's damage award for the years 2001 to 2004 is unsustainable. The Interdependency Memo could be interpreted to mean that, if a multi-year contract were signed in 2000, then the entire amount of revenue produced over the life of the contract was generated or "brought into existence" in 2000.

ARS's next argument concerns the term "annualized premiums." The Interdependency Memo provided that Combined agreed to place into the bonus pool thirty percent of "annualized premium on all life products over fifteen year term." ARS claims that Meadors produced no evidence that the premium

figures on which he relied for his 2001 to 2004 damages were annualized premiums. We disagree. Meadors defined an annualized premium as a "premium for a full year," and the figures contained in Neil Mayfield's 2001 to 2004 calculations refer to "annual premiums." Although Meadors testified that he was "guessing" that Mayfield's calculations were based on annualized premiums, Mayfield's numbers speak for themselves, and the jury may have concluded that the 2001 to 2004 figures represented premiums for a full year.[2]

Additionally, ARS argues that all of Meadors's damage calculations were wrong because they included premiums for a company that was not listed on the Interdependency Memo — Provident Unum. While ARS is correct that Provident-Unum premiums were included, as Neil Mayfield explained, in states where certain products were not approved for Combined to sell "we used Provident." From this testimony, the jury may have concluded that a Unum Provident product fell within the umbrella of Combined Insurance Companies.

Based on the foregoing analysis, we affirm the jury's verdict in favor of Meadors for breach of a unilateral contract and reinstate the jury's damages award of $2,406,522.60 pertaining to the Dillard's account.

IV. Attorney Fees

After trial, Meadors's attorneys presented fee petitions based on hourly rates totaling approximately $200,000. They also provided the court with their employment contract with Meadors, which called for them to receive forty percent of all sums recovered if the case went to trial. The trial judge awarded Meadors fees of $177,500, although in a corrected judgment filed later that same day, the amount was stated as $150,000. However, the judge declared that, in the event that ARS Arkansas appealed, the fee would be increased to $320,482.72.

ARS now argues that Arkansas law does not permit a trial court to enhance an attorney-fee award based on the opposing party's decision to appeal. It cites the factors to be considered in

[2] Our disposition of this issue makes it unnecessary for us to reach Meadors's argument on cross-appeal that the trial court erred in excluding certain evidence regarding annualized premiums.

making an award of attorney fees that our supreme court set out in *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), and notes that a party's decision to appeal is not included among them. ARS also cites *Roberts v. Roberts*, 226 Ark. 194, 288 S.W.2d 948 (1956), where our supreme court held that a trial court cannot condition a party's right to appeal on his first paying an attorney fee.

We review a trial court's award of attorney fees for an abuse of discretion. *Newcourt Fin. v. Canal Ins.*, 67 Ark. App. 347, 1 S.W.3d 452 (1999). However, because we have reinstated a substantial portion of the jury's verdict, rather than review the trial court's fee award, we reverse and remand for the trial court to reconsider the award. Upon remand, the trial court may take into account the time and effort spent on appeal. But we take this opportunity to voice our doubt that an enhanced fee award, employed as a prior restraint on a party's right to appeal, would lie within a trial court's discretion.

V. Prejudgment Interest

The trial court refused to award Meadors prejudgment interest on his recovery, and he cross-appeals from that ruling.

Prejudgment interest is allowable where the amount of damages is definitely ascertainable by mathematical computation, or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion. *Ray & Sons Masonry Contr. v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003). If a method exists for fixing the exact value of a cause of action at the time the event that gives rise to the cause of action occurs, prejudgment interest should be awarded. *Nationsbanc Mtg. Corp. v. Hopkins*, 82 Ark. App. 91, 14 S.W.3d 757 (2003).

In this case, a five-year agreement was brokered between Dillard's and Combined, and the Interdependency Memo set forth specific percentages of Combined premiums that were to be placed in the bonus pool. A method therefore existed by which Meadors's damages could be computed without reliance on opinion or discretion. ARS claims, however, that discretion played a part in determining how much of the bonus pool it would have distributed to Meadors, given that the Interdependency Memo vested local managing directors with discretion in allocating the pool money. While that discretion may have proved

relevant if two or more ARS Arkansas staffers had been responsible for the Dillard's transaction, that was not the case here. Mark Brockington agreed that Meadors was the producer on the Dillard's account. Further, there was no evidence that any other ARS office or any other ARS Arkansas employee was responsible for the Dillard's/Combined transaction. Additionally, the Memo required the managing director to distribute one-hundred percent of the money in the bonus pool. Thus, Brockington could not have employed discretion in allocating the bonus money to anyone other than Meadors. We therefore reverse and remand to allow the trial court to calculate an award of prejudgment interest.

VI. Other Damage Awards

Meadors's complaint also sought damages against ARS Arkansas for breach of contract concerning a JB Hunt account and for unpaid compensation under his basic employment contract. The jury awarded him $40,500 on his JB Hunt claim and $59,000 in unpaid compensation. After trial, the circuit judge reduced the JB Hunt award to zero and the unpaid compensation award to $23,000. Meadors argues on cross-appeal that these reductions were erroneous, but we affirm them. The jury also awarded Meadors $3105 under the Interdependency Memo for business he placed with another Aon entity listed in the Memo, Cambridge. The trial judge refused to reduce that award, and ARS asserts error, but we affirm that ruling as well.

Regarding the JB Hunt account, Meadors developed an arrangement in which Aon entities reviewed Hunt's employee-benefit plans and made recommendations in exchange for a consulting fee. Hunt eventually paid a fee of $355,000. However, ARS Arkansas received only $85,000. According to Mark Brockington, the remaining money went to the other Aon entities that participated in the consultation. Pursuant to his employment contract with ARS, Meadors received fifteen percent of the $85,000 that ARS Arkansas collected, for a total of $12,750. However, Meadors argued at trial that he was entitled to fifteen percent of the entire $355,000, which would have totaled $53,250. He therefore asserted a claim for the $40,500 difference. The jury awarded him $40,500, but the circuit judge reduced the verdict to zero based on a finding that Meadors received all that was due him under his employment contract. The trial court's ruling was correct. It was undisputed that ARS Arkansas received $85,000

from the JB Hunt transaction. Meadors's employment contract provided that he would receive fifteen percent of first year commissions "earned and collected" by ARS Arkansas. Because ARS collected $85,000, Meadors was fully compensated by receiving fifteen percent of that amount, or $12,750.

Meadors also sought compensation of $59,000 under his employment contract, separate and apart from the Interdependency Memo. This figure was based on a 2002 calculation by Chief Operating Officer Greg Golden concerning amounts owed to Meadors as Meadors was nearing the end of his five-year employment period. Golden determined that Meadors was due $59,000 in additional salary, based in part on revenues earned by ARS in the Dillard's transaction. The jury awarded Meadors $59,000, but the trial court correctly reduced it to $23,000, based on undisputed testimony that Meadors received $36,000 as a standard commission from ARS Arkansas on the Dillard's deal.

Finally, ARS argues that there was no substantial evidence to support a damage award on Meadors's transaction with Cambridge. The jury awarded Meadors $3105 based on a 2002 memo in which Greg Golden stated that Meadors "did a deal with Cambridge in 2001 — it is not fully paid yet." The memo further stated that Meadors was owed $3105. In light of this memo, we find no error in the trial court's refusal to remit that award.

VII. Summary Judgments Granted to Other Aon Entities

Meadors's complaint named as defendants six Aon entities other than ARS Arkansas: ARS of the Americas, ARS of Missouri, Aon Corporation, Combined Insurance Companies, Aon Risk Management, and ARS Illinois. The trial court granted summary judgment in favor of all defendants except ARS Arkansas and ARS Illinois.[3] Meadors now argues that these grants of summary judgment were in error. We affirm the summary judgments against all entities other than Combined Insurance Companies.

At various points, Meadors's complaint refers to the entities other than Combined and speculates on their involvement with the Interdependency Memo and other aspects of the case.

[3] Meadors's case against ARS Illinois went to trial on one particular transaction. He was awarded $45,500, and ARS Illinois satisfied that judgment. It is not at issue on appeal.

However, the complaint does not state facts that show that these entities participated in any breach or other conduct that led to Meadors's damages. Moreover, upon being faced with summary judgments, Meadors was likewise unable to satisfactorily explain his inclusion of these entities as defendants or create a material question of fact as to why they should remain in the case. And finally, in his appellate brief, Meadors makes no convincing argument that the trial court erred in granting summary judgment to these companies. He therefore has not met his burden on appeal of demonstrating reversible error. *See Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003).

However, Meadors is more exact with regard to his case against Combined Insurance Companies. His complaint asserts that Combined was an obligor on the Interdependency Memo, which he described as a contract between him, ARS Arkansas, and Combined. He further alleged that a breach occurred when Combined and ARS Arkansas failed to pay him the amounts called for in the contract. Moreover, in his response to the defendants' motions for summary judgment, Meadors attached Combined's responses to requests for admission, in which Combined admitted that the Interdependency Memo accurately set out the terms and conditions of an agreement among Aon entities identified on the first page (which included Combined), and that Combined was a participant in the Interdependency program. The Memo itself was also attached, showing that Combined had agreed to deposit certain amounts into a bonus pool. Further, it was undisputed that Combined did not place monies from the Dillard's transaction into the bonus pool. We need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Doe v. Baum*, 348 Ark. 259, 72 S.W.3d 476 (2002). Because the evidence showed that a material question of fact remained with regard to whether Combined breached a contract with Meadors, summary judgment was inappropriate as to Combined. *See generally Newberg v. Next Level Events, Inc.*, 82 Ark. App. 1, 110 S.W.3d 332 (2003).

Combined argues that it was nevertheless entitled to summary judgment because Meadors testified at trial that his only contract was with ARS Arkansas. However, by the time of trial, Meadors's only remaining cause of action was against ARS Arkansas; Combined had already been dismissed from the case. In any

event, Meadors's deposition attached to his response to the motions for summary judgment and his complaint assert that his contract was with ARS Arkansas and Combined. We therefore reverse and remand the award of summary judgment to Combined.[4]

VIII. Summary Judgment on Other Causes of Action

The trial court also granted summary judgment against Meadors on his claim that he was a third-party beneficiary of the Interdependency Memo and on his claims of fraud and unjust enrichment.

Meadors's third-party beneficiary count was pled as an alternative to his allegation that the Interdependency Memo created a unilateral contract. Because we hold today that a unilateral contract was created by the Memo and that Meadors, by his acceptance, was an obligee under the Memo, his alternative third-party beneficiary claim is no longer extant. We therefore decline to address this moot point. *See Davis v. Williamson*, 359 Ark. 33, 194 S.W.3d 197 (2004).

Meadors's unjust-enrichment claim is likewise moot because it was not asserted against either ARS Arkansas or Combined Insurance Companies but against other Aon companies, which we have already determined were entitled to summary judgment.

This leaves the fraud count for our consideration. Meadors's complaint essentially alleged that Combined and ARS Arkansas committed fraud by publicizing the Interdependency Memo with the intent of inducing the sale of products but with no intent of abiding by agreement and by not allocating to him what was earned from the Dillard's transaction. As damages, he sought his full compensation under the Interdependency Memo. In light of our decision that ARS Arkansas breached the contract created by the Memo and our holding that a fact question remains as to whether Combined did the same, we see no point in reversing a summary judgment on a fraud count that is, for all practical

[4] Our reinstatement of Meadors's damages on the Dillard's transaction seemingly renders his case against Combined on the same transaction moot. However, during oral argument, Meadors asked that, if we reinstated his award, we nevertheless review the entry of summary judgments in favor of other Aon entities, in the event that he is unable to collect on his judgment against ARS Arkansas.

purposes, based on a breach of contract and seeks the same damages that Meadors has already been awarded. We therefore consider this point moot as well.

IX. Conclusion

We affirm the jury's verdict for breach of a unilateral contract against ARS Arkansas and reinstate Meadors's damages of $2,406,522.60 pertaining to the Dillard's transaction. We affirm the jury's damages award of $3105 on the Cambridge transaction and affirm the trial court's reduction of damages on the JB Hunt account and on Meadors's claim for unpaid compensation. We also affirm the trial court's grant of summary judgment against all other Aon entities except Combined Insurance Companies, which we reverse. We decline to address the grant of summary judgment on Meadors's three additional causes of action as moot. Finally, we reverse and remand for the trial court to reconsider the attorney-fee award and to award prejudgment interest.

Affirmed in part; reversed and remanded in part.

ROBBINS, J., agrees.

BAKER, J., concurs.

Victor L. BETTIS *v.* Wendy P. BETTIS

CA 06-1417 267 S.W.3d 646

Court of Appeals of Arkansas
Opinion delivered November 7, 2007

[Rehearing denied December 12, 2007.*]

* GRIFFEN, J., would grant rehearing.

Worsham Law Firm, P.A., by: *Richard E. Worsham*, for appellant.

Dover Dixon Horne, PLLC, by: *W. Michael Reif* and *Nona M. Robinson*, for appellee.

LARRY D. VAUGHT, Judge. Appellant Victor Bettis appeals the trial court's order modifying the divorce decree that extended and increased alimony payments to his former wife, appellee Wendy Bettis. We affirm.

Victor and Wendy were divorced in 2002. They have three children — Megan, Jacqueline, and Evan. Jacqueline and Evan were minors at the time of the divorce, age sixteen and fourteen

respectively. Jacqueline suffers from cerebral palsy and is confined to a wheelchair. Although Jacqueline requires twenty-four hour a day care, she is currently enrolled at the University of Central Arkansas and maintains a 3.0 grade-point average.

The divorce decree awarded custody of Jacqueline and Evan to Wendy; awarded Wendy child support for Jacqueline and Evan; acknowledged that child support for Jacqueline would continue beyond the age of majority because of her disability; and awarded $1000 per month in alimony to Wendy until Evan graduated from high school.

In November 2004, the trial court entered an order that, among other things, stated that child support would continue for Jacqueline due to her disability; however, the parties agreed that child support for Jacqueline was abated as of May 1, 2004, so that she could receive government assistance.[1] According to the testimony at trial, Jacqueline is not entitled to government benefits if Wendy receives child-support payments for Jacqueline.

On March 20, 2006, Victor filed a motion for termination of alimony and child support. He alleged that child support payments for Evan should be terminated, because Evan turned eighteen and was about to graduate from high school. Wendy conceded this issue, and the trial court terminated these payments. Victor also alleged that alimony should be terminated because the divorce decree stated that alimony will be terminated upon Evan's graduation from high school. Wendy filed a response and countermotion seeking the continuation and increase of alimony.

At trial, Wendy testified that she is employed as a teacher at the Cathedral School where she has worked for twelve years. Her salary for the 2006-07 school year was $33,000. Since the divorce, her salary has increased $5100. She lives in the home that she and Victor built to accommodate Jacqueline's special needs. The testimony was undisputed that Wendy is the primary-care giver for Jacqueline year round and that Jacqueline needs assistance with every task. Also, while Jacqueline is in college during the school year, she lives with Wendy during the weekends, holidays, and summers.

Victor testified that he is employed with Remington Arms where he earns $82,500 a year. He testified that since the divorce,

[1] Jacqueline receives college tuition scholarships from the Arkansas Academic Challenge and Arkansas Rehabilitation, social security disability benefits, Medicare benefits, and Independent Choices benefits.

his salary has increased in excess of $10,000. He admitted that Wendy is the primary care giver for Jacqueline, but he testified that he provides help when needed.

Lyles Henry testified on behalf of Wendy as an expert witness. He reviewed Victor's tax returns and his Affidavit of Financial Means. Mr. Henry testified that Victor had a net annual income of $60,022 and expenses of $36,732. Therefore, Mr. Henry concluded that Victor had the ability to pay $1000-$2000 per month in alimony.

The trial court subsequently entered an order finding that there had been a substantial change in circumstances since the entry of the divorce decree justifying an increase in the duration and amount of alimony awarded to Wendy. The trial court stated:

> The substantial change in circumstances include the following:
>
> a. The Defendant's annual income increased by at least $10,000 since the entry of the Divorce Decree and the Plaintiff's annual income increased by at least $5000 since the entry of the Divorce Decree.
>
> b. The Defendant received a $30,000 bonus from his employer.
>
> c. The child support for Jacqueline has been abated. The Plaintiff anticipated at the time of the divorce that she would be receiving child support payments to assist in Jacqueline's care and to provide her a home. Plaintiff is not receiving child support payments to assist her in the care of Jacqueline, who is an adult and who is in need of care because of her disability.
>
> d. Jacqueline is attending college.
>
> e. The Defendant is not paying any child support for Jacqueline and therefore has a higher level of income than he anticipated at the time of the divorce.
>
> f. Plaintiff provides a substantial amount of care for Jacqueline.
>
> g. Either of the parties could have chosen to provide the care for their adult daughter, who is in need of substantial care, however, the party who provided the care for Jacqueline was Plaintiff.

The trial court further stated that it considered the tax effect of Victor's continued alimony payments. The court found that Wendy's weekly income was approximately $512 while Victor's weekly in-

come was approximately $1,184.55. The trial court then awarded alimony to Wendy in the amount of $1150 per month and awarded her $3000 in attorney's fees and expenses. Victor has appealed from this order.

Victor first argues that the trial court erred in finding that there had been a change in circumstances sufficient to continue and increase alimony to Wendy. He argues that Wendy is actually seeking child support but calling it alimony. A decision whether to award alimony is a matter that lies within the trial court's sound discretion, and on appeal we will not reverse a trial court's decision to award alimony absent an abuse of that discretion. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000); *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). Alimony is intended to rectify any economic imbalance in the earning power and standard of living of the parties in light of the particular facts of the case. *Cole*, 82 Ark. App. at 58, 110 S.W.3d at 317. The primary factors to be considered are the financial need of one spouse and the ability of the other spouse to pay. *Id.*

Modification of an award of alimony must be based on a change of circumstances of the parties. *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998). The burden of showing a change of circumstances is always on the party seeking the change in the amount of alimony. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). In the divorce decree, the parties agreed that alimony would discontinue when Evan graduated from high school. Therefore, the burden of showing a change of circumstances to support a continuation and increase of alimony was on Wendy.

We hold that the trial court did not abuse its discretion in modifying the divorce decree by continuing and increasing alimony. First, the evidence supports the trial court's findings of Victor's ability to pay and Wendy's need. Wendy's annual income is $33,000 while Victor's is $82,500. Wendy's expert witness testified that Victor had the ability to pay up to $2000 per month in alimony. At trial, Victor admitted that "I've got more than enough [money] to cover my expenses and continue to pay the alimony." In contrast, Wendy testified that, "I cannot make my house payment without the current alimony." Wendy's ability to pay the mortgage is significant in light of the undisputed fact that she is the primary care giver for Jacqueline who, along with Wendy, must have a place to live. Even Victor testified about the importance of Wendy having a home: "I would agree that Jacque-

line needs a place to stay on the weekends. [I] [n]ever denied that [Jacqueline] needs a place to stay on holidays and in the summer. My ex-wife has been the only one to provide that."

Furthermore, we hold that the trial court did not abuse its discretion in finding a change of circumstances. Since the entry of the divorce decree, Victor's income increased by $10,000 while Wendy's increased only by $5000. At the time of the divorce, Victor anticipated paying child support indefinitely, and because it was abated, he has experienced an unexpected increase in income. When the parties divorced, Wendy testified that she never anticipated that Jacqueline would be able to attend college. Moreover, Wendy did not anticipate that Jacqueline's child support would be abated so that Jacqueline could receive government benefits. These facts alone demonstrate a significant change in circumstances since the entry of the divorce decree.

We disagree with Victor, and the dissent, that this case is nothing more than Wendy's effort to collect child support by calling it alimony. We further acknowledge the unusual circumstances of this case: Jacqueline will likely need care and support for the rest of her life, but she cannot be the beneficiary of child-support payments because of her receipt of government benefits. Nevertheless, based on the findings of the trial court Wendy is, independent from the child-support issue, entitled to continued and increased alimony.

Victor also argues that the trial court erred in awarding $3000 in attorney's fees and expenses in favor of Wendy. Arkansas Code Annotated section 9-12-309(b) (Repl. 2002) provides that a court may allow either party additional attorney's fees for the enforcement of alimony. Victor contends that his motion to terminate alimony and Wendy's counter motion to continue and increase alimony does not fall within the purview of that statute. We disagree. There was only one issue in this case — whether Wendy was entitled to alimony. We also note that the trial court has great discretion on the issuance of an attorney's fee award in alimony cases. *McKay*, 340 Ark. at 183, 8 S.W.3d at 532. Therefore, we cannot say that the trial court abused its discretion in awarding attorney's fees to Wendy, and we affirm the award.

Affirmed.

PITTMAN, C.J., and HART, BIRD and HEFFLEY, JJ., agree.

GLADWIN, GRIFFEN, GLOVER and MILLER, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. Today the majority expands the definition of alimony to include child support. Because I believe that the trial court erred in finding a change of circumstances and that there was insufficient evidence to continue the payment of alimony beyond the period specified in the divorce decree, I would reverse.

The evidence presented in this case centers on the parties' middle child, Jacqueline, who has cerebral palsy and is completely dependent on others to give her assistance in eating and personal care. She is cognitively alert, but is only able to use part of the right side of her body enough to drive a power wheelchair and to use a computer with one finger. She is now twenty years old and attending the University of Central Arkansas, where she has a 3.0 grade-point average. She lives on campus and is able to pay personal caregivers from a Medicaid-sponsored program called Independent Choices. Appellant was instrumental in discovering this particular funding and was also able to help her obtain social-security payments. Jacqueline returns home on weekends, and appellee is in charge of caring for Jacqueline's personal needs during her visits. Jacqueline has also arranged for a personal caregiver to assist her periodically on the weekends. Depending on the number of hours used by outside caregivers, appellee is sometimes paid by the Medicaid program for her care of Jacqueline.

In 2004, appellant sought modifications of the divorce decree and both parties filed contempt motions against the other. Among other things, the trial court found, that because of Jacqueline's physical disabilities, child support would continue beyond her eighteenth birthday. However, the parties agreed that appellant's child-support obligation for Jacqueline would abate as of May 1, 2004, due to the government assistance she began receiving. Further they agreed that either party could petition the court for reinstatement of child support if Jacqueline were ever denied government assistance.

On March 20, 2006, appellant filed a motion to terminate child support and alimony effective upon the youngest child's high school graduation as provided in the 2002 divorce decree. Appellee filed a counter-petition seeking both a continuation of and an increase in alimony. After a hearing, the trial court entered an order finding that, among other things:

8. The substanial change in circumstances includes the following:

a. The Defendant's (appellant) annual income increased by at least $10,000 since the entry of the Divorce Decree and the Plaintiff's (appellee) annual income increased by at least $5,000 since the entry of the Divorce Decree.

b. The Defendant (appellant) received a $30,000 bonus from his employer.

c. The child support for Jacqueline has been abated. The Plaintiff (appellee) anticipated at the time of the divorce that she would be receiving child support payments to assist in Jacqueline's care and to provide her a home. Plaintiff (appellee) is not receiving child support payments to assist her in the care of Jacqueline, who is an adult and who is in need of care because of her disability.

d. Jacqueline is attending college.

e. Defendant (appellant) is not paying any child support for Jacqueline and therefore has a higher level of income than he anticipated at the time of the divorce.

f. Plaintiff (appellee) provides a substantial amount of care for Jacqueline.

g. Either of the parties could have chosen to provide the care for their adult daughter, who is in need of substantial care, however, the party who provided the care for Jacqueline was Plaintiff (appellee).

The trial court further found that even though appellee has a male friend in the house a substantial amount of time who does not pay expenses, he nonetheless contributes to the home by assisting appellee with lifting Jacqueline and other tasks. The trial court also found that it was not in Jacqueline's best interest for the appellee to move from her current residence, and that Jacqueline has a total inability to care for herself. The trial court considered the tax effects of the alimony payments on both parties, and found that appellant's income was $1,184.55 per week and appellee's income was $512 per week. The trial court then awarded alimony to the appellee in the amount of $1150 per month effective June 1, 2006, and awarded attorney's fees to appellee in the amount of $3000.

The purpose of alimony is to rectify economic imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case. *Harvey v. Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988). Modification of an award of alimony must be based on a change of circumstances of the parties. *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998). The burden of showing a change in circumstances is always upon the party seeking the change in the amount of alimony. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). Changes in circumstances are not material if they were contemplated at the time of the original award. *Id.*

The primary factors to be considered in changing an award of alimony are the needs of one party and the ability of the other party to pay. *Parker v. Parker*, 97 Ark. App. 298, 248 S.W.3d 523 (2007). Secondary factors that may also be considered include (1) the financial circumstances of both parties; (2) the couple's past standard of living; (3) the value of jointly owned property; (4) the amount and nature of the income, both current and anticipated, of both parties; (5) the extent and nature of the resources and assets of each of the parties; (6) the amount of each party's spendable income; (7) earning ability and capacity of both parties; (8) the property awarded to each party; (9) the disposition of the homestead or jointly owned property; (10) the condition of health and medical needs of the parties; (11) the duration of the marriage. *Delacey v. Delacey*, 85 Ark. App. 419, 155 S.W.3d 701 (2004). Each case is to be judged upon its own facts. *Id.* Discretion is vested in the trial judge, and we will not reverse absent an abuse of discretion. *Id.*

The only findings made by the trial court in paragraph eight concerning the parties is that appellant's and appellee's income both increased and that appellant received a one-time bonus from his employer. The other findings use the term "child support" or refer specifically to Jacqueline. The finding under paragraph nine is that appellee has a male friend in the house who does not pay expenses. None of these findings present a change in circumstances that warrants an extension of appellant's alimony obligation.

The majority focuses on the fact that appellant has had an increase of income. The fact that appellant enjoys a greater income is not a material change in circumstances. An increase in a payor's income alone does not warrant an increase in alimony. *See Parker*, 97 Ark. App. 298, 248 S.W.3d 523 (2007).

None of the other findings that were made by the trial court about Jacqueline were unexpected, and therefore, would not support an increase in alimony. The child support for Jacqueline was abated by agreement of the parties so that she could obtain government assistance. The fact that Jacqueline needs additional assistance was also expected, which is why the trial court extended child support for Jacqueline past her eighteenth birthday. Neither the fact that Jacqueline needs a handicapped-accessible house nor that appellee is her primary caregiver is a change of circumstances. These factors existed in 2002 at the time of the divorce as well as in 2004 when the modification was entered.

Further, the fact that Jacqueline now attends college does not constitute a change in circumstances. The fact that she spends the majority of her time living on campus actually reduces the appellee's daily burden. The abatement of child support in exchange for the government assistance was agreed to by the appellee so it should not be considered a changed circumstance. If anything, it supports the notion that the award is for Jacqueline's benefit, and is not alimony.

All of the factors set out by the court in support of a material change in circumstances are circumstances concerning Jacqueline. These factors support the trial court's earlier finding that Jacqueline's child support should continue. However, the trial court and the majority call this increase alimony, even though it is very clearly child support based on Jacqueline's needs, and not appellee's.

As I would find that the trial court was clearly erroneous in finding a change in circumstances, a reversal on the attorney's fees issue would also be necessary.

GRIFFEN, GLOVER, and MILLER, JJ., agree.

WENDELL L. GRIFFEN, Judge, dissenting. I fully join Judge Gladwin's dissenting opinion. Nonetheless, I write separately to further expose the obvious factual and legal gaps in the decision announced by the majority opinion.

I would reverse the trial court's order because appellee, Wendy Bettis, failed to show a change of circumstances warranting an increase and extension in alimony. In stating that "there was only one issue in this case — whether Wendy was entitled to alimony," the majority precisely pinpoints the flaw in its own

analysis — it repeats and compounds the trial court's error in treating Wendy's request for *increased alimony to pay her mortgage due to her reduction in child support* as anything other than a guise for an *increase in child support.*

Wendy requests alimony — not child support — until her adult disabled daughter, Jacqueline Bettis, is able to live independently, but admitted that she does not know whether Jacqueline will ever be able to do so. Hence, the trial court's order essentially obligates the father, Victor Bettis, to pay alimony as long as Jacqueline, a college student who lives outside the home most of the time, resides with Wendy in the current home. In citing to Wendy's ability to pay the mortgage as a "significant" factor in affirming the trial court's order, the majority vividly demonstrates that its decision is based on *Jacqueline's* needs, not Wendy's. In short, the majority converts child support into alimony.

It is true that Victor has enjoyed a $10,000 annual increase in his salary, whereas Wendy's salary has increased by only $5100 during that same period of time. However, even considering Victor's increase in income, there are no factors supporting that an increase in alimony is warranted. An increase in a payor's income, alone, does not warrant an increase in a alimony. *See Parker v. Parker*, 97 Ark. App. 298, 248 S.W.3d 523 (2007). Nor does the fact that Victor now enjoys a "greater" income *because* his child-support obligation has abated, an increase that will necessarily result whenever a payor's child-support obligation abates.[1]

The majority additionally cites as changed circumstances warranting an increase in alimony only the following facts: Wendy did not anticipate that Jacqueline's child support would be abated so that Jacqueline could receive government benefits or that Jacqueline would be able to attend college. The majority goes even farther and boldly states that these facts *alone* demonstrate a significant change in circumstances warranting an increase in alimony. This assertion is plainly belied by the record.

Although Wendy now cites to the abatement of *Jacqueline's* child support as a changed circumstance, her request for increased alimony, in fact, was based on the abatement of *Evan's* child

[1] Victor received a $30,000 bonus prior to the entry of the 2004 order from which no child support or alimony was paid, but the trial court addressed the bonus issue in the 2004 decree, stating that Wendy would receive 15% of any *future* bonus as child support.

support when he graduated from high school. Wendy has known since the original decree was entered in 2002 that her alimony would cease in 2006 when Evan was scheduled to graduate from high school. Thus, the abatement of Evan's child support cannot constitute a changed circumstance that warrants an increase in alimony. If that is so, every alimony payee can petition for greater alimony whenever child-support payments cease. If the majority intends for that to be the law, it should say so.

Further, the abatement of Jacqueline's child support does not constitute a changed circumstance warranting an increase in alimony. The trial court accounted for the special circumstances of Jacqueline's physical condition in awarding child support past her eighteenth birthday; the parties did so in setting up a special account to cover Jacqueline's needs that are not met by her government benefits. The original decree and the 2004 decree stated that Jacqueline's child support would extend beyond her eighteenth birthday; however, the 2004 order abated Jacqueline's child support as of May 1, 2004, and provided that child support could be reinstated if Jacqueline was denied governmental benefits. *Wendy has never filed a petition to have Jacqueline's child support reinstated. Wendy agreed to abate child support and, Jacqueline's disabilities notwithstanding,* the majority opinion does not explain how — or why — a party should be allowed to mount a collateral attack on her own agreement to abate child support to justify an increase in alimony.

Plainly, Jacqueline is not without recourse to meet her special needs because the parties have been well-aware of her needs since her infancy and have provided a means — *other than* child support or alimony — to meet those needs. The majority opinion does not mention that the parties agreed in the 2004 order to establish a joint account for Jacqueline's expenses "over and above any governmental assistance she receives," with Victor paying two-thirds of the expenses, and Wendy paying one-third. The initial amount to be paid was $250 per week, and either party is permitted to petition the trial court to modify the amount. *Notably, this provision is not conditioned on the receipt of child support or alimony.* The 2004 order further stated, "The parties anticipate that they may need to fund the account beyond graduation from college due to Jacqueline's disability." Wendy does not assert that this provision is inadequate to meet Jacqueline's current needs. She

has never petitioned the court to modify this term of the order. Instead, she asks for an unwarranted increase in alimony.[2]

It is true that the parties did not anticipate that Jacqueline would be able to attend college. However, simply because a circumstance was unanticipated does not justify an increase in alimony. Glaringly absent from the majority's opinion is any explanation linking Jacqueline's college attendance to Wendy's entitlement to increased alimony. The fact that Jacqueline attends college does not warrant an increase in alimony because Jacqueline's financial needs for college are either paid by scholarships or by Jacqueline herself. There was no evidence that Wendy incurred any expenses as a result of Jacqueline attending college. In fact, Wendy testified that the only expenses she incurred relating to Jacqueline were household expenses, which cannot be attributed to the fact that Jacqueline attends college (and which, in any event, are presumably lessened because Jacqueline no longer lives with Wendy full-time, as she did when the parties were divorced). It is inconceivable that Wendy's alimony should be increased merely because her adult daughter attends college and fully pays her own expenses related thereto. While Wendy does occasionally assist Jacqueline with her course work, the majority does not explain how that fact entitles Wendy to increased alimony.

I am sympathetic to Jacqueline's needs and special circumstances. However, the means by which those needs should be addressed is not an increase and extension of alimony to her mother. While Wendy laudably keeps Jacqueline at home, she is not legally entitled to receive alimony for doing so. Nor is Victor legally obligated to pay *alimony* to assure that Wendy remains able to pay her mortgage, any more than any other payor is obligated to ensure that a payee is financially able to afford the marital home once the children reach majority.

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[2] Neither the fact that Jacqueline needs a handicapped-accessible home nor Wendy's position as Jacqueline's primary caretaker constitutes a changed circumstance because those circumstances existed before the parties divorced. In fact, Wendy devotes *less* time to Jacqueline's care than when the decree was entered because then, she was required to regularly assist Jacqueline during week nights when her daughter was in high school. Now, while Jacqueline is away at college, Wendy is required to only occasionally assist her daughter during the week. Further, Wendy's boyfriend, who contributes no financial support but assists with Jacqueline, lives with Wendy "full time." In addition, during at least part of the summer, a caretaker lives with them to assist with Jacqueline's needs.

The majority opinion provides no guidance at all to trial judges or litigants about how its decision will be applied in other alimony cases. Thus, it is impossible to know, let alone reasonably predict, whether trial judges will be upheld if they grant requests for increased alimony in similar situations, different situations, or if this case is somehow a special phenomenon in the law. The majority opinion cites no decision by the Arkansas Supreme Court that is even remotely analogous to the unprecedented result in this case. As much as one may admire the concern expressed for Jacqueline in the majority opinion, the decision is an unwarranted departure from the well-established principles our courts have followed for awarding alimony.

Accordingly, I would reverse the trial court's order increasing and extending Wendy's alimony.

Connie BELL *v.* Merrie HUTCHINS, in the Matter of the Estate of Alvin R. Hutchins, Deceased

CA 07-78 268 S.W.3d 358

Court of Appeals of Arkansas
Opinion delivered November 14, 2007

Tennille H. Price and *Gary D. McDonald*, for appellant.

Burbank Dodson & Barker, PLLC, by: *Don B. Dodson*, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Connie Bell appeals the June 28, 2006 judgment, of the Union County Circuit Court, finding that the last will and testament of decedent Alvin R. Hutchins, dated September 15, 2005, is invalid and setting aside the order admitting it to probate. Appellant contends that the circuit court erred in finding that she procured the will and that she had unduly influenced Alvin R. Hutchins to make the will. We reverse the circuit court's finding of procurement and remand for proceedings consistent with this opinion.

Mr. Alvin R. Hutchins lived in Arkansas for fifteen years prior to his death. During that time, his daughter, who lives out of state, did not visit him, but Mr. Hutchins made it known that his daughter would inherit all that belonged to him upon his death. Mr. Hutchins hired appellant Connie Bell to be his housekeeper in early 2005 after he had suffered some falls and had become too feeble to care for himself and his home. Mr. Hutchins did not own a washing machine or dryer prior to his hiring appellant, but bought a set and had them installed in appellant's home in order that she might wash his clothes. Mr. Hutchins did not drive, but after he hired appellant, he bought a brand new GMC pick-up truck, which appellant drove. Mr. Hutchins also loaned appellant money for a deposit and first-month's rent on a house.

According to trial testimony, these purchases and financial transactions were out of the ordinary for Mr. Hutchins, who was said to have been frugal. His small house had no running hot water

and no toilet facilities indoors. A wood-burning stove provided heat for the house. However, it was established at trial that Mr. Hutchins was generous with his church and helped people in need. Friends became concerned about Mr. Hutchins's spending when the washing machine, dryer, and truck were purchased.

Appellant made an appointment for Mr. Hutchins with attorney Teresa Wineland for September 15, 2005. On that date, appellant drove Mr. Hutchins to Ms. Wineland's law office and waited in the truck. Mr. Hutchins asked Ms. Wineland to draft a new will, leaving the washing machine, dryer, truck, and half of the remainder of his estate to appellant, with the other half of the estate going to his daughter. After Mr. Hutchins executed the will, appellant kept it in her possession.

Friends who picked Mr. Hutchins up for church on Sunday mornings testified that appellant would help him get dressed for church. However, the last few Sundays of his life, appellant did not help Mr. Hutchins get ready for church. On Sunday, October 2, 2005, Mr. Hutchins was found on the floor of his home by a friend. He had apparently fallen and had lain on the floor for several days. He was taken to the hospital where he died a week later. Three days after his death, appellant filed a petition to probate the September 15, 2005 will. The will was admitted to probate on October 12, 2005, and a motion to contest the will's admission was filed on November 28, 2005, by Merrie Hutchins, Mr. Hutchins's daughter.

After a hearing, the trial court found that appellant had procured the will, effectively shifting the burden from the will challenger, Merrie Hutchins, to the proponent of the will, appellant. Because of the finding of procurement, the trial court found that a rebuttable presumption of undue influence arose and that the burden of proof was on the appellant to prove beyond a reasonable doubt that the testator had both the testamentary capacity and the freedom from undue influence to execute a valid will. The trial court found that Mr. Hutchins had the mental capacity to execute the will on September 15, 2005. However, the trial court found that, based upon the facts, appellant failed to rebut the presumption of undue influence and declared the will invalid. This appeal follows.

We review probate proceedings de novo, but we will not reverse the trial court's decision unless it is clearly erroneous. *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004). A decision is

clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003). When reviewing the proceedings, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Moore, supra.*

In a typical will contest, the party contesting the validity of the will has the burden of proving by a preponderance of the evidence that the testator lacked mental capacity at the time the will was executed or that the testator acted under undue influence. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). However, where a beneficiary under the will actually drafts or procures the will, a higher burden of proof is applied under Arkansas law:

> In *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979), we held that the proponent of a will who is a beneficiary and who drafted the will or caused it to be drafted has the burden to prove beyond a reasonable doubt that it was not the result of undue influence and that the testator had the mental capacity to make the will. We again held in *Smith v. Welch*, 268 Ark. 510, 597 S.W.2d 593 (1980), that where a beneficiary procures the making of a will, "it is incumbent upon those who, in such a case, seek to establish the will, to show beyond reasonable doubt, that the testator had both such mental capacity, and such freedom of will and actions as are requisite to render a will legally valid."

Park v. George, 282 Ark. 155, 159, 667 S.W.2d 644, 647 (1984). *See also Short v. Stephenson*, 238 Ark. 1048, 386 S.W.2d 501 (1965).

Appellant contends that the circuit court erred when it found that she procured the will and thereafter shifted to her the burden to prove beyond a reasonable doubt that on September 15, 2005, Alvin Hutchins had both the testamentary capacity to execute a valid will and freedom from undue influence. She argues that under *Looney, supra*, she did not procure the will, as procurement requires actually drafting the will for the testator or planning the testator's will and causing him to execute it. She maintains that there was no evidence that she actually drafted the will or that she planned it or caused Mr. Hutchins to execute it.

Appellee contends that the instant case is similar to *Looney*, wherein the procurer of the will, Ms. Looney, was the administrator of the nursing home wherein the elderly Ms. Wade resided.

Ms. Wade feared that no one would care for her in her declining years. The court noted that the proponent of the will was Ms. Wade's caregiver and that she had a fiduciary duty to protect Ms. Wade and not to gain financially from her advanced age and weakened physical condition. Appellee argues that, here, Mr. Hutchins relied upon appellant as a cook and housekeeper, and rather than protect him, appellant took advantage of him financially by helping him secure a will that favored her in derogation of all prior representations as to what his natural disposition of his property to his daughter would have been.

The circuit court found that appellant's acts of procurement were that she was a beneficiary under the will who called the lawyer's office to make the appointment for Mr. Hutchins, drove Mr. Hutchins to the appointment, and waited in the truck for him while he kept the appointment. Further, appellant kept the will in her possession following the appointment. The trial court did not find credible her testimony that she did not know the content of the will or why the decedent went to the lawyer's office.

Rose v. Dunn, 284 Ark. 42, 679 S.W.2d 180 (1984), is similar to the instant case, but has a different result. There, Mr. Dunn drove the testator to the lawyer's office and participated in the initial discussions concerning making a will. However, the court held that the testator freely and voluntarily executed his own will, and that Mr. Dunn did not procure the making of the will. The court relied upon the case of *Park, supra,* in determining what it means to procure a will, and stated as follows:

> In the case of *Park v. George, Pers. Rep.*, 282 Ark. 155, 667 S.W.2d 644 (1984), an attorney who named himself as a beneficiary in the amount of $10,000.00 drew a will for an 88 year old woman who had been hospitalized and sedated and who appeared confused and upset. In the case at bar, Delma Dunn merely drove Mr. Pierce to the attorney's office and participated in the initial discussions concerning making a will. The court found that Mr. Pierce was possessed of both testamentary capacity and freedom of will. Where a competent individual freely and voluntarily executes his own will, it cannot be said that another procured the making of that will.

Rose, 284 Ark. at 47, 679 S.W.2d at 183.

Here, appellant merely called the lawyer's office to make the appointment for Mr. Hutchins. Subsequently Ms. Wineland, the attorney, contacted Mr. Hutchins personally to make

sure he wanted the appointment. Appellant was not present in the office when the will was executed. Further, Ms. Wineland testified that Mr. Hutchins explained to her the reasoning behind dividing his estate between his daughter and appellant. Ms. Wineland stated that she was convinced that Mr. Hutchins had the proper mental capacity to do what he did. Therefore, based upon *Rose*, we hold that the trial court erred in finding that appellant procured the will and shifting the burden of proof to her.

Further, we hold that the trial court made a proper finding of testamentary capacity as follows:

> As to testamentary capacity, the testimony of Teresa Wineland, who prepared and witnessed the Will, and Martha Kellum, the second witness, clearly established that Alvin Hutchins possessed the capacity to execute the Will on September 15. Decedent knew what he wanted to do, appeared coherent, and answered counsel's questions in a manner that indicated sufficient capacity on that day. The testimony of Martha Kellum confirmed the observations and conclusions of counsel.

Once testamentary capacity is established, the question of whether the testator was unduly influenced must be answered. We do not find error in the trial court's finding that Mr. Hutchins had the testamentary capacity to execute a will; however, because the trial court erroneously shifted the burden of proof to appellant, we reverse and remand for the trial court to act consistently with this opinion.

Reversed and remanded.

BIRD and HEFFLEY, JJ., agree.

Leslie TOIA *v.* HTI LOGISTICS, Employer

CA 07-234 268 S.W.3d 334

Court of Appeals of Arkansas
Opinion delivered November 14, 2007

Richard Whiffen, P.C., by: *Richard Whiffen*, for appellant.

John Barttelt, for appellee.

ROBERT J. GLADWIN, Judge. This appeal follows the December 13, 2006 decision of the Workers' Compensation Commission (Commission) that reversed the June 29, 2006 opinion of the Administrative Law Judge (ALJ), finding specifically that appellant Leslie Toia failed to prove by a preponderance of the evidence that he was performing employment services at the time his injuries occurred. On appeal, appellant challenges the Commission's decision on that single issue. We reverse and remand for an award of benefits.

Appellant picked up a load of newsprint in Pine Bluff, Arkansas, and was scheduled to deliver it in Burlington, Vermont, on May 10, 2002. He arrived in Burlington on May 9, 2002, and proceeded to his drop-off location. After he was informed that he would have to wait until the following morning to unload, he parked his truck at a local shopping mall. According to appellant, sometime after he parked the truck he left to get something to eat.

Appellant testified that he subsequently returned to his truck intending to retire for the night in the sleeper compartment of the truck. He checked the seals on the truck and walked around, generally checking the truck itself, then proceeded to climb back in the truck for the evening.

Appellant lost his footing while climbing up into the cab of his truck, slipped off the top step, fell backwards onto the ground, and landed on his back. He stated that he lay helpless on the ground for about forty-five minutes, with no one stopping to help, before finally being able to get back up and into the cab of his truck. Appellant stated that he rested there for about an hour or two, then disconnected the trailer, and eventually drove himself to the emergency room of a nearby hospital. Appellant testified that he was examined at the emergency room but that no x-rays were taken. He further testified that he was released with pain medication and ibuprofen.

Appellant delivered his load the next morning as scheduled, then contacted Tim Hogan, appellee's dispatcher, to notify appellee of his injury. He stated that he was told that he would have to return to Jonesboro, Arkansas, for further medical treatment. First, however, he was instructed to pick up a load approximately 300 miles away in up-state New York. Appellant eventually arrived at his destination in New York, where he again sought treatment at the emergency room of a local hospital. Appellant testified that surgery was recommended at that time, which he refused because he preferred being treated in his home state of Montana. He then flew home to Montana where he was examined by a neurosurgeon, who allegedly performed surgery the same day. There are no medical records to corroborate appellant's version of events surrounding his alleged injury. Appellant stated that, after two months of recovery time from this surgery, he returned to work for appellee. He left his employment with appellee approximately four to five months later for a higher-paying position with another trucking company.

Appellant admitted during the hearing before the ALJ on May 5, 2006, that he had given false statements during his July 6, 2005 deposition. These false statements related primarily to the times at which events occurred on the date in question. Appellant explained that he had been untruthful because he had corrected his Department of Transportation (DOT) logs, to which he had referred during his deposition, in order to avoid violations. Appellant further explained that he had been reprimanded on numer-

ous occasions for violating DOT regulations in reporting. Notwithstanding these admitted indiscretions, both the ALJ and the Commission found that the preponderance of the credible evidence demonstrated that appellant was an employee of appellee at the time of his alleged accident. Appellant's employment status is not at issue for purposes of this appeal.

Appellant also admitted that he had three beers with his meal but denied being intoxicated at the time this incident allegedly occurred. There is no toxicology report contained within the record to verify appellant's level of blood alcohol at the time of this incident. Although aware of those admissions, the Commission did not appear to focus on that issue, specifically pursuant to the provisions of Ark. Code Ann. § 11-9-102(4)(B)(iv)(a) (Repl. 2002), when making findings regarding compensability.

With regard to the issue of employment services, as previously mentioned, appellant was less than candid during his deposition regarding: the time he arrived in Burlington; his activities immediately following his arrival there; his activities immediately prior to his alleged accident; the time the accident occurred. Although he admitted that he had essentially lied during his deposition about the chronology of events on May 9, 2002, it appears from his testimony at the hearing before the ALJ that he most likely did sustain a legitimate injury on that date. The Commission stated in its opinion that the truth appeared to be that appellant was returning to his truck after taking a dinner break, with plans to sleep there before delivering his load the next morning. The Commission also set forth in its opinion that appellant mis-stepped while he was climbing into the cab of his truck, and landed on the ground. Therefore, the only remaining issue to be resolved is whether appellant was performing employment services at the time of his alleged accident.

Standard of Review

In appeals involving claims for workers' compensation, our court views the evidence in a light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *Moncus v. Billingsley Logging*, 366 Ark. 383, 235 S.W.3d 877 (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court

must affirm the decision. *Id.* Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Id.*

It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *See Mize v. Resource Power, Inc.*, 99 Ark. App. 415, 261 S.W.3d 477 (2007). Arkansas Code Annotated section 11-9-704(b)(6)(A) (Repl. 2002) vests with the Commission the duty to review the evidence and if deemed advisable to hear the parties, their representatives, and witnesses. The statute further requires the Commission to determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2). Thus, in determining that the Commission's authority and duty to conduct a de novo review of the entire record, including issues of credibility, are constitutional, this court stated in *Stiger v. State Line Tire Serv.*, 72 Ark. App. 250, 261, 35 S.W.3d 335, 342 (2000):

> When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. In addition, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Cottage Café, Inc. v. Collette*, 94 Ark. App. 72, 226 S.W.3d 27 (2006).

A compensable injury is "an accidental injury . . . . arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002). A compensable injury does not

include injuries suffered at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii). An employee is performing "employment services" when he or she is doing something that is generally required by his or her employer. *White v. Georgia-Pacific Corp.*, 339 Ark 474, 6 S.W.3d 98 (1999). The same test is used to determine whether an employee was performing "employment services" as when determining whether an employee was acting within "the course of employment." *Moncus, supra.* The supreme court has stated that an employee is performing employment services when he is doing something that is generally required by his employer. *Id.* The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *White, supra.* Furthermore, when the injury occurs outside of the time and space boundaries of employment, the critical determination to be made is whether the employee was directly or indirectly advancing the interests of the employer at the time of the injury. *Moncus, supra.*

Whether a claimant was performing employment services depends on the particular facts and circumstances of each case. The following factors may be considered in determining whether the claimant's conduct falls within the meaning of "employment services": (1) whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests; (2) whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work; (3) whether the activity engaged in when the accident occurs is an unexpected part of the employment; (4) whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work activities; (5) whether the employee is compensated during the time that the activity occurs; (6) whether the employer expects the worker to stop or return from permitted non-work activity in order to advance some employment objective. *See Matlock v. Ark. Blue Cross Blue Shield,* 74 Ark. App. 322, 49 S.W.3d 126 (2001).

Discussion

Appellant contends that, because he was returning to the truck to sleep, he was advancing the employer's interests by insuring the safety of the truck. It is undisputed that in the present case, appellee required employees to maintain control of their

trucks and to make sure the contents of the truck and the truck itself were safely secured. Both appellant and Ms. Jodie Israel, the former payroll and personnel employee for appellee, testified that appellant would be required to secure his vehicle and the contents therein. Appellant also testified that there were facilities in the truck that were designed to allow drivers to sleep on board. More importantly, appellant testified that employees would rarely stay in a motel room unless they were on a two-day layover. Appellant was not on a two-day layover, and he argued that he saved appellee money by staying in the truck.

Appellant also contends that he provided security by staying in the truck. Appellant specifically testified that there were benefits to staying in the truck, including that it prevented theft. When asked why he would spend the night in the truck, he answered, "[b]ecause if anything's going to happen to your trailer you can feel it rocking. I mean, as soon as you open the door, actually physically lift the handles and pull it open and when you feel the doors open you can actually feel the vibration right through the whole truck." Appellant testified that, one time in the past when he was in New York, someone was attempting to break in his truck while he was sleeping and that he felt the vibrations and got out of bed. He started the truck and went around back, at which time he found that the trailer door was open. He argues that by sleeping in the truck he was able to stop what was apparently an attempted robbery, which would clearly benefit appellee.

Appellant cites *Jivan v. Economy Inn & Suites*, 97 Ark. App. 115, 253 S.W.3d 4 (2006), as paralleling the facts of this case. There, the claimant was the estate of Nimisha Jivan, deceased, who was an assistant manager at the Economy Inn in Hope, Arkansas, and whose husband, Jack Jivan, was a manager. The Jivans lived in a room provided by the hotel and carried out their work responsibilities on the premises. On February 17, 2003, Nimisha, who was off duty, was changing her clothes while in the bathroom of her hotel room preparing to go to the gym. A fire broke out, and Nimisha was not able to escape her hotel room. She died as a result of smoke inhalation from the fire.

In its opinion reversing this court's decision to deny benefits, our supreme court discussed the fact that Nimisha, like the claimant in *Deffenbaugh Industries v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993), resided on the employer's premises at the time of her fatal injury. *Jivan v. Economy Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007). The supreme court employed an increased-

risk analysis, discussing that Nimisha was expected to reside on the premises and, as a residential employee of the hotel, the condition of living at the hotel "intensified the risk of injury due to extraordinary natural causes." *See Deffenbaugh*, 313 Ark. at 106, 852 S.W.2d at 808. The supreme court stated that her presence on the premises during the fire exposed her to a greater degree of risk than someone who did not live on the premises. The parties had stipulated that Nimisha was on call twenty-four hours per day, and while on the premises, she was to carry out her responsibilities as an assistant manager of the hotel by being available for work duties at all times. Accordingly, the supreme court held that Nimisha indirectly advanced her employer's interests.

In *Jivan*, the supreme court pointed out that in our supplemental majority opinion, this court cited *Cook v. ABF Freight Systems, Inc.*, 88 Ark. App. 86, 194 S.W.3d 794 (2004) (holding that a truck driver, who was on call, was not compensated for an injury in a motel room provided by his employer), for the proposition that an injury is not compensable where an employee performs an activity for the purpose of attending to his personal needs. The supreme court found *Cook* to be distinguishable from the *Jivan* case because the truck driver was not a residential employee of the motel. The driver spent the night in a motel room, which, while paid for by the employer, was neither owned nor operated on the premises of his employer. However, the supreme court *specifically* stated that "[t]he scenario might have been different if the truck driver had sustained the injury while sleeping in his truck." *Jivan*, 370 Ark. at 420, 260 S.W.3d at 286. That is exactly the situation that occurred in the instant case.

The supreme court held that, under the increased-risk doctrine, Nimisha's fatal injury was compensable as a residential employee who indirectly advanced the interests of her employer. Appellant points out that the claimant in *Jivan* was getting ready to leave her employment location at the time of her accident, yet the injuries were found to be compensable. Here, appellant was doing just the opposite. When he walked around the truck to make certain that it and the contents were secure and proceeded to climb back into the truck to retire for the evening, appellant had returned to the "premises" of his employment. He was remaining in the truck, his mobile "office" so to speak, in order to prevent anything from happening to it or its contents prior to delivery to the customer the following morning.

Appellant also cites *Arkansas Department of Health v. Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984), where this court held that activities of a personal nature, that are not forbidden but reasonably expected, may be a material incident of employment and injuries suffered in the course of such activities are compensable. The court stated that the controlling issue is whether the activity is one to be reasonably expected so as to be an incident of the employment and thus in essence a part of it. *Id.* In the instant case, appellant climbing into his truck is an activity that the employer should reasonably expect and is an incident of his employment. There are many activities directly related to his employment that require him to get into and out of the truck, including, but not limited to, loading and unloading, pumping gas, talking to customers upon pick-up or delivery, etc. Here, he was climbing into the truck after checking the seals and inspecting the truck itself in order to save appellee money on lodging while also keeping his vehicle and the contents therein secure.

Appellee focuses on the lack of factual information known about the injury and the inconsistencies between appellant's testimony at each of his two depositions and at the hearing, reminding us that appellant has the burden of proving by a preponderance of the evidence that his injury is compensable. Appellee urges this court to decide this case based on the principles of *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999), where a food-service worker was entitled to benefits for an injury that she sustained while she was on break. The determining factors regarding whether she was performing employment duties at the time of the accident were that her breaks were paid and she was required to assist diners, even during her break, should the need arise.

Appellee maintains that in the instant case, appellant was not performing employment services either before, after, or during the injury. Appellee contends that he was not required to perform employment services until 8:00 a.m. the following morning, when he was to deliver the load. Appellee asserts that it could not benefit from appellant's personal activities such as shopping, eating, beer drinking, or going to the movies. *Kinnebrew v. Little John's Truck, Inc.*, 66 Ark. App. 90, 989 S.W.2d 541 (1999), is also cited as an example of this court holding that a truck driver was not performing employment services when he was injured while taking a shower at a truck stop. As previously discussed, *Kinnebrew* is distinguishable because appellant's activities at the time of the

injury are much more closely tied to the truck, its contents, and appellant's responsibility to make sure nothing happened to either one prior to delivery.

The Commission found that appellant was off duty and free to do as he as he pleased at the time of the alleged incident. There was contradictory testimony about appellant's reporting of the accident, his initial handling of obtaining medical treatment, a potential delay in giving notice of the claim, the lack of medical records substantiating the injury, and his status as an employee. The Commission did not focus on those issues, however, focusing solely on whether appellant was performing employment services at the time of the injury.

Limiting our review to that one issue, under the analysis recently set forth in *Jivan*, we hold that reasonable minds could not reach the result found by the Commission because appellant's activities related to returning to the "premises," *i.e.*, his truck, in preparation of staying overnight in the truck to protect it and the cargo, advanced the interests of his employer. Despite the allegations of falsified statements, DOT records, and lack of credibility, even the Commission stated in its opinion that appellant was engaged in activities related to his truck at the time he fell. Accordingly, we reverse and remand for an award of benefits.

Reversed and remanded.

HART and GLOVER, JJ., agree.

MILLER, J., concurs.

BIRD and HEFFLEY, JJ., dissent.

BRIAN S. MILLER, Judge, concurring. I concur with the decision to reverse and remand this case for an award of benefits; and I write separately to reconcile this view with my position in *Economy Inn & Suites v. Jivan*, 97 Ark. App. 115, 253 S.W.3d 4 (2007). In *Jivan*, I voted with this court's majority to deny benefits based on my view that the claimant was not advancing the interests of her employer while changing clothes to attend a work-out session. The supreme court, however, reversed us in *Jivan v. Economy Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007).

The majority opinion clearly articulates the similarities between *Jivan* and the present case. Although it is arguable that the claimant, Leslie Toia, was not advancing the interests of his

employer at the time of his injury, we are bound by the precedent of our supreme court. *See Sanderson v. McCollum*, 82 Ark. App. 111, 112 S.W.3d 363 (2003); *Gause v. Shelter Gen. Ins.*, 81 Ark. App. 133, 98 S.W.3d 854 (2003). Therefore, I join the majority.

SAM BIRD, Judge, dissenting. This court has reversed the Commission's opinion, which found that appellant was not performing employment services at the time he was allegedly injured and, therefore, denied him benefits. I respectfully dissent because I believe that there is substantial evidence to support the Commission's denial of benefits.

A recitation of our standard of review is critical to my opinion in this case. We review the evidence in a light most favorable to the Commission's decision and affirm the decision if it is supported by substantial evidence. *Moncus v. Billingsley Logging*, 366 Ark. 383, 235 S.W.3d 877 (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different result from the Commission; unless we conclude that reasonable minds could not reach the conclusion reached by the Commission, we are required to affirm its decision. *Id.* In this case, the Commission specifically found that appellant was off-duty at the time of the alleged injury and that he failed to prove by a preponderance of the evidence that he was performing employment services. In my view, the Commission's decision is supported by substantial evidence and should be affirmed.

In support of its decision to reverse the Commission's determination, the majority relies upon appellant's testimony that employees rarely stayed in a motel unless they were on a two-day layover; that he saved money by staying in his truck; and that staying in the truck benefitted his employer by providing security. The majority then compared the facts of this case to the facts in *Jivan v. Economy Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007), in which the supreme court affirmed an award of benefits for the family of Nimisha Jivan, the assistant manager of a hotel, who died in a fire at the hotel while she was off-duty but while she was changing her clothes in the bathroom of her hotel room. In *Jivan*, the supreme court relied on the parties' stipulation that Mrs. Jivan was required to live at the hotel and was always considered to be on-call to address any hotel-related issues. The court held that Mrs. Jivan's injury was compensable as a residential employee who indirectly advanced the interests of her employer. However, the

court noted that its holding would "not extend workers' compensation coverage to include every possible scenario, but rather in a more narrow sense, it will cover those injuries, particularly those from extraordinary natural causes, that *residential employees* sustain on their *employers' premises.*" *Id.* at 420, 260 S.W.3d at 286 (emphasis added).

I disagree with the majority that the holding in *Jivan* requires reversal of the Commission's decision in this case. The facts in this case are significantly different from the facts that were critical to the court's decision in *Jivan.* Appellant was not a residential employee and did not sustain an injury on his employer's premises. In attempting to compare this case to *Jivan,* the majority refers to appellant's truck as the "premises" and as his "mobile office." In fact, to use the supreme court's analysis in *Jivan,* we must assume that appellant's truck is the employer's "premises." It is only when an employee resides on the employer's property that he is in fact a residential employee. Residence means "the place, esp. the house, in which a person lives or resides; dwelling place; home." *Webster's College Dictionary* 1145 (1996). A company vehicle — even one with a sleeping compartment — is not a residence. In fact, appellant testified that he "resided" in Billings, Montana. Unless we are going to extend the definition of a residential employee from those employees required to live on the jobsite and remain on-call twenty-four hours per day to truck drivers, or any other employee who spends a significant amount of time in a vehicle owned by his or her employer, appellant was not a residential employee.

The question in this case is whether there is substantial evidence to support the Commission's decision that an off-duty truck driver, who injured himself while allegedly attempting to climb into his company-owned truck to sleep, was not performing employment services. The Commission found that the credible testimony demonstrated that appellant was off duty at the time he slipped and fell. It also found that he was not returning to his truck to perform any work-related activity, but to sleep. The Commission found that appellant was "free to do as he pleased" at the time of the incident and the fact that he chose to sleep in his truck did not imply that he was advancing his employer's interests, either directly or indirectly, by doing so. There was no testimony by appellant or anyone else that appellant was required to sleep in his truck. In fact, he testified that sometimes he would get a motel room and "sometimes" he needed permission to get a motel room

and "sometimes" he did not need permission. This testimony certainly did not establish that appellant was required by his employer to sleep in his truck.

The Commission also found that, even if inspecting the truck rose to the level of employment services, appellant had completed the inspection before he decided to climb into the truck to retire for the evening. The Commission stated that the completed inspection did not transform his decision to retire for the evening into an employment activity. I believe that reasonable minds could accept this evidence as adequate to support the Commission's decision.

The Commission found that appellant was off-duty. Where he chose to spend his off-duty time — in his truck — does not change this critical fact. Because he was off-duty when he was allegedly injured, the Commission determined that he was not performing employment services. We have affirmed the Commission's denial of benefits for a truck driver who was injured in the bathroom while "on-call" in a hotel room provided by his employer. *Cook v. ABF Freight Sys., Inc.*, 88 Ark. App. 86, 194 S.W.3d 794 (2004). We also affirmed the denial of benefits for a truck driver who was injured while showering in a truck stop during his required eight-hour break between deliveries. *Kinnebrew v. Little John's Truck, Inc.*, 66 Ark. App. 90, 989 S.W.2d 541 (1999). Like the appellant in this case, these truck drivers were off-duty. One was in the bathroom of a hotel room provided by his employer and one was in a truck-stop shower; appellant was getting into his truck to sleep. However, all were off-duty and free to do as they pleased.

It is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Cooper Tire & Rubber Co. v. Angell*, 75 Ark. App. 325, 58 S.W.3d 396 (2001). The Commission did not believe appellant's testimony that, by getting into his truck to sleep, he was performing employment services. While acknowledging the proper standard of review, the majority nonetheless ignores it, disregards the Commission's conclusion, and concludes instead that appellant was injured while getting into his "premises" to sleep. Although there may be a case in which a truck driver should be compensated for an injury received while sleeping in his truck, I do not believe that this is that case. There was no evidence that appellant's employer either required or requested that appellant sleep, eat, or otherwise remain in his truck during his free time. Appellant chose

to go out to a restaurant, eat a steak, and drink some beers; he then chose to return to his truck to sleep. In my view, there is substantial evidence to support the Commission's decision that appellant was not performing employment services at the time of the incident because he was off-duty and was, therefore, "free to do as he pleased." Therefore, I would affirm.

HEFFLEY, J., joins this dissent.

David LOONEY *v.* Kay RABY

CA 07-49 268 S.W.3d 345

Court of Appeals of Arkansas
Opinion delivered November 14, 2007

Butler, Hicky & Harris, by: *Andrea Brock*, for appellant.

Hale, Holitik & Young, by: *James C. Hale, III*, and *Laura E. Partlow*; *Rieves, Rubens & Mayton*, by: *Kent J. Rubens*, for appellee.

JOHN B. ROBBINS, Judge. The Crittenden County Circuit Court rejected appellant David Looney's objections to a writ of execution and affirmed a sale held pursuant to the writ. Mr. Looney now argues that the court erred in (1) denying his motion for a continuance; (2) relating appellee Kay Raby's substitution as the real party in interest back to the date of the writ; (3) ruling that Mr. Looney's response to the writ of execution did not comply with Ark. Code Ann. § 16-66-301; (4) ruling that the Arkansas Farm Mediation Act did not apply to this case; and (5) enforcing the sale where the sheriff failed to follow the statutory requirements in levying execution. We find no error and affirm.

Background Facts

On July 23, 1997, the Bank of West Memphis obtained a judgment against David Looney for $58,079.67, plus interest and attorney fees, due to nonpayment of a promissory note. Writs of garnishment were issued but not pursued, and the record reflects no further activity on the case for seven years.

In 2004, the Bank's successor-in-interest, the National Bank of Commerce, assigned the judgment to Bill McAuley, III, and McAuley assigned it to appellee Kay Raby on February 11, 2005. Ms. Raby immediately began collection efforts, procuring, among other writs, the February 22, 2005, writ of execution that is the subject of this appeal. The writ of execution listed the Bank of West Memphis as the plaintiff, despite the assignment to Raby, and commanded the sheriff to seize various property from Mr. Looney, including his stock in Arkansas Environmental Waste Recycling Corporation (the Corporation) and Riverside Environmental Disposal, LLC (the LLC). Mr. Looney responded on March 17, 2005, pleading the defenses of exemption, accord and satisfaction, laches, estoppel, payment, release, and violation of the Arkansas Farm Mediation Act.

A hearing on Mr. Looney's response and other matters was set for August 10, 2005. Before that date, the sheriff issued a notice that Mr. Looney's interest in the Corporation and the LLC would be sold on August 22, 2005.

On August 9, 2005, the day before the hearing, Mr. Looney's counsel, Richard West, moved to withdraw from the case. Mr. West stated that the case had evolved into a complex matter that he was unqualified to handle. Based on his counsel's motion to withdraw, Mr. Looney moved for a continuance and stated that he was currently seeking a new attorney. The trial court reluctantly continued the hearing until September 8, 2005, and gave Mr. Looney the option of stopping the August 25 sale by posting a bond. Mr. Looney did not do so. The sale took place, and Kay Raby purchased Mr. Looney's stock in the Corporation and his membership units in the LLC for a total of $2000.

At the September 8 hearing, Mr. Looney again requested a continuance on the ground that his new attorney, hired on September 2, had not had time to prepare. That motion was denied. The hearing went forward, and the court considered Mr. Looney's defenses to the writ of execution. The court also heard Ms. Raby's motion to substitute herself as the real party in interest and to have that substitution relate back to the February 22, 2005, writ. Following the hearing and briefing on some issues, the court entered an order on June 19, 2006, substituting Ms. Raby as the real party in interest; declaring that Mr. Looney did not properly challenge the writ under Arkansas law; finding that the Arkansas Farm Mediation Act did not apply; and "affirming" the August 25, 2005, sale of Mr. Looney's interest in the Corporation and the LLC. Mr. Looney appeals from that order.

Denial of Continuance

Mr. Looney first argues that the trial court erred in denying his motion to continue the September 8, 2005, hearing. He claims that his new counsel had insufficient time to prepare for the hearing and that he was deprived of the opportunity to subpoena witnesses and file amended pleadings.

The grant or denial of a motion for continuance is within the sound discretion of the trial court. *City of Dover v. City of Russellville*, 346 Ark. 279, 57 S.W.3d 171 (2001). The court's decision on a continuance will not be reversed absent an abuse of discretion amounting to a denial of justice. *See id.* An appellant must show prejudice from the denial of a continuance, and when a motion is based on a lack of time to prepare, the appellate court considers the totality of the circumstances. *See id.*

We find no abuse of discretion here. The continuance of the hearing from August 10 to September 8 was at Mr. Looney's

request. The court expressed misgivings but allowed the continuance based on Mr. Looney's assurances that he would have new counsel by that time:

> COURT: Mr. Looney, do you understand if I allow Mr. West to withdraw you have less than a month to find a lawyer that will be ready to go because I am not going to continue this again?
>
> LOONEY: Yes, sir. I have probably met so many lawyers in town that will not only take me but will do a good job.
>
> COURT: What is your position about Mr. West requesting to withdraw?
>
> LOONEY: I understand that it has grown so much in the past week that it has overwhelmed him and it has overwhelmed me. I might have to hire two people just to take his place. I can understand where he is coming from but I will hire me an attorney soon.
>
> COURT: At least at this point so you will have somebody. I am not allowing you [Mr. West] to withdraw. If you don't get anybody, it will be Mr. West whether he feels confident or not.

Despite being forewarned that he had a short time within which to find a new attorney and that the court would not continue the September 8 hearing, Mr. Looney did not secure new counsel until September 2. He then sought another continuance on the day before the hearing, asserting a lack of time to prepare. This lack of diligence alone was sufficient cause to deny a continuance. *See id.*[1]

Additionally, Mr. Looney does not demonstrate prejudice from the lack of a continuance. His new counsel ably examined and cross-examined witnesses at the hearing and made

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[1] Mr. Looney argues that he underwent surgery sometime after August 10, but he cites no such testimony in the record as abstracted; nor was this pled as a ground in his motion for a continuance. Looney's counsel told the court, "If I could say one thing on his behalf, he has had surgery in the meantime and has had some difficulty in being able to find counsel," but we do not consider that statement evidence, *see Alltel Ark., Inc. v. Ark. Pub. Serv. Comm'n*, 70 Ark. App. 421, 19 S.W.3d 634 (2000), and we cannot ascertain from that statement the nature of Mr. Looney's surgery and how he was prevented from finding an attorney.

cogent arguments on all points. Further, the primary issues in this case were addressed either in post-hearing briefs or at the August 10 hearing, where Mr. Looney was represented by Mr. West. Moreover, Mr. Looney's claim that he was deprived of the opportunity to subpoena witnesses or file amended pleadings is not well taken. Until September 2, he continued to be represented by Mr. West, who could have obtained subpoenas or filed any amendments.

Based on the totality of the circumstances, we find no abuse of discretion in the trial court's denial of the continuance.

Relation Back of Substitution of Real Party In Interest

The February 22, 2005, writ of execution named the original judgment creditor, the Bank of West Memphis, as plaintiff even though the judgment had been assigned to appellee Kay Raby. On September 7, 2005, Ms. Raby asked to be substituted as the real party in interest and that her substitution relate back to the February 22, 2005, writ. Mr. Looney argues that Ms. Raby's status as the real party in interest should not relate back and that the February 22 writ, bearing the name of the Bank of West Memphis as plaintiff, is a nullity.

We have some doubt that Mr. Looney's argument is preserved for appeal. The trial court did not clarify until after entry of the order appealed from that the substitution related back to the issuance of the writ. In any case, the Arkansas Rules of Civil Procedure permit relation back in this instance.[2] Rule 25(c) provides that, in the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted. Rule 17(a) provides that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest "until a reasonable time has been allowed after objection for ratification of commencement of the action by . . . or substitution of, the real party in interest." The rule further declares that such substitution "shall have the same effect as if the action had been commenced in the name of the real party in interest."

[2] Neither party argues that the Rules of Civil Procedure do not apply to execution proceedings.

Additionally, Ark. R. Civ. P. 15(c)(1) states that amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." At the time Ms. Raby moved to substitute herself as the real party in interest, she did not change the nature of her claim; she was pursuing execution of the same judgment that was the subject of the February 2005 writ. Her efforts therefore arose out of the same "conduct, transaction, or occurrence" that existed when the original writ of execution was issued.[3]

Challenging the Writ Under Ark. Code Ann. § 16-66-301

Arkansas Code Annotated section 16-66-301(a) (Repl. 2005) provides:

> If any person against whom any execution has been issued applies to the judge of the court out of which the execution or order of sale was issued, by petition verified by affidavit, setting forth good cause why the execution ought to be stayed, set aside, or quashed, reasonable notice of the intended application having been previously given to the adverse party or his or her agent or attorney of record, the judge shall, upon the application, hear the complaint.

Mr. Looney did not file a petition verified by affidavit; he filed a simple response listing his defenses to the writ. The trial court ruled that Mr. Looney's response failed to comply with the above statute, and Mr. Looney argues that this ruling was erroneous. We disagree.

Section 16-66-301(a) and its accompanying statutes contain the exclusive means of staying or vacating writs of execution, and all other means are excluded. *See Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989); *Taylor v. O'Kane*, 185 Ark. 782, 49 S.W.2d 400 (1932). It is undisputed that Mr. Looney did not file a petition verified by affidavit as the statute requires. It also appears that, despite the court's ruling that Mr. Looney's response did not comply with the statute, the court considered most if not all of the pled defenses at the September 8, 2005, hearing. Thus, we see no reason for reversal on this point.

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[3] Rule 15(c)(2) contains a provision concerning relation back when the names of parties are changed, but that provision applies to a change in the name of a party *against whom* a claim is asserted.

Farm Mediation Act

Arkansas's Farm Mediation Act, codified at Ark. Code Ann. §§ 2-7-101 to 310 (Repl. 1996), provides that, in connection with secured indebtedness of $20,000 or more, no proceeding against a farmer shall be commenced to enforce any judgment against agricultural property unless the creditor has first obtained a release. Ark. Code Ann. § 2-7-302 (Repl. 1996). In the absence of a release, the creditor must, prior to the commencement of a proceeding, give notice to the farmer that he may request mandatory mediation. Ark. Code Ann. § 2-7-303 (Repl. 1996). The trial court ruled that the Act did not apply in this case. We agree.

The Act defines a "farmer" as:

> any person who is engaged in farming or ranching, who has at least twenty thousand dollars ($20,000) in outstanding agricultural loans that are secured by real estate, crops, livestock, farm machinery, or other agricultural supplies, and who either:
>
> (A) Owns or leases a total of fifty (50) acres or more of land that is agricultural property; or
>
> (B) Has had gross sales of farm products of at least twenty thousand dollars ($20,000) in any of the preceding three (3) years.

Ark. Code Ann. § 2-7-102(4). "Farming" or "ranching" means the employment or operation of real property for the production of agricultural products. Ark. Code Ann. § 2-7-102(5).

Mr. Looney testified that, among the tracts of real estate mentioned in the writ of execution, at least eighty acres were used as farmland to grow soybeans, and that he leased this land to tenant farmers. He also testified that he had over $20,000 in outstanding agricultural loans. However, he did not make it clear that those loans were "secured by real estate, crops, livestock, farm machinery, or other agricultural supplies" as required in the definition of a "farmer." Further, as Ms. Raby points out, that portion of the Act requiring a release from mediation before proceeding against a farmer applies "in connection with a secured indebtedness of $20,000 or more." Ark. Code Ann. § 2-7-302. Mr. Looney has not shown that this proceeding was in connection

with a secured indebtedness. In fact, it was simply an execution on a judgment. The trial court, therefore, did not err in refusing to apply the Act to this case.[4]

Sheriff's Failure to Properly Levy Execution

Mr. Looney argues that the sheriff did not endorse the February 22, 2005, writ or return it within sixty days, as required by statute. *See* Ark. Code Ann. § 16-66-110 (Repl. 2005); Ark. Code Ann. § 16-66-416(a) (Repl. 2005). The trial court did not rule on this argument in the order appealed from. We therefore do not consider it. *See Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987).

The trial court's order is affirmed in all respects.

Affirmed.

VAUGHT and BAKER, JJ., agree.

[4] The question of whether the Act would have applied to the original action on Mr. Looney's indebtedness is not at issue. The Bank of West Memphis obtained a release from mandatory mediation before suing Mr. Looney in 1997. *See* Ark. Code Ann. § 2-7-310 (Repl. 1996).

Shirley M. JARAMILLO *v.* Leonard E. ADAMS, Sr.

CA 07-59 268 S.W.3d 351

Court of Appeals of Arkansas
Opinion delivered November 14, 2007

Judith Rebecca Pratt Hass, for appellant.

Len W. Bradley, for appellee.

KAREN R. BAKER, Judge. Appellant, Shirley M. Jaramillo, appeals from a decision by the Johnson County Circuit Court finding that a deed from Grace Adams to Shirley Jaramillo was null and void. Ms. Jaramillo has three arguments on appeal. First, she argues that the trial court's decision to cancel the deed must be reversed because the court erred as a matter of law when it found that the case filed in 2004 was not barred by the statute of limitations where the deed was notarized, executed, and filed of record in 1984 and the grantee (through whom the appellee claims his right to the lands) died in 1992. Furthermore, tolling of the statute will not be found in the case of a recorded deed where the appellee was aware of his mother's death for some twelve years before maintaining this action. Second, she argues that the trial court's decision to cancel the deed must be reversed because the court erred as a matter of law when it found that this case, which was filed in 2004, was not subject to the defense of laches where the deed was notarized, executed and filed of record in 1984 and the grantee (through whom the appellee claims his right to the lands) died in 1992. Third, she argues that the trial court's decision to cancel the deed must be reversed because the court abused its discretion and committed prejudicial error when it refused to admit into evidence a will executed by the mother of the parties and a statement executed by a deceased brother of the parties, finding the evidence was excluded as hearsay. We find merit in appellant's first two arguments and reverse and dismiss.

Grace Adams and James H. Adams acquired an interest as tenants by the entirety in real property located in Johnson County, Arkansas, by warranty deed dated and recorded of record on December 4, 1974. The warranty deed conveyed approximately thirty-nine acres of land. Grace Adams had four children, Shirley M. Jaramillo (appellant), Leonard E. Adams, Sr. (appellee), Denver Adams, and Marjorie Hudgens. On November 19, 1984, Grace Adams executed a warranty deed conveying the thirty-nine acres in Johnson County to Shirley and reserving a life estate in herself. The warranty deed was recorded on November 28, 1984. Subsequently, on May 30, 1988, Shirley quitclaimed the thirty-nine acres to Barry Watkins (an attorney), who in return, quitclaimed the same real property to Shirley and her husband Lotario O. Jaramillo for the purpose of creating a tenancy by the entirety. Grace Adams died intestate on May 21, 1992. On February 20, 2004, Shirley's sibling, Leonard Adams, filed a complaint in Johnson County Circuit Court alleging that Grace Adams's signature on the deed conveying the thirty-nine acres to Shirley was a

forgery; therefore, Grace Adams died while owning a fee simple title to the thirty-nine acres and the title passed by operation of law to all four of Grace Adams's children in equal shares as tenants in common.

A hearing was held on March 24, 2006, and resumed on September 20, 2006. Shirley testified first at the hearing. She explained that both her mother and father began living with her in 1980. Her father lived with her until his death in 1985, and her mother continued to live with her until her death in 1992. Shirley testified that during that time, she cared for her parents and provided all the physical and financial assistance that her parents needed. In 1984, she and her husband took her mother to attorney Barry Watkins's office to have a deed prepared conveying the thirty-nine acres to Shirley and retaining a life estate in her mother. She was present when the deed was signed, and Mr. Watkins and his secretary and notary, Janie Barnett, were also present. Mr. Watkins recorded the deed on November 28, 1984. In 2002, a lawsuit was filed in Sebastian County to determine entitlement to the proceeds of the mineral interests and royalties on the thirty-nine acres. At the time, Shirley claimed that she was the sole owner of the thirty-nine acres, and Leonard disputed the claim that she was the sole owner.[1] Ultimately, on July 23, 2003, the judge in the Sebastian County lawsuit entered an order distributing the payment of royalties equally among Grace Adams's four children. Shirley testified that she did not dispute the court's distribution of the payments because the lawsuit concerned payments of royalties from 1979 until 1994. Because her mother retained a life estate and died in 1992, she would have been entitled only to the proceeds of the last two years of that time period.

Shirley testified that when she became aware of the fact that her brother Leonard and her sister Marjorie believed the 1984 deed was a forgery, she hired Linda Taylor, a handwriting analyst, to examine Grace Adams's signature on the deed. Ms. Taylor's July 12, 2004 report demonstrated that she was unable to confirm that Grace Adams was the person that signed the deed. However, Shirley testified that she was one hundred percent certain that her mother signed the deed, and she signed it in the presence of Mr. Watkins, Ms. Barnett (the notary), and Shirley. Mr. Watkins was

[1] Shirley's husband died in 1990. Because she and her husband owned the property as tenants by the entirety, Shirley became the owner of the property upon his death.

available and testified at the hearing; however, although every attempt was made to find Janie Barnett, Shirley was unable to locate her.

Shirley also testified that her mother executed a will, drafted by attorney Barry Watkins, which was discovered after Grace Adams's death in some of her personal papers. The will was never probated because Shirley testified that she did not become aware of the fact that a will was executed until approximately a year before the hearing in this case. Shirley attempted to introduce the will at the hearing, but the judge ruled that the will was inadmissible. She stated that the signature on the will belonged to her mother, and that Mr. Watkins and Janie Barnett were witnesses to the will. Shirley also attempted to introduce a document executed by her brother, Denver Adams, before his death. It was signed by Denver, his wife, and Shirley. However, the trial court determined that the document was hearsay and inadmissible "[a]lthough it [did] point out that on the defense of laches the number of witnesses we[']re seeing [were] not available anymore. But, I'm going to sustain Mr. Bradley's objection."

Mr. Watkins testified that when he was a practicing attorney[2] he did real estate work, such as preparing deeds, contracts for sale, mortgages, and notes. Although not absolutely certain, he stated that he remembered preparing the deed signed by Grace Adams. He also remembered meeting with her on two occasions. At the first meeting, which took place in his office, he remembered discussing Grace Adams's desire, except for retaining a life estate in the thirty-nine acres, to "convey everything to Shirley." He wanted to make sure she understood the implications of conveying all of her property to only one of her four children. On the second occasion when Grace Adams was present at his office, she signed the deed. He thought he was present on this second occasion and stated "I have no reason to doubt that it is indeed her signature." He explained that it was standard procedure in his office for his secretary to type the deed and to notarize only the documents that she witnessed the client signing. At the time the deed was prepared, Janie Barnett, his secretary, signed and notarized the deed. After working for him approximately eight or nine years, Janie left

[2] Mr. Watkins surrendered his law license after numerous complaints were filed against him alleging that he failed to accurately communicate with his clients about the status of their cases.

his office, and began working at the Ozark Guidance Center. Mr. Watkins stated that he had not had any contact with Janie since she obtained other employment.

Mr. Watkins also testified that an associate of his law firm prepared a Last Will and Testament for Grace Adams. On October 2, 1984, he "witnessed Ms. Adams signature on this [w]ill, and [he knew] it to be her signature." Mr. Watkins signed the document as a witness. There were also two other witnesses to the will; however, they were both employees that, at the time, worked in a nearby office, and there had been no communication with either witness since the will was signed.

Leonard Adams also testified at the hearing. The following excerpts from his testimony demonstrate the confusing and inherently contradictory nature of his statements. Leonard testified that he became concerned about the property back in 1976 or 1977, and after several conversations with Shirley, he decided to check the deed to the thirty-nine acres. He stated that, "[w]hen I found the deeds I knew they were not my mother's signature." However, even after seeing the deeds, he did not share any of his concerns with Shirley. Leonard testified that "I think it was about two years before I filed the lawsuit that I went to the Courthouse and got copies of the deeds. . ." However, he also stated that "I would say that it was about five or six years after 1984 that I found the deed dated November 19, 1984 and I found it in the Clerk's office at that same courthouse." Leonard also testified that he "found the deeds after the funeral," and that it had been close to ten years since he "went to check out the deeds at the courthouse." Leonard stated that, "I found the deed but I had to have it analyzed before I would believe it. That wasn't 10 years ago though, it hasn't been quite that long." Leonard then testified that, "It's been over 10 years ago when I went and checked out the deed records." He stated that Shirley told him that "[the property] belongs to all of us, nothing has changed." However, Leonard stated that the three deeds that he found showed otherwise. Then, he testified that he found the deeds "about 5 or 6 years after the first deed was filed. When I found these deeds in the record my mother was not still alive. The deed was made in 1984 and it was filed of record then. It was 5 or 6 years after it was filed that I found it in the record. It was quite awhile after Mother's death that I found the deed."

Leonard further testified that after his mother's death, he and siblings Denver and Marjorie discussed what they would do with

the thiry-nine acres. He did not discuss it with Shirley because Shirley claimed to own it all. At the time he found the deed, which he again testified was ten years ago, Shirley was claiming that she owned the land. He also restated that he concluded that the moment he first discovered the deed, he knew it did not contain his mother's signature. To confirm that it was not his mother's signature, he hired B.P.I. Laboratories in Texas to analyze the deed. The letter Leonard received from B.P.I. Laboratories, dated May 9, 2003, stated that, in the opinion of the examiner, the signature on the deed appeared to be traced from the original 1974 warranty deed and was, therefore, not a genuine signature. At this point in his testimony, Leonard stated that he thought he found the deeds two years before receiving the 2003 letter from B.P.I. Laboratories.

During Leonard's testimony he was also shown a copy of the Last Will and Testament of Grace Adams. When he looked at the signature, Leonard stated that while the signature matched the one on the deed, neither signature belonged to his mother. At this point, Shirley's counsel attempted to proffer the will for the record. The trial court allowed introduction of the signature of Grace Adams and the signature of one witness, Mr. Watkins. However, the trial court did not allow the contents of the will to be introduced.

After hearing the testimony of several witnesses, the trial court took the case under advisement. On October 13, 2006, the trial court entered a judgment in the case, finding that based on the expert opinion of Ms. Linda Taylor, which the court found to be unbiased, credible, and more convincing, the deed did not contain the signature of Grace Adams and the deed was declared canceled and null and void. The trial court also determined that the defenses of the statute of limitations and laches had no applicability to this case. From that decision, comes this appeal.

In bench trials such as this, the standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a); *Reding v. Wagner*, 350 Ark. 322, 86 S.W.3d 386 (2002); *Shelter Mut. Ins. Co. v. Kennedy*, 347 Ark. 184, 60 S.W.3d 458 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Flagstar Bank v. Gibbins*, 367 Ark. 225, 238 S.W.3d 912 (2006)

(citing *Sharp v. State,* 350 Ark. 529, 88 S.W.3d 348 (2002)). Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.* (citing *Sharp, supra*; *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (2001)). However, a trial court's conclusions of law are given no deference on appeal. *McWhorter v. McWhorter*, 351 Ark. 622, 97 S.W.3d 408 (2003) (citing *City of Lowell v. M & N Mobile Home Park Inc.*, 323 Ark. 332, 916 S.W.2d 95 (1996)); *Millwood Sanitation & Park Co., Inc. v. Mattingly*, 100 Ark. App. 56, 264 S.W.3d 566 (2007).

Shirley argues that Leonard's claims are barred because he did not file his claim until twenty years after the deed was executed and recorded and twelve years after the death of their mother. Arkansas Code Annotated section 18-61-101 states that "[n]o person or his or her heirs shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments after seven (7) years once his or her right to commence, have, or maintain the suit shall have come, fallen, or accrued." Additionally, Shirley argues that the trial court erred as a matter of law in finding Leonard's cause of action was not barred by the defense of laches. Both rulings were premised on the trial court's determination that the deed was a forgery. Because Shirley's first two arguments on appeal both turn on the question of when Leonard's right to maintain the suit accrued, we will address them together.

The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775 (1995). Laches or estoppel does not arise merely by delay, but by delay that works a disadvantage to another. *Ueltzen v. Roe*, 242 Ark. 17, 411 S.W.2d 894 (1967). So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly within limits allowed by law. *Id.* But where one, knowing his rights, takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state if the right be enforced, delay becomes inequitable and operates to estop the asserted right. *Id.* This disadvantage may come from loss of evidence, change of title, intervention of equities, the making of substantial improvements to the land, and other causes, for where the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief. *Id.*

Put in other terms, estoppel is merely the manner, in courts of equity, and sometimes even in courts of law, where when one party, or one group of parties sit idly by and do not speak when, in good conscience, they should speak, they will not later be heard to speak when they should in good conscience, remain silent. *Id.*

Because of Leonard's delay in taking action, Shirley's position has detrimentally changed. When an affirmative defense is raised, the defendant has the burden of proof. *See generally Marx v. Huron Little Rock*, 88 Ark. App. 284, 198 S.W.3d 127 (2004) (stating that because comparative fault is an affirmative defense, the burden is on the defendant to prove that the plaintiff was at fault); *Beeson v. Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984) (stating that when the statute of limitations has been pled, the one relying upon it has the burden of proving those facts giving rise to it). Here, in attempting to meet her burden, Shirley was forced to depend on documents that were determined by the court to be unreliable because at the time the hearing was held, as noted by the trial court, witnesses were unavailable to testify. Shirley also attempted to rely upon a signed statement from her now deceased brother, Denver Adams, that the signature on the deed belonged to her mother. However, the court determined that the signed statement was hearsay and inadmissible. Also due to Leonard's delay, Shirley was unable to locate Janie Barnett, the secretary and notary from Mr. Watkins's law office. She testified that every attempt was made to locate Janie, but because Janie had only worked for Mr. Watkins for eight or nine years, and Mr. Watkins had no contact with her after she left his employ, her attempts were unsuccessful. Certainly Shirley's position had changed to her detriment in reliance on Leonard's inaction.

Based on Leonard's testimony, we find that it was impossible to determine, or for Shirley to prove, exactly *when* he discovered the deed. The *only* definite fact that the trial court could have derived from Leonard's testimony was that when he first discovered the deed, he knew that the signature on the deed did not belong to his mother. Likewise, we know that after his mother's death in 1992, Leonard and siblings Denver and Marjorie discussed what they would do with his mother's land, but did not discuss it with Shirley because she claimed to own it all. A statute of limitations begins to run only when a right accrues. *See Marshall v. Gadberry*, 303 Ark. 534, 535, 798 S.W.2d 99, 100 (1990). When the question of laches is in issue, the plaintiff is chargeable with

such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence. *See Mitchell v. Hammons, M.D.*, 31 Ark. App. 180, 792 S.W.2d 333 (1990). Although we do not determine when Leonard discovered the deed, we do find that any reasonable person should have inquired as to the ownership of the property at the time of Grace Adams's death in 1992, when Shirley continued in possession of the thirty-nine acres, claiming sole ownership. Any reasonable inquiry would have led to the discovery of the deed, which was filed for record in 1984, and any potential forgery would have become apparent at that time. However, it was not until 2004 that Leonard filed the complaint in this case alleging that the signature on the deed was a forgery.

We hold that at least by the time of Grace Adams's death, Leonard's rights had accrued and the seven-year statute of limitations began to run. Thus, the trial court erred as a matter of law in finding that because of his determination that the deed was forged, the defenses of statute of limitations and laches could not apply. Here, the question concerning the applicability of the defenses raised by Shirley was not whether the deed was forged; but rather, whether Leonard still had the right to question the authenticity of the signature on the deed twenty years after it was executed and recorded and twelve years after the death of Grace Adams. We hold that he did not.

Shirley's final argument is that the trial court abused its discretion and committed prejudicial error when it excluded as hearsay a will executed by the mother of the parties and a statement executed by a deceased brother of the parties. Because of our conclusion as to Shirley's first two arguments, we do not address this issue.

Reversed and dismissed.

MARSHALL and MILLER, JJ., agree.

Antonio EPPS *v.* STATE of Arkansas

CA CR 07-218 268 S.W.3d 362

Court of Appeals of Arkansas
Opinion delivered November 14, 2007

William R. Simpson, Jr., Public Defender, *Kent C. Krause*, Deputy Public Defender, by: *Clint Miller*, for appellant.

Mike Beebe, Att'y Gen., by: *Karen Virginia Wallace*, Ass't Att'y Gen., for appellee.

BRIAN S. MILLER, Judge. Appellant Antonio Epps was convicted in Pulaski County Circuit Court for possessing cocaine with intent to deliver, simultaneously possessing drugs and

firearms, possessing marijuana, second offense, and being a felon in possession of a firearm. Epps contends that, because the State failed to prove that he had a prior drug possession conviction and a prior felony conviction, the trial court erred in denying his motion to dismiss the charge of possession of marijuana, second offense, and the charge of being a felon in possession of a firearm. We affirm Epps's conviction for possessing marijuana, second offense, and we reverse and dismiss his felon in possession of a firearm conviction.

Officers with the Little Rock Police Department stopped Epps's Chevy Suburban on June 16, 2005, and recovered marijuana, cocaine, and a .32 caliber handgun from the vehicle. Epps was charged with possession of cocaine with intent to deliver, simultaneous possession of drugs and firearms, possession of marijuana, second offense, and with being a felon in possession of a firearm.

A bench trial was held on October 2, 2006. At the conclusion of the State's case, Epps moved to dismiss the charges for possessing marijuana, second offense, and for being a felon in possession of a firearm, asserting that the State failed to prove that he had either a prior drug possession conviction or a felony conviction. The trial court denied the motion and Epps introduced no evidence in his case in chief. Epps renewed his motion to dismiss and again it was denied. The court found Epps guilty on all four counts and scheduled a sentencing hearing for November 6, 2006.

At the sentencing hearing, the court reviewed, without objection, a pre-sentencing report that indicated that Epps had a prior conviction for possessing drugs. The court then sentenced Epps to ten years' imprisonment for possessing cocaine with intent to deliver, ten years' imprisonment for simultaneously possessing drugs and firearms, five years' imprisonment for possessing marijuana, second offense, and five years' imprisonment for being a felon in possession of a firearm. The sentences were run concurrently for an aggregated sentence of ten years.

Epps's first argument is that the trial court erred in denying his motion to dismiss the charge of possession of marijuana, second offense. A motion to dismiss in a bench trial is identical to a motion for a directed verdict in a jury trial in that it is a challenge to the sufficiency of the evidence. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations

made by the fact-finder. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Instead, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm the conviction if there is substantial evidence to support it. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without resorting to speculation or conjecture. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991).

Epps argues that a prior drug conviction was a substantive element of the charge against him. Consequently, he asserts that the State was required to prove, during the guilt phase of the trial, that he had a prior conviction for possessing marijuana. The State argues that a prior conviction is not an element of the crime but merely enhances the sentence. It further argues that the pre-sentencing report introduced in the sentencing hearing was sufficient to prove Epps's prior drug conviction.

In *Banks v. State*, 354 Ark. 404, 411, 125 S.W.3d 147, 152 (2003), the Arkansas Supreme Court held that, "even though the prior offense is an element that must be proven, it is an element properly proven during the sentencing phase of a bifurcated proceeding." The court also held that proof of prior convictions must be introduced during the punishment phase of a bifurcated trial to protect a defendant from possible prejudice during the guilt phase. *See id.*

The trial court was correct in permitting the State to introduce proof of Epps's prior convictions during the sentencing phase. During that phase, the State merely introduced the pre-sentence report pursuant to Ark. Code Ann. § 16-97-102(2) (Repl. 2006). We decline, however, to address whether the pre-sentence report was the type of proof necessary to prove a prior conviction, because Epps neither objected to the introduction of the report, nor did he object to the sufficiency of the report to prove a prior drug conviction. He merely argued that the evidence presented in the guilt phase was insufficient to support his conviction. For these reasons, we affirm on this point.

Epps's second argument is that the trial court erred in convicting him of being a felon in the possession of a firearm because the State introduced no evidence showing that he was a felon. We agree. Two elements must be proven to convict a

defendant for being a felon in possession of a firearm. *Timmons v. State*, 81 Ark. App. 219, 100 S.W.3d 52 (2003). First, the State must prove that the defendant owned or possessed a firearm. *Id.* Second, the State must prove that the defendant had a prior felony conviction. *Id.* The State, however, introduced no evidence that Epps had a prior felony conviction. Indeed, the State concedes error on this point. We, therefore, reverse and dismiss Epps's conviction for this charge.

Affirmed in part; reversed and dismissed in part.

MARSHALL and BAKER, JJ., agree.

Gloria FOLLETT, as Trustee of the Gloria Follett Revocable Trust UDT 11/92 *v.* Joseph FITZSIMMONS and Patricia Fitzsimmons

CA 06-1409 268 S.W.3d 902

Court of Appeals of Arkansas
Opinion delivered November 28, 2007

Gerald K. Crow, for appellant.

Susan K. Lourne, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. This case involves a dispute over a small wedge of property between appellant's residence and appellees' bed and breakfast inn. Appellant claimed title to the disputed property based on adverse possession. Appellees bought this property from the First Methodist Church and, after this action was filed against them, filed a third-party indemnity action joining the First Methodist Church in the litigation. The trial court entered a "directed verdict" in favor of appellees and dismissed appellant's cause of action for adverse possession, but did not dismiss or otherwise resolve appellees' third-party action against the First Methodist Church. Because the third-party action has not been resolved and the trial court's Ark. R. Civ. P. 54(b) certification is deficient, the order is not final, and we must dismiss the appeal.

Rule 54(b) of the Arkansas Rules of Civil Procedure provides, in pertinent part:

> (1) *Certification of Final Judgment.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute the following certificate, which shall appear immediately after the court's signature on the judgment, and which shall set forth the factual findings upon which the determination to enter the judgment as final is based:
>
> Rule 54(b) Certificate
>
> With respect to the issues determined by the above judgment, the court finds:

[Set forth specific factual findings.]

Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.

Certified this ___ day of _____, _____.

_____
Judge

(2) *Lack of Certification.* Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

Here, the Rule 54(b) certification merely states the conclusion that "there is no just reason for delay of the entry of a final judgment" based upon the finding that appellees were entitled to a directed verdict. This is not specific enough. The supreme court has explained:

> Ordinarily, an order granting a motion to dismiss to one party to a lawsuit, which involves multiple parties and multiple claims, is not an appealable order. *Arkansas Dep't of Human Serv. v. Farris*, 309 Ark. 575, 832 S.W.2d 482 (1992); *Sherman v. G & H Transportation, Inc.*, 287 Ark. 25, 695 S.W.2d 832 (1985). An appeal from such an order, however, is permissible under Rule 54(b) when the trial court directs the entry of a final judgment as to one or more of the claims or parties and makes express findings that there is no just reason to delay the appeal. *Wallner v. McDonald*, 308 Ark. 590, 825 S.W.2d 265 (1992). In order to determine that there is no just reason for delay, the trial court must find that a likelihood of hardship or injustice will occur unless there is an immediate appeal and must set forth facts to support its conclusion. *Barr v. Richardson*, 314 Ark. 294, 862 S.W.2d 253 (1993); *Wallner v. McDonald, supra; Franklin v. OSCA, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992). That factual

> underpinnings supporting a Rule 54(b) certification may exist in the record is not enough. They must be set out in the trial court's order. *Franklin v. OSCA, Inc., supra.*

Davis v. Wausau Insurance Co., 315 Ark. 330, 332, 867 S.W.2d 444, 445-46 (1993).

Here, the trial court had resolved all of the issues necessary to dismiss the third-party complaint against the First Methodist Church based on warranty of title and duty to defend, but failed to do so in its order, and also failed to find any facts that would justify permitting an appeal before entry of judgment on the third-party complaint. Consequently, we dismiss the appeal without prejudice to refile at a later date. *Bank of Arkansas v. First Union National Bank*, 342 Ark. 705, 30 S.W.3d 110 (2000).

Appeal dismissed.

GRIFFEN and MARSHALL, JJ., agree.

Donna Courtney TURNER *v.* Mark R. BRANDT
and Nanci Lynn Brandt

CA 07-88 268 S.W.3d 924

Court of Appeals of Arkansas
Opinion delivered November 28, 2007

Timothy M. Weaver, for appellant.

Slinkard Law Firm, by: *Andrew R. Huntsinger*, for appellees.

SAM BIRD, Judge. Donna Turner appeals an order of the Benton County Circuit Court that awarded judgment, costs, and attorney's fees to her neighbors, Mark and Nanci Brandt, in their boundary-line dispute with her. Noting that Turner twice had been found in contempt of the court's previous rulings in this case, the order stated that the court would tolerate no violations of its order and judgment. Further, the order stated:

> To ensure that [Turner] abides by this ruling, should [she] violate ANY element or provision of this Judgment and Order, the [Brandts] shall immediately petition the Court for a hearing, and if it is found that [she] has, in fact, violated this Order and Judgment, that upon a petition by [the Brandts] and a finding by the court that [she] had in fact violated the order and judgment, [she] shall immediately be sentenced to not less than one hundred eighty (180) days in jail and shall be obligated to pay, in addition to any fine deemed appropriate by the Court, any and all of [the Brandts'] attorney's fees associated with petitioning the Court and proving the elements of that petition.

Turner raises three points on appeal. First, she contends that the order should be set aside and the case remanded for a new hearing because the court failed to make a record of a hearing to which the order refers. Second, she contends that the award of costs and attorney's fees was improper without a record to establish the basis of the award. Third, she contends that the court erred in pre-setting "minimum punishments for all future acts of contempt that include 180 days of incarceration." We find no merit to these points, and we affirm the order of the circuit court.

The Missing Record

The circuit court's written order, filed on October 5, 2006, states that this matter came before the court for trial on August 29, 2006; that the Brandts, appearing in person and by their attorney, announced ready for trial; and that Turner, after being called, was found not to be present. The order reflects that the court made its findings "upon review of the pleadings and petitions filed herein and other matters before the Court."

Turner contends on appeal that the circuit court's failure to make a record is grounds to set aside its order and that the case should be remanded so that a hearing can be held and a record can be made. She notes the statutory requirement that all circuit courts "shall keep just and faithful records of their proceedings." Ark. Code Ann. § 16-10-104 (Repl. 1999). She asserts that the court's failure to make a record of the August 29 hearing, if it actually took place, leaves her and the appellate court without the ability to review the basis of its findings. The Brandts respond that appealing a matter and seeking remand is not the correct course to pursue for the creation of a record, and that Turner should have pursued other options at the trial level. We agree.

Rule 6(d) of the Arkansas Rules of Appellate Procedure–Civil provides that, if no record was made of the evidence or proceedings at a hearing, the appellant may prepare a statement of the evidence or proceedings from the best means available, and the appellee may respond with amendments or objections; the trial court then settles and approves the record. It is clear that the procedures outlined in Rule 6(d) are to be pursued in the trial court and not in the appellate court. *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981). When there is no attempt to make a record in compliance with Rule 6(d), it is presumed that the matters presented in the unrecorded hearing support the trial

court's findings. *Argo v. Buck*, 59 Ark. App. 182, 954 S.W.2d 949 (1997). The appellant cannot demonstrate error without the evidence and testimony, and it is well established that the abstract is the record for purposes of appeal. *Id.* Here, because Turner did not attempt to reconstruct a record under Rule 6(d) of the Arkansas Rules of Appellate Procedure–Civil, she cannot demonstrate error by the trial court concerning its failure to make a record.

The Award of Costs and Attorney's Fees

As her second point on appeal, Turner contends that the award of costs and attorney's fees to the Brandts was improper without a record to establish a basis for the award. Again, Turner cannot demonstrate error because she has made no attempt to make a record in this case. *See id.* Furthermore, she has waived this argument on appeal because she did not raise this issue to the circuit court. Objections to the circuit court's award of costs and attorney's fees must be raised in the trial court, perhaps via a motion to amend the judgment pursuant to Ark. R. Civ. P. 52(b). *Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. David*, 324 Ark. 387, 921 S.W.2d 930 (1996).

Punishment for Future Acts of Contempt

Turner contends as her third point that it was error for the circuit court "to pre-set minimum punishments for all future acts of contempt that include 180 days of incarceration." As previously noted in our opinion, the court warned Turner that she would receive the sentence should the court find, upon a petition by the Brandts, that she had in fact violated its order. Turner raises arguments concerning civil versus criminal contempt, the length of sentence allowed for contempt by statute, and due-process rights afforded a person charged with indirect contempt. She asserts that the court's order pre-sets the sentence based on a hearing at which no record was made and at which she was not present.

We agree with the Brandts that Turner has failed to show that she has been prejudiced by the court's threat to hold her in contempt should she not obey its order. Only upon entry of a final order granting a petition for contempt would an appeal of the "pre-set" 180-day sentence be ripe for review. Therefore, it is not proper for us to address the question of whether or not the order prescribed or warned of inappropriate punishments.

Affirmed.

GRIFFEN, J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. I agree that this case should be affirmed. However, I write separately because I wish to emphasize my belief that the appellant's argument is unavailing. If this were a case where the trial court neglected or refused to make a verbatim record of a hearing, our case law is clear that the case must be reversed, even if an appellant failed to make a contemporaneous objection. In *Mattocks v. Mattocks*, 66 Ark. App. 77, 986 S.W.2d 890 (1999), we interpreted the supreme court's Administrative Order No. 4 to require that we reverse a case where the trial judge failed to make a record of in camera proceedings despite the appellant's apparent acquiescence to the practice at the hearing. Likewise, in *George v. State*, 356 Ark. 345, 151 S.W.3d 770 (2004), the supreme court remanded the case when no verbatim record of a proceeding was made. Moreover, I do not believe that *Argo v. Buck*, 59 Ark. App. 182, 954 S.W.2d 949 (1997), the case that the majority relies on, would compel a different result. In *Buck*, the court of appeals affirmed when the appellant failed to ensure that deficiencies in the transcript were rectified prior to the case being submitted on appeal. Certainly *Mattocks* and *George* do not annul the maxim that it is the appellant's duty to bring up a record that demonstrates error.

This case differs from *Mattocks* and *George* because appellant is unwilling to establish whether or not a hearing was even held. From the record, it appears likely that there was no hearing to record. I believe that a fair reading of the transcript indicates that this case involved the entry of a default judgment, and apparently no effort was made to set the default judgment aside, as provided for in Rule 55 of the Arkansas Rules of Civil Procedure. Similarly, I am troubled by the fact that the trial court awarded $5,000 in attorney feees without the submission of a fee petition, as required by Rule 54(e) of the Arkansas Rules of Civil Procedure. However, I agree with the majority that this argument was not presented either to the trial court or to this court on appeal, and therefore it obviously cannot support reversal of this case.

Finally, regarding the trial judge's threat to summarily impose a 180-day sentence for future contempt, I believe this rare display of judicial intemperance communicates a bias on the part of the trial judge that should support a recusal motion in the event

that the appellant is summoned to appear at some time in the future. Nonetheless, I agree with the majority that, because it involves only a possible future cause of action, it is not ripe for our consideration.

Richard TOMBOLI *v.* STATE of Arkansas

CA CR 07-441 268 S.W.3d 918

Court of Appeals of Arkansas
Opinion delivered November 28, 2007

David Cannon, for appellant.

Dustin McDaniel, Att'y Gen., by: *Carolyn Boies Nitta*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. A Lonoke County jury found Richard Tomboli guilty of theft by receiving and sentenced him to a thirty-year term in the Arkansas Department of Correction. He appeals from the conviction, asserting that the State presented insufficient evidence to show that he possessed the stolen vehicle in question. He also alleges that the trial court erred in

allowing victims of other thefts to testify about those thefts and in not allowing him to cross-examine a witness regarding a third party who was also accused of theft by receiving. We affirm, holding (1) that the State presented sufficient evidence that appellant was in possession of the stolen vehicle; (2) that, while the court erroneously permitted evidence of other thefts, the error was harmless; and (3) that the trial court properly excluded questions regarding thefts committed by a third party absent a connection to the present case.

Factual and Procedural History

Appellant was charged with felony theft by receiving and fleeing.[1] Evidence presented at trial shows that in September 2005, Dale Lamb's white 2004 Dodge Ram truck was stolen from his fiance's residence. Police recovered a white 2004 Dodge Ram in November 2005. The truck recovered by police appeared to be Lamb's truck, though a pinstripe and a Razorback decal had been added. Lamb's insurance company paid on a theft claim, and insurance records show that the VIN number of Lamb's truck was 1D7HA16D14J171118.

The truck was recovered on the afternoon of November 20, 2005, by Deputy Steve Benton of the Lonoke County Sheriff's Office. He initiated a traffic stop after seeing a white Dodge Ram passing on a double-yellow line. The truck stopped on Pickthorne Road, but as Benton exited his patrol car and started toward the truck, the truck drove off. When the truck left, Benton returned to his patrol car and pursued the truck. The truck later turned into a hayfield, and Benton lost sight of it. However, he later discovered the truck abandoned in the field. Benton checked the VIN number of the truck, 1D7HA16D14J171118, and discovered that the truck was stolen. He found several items in the field close to or inside the truck, including a claw hammer, a shoe, a hand saw, some business checks, a plastic wedge, a "slim jim" (used for unlocking cars), a stun gun, a small can of mace, flashlights, a radio antenna adaptor, bolt cutters, and a handsaw. Several items were fingerprinted, and a print belonging to appellant was found on one of the checks. In addition, during the chase, Benton saw the driver throw a black bag out of the truck. Police later recovered the bag, and it contained an assortment of keys and key rings. Benton identified

[1] Appellant was charged with several other misdemeanors; however, the theft-by-receiving and fleeing charges are the only ones relevant here.

appellant as the driver of the truck. He first identified appellant as the driver when presented with appellant's driver's license photo the following day. Benton described the driver of the truck as a white male with dark "spiky-type" hair.

The State also presented testimony of Amanda Garmen, who works for American Storage in Sherwood. According to her testimony, appellant rented two storage units. She testified that video tape from November 2005 showed appellant arriving at the storage facility driving a white Dodge pickup truck. On the day she saw the video, she saw a yellow four-wheeler in the bed of the truck.

Over appellant's objection, Detective Michelle Stracener testified that she and other officers executed a search warrant on Tomboli's storage units. During the search, police recovered a yellow four-wheeler, which was later returned to its owner; a set of golf clubs, which was returned to its owner; a golf cart and another set of golf clubs, released to their rightful owner; and two firearms. Jerry Bradley testified that the checks recovered from the stolen truck belonged to him and that he did not authorize appellant to use the checks. Over appellant's objection, he testified that Stracener returned the golf clubs to him. Appellant made the same objection when Davis Kolasa testified about the theft of his four-wheeler.

Finally, the State presented the testimony of Kelli Martindill. She identified herself, appellant, and Ronnie Stover as the subjects of photographs found in the stolen truck. On cross-examination, Martindill testified that Stover matched the description of appellant. When appellant questioned Martindill about Stover's criminal history, the State objected, contending that Martindill had no personal knowledge of Stover's record. Appellant argued that the evidence was admissible under a "reverse" Rule 404(b) analysis, but the court sustained the State's objection. Appellant proffered that Martindill would have testified that Stover was facing several criminal charges, including theft by receiving, for selling stolen items over the Internet.

At the conclusion of the State's case, appellant moved for directed verdict, arguing that the State failed to prove that the vehicle he allegedly drove was the one stolen from Lamb. He emphasized the characteristics that distinguished Lamb's vehicle from the one found by police. The court denied the motion, and appellant rested without presenting a case. After deliberations, the

jury found appellant guilty of theft by receiving, but found him not guilty of the fleeing charge. It later sentenced him to thirty years in the Arkansas Department of Correction.

Sufficiency of the Evidence

Appellant now challenges the sufficiency of the evidence to support his conviction. He argues that the State presented insufficient evidence that he was the person who was driving the truck in November 2005. Appellant contends that the only evidence connecting him to the truck was a fingerprint on a check found outside the truck and a photograph of him found inside the truck. Regarding the evidence that appellant was driving a white Dodge truck to his storage units, he argues that the State failed to present any evidence identifying the truck, and he urges us to take judicial notice of the fact that hundreds of Dodge trucks are being driven in this State.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Nelson v. State*, 365 Ark. 314, 229 S.W.3d 35 (2006). When a defendant makes a challenge to sufficiency of the evidence on appeal, the appellate court views the evidence in the light most favorable to the State. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003). The test for determining sufficiency of the evidence is whether the verdict is supported by substantial evidence. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* Only evidence supporting the verdict, including evidence erroneously admitted, will be considered. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997). We affirm the conviction if there is substantial evidence to support it. *Id.* Circumstantial evidence may constitute sufficient evidence to support a conviction, but it must exclude every other reasonable hypothesis other than the guilt of the accused. *Whitt v. State*, 365 Ark. 580, 232 S.W.3d 459 (2006). The question of whether the circumstantial evidence excludes every other reasonable hypothesis consistent with innocence is for the jury to decide. *Id.*

■ We hold that the State presented sufficient evidence to show that appellant was in possession of Lamb's stolen truck. Before the trial court, appellant argued that the State failed to prove that the truck found by Benton was the one stolen from Lamb. However, the State presented evidence showing that the VIN numbers of Lamb's truck and the truck recovered from the scene were the same, and Lamb testified that the recovered truck

was similar to his own truck. As for appellant's argument that he was not the person driving the truck, the evidence shows that his fingerprint was on an item found near the truck, and he was in photographs found inside the truck. Appellant was seen driving a white Dodge truck to his storage unit. Finally, Benton identified appellant as the person he saw on the day that the truck was recovered. This evidence is sufficient to compel the conclusion that appellant was in possession of Lamb's stolen truck.

Evidentiary Rulings

Next, appellant argues that the trial court erred in allowing the State to introduce testimony from victims of other thefts when he had not been charged with those thefts. He contends that the State introduced the evidence only to show that, because he was in possession of other stolen property, he was in possession of the truck. Appellant asserts that this violates Ark. R. Evid. 404(b). The State argues that the testimony proved identity and absence of mistake.

Rule 404(b) of the Arkansas Rules of Evidence (2007) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court, and we will not reverse absent a showing of manifest abuse. *Holt v. State*, 85 Ark. App. 308, 151 S.W.3d 1 (2004). Evidence offered pursuant to Rule 404(b) must be independently relevant. *Id.* Evidence is independently relevant if it tends to prove a material point and is not introduced solely to prove that the defendant is a bad person. *Id.*

The State argues that the Rule 404(b) evidence was admissible because the identity of the driver of the truck was at issue. It contends that the check with appellant's fingerprint and the truck were in close enough proximity to suggest that appellant was the driving the stolen truck. The State also suggests that the golf clubs stolen at the same time as the truck and found in one of appellant's

storage units make it more likely than not that appellant was the driver of the stolen truck. While not explicitly argued by the State, a similar analysis could apply to the recovery of the four-wheeler. Because appellant was seen driving the truck containing the four-wheeler to the storage facility, it makes it more likely that appellant was the driver of the truck.

We agree with appellant that the trial court improperly allowed the State to introduce evidence of the other thefts. The fact that the items were stolen is not independently relevant to appellant's identity. The connection to the items themselves was sufficient to establish evidence of appellant's identity. There was no need for the State to present testimony from the victims regarding the fact that the items were stolen. Further, we reject the State's argument that evidence of other thefts was relevant to show that appellant knew that the truck was stolen. This is the very type of evidence Rule 404(b) was meant to exclude. The trial court abused its discretion in allowing the State to introduce that testimony.

Nevertheless, we affirm on this point because the error in admitting the improper Rule 404(b) evidence was harmless. When the evidence of guilt is overwhelming and the error is slight, we can declare that the error was harmless and affirm the conviction. *E.g.*, *Barrett v. State*, 354 Ark. 187, 119 S.W.3d 485 (2003). If evidence of the other thefts is excised from the record, the jury still had before it testimony that a person identified as appellant was seen driving away from Benton and later fled the stolen truck. A check with appellant's fingerprint was found near the truck, thus connecting appellant to the truck. Further, appellant was seen driving the truck to his storage units, and he was in photographs found in the truck. We hold that any error in allowing the victims to testify about the theft of their property is slight in comparison to the overwhelming evidence of guilt. Accordingly, we affirm on this point.

Finally, appellant contends that the trial court abused its discretion in refusing to allow him to introduce evidence that a third party had committed similar crimes. He asserts that questions regarding Stover's criminal activity tended to show that another person could have stolen or been in possession of Lamb's truck.

While evidence of other crimes, wrongs, or acts by a party other than the defendant may not be admitted to show that the party acted in conformity with a known character trait, the

evidence may be admitted for other purposes, such as to show motive, opportunity, intent, or identification of that other party, thus tending to negate the guilt of the defendant. *Price v. State*, 365 Ark. 25, 223 S.W.3d 817 (2006). For "reverse 404(b)" evidence to be admissible, the crimes by the other person must be so closely connected in time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime charged against him. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994) (citing *State v. Bock*, 229 Minn. 449, 39 N.W.2d 887 (1949)).

The only evidence appellant proffered to show that someone else committed the crime was that Stover had been charged with other thefts. He proffered no evidence showing that Stover's thefts were similar in time or method of operation to the theft of the truck. In other words, the only reason appellant presented this evidence was to show that, because Stover was currently being charged with theft by receiving in a separate case, he must have been the person to commit the theft in this case. Again, this is the very type of evidence Rule 404(b) seeks to exclude. The trial court did not err in excluding testimony regarding Stover's crimes, and we affirm on this point as well.

Affirmed.

MARSHALL, J., agrees.

PITTMAN, C.J., concurs.

JOHN MAUZY PITTMAN, Chief Judge, concurring. I agree with the result reached in this case. However, I do not agree with the majority's position that the trial court erred in admitting evidence of the stolen checks and golf clubs.

As noted by the majority, evidence of other bad acts by a defendant may be admissible if independently relevant to a material issue in the case. One permissible purpose for which other crimes evidence may be admitted is to establish identity. Ark. R. Evid. 404(b).

Here, appellant was tried for and convicted of theft by receiving a white Dodge pickup truck. A critical issue at trial was whether appellant was the person driving the stolen truck when it was observed and pursued by the police. Evidence was admitted that stolen checks, bearing appellant's fingerprints, were found

near the stolen truck after the driver abandoned the truck and fled. Evidence was also admitted that stolen golf clubs were later found in a storage room rented to appellant. The checks and golf clubs had been stolen in a single theft from a different victim, Dr. Jerry Bradley.

Proof of a physical connection between appellant and *two* sets of items taken in a *single* crime, one of which was found in the vicinity of the stolen truck, is independently relevant to the question of whether appellant was the driver of the stolen truck. I cannot agree with the majority that proof of appellant's "connection to the [checks and golf clubs] themselves," without proof that they had been stolen, would have been anywhere near as probative on the issue of the driver's identity. Appellant's simple possession of golf clubs in a different location would be irrelevant to any issue in this case. It is the connection of the clubs to the checks found at the scene of the abandoned truck that makes the clubs relevant. It was only through proof that the checks and clubs were taken in a single act of theft that the necessary connection between the checks and clubs could be established. Appellant's continuing connection to golf clubs stolen at the same time as the checks makes it more likely that appellant's connection to the checks was not simply transitory or coincidental. And it cannot be disputed that, as the strength of appellant's connection to the checks grows, so does the strength of his connection to the truck. I find no abuse of discretion in the trial court's admission of the evidence concerning the theft and recovery of Dr. Bradley's checks and golf clubs.

Laura GRAFTENREED *v.* Karen Wood SEABAUGH
and Kaity Wood

CA 06-1289 268 S.W.3d 905

Court of Appeals of Arkansas
Opinion delivered November 28, 2007

[Rehearing denied January 9, 2008.]

David A. Hodges, for appellant.

Chaney Law Firm, P.A., by: *Don P. Chaney*, for appellees.

LARRY D. VAUGHT, Judge. This is a personal-injury case. When she was fifteen years old, appellee Kaity Wood was injured in a vehicle accident caused by appellant Laura Graftenreed. Ms. Graftenreed appeals from a judgment entered on a jury verdict for Ms. Wood and her mother, appellee Karen Wood Seabaugh. On appeal, Ms. Graftenreed challenges some of the jury instructions, the introduction of certain medical evidence, and the sufficiency of the evidence. We affirm on all points.

The accident occurred in January 2001. Appellant's vehicle struck the vehicle in which Ms. Wood was a passenger from behind, causing it to hit the vehicle in front of it. Four days later, Ms. Wood saw her family doctor for shoulder and neck pain. The x-rays he took were normal, and he prescribed anti-inflammatories and muscle relaxers. A week later, he saw no reason to prescribe further treatment. Her symptoms, however, returned and worsened. Ten months later, Ms. Wood saw Dr. Kenneth George, a chiropractor, for neck and back pain. He saw Ms. Wood on nine occasions between November 2001 and January 2002. Mrs. Seabaugh filed this negligence lawsuit against appellant on Ms. Wood's behalf in March 2002. Ms. Wood joined the lawsuit when

she reached the age of majority. In February 2003, Ms. Wood saw Dr. George again for the same symptoms.

Ms. Wood was involved in another accident in October 2003. She was examined in the emergency room, complaining of pain in her knee, elbow, neck, and chin and was diagnosed with "ligamentous strain, right knee." A neck x-ray taken at that time showed straightening of her cervical spine. Ms. Wood did not tell Dr. George about the second accident when she saw him for subsequent treatments. Appellees have consistently maintained that her primary complaint from the second accident was a knee injury and that her neck and back problems resulted from the accident caused by appellant.

Dr. George referred Ms. Wood for digital motion x-rays (DMXs). DMXs, which are a type of video fluoroscopy, are a relatively new use of an old technology (x-rays) and are used by some physicians and chiropractors to diagnose a ligamentous injury. A DMX machine uses a video camera to take thirty x-ray frames per second, for ninety seconds, as the patient moves. These images are viewed on a computer. Dr. David Harshfield and Dr. Kenneth Ratajczak, radiologists, reviewed Ms. Wood's DMXs. Using their reports, Dr. George was prepared to testify at trial that Ms. Wood had suffered permanent neck and low-back injuries caused by the collision with appellant that would limit her activities and require future medical treatment.

Appellant objected to the introduction of the DMX evidence by filing motions in limine before trial. She asked the trial court to prohibit any testimony from Dr. George that was not timely disclosed. She also argued that there was no basis for Dr. George to testify about the radiology reports; that the second accident was an intervening cause of her injuries; that DMX technology was not scientifically reliable; and that Dr. George was not qualified to testify about radiology results reported by a medical doctor. The trial court denied these motions and held that, assuming that the DMX evidence was subject to a reliability challenge, Ms. Wood had sufficiently shown that it is reliable and accepted by the chiropractic and medical communities. The court also held that the value of the DMX evidence was not outweighed by the danger of unfair prejudice.

At trial, the circuit court denied appellant's motions for directed verdict on the issues of negligence, liability, and damages. The case was submitted to the jury over appellant's objections to a

damages instruction that included transportation costs related to medical care and Ms. Wood's loss of ability to earn in the future. On a general verdict, the jury awarded Mrs. Seabaugh $1,485 (her requested out-of-pocket medical expenses) and $57,000 to Ms. Wood.

I. The jury instructions

Appellant first argues that the trial court erred in instructing the jury on Ms. Wood's transportation costs in seeking medical care and her loss of future earning ability.

A. Transportation costs

Appellant argues that there was no evidence to support the instruction on transportation costs as damages. Paragraph two of the damages instruction stated that, if the jury found in favor of Ms. Wood on liability, it must fix the amount of money to reasonably and fairly compensate her for "[t]he reasonable expenses of any necessary medical care, treatment, and services received after Kaity Wood turned eighteen years of age, including transportation necessarily incurred in securing such care, treatment or services, and the present value of such expenses reasonably certain to be required in the future." Appellant asked that the same instruction be given without the clause involving transportation costs because there was no evidence of past expenses or of the present value of such expenses reasonably certain to be required in the future. Appellees argued that their evidence that Ms. Wood went to Little Rock for the DMXs and to Jonesboro for an MRI was sufficient to submit this instruction. Ms. Wood testified about her out-of-town trips for these medical tests but did not present any evidence of their monetary value. She testified that she now works in Jonesboro and plans to seek future medical care there.

Appellant also argues that there is no way to tell how much of the verdict was intended as damages for past and future transportation costs. The supreme court has held that, when an erroneous instruction has been given and a jury has rendered a general verdict from which prejudice due to the error cannot be ascertained, it will reverse. *England v. Costa*, 364 Ark. 116, 216 S.W.3d 585 (2005).

A party is entitled to a jury instruction when it is a correct statement of the law and when there is some basis in the evidence to support giving the instruction. *Barnes v. Everett*, 351 Ark. 479, 95

S.W.3d 740 (2003). We will not reverse a trial court's decision to give an instruction unless the court abused its discretion. *See Marx v. Huron Little Rock*, 88 Ark. App. 284, 198 S.W.3d 127 (2004).

The trial court did not err in giving this instruction. It has long been held that judicial notice may be taken of the locations and distances between towns. *St. Louis S.W. Ry. v. Taylor*, 258 Ark. 417, 525 S.W.2d 450 (1975). Additionally, jurors are entitled to take into the jury box their common sense and experience in the ordinary affairs of life. *Fayetteville Diagnostic Clinic, Ltd. v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001); *Palmer v. Myklebust*, 244 Ark. 5, 424 S.W.2d 169 (1968). The jurors were competent to determine the cost of such transportation from their common knowledge and experience. *See St. Louis, I.M. & S. Ry. Co. v. Stell*, 87 Ark. 308, 112 S.W. 876 (1908).

B. Ms. Wood's future earning ability

Appellant next argues that the jury should not have been instructed to consider Ms. Wood's loss of future earning ability because Ms. Wood testified that she had never missed any work because of her injuries. At trial, Ms. Wood testified that she worked about two to three days a week for IGA at the time of the accident and that, afterward, she continued to work the same amount of time. She also testified that she never missed any work at her subsequent jobs.

Damage resulting from loss of earning capacity is the loss of the ability to earn in the future. *Cates v. Brown*, 278 Ark. 242, 645 S.W.2d 658 (1983). The impairment of the capacity to earn is sometimes confused with permanency of the injury, but it is a separate element. *Id.* A permanent injury is one that deprives the plaintiff of her right to live her life in comfort and ease without added inconvenience or diminution of physical vigor. *Wheeler v. Bennett*, 312 Ark. 411, 849 S.W.2d 952 (1993). It is well recognized that impairment of earning capacity is recoverable only upon proof that an injury is permanent. *Id.* Although whether a permanent injury exists is not to be left up to speculation and conjecture on the part of the jury, proof of this element does not require the same specificity or detail as does proof of loss of future wages. *Cates v. Brown*, 278 Ark. at 245. This is because a jury can observe the appearance of the plaintiff, her age, and the nature of the injuries that will impair her capacity to earn. *Id.* Proof of specific pecuniary loss is not indispensable to recovery for this element. *Id.* It is to be

determined by the application of the common knowledge and experience of the jurors to the facts and circumstances of the case. *Coleman v. Cathey*, 263 Ark. 450, 565 S.W.2d 426 (1978).

By all accounts, Ms. Wood was a competitive athlete before the accident; afterward, she had to push herself to continue participating in cheerleading and softball. She had to give up playing basketball, and she was forced by her neck and back pain to severely restrict her participation in the other activities. Although she continued to appear with the other cheerleaders, she could not do any tumbling or "pyramid-building" and spent much of her time sitting with their sponsor. She testified that, mostly, she just yelled and waved her arms and even that hurt. Often, she was reduced to tears by her inability to keep up with the other girls. Now, as an adult with a full-time job, she testified about the problems her injuries have caused her at work. She said that she has to change positions frequently to avoid being in one position too long and sometimes stands up while using the computer. She also cannot sit up straight. She said that she cannot do housework without difficulty and pain, nor can she play with her baby as she would like. In our view, this evidence was sufficient to take the issue of her lost earning capacity to the jury.

II. The digital motion x-rays

Appellant next argues that the trial court should not have admitted the DMX evidence on four grounds: (1) it was not timely disclosed; (2) it was not admissible through Dr. George; (3) it was not scientifically reliable; and (4) there was no proof that it reflected injuries caused by the 2001 accident. We will not reverse the trial court's decision to admit or refuse evidence in the absence of an abuse of that discretion and a showing of prejudice. *Turner v. N.W. Ark. Neurosurgery Clinic, P.A.*, 84 Ark. App. 93, 133 S.W.3d 417 (2003).

A. Timely disclosure of the DMX

Appellant argues that appellees failed to timely disclose the DMX evidence as the basis for Dr. George's testimony. When his deposition was taken on March 3, 2003, trial was scheduled for March 15, 2005. Appellees' attorney supplemented their discovery responses on February 3, 2005, with reports from the radiologists that would be used to support Dr. George's opinion that Ms. Wood was permanently impaired. On February 14, 2005, appel-

lant filed a motion in limine objecting to the last-minute supplementation of appellees' discovery responses. She filed another motion in limine on March 3, 2005, to prohibit Dr. George's testimony. The court then rescheduled the trial for March 26, 2006. On March 21, 2006, appellees provided appellant with approximately 200 pages of documents to be used to support Dr. George's testimony. Appellant filed another motion in limine on March 23, 2006, asking the court to prohibit any testimony from Dr. George that was based on evidence not timely disclosed. The court decided to admit the testimony. Appellant asks us to hold that Dr. George's testimony should have been limited to the matters that he disclosed in his deposition over a year before trial. We decline to do so.

Arkansas Rule of Civil Procedure 26(e)(1) requires a party to supplement her discovery responses in the case of expert witnesses, to identify the identity and location of each person expected to be called as a witness at trial, and the subject matter and substance of his testimony. It is within the trial court's discretion whether to limit the testimony of witnesses, and that discretion will not be second-guessed by the appellate court. *Id.*; *see also Ark. State Highway Comm'n v. Frisby*, 329 Ark. 506, 951 S.W.2d 305 (1997). Appellant received a continuance of over a year in order to review the DMX reports. As for the 200 or so pages of documents supplied the week before trial, they contained no surprises and primarily illustrated the acceptance and reliability of the DMX evidence already in appellant's possession. We cannot say that the trial court abused its discretion in rejecting appellant's untimeliness argument.

B. The admission of the DMX evidence through Dr. George's testimony

Appellant argues that it was error to admit the DMX evidence through Dr. George because he had no personal experience with DMX technology. Dr. George admittedly was not an expert in performing digital motion x-rays or in interpreting them; in fact, he had never ordered them for a patient before Ms. Wood.

Whether a witness qualifies as an expert in a particular field is a matter within the trial court's discretion, and we will not reverse such a decision absent an abuse of that discretion. *Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304 (2002). If an opponent of the expert testimony contends that the expert is not qualified, the

opponent bears the burden of showing that the testimony should be stricken. *Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. 42, 98 S.W.3d 48 (2003). Experts may not offer opinions that range too far outside their area of expertise. *Id.* An expert may, however, rely on information provided by others in the formulation of his opinion. *Id.* If some reasonable basis exists demonstrating that a witness has knowledge of a subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony. *Id.* There is a decided tendency to permit the fact-finder to hear the testimony of persons having superior knowledge in the given field, unless they are clearly lacking in training and experience. *Id.* The fact that a medical expert is not a specialist in that particular field does not necessarily exclude him from offering testimony. *Hill v. Billups*, 92 Ark. App. 259, 212 S.W.3d 53 (2005). Arkansas Rule of Evidence 702 expressly recognizes that an expert's testimony may be based on experience in addition to knowledge and training. Absolute expertise concerning a particular subject is not required to qualify a witness as an expert. *Mearns v. Mearns,* 58 Ark. App. 42, 946 S.W.2d 188 (1997).

Generally, a chiropractor is qualified to testify in a personal-injury action concerning matters within the scope of the profession or practice and may testify as to the permanency of an injury, as well as its probable cause. *Stevens v. Smallman*, 267 Ark. 786, 590 S.W.2d 674 (Ark. App. 1979). As long ago as 1927, the Arkansas Supreme Court held that there was no error in the trial court's permitting a chiropractor to testify as an expert witness about a burn injury caused by the administration of x-rays. *See Dorr, Gray & Johnston v. Headstream*, 173 Ark. 1104, 295 S.W. 16 (1927). Dr. George, who routinely uses x-rays in his practice, testified that he received extensive training in the use of x-rays when he was in chiropractic school. If he had testified about his interpretation of the digital motion x-rays, we would agree with appellant. *See Hill v. State Farm Mut. Ins. Co.*, 56 Ark. App. 67, 937 S.W.2d 684 (1997). However, he simply used the radiologists' reports to supplement the x-rays that he took of Ms. Wood and to verify his own diagnosis. A physician may base his diagnosis on the reports of other medical sources. *See Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997); Ark. R. Evid. 703. The trial court did not abuse its discretion in permitting Dr. George to testify as an expert witness.

C. The scientific reliability of DMX evidence

The trial court found that, assuming that the DMX reports were subject to a reliability challenge, Ms. Wood had sufficiently shown that DMX evidence is reliable and that it is accepted by the chiropractic and medical communities. The court also found that the value of the DMX evidence was not outweighed by the danger of unfair prejudice or confusion. Appellant argues that Dr. George was not qualified to give expert testimony about the DMX evidence pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In a *Daubert* inquiry, the trial court must determine whether the evidence is relevant and reliable and whether the reasoning behind the scientific evidence is scientifically valid and can be applied to the facts of the case. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003). A primary factor for a trial court to consider in determining the admissibility of scientific evidence is whether the scientific theory can be or has been tested. *Arrow Int'l, Inc. v. Sparks*, 81 Ark. App. at 51, 98 S.W.3d at 54. Other factors include whether the theory has been subjected to peer review and publication, the potential error rate, and the existence and maintenance of standards controlling the technique's operation. *Id.* It is also significant whether the scientific community has generally accepted the theory. *Id.* The Arkansas Supreme Court adopted the *Daubert* analysis in *Farm Bureau Mutual Insurance Co. of Arkansas, Inc. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000).

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the United States Supreme Court held that the trial judge's basic gatekeeping function imposed in *Daubert* applies to all, and not just scientific, expert testimony. The requirements of Ark. R. Evid. 702 have also been held to apply equally to all types of expert testimony, not simply to scientific expert testimony. *See Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005).

Appellant argues that DMX technology does not meet the *Daubert* test because it has not been proven to aid in diagnosing or treating any injury and that DMXs give no more information than standard x-rays. Appellant also asserts that the scientific community has not generally accepted the use of DMXs for diagnosing or treating any injury or ailment. We disagree.

Because the *Daubert* factors are applicable only to "novel" evidence, theory, or methodology, *see Regions Bank v. Hagaman*, 79 Ark. App. 88, 84 S.W.3d 66 (2002), a *Daubert* analysis

is not appropriate in this case. As shown by Dr. George's testimony and the documents filed by appellees, DMX technology is not novel; it is simply a technological advancement of established, reliable procedures, as are MRIs and CT scans. Appellees filed the affidavit of Dr. David Harshfield, who stated that DMX technology has been accepted by the chiropractic and medical communities and that it has government approval. Appellees filed supporting documents showing that DMX technology was approved by the U.S. Food and Drug Administration for patients with spinal and peripheral joint disorders and that the Arkansas Department of Human Services gave its approval in 2003. They also showed that DMX technology has received approval from the National Guideline Clearing House, the Arkansas Board of Chiropractic Examiners, the American Chiropractic Association Council on Diagnostic Imaging Physicians, the Arkansas Chiropractic Society, the American Academy of Pain Management, and the American College of Occupational and Environmental Medicine.

Appellant further argues that, even if the DMXs were reliable, the evidence based upon them should have been excluded because any probative value it had was significantly outweighed by the danger of unfair prejudice. Even though evidence is relevant, it may be excludable under Ark. R. Evid. 403, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The trial court has discretion in determining the relevance of evidence and in gauging its probative value against unfair prejudice, and its decision will not be reversed absent a manifest abuse of that discretion. *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999). The mere fact that evidence is prejudicial to a party, however, does not make it inadmissible; it is only excludable if the danger of *unfair* prejudice substantially outweighs its probative value. *See Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346, *cert. denied*, 540 U.S. 1012 (2003). The prejudice referred to in Rule 403 denotes the effect of the evidence upon the jury, not the party opposed to it. *Id.* Here, there is no question that this evidence was prejudicial to appellant's position; however, we cannot say that it was *unfairly* prejudicial.

D. The nexus between the digital motion x-rays and the original accident

Appellant next argues that the trial court erred in admitting the DMX evidence because there was no proof as to which accident caused the ligament damage referred to in the radiologists' reports. According to appellant, even if the DMXs indicated injury, there was no proof that it was caused by the January 2001 accident.

To establish a prima facie case in tort, a plaintiff must show that the defendant's negligence was a proximate cause of the damages. *J.E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001). Proximate cause is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Chambers v. Stern*, 347 Ark. 395, 64 S.W.3d 737 (2002), *cert. denied*, 536 U.S. 940 (2002). When there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *Id.* Proximate cause may be shown from circumstantial evidence, and such evidence is sufficient to show proximate cause if the facts proved are of such a nature and are so connected and related to each other that the conclusion may be fairly inferred. *Arthur v. Zearley*, 337 Ark. 125, 992 S.W.2d 67 (1999). The original act is not eliminated as a proximate cause by an intervening act unless the latter is in itself sufficient to stand as the cause of the injury, and the intervening cause must be such that the injury would not have been suffered except for the act, conduct, or effect of the intervening cause totally independent of the acts or omissions constituting the primary negligence. *Ouachita Wilderness Inst., Inc. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997).

There was more than sufficient evidence to let the jury decide whether Ms. Wood's injuries were caused by the 2001 accident. Appellees presented testimony that her symptoms began immediately after this wreck; that they continued over several years; that the 2003 accident did not exacerbate them; and that the pain and problems she was experiencing at the time of trial were the same as those that began right after the 2001 wreck.

III. Appellant's motion for directed verdict

In her last point, appellant contends that the trial court should have granted her motion for a directed verdict on the issues of negligence and liability. A directed-verdict motion is a chal-

lenge to the sufficiency of the evidence. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004). When reviewing the denial of a motion for a directed verdict, we determine whether the jury's verdict is supported by substantial evidence. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without having to resort to speculation or conjecture. *Id.* When determining the sufficiency of the evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.* A motion for a directed verdict should be denied when there is a conflict in the evidence or when the evidence is such that fair-minded people might reach different conclusions. *Id.* Under those circumstances, a jury question is presented and a directed verdict is inappropriate. *Id.* It is not our province to try issues of fact; we simply examine the record to determine if there is substantial evidence to support the jury verdict. *Id.*

To prove negligence, a party must show that the defendant has failed to use the care that a reasonably careful person would use under circumstances similar to those shown by the evidence in the case. *Wagner v. Gen. Motors Corp.*, 370 Ark. 268, 258 S.W.3d 749 (2007). Although the evidence that appellant failed to keep a proper lookout and followed too closely for conditions was not *conclusive* of negligence, it was sufficient to present a question for the jury. *See Dovers v. Stephenson Oil Co.*, 354 Ark. 695, 128 S.W.3d 805 (2003). This is especially true when one considers appellant's statements immediately after the crash that she was not paying attention and did not see that the vehicle ahead of her had stopped.

Appellant also argues that the evidence was inadequate to support the jury's verdict as to damages because there was no proof that the injury was caused by the January 2001 accident. As discussed above, there was sufficient evidence to let the jury decide this issue.

Affirmed.

ROBBINS and BAKER, JJ., agree.

James and Aileen BRYANT *v.*
CADENA CONTRACTING, INC.

CA 07-376 269 S.W.3d 378

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

Joe O'Bryan, for appellants.

Law Office of Odette Woods, PLLC, by: *Odette B. Woods*, for appellee.

ROBERT J. GLADWIN, Judge. Appellants James and Aileen Bryant appeal from the December 12, 2006 judgment of the Lonoke County Circuit Court, which found that subcontractors are exempt from the statutory notice requirement contained in Ark. Code Ann. § 18-44-115 (Supp. 2007), and ordered a foreclosure on appellants' property in the lien amount. Appellants contend that a subcontractor may not acquire a lien on residential property pursuant to the statute unless the "IMPORTANT NOTICE TO OWNER" mandated by it has been served upon the owner prior to the applica-

tion of the labor or materials to the property. We reverse the trial court's finding of a valid lien against appellants' property.

Appellants filed a complaint in circuit court against appellee Cadena Contracting, Inc., and Craig Williams, d/b/a The Craig Williams Company, seeking to remove a cloud from the title to their property located at 101 Magnolia Circle and described as Lot 9, Block 19, Privett Subdivision, Lonoke, Arkansas. Appellants bought the property from Williams, whom appellants also hired as general contractor to build their house. Appellee counterclaimed and cross-claimed seeking a total of $10,645, which was the amount owed it for the framing work that Williams had subcontracted with appellee to perform. When Williams failed to pay appellee, appellee made a demand for payment from Williams and notified appellants by notice and invoice on January 7, 2005, that money was owed and that appellee had a right to file a lien against the property if payment was not received. Appellee filed a lien in Lonoke County on March 1, 2005, asserting that it furnished labor to appellants, Williams, and The Craig Williams Company at the construction project, that a total of $10,645 was due and owing, and that it had caused notice of the lien to be served.

At trial, appellants sought to remove the lien and argued that Ark. Code Ann. § 18-44-115 requires that notice of the potential lien be given by the subcontractor to the property owner by personal delivery or by certified mail before the work is done, not after it is completed. Appellee claimed that the statute did not require that notice be given before the work is performed, only that the owner receive notice before the lien is obtained. Further, appellee argued that section 115 applies only to contractors, not subcontractors, thus making section 115 inapplicable in this matter. Appellee claimed that Ark. Code Ann. § 18-44-114 (Supp. 2007) is the statute applicable to subcontractors, and that it had complied with the ten-day notice requirement therein contained.

The trial court found that the mechanic's and materialmen's lien statute differentiates between classes of people within the construction industry and defines those terms under Ark. Code Ann. § 18-44-107 (Repl. 2003). The trial court found that appellee was a subcontractor for purposes of the statute, and that, as such, had to comply with Ark. Code Ann. § 18-44-114, which provides that a subcontractor must give ten-days notice before the filing of the lien. The trial court found that appellee complied with

this requirement. Further, the trial court found that Ark. Code Ann. § 18-44-115 only applies to contractors. The trial court, therefore, granted the appellee's motion for directed verdict and denied the appellants' request to remove the cloud from their title. The appellants filed a timely motion for new trial, which was deemed denied when the trial court did not rule. This appeal follows.

We review issues of statutory construction de novo because it is our responsibility to determine what a statute means. *R. N. v. J. M.*, 347 Ark. 203, 61 S.W.3d 149 (2001). While we are not bound by the trial court's ruling, we will accept the trial court's interpretation of a statute unless it is shown that the trial court erred. *Id.* The purpose of statutory interpretation is to give effect to the intent of the General Assembly. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). We first seek the legislature's intent by giving the words of the statute their ordinary and usual meaning in common language. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000). Where the meaning is clear and unambiguous, we do not resort to the rules of statutory interpretation. *Id.*

Appellants claim that the lien asserted by appellee is invalid because the "IMPORTANT NOTICE TO OWNER," as required and contained in Ark. Code Ann. § 18-44-115(c), was not delivered to them by either personal delivery or certified mail until after the framing work had been done. Arkansas Code Annotated section 18-44-115 states in pertinent part as follows:

> (a)(1) No lien may be acquired by virtue of this subchapter unless the owner or his or her authorized agent has received, by personal delivery or by certified mail, a copy of the notice set out in subsection (c) of this section.
>
> . . .
>
> (b)(1)(A) It shall be the duty of the contractor to give the owner or his or her authorized agent the notice set out in subsection (c) of this section on behalf of all potential lien claimants under his or her contract prior to the supplying of any materials or fixtures.
>
> (B) Any potential lien claimant may also give notice.
>
> (2) However, no lien may be claimed by any supplier of material or fixtures unless the owner or agent has received at least one (1) copy

of the notice, which need not have been given by the particular lien claimant.

(c) The notice set forth in this subsection may be incorporated into the contract or affixed to the contract and shall be conspicuous, worded exactly as stated in all capital letters, and shall read as follows:

"IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH PERSON SUPPLYING MATERIAL OR FIXTURES IS ENTITLED TO A LIEN AGAINST PROPERTY IF NOT PAID IN FULL FOR MATERIALS USED TO IMPROVE THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY MATERIALS OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.

SIGNED: _____

_____

ADDRESS OF PROPERTY

DATE: _____

I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER OR AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.

_____

CONTRACTOR"

Appellants argue that the trial court relied on the fact that "subcontractor," "contractor," "material supplier," and "person" are each defined by Ark. Code Ann. § 18-44-107, which states as follows:

> As used in this subchapter:
>
> (1) "Contractor" means any person who contracts orally or in writing directly with a person holding an interest in real estate, or such person's agent, for the construction of any improvement to or repair of real estate;
>
> (2) "Material supplier" means any person who supplies materials, goods, fixtures, or any other tangible item to the contractor or a subcontractor, or an individual having direct contractual privity with such persons;
>
> (3) "Person" includes an individual, a partnership, a corporation, a limited liability organization, a trust, or any other business entity recognized by law; and
>
> (4) "Subcontractor" means any person who supplies labor or services pursuant to a contract with the contractor, or to a person in direct privity of contract with such person.

The trial court reasoned that this differentiation exempted subcontractors from the requirements under section 115. However, appellants maintain that each category has the same list of requirements to obtain a valid and enforceable labor or material lien.

Appellee asserts that mechanic's liens are strictly construed. *See Books a Million, Inc. v. Arkansas Painting & Specialties Co.*, 340 Ark. 467, 10 S.W.3d 857 (2000). He contends that the General Assembly distinguished categories of potential lien claimants and defined them in Ark. Code Ann. § 18-44-107. The legislature

then set forth section 114, which applies to all "persons," and which states in pertinent part as follows:

> (a) Every person who may wish to avail himself or herself of the benefit of the provisions of this subchapter shall give ten (10) days' notice before the filing of the lien, as required in § 18-44-117(a), to the owner, owners, or agent, or either of them, that he or she holds a claim against the building or improvement, setting forth the amount and from whom it is due.

The statute clearly requires every "person" to give a ten-day notice to the owner before filing a lien. Appellee asserts that section 115 applies to every "contractor." Appellee contends that the statute does not require that the owner must receive the "IMPORTANT NOTICE TO OWNER" prior to the application of any "labor" to the property in order for a subcontractor to acquire a lien. Appellee contends that under section 115(b)(1)(A), the contractor is duty bound to give the notice prior to the supply of materials or fixtures, but not the supply of "labor" and "service," which are not included in the statute. Appellee argues that "labor" and "service" are included in the definition of subcontractor, and therefore, section 115 does not apply to subcontractors.

Finally, appellee claims that under appellants' argument of prior notice, subcontractors who perform labor or services and who fail to receive payment from the owner or the contractor for work performed are only able to file a lien if the same contractor who failed to pay the subcontractor provided the "IMPORTANT NOTICE TO OWNERS" to the owner prior to any labor being performed. Appellee argues that this would place subcontractors at the mercy of the contractors, allowing contractors to avoid liens filed by subcontractors against the property for non-payment simply by failing to give the notice before any work is provided. However, appellee fails to recognize the statutory provision for subcontractors to give the required notice to the owner. *See* Ark. Code Ann. § 18-44-115(b)(1)(B). This provision protects the subcontractor from the contractor who fails to give notice. The distinction between contractors and subcontractors in the statute is that the contractor has a legal duty to serve the notice before the work is commenced, while the subcontractor may serve the notice. *See* Ark. Code Ann. § 18-44-115(b)(1)(A), (B). Appellants claim, and we agree, that this distinction allows the subcontractor to preserve his right to file a lien in the event that the general

contractor fails to fulfill his obligation under the statute; *i.e.*, to serve the notice. If failure to serve the notice prior to work being done did not impair the right of the subcontractor to acquire a lien against real property, then there would be no explanation for the statutory provision that the subcontractor may serve the notice himself, nor any reason for him to do so.

Appellants cite *Urrey Ceramic Tile Co., Inc. v. Mosely*, 304 Ark. 711, 805 S.W.2d 54 (1991), where the Arkansas Supreme Court held that the exception to the notice requirement in the statute at issue there violated the Equal Protection clauses of the Fifth and Fourteenth Amendments, and declined to enforce a lien claimed by Urrey Ceramic Tile, a subcontractor, when no "IMPORTANT NOTICE TO OWNER" had been filed by the contractor or the subcontractor. The court stated, "Generally, under § 18-44-115(a)-(d) (1987), the principal contractor, prior to any materials being supplied, must give notice to the property owners of any potential lien claimants under his contract before a lien can be acquired against the owners' property." *Id.* at 712, 805 S.W.2d at 55. The court then noted that any potential lien claimant may give notice so as to perfect his lien, citing § 18-44-115(b). *Id.* Appellants also cite *Books a Million, supra*, where the Arkansas Supreme Court held that strict compliance with § 18-44-115 (Supp. 1999) was required for a subcontractor who had failed to send the notice within the time and in the manner specified by the statute then in force. In this commercial property case, the subcontractor failed to send the notice within the seventy-five day period following completion of the work. The court held that because the notice requirements must be complied with strictly, the lien was not validly created.

Appellants argue that the situation herein and in the cases cited above illustrate why the legislature added the boldfaced twelve-point type warnings to the construction-lien procedure. The notice required by section 115 contains advance warnings, precautions, and suggestions as to how to deal with the possibility that the general contractor may fail to pay all the bills. Appellants argue, and we agree, that after the work was done, the owner's financing was exhausted, and the contractor was in default, there was no benefit in appellee notifying appellants that they could demand a list of all the suppliers of labor and material and that they could make all their checks payable to the contractor and subcontractor jointly. Therefore, we hold that the "IMPORTANT NOTICE TO OWNER" must be given by either the contractor

or subcontractor before the work is done in order for it to be of any practical value. Accordingly, we reverse the trial court's finding of a valid lien against appellants' property.

Reversed.

HEFFLEY, J., agrees.

BIRD, J., concurs.

SAM BIRD, Judge, concurring. I agree with the court's decision but am concerned with the confusion caused by Ark. Code Ann. § 18-44-115 for the reasons set forth in my concurring opinion in *Bryant v. Jim Atkinson Tile*, 100 Ark. App. 408, 269 S.W.3d 383 (2007).

[redacted]

Kerry MURPHY and Blue Monkey, Inc. *v.*
MICHELLE SMITH DESIGNS d/b/a Blue Dog Designs

CA 07-251 269 S.W.3d 390

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

[redacted]

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *P. Benjamin Cox*, for appellants.

Gill Elrod Ragon Owen & Sherman, P.A., by: *Roger H. Fitzgibbon, Jr.*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellants Kerry Murphy and Blue Monkey, Inc., appeal from an order refusing to dissolve a preliminary injunction. We dismiss the appeal because the record was not timely filed.

In January 2004, Murphy sold the assets of his silk-screening and embroidery business, Blue Dog Designs, to Michelle Smith Designs ("Smith") and agreed to work for Smith as the manager of the business. Among the documents Murphy signed in connection with the sale was a "Non-Competition and Confidentiality Agreement," in which he essentially agreed not to compete with Smith or solicit Smith's customers or employees for two years after the end of his employment.

Murphy's employment ended on or about January 4, 2006. On March 2, 2006, Smith sued Murphy and the new company he was working for, Blue Monkey, Inc., claiming that Murphy violated the non-compete agreement by operating a business similar to Smith's and diverting Smith's customers and employees. The trial court entered a preliminary injunction on March 28, 2006, finding that Murphy was operating a screen-printing, embroidery, and design company that was doing substantially the same kind of work as Smith and performing services for Smith's customers. Murphy was enjoined from operating his business in nineteen Arkansas counties, pending a final determination on the merits.

The case was set for a final hearing on October 20, 2006. However, when Murphy learned that the case would be continued, he asked the court to dissolve the preliminary injunction. The court entered an order on January 23, 2007, denying Murphy's request. Murphy filed his notice of appeal from that order on February 22, 2007. The record was filed with our clerk's office on March 9, 2007.

Murphy's appeal is brought pursuant to Ark. R. App. P.–Civil 2(a)(6), which provides that an appeal may be taken from:

> An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused.

When an appeal is taken from an interlocutory order pursuant to Rule 2(a)(6) or an order appointing a receiver pursuant to Rule 2(a)(7), "the record must be filed with the Clerk of the Supreme Court within

thirty (30) days from the entry of such order." Ark. R. App. P.–Civil 5(a). The order appealed from in this case was entered on January 23, 2007, making the record due on February 22, 2007. *See Johnson v. Langley*, 93 Ark. App. 214, 218 S.W.3d 363 (2005); *see also U.S. Bank v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003) (involving an appeal from an order appointing a receiver). However, the record was not filed until March 9, 2007. It was therefore untimely, and we are without jurisdiction to hear the appeal. *See Conlee v. Conlee*, 366 Ark. 342, 235 S.W.3d 515 (2006) (holding that the timely filing of the record is a jurisdictional requirement for perfecting an appeal). Consequently, the appeal must be dismissed.

Although neither party has argued this issue in their briefs, we have a duty to raise questions concerning our own jurisdiction even if the parties do not. *See generally Barnes v. Newton*, 69 Ark. App. 115, 10 S.W.3d 472 (2000).

Appeal dismissed.

HART and GLADWIN, JJ., agree.

Benjamin F. LACKEY, Jr. *v.* Mark A. MAYS, et al.

CA 06-521 269 S.W.3d 397

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

[Rehearing denied November 12, 2008.*]

* ROBBINS and GRIFFEN, JJ., would grant rehearing in part.

Callis L. Childs, for appellant.

Huckabay, Munson, Rowlett & Moore, P.A., by: *Sarah E. Greenwood*, for appellee Mark A. Mays.

Barber, McCaskill, Jones & Hale, P.A., by: *Michael J. Emerson*, for appellee Trent Properties, A Partnership, and Charles W. Trent.

D.P. MARSHALL JR., Judge. Benjamin Lackey, a Conway police officer, was involved in two automobile accidents in the span of about six weeks. He sued several of the parties involved in the accidents, and the litigation has continued for some time. Several years ago, Lackey petitioned the supreme court for a writ of *certiorari* or mandamus about a severance issue. *Lackey v. Bramblett*, 355 Ark. 414, 139 S.W.3d 467 (2003). The facts about the accidents are

recounted in detail in that opinion, which dismissed Lackey's petitions. Lackey's appeal comes now to this court on the merits. We do not reach the merits, however, because his briefs do not comply with our Rules. Ark. Sup. Ct. R. 4-2(b)(3). We describe the defects in Lackey's briefs in detail for two reasons: to give him a map for preparing compliant briefs and to remind the bar about our briefing rules.

This is not the first time that Lackey's briefs have been deficient. After he filed his first set of briefs in late 2006, Lackey moved to submit a substituted addendum, abstract, and brief to add inadvertently omitted and important material to his abstract and addendum. This court granted that motion. In due course, the Clerk rejected Lackey's substituted briefs because they did not comply with Arkansas Supreme Court Rule 4-2. The docket reflects that, in those briefs, Lackey incorrectly numbered his pages, failed to list the witnesses in the table of contents, and abstracted pleadings and other court papers instead of copying them in the addendum. In early 2007, Lackey moved again to file a substituted brief, addendum, and abstract, this time as separate bound documents. This court granted that motion.[1] The Clerk then accepted and filed Lackey's substituted briefs, which are the ones we have before us. They are still deficient. Here are the particulars.

In his abstract, Lackey should have condensed impartially the hearings and testimony in the record that are necessary to our understanding of the issues on appeal. Ark. Sup. Ct. R. 4-2(a)(5). He did not do so. First, Lackey italicized and bolded many words and phrases, embellishing the transcript rather than summarizing it without emphasis. Abstracting requires an even hand, not a thumb on the scale. Second, Lackey should have distilled the exchanges between the circuit court and the lawyers at the many hearings. Instead, Lackey's abstract of the hearings is mostly a retyped transcript of them. Third, Lackey retained the transcript's question-answer format throughout much of his abstract of the trial. This was wrong. The abstract must give the essence of each witness's testimony in an impartial first-person

[1] Here Lackey proceeded correctly. In a case with a long abstract or a voluminous addendum, it may make good sense to separate those reference materials from the rest of the brief. This is easily done with the addendum because it comes last in the brief, or next to last if counsel certifies service in the brief. Ark. Sup. Ct. R. 4-2(a)(8). Binding an addendum separately merely creates a multi-volume brief. This requires no motion. Binding an abstract by itself, however, departs from the prescribed order of contents for a brief. Ark. Sup. Ct. R. 4-2(a)(1)-(8). This kind of deviation requires a motion that shows good cause for this step.

narrative, the witness's story shorn of the immaterial details, redundancies, and hiccups that characterize testimony under questioning. The transcript's question-answer format must fall away — except in those instances where the exchange simply cannot be condensed without losing something important. Page after page of questions and answers does not hit this mark. Fourth, Lackey abstracted the documents admitted as exhibits at the hearings. This was wrong too. Since 2003, our Rules have not required that documents be abstracted. With one exception, all documentary exhibits should be copied in the addendum, with helpful identifying references in the abstract to those exhibits. The exception is for exhibits that are transcripts, such as the deposition transcripts in this case, and this brings us to the fifth mistake. Lackey mishandled the deposition transcripts: some of them are in the abstract, but they remain in question-answer format; and summaries of some depositions are in the addendum. This was a compound error. Transcripts — whether of testimony at trial or on deposition or of hearings — must be converted into an impartial first-person narrative in the abstract. Transcripts should not be in the addendum.

Lackey's addendum is unusual. He arranged the documents thematically by issue, rather than chronologically. His decision to organize his addendum in this way does not violate the letter of any Rule, but it concerns us nonetheless. This tactic makes it appear that Lackey is trying to persuade this court by organizing the documents to his advantage, giving emphasis by placement. The addendum — like the abstract — must be impartial. Arranging the documentary part of the record chronologically is the best practice.

Lackey's briefing errors extend beyond his abstract and addendum. Lackey titled his replacement briefs as "supplement" briefs. They are not supplements; they are substituted briefs. His informational statement and the statement of the case are argumentative, peppered with bolded, underlined, and italicized words. This was improper. The argument section of the brief is the only place for argument. Ark. Sup. Ct. R. 4-2(a)(6). Because Lackey designated less than the full trial record as the record on appeal, he was required to file a list of his points on appeal with his notice of appeal. Ark. R. App. P.–Civil 3(g). This filing gives the other parties the information they need to designate other parts of the record that they believe are material to Lackey's arguments for

reversal. Lackey's argument on appeal, however, includes at least one argument that he did not mention in the points he filed. This was likewise improper. *Jones v. Adcock*, 233 Ark. 247, 248, 343 S.W.2d 779, 780 (1961).

Given the prior opportunities to cure, Lackey's errors seem willful, not inadvertent. And we caution him about the possibility of sanctions for disregarding the briefing rules. *King v. State*, 312 Ark. 89, 91, 847 S.W.2d 37, 38-39 (1993). We order rebriefing and give Lackey thirty days to file an abstract, brief, and addendum that comply with the Rules. We will not extend this deadline except for some extraordinary reason. This case has been pending long enough. We direct Lackey's attention to the model abstract, brief, and addendum on the Arkansas Judiciary website — http://courts.state.ar.us/ — under Publications & Forms. The appellees shall have thirty days after Lackey files his opening substituted abstract, brief, and addendum to file substituted response briefs if they wish to do so. And Lackey may file a reply brief within fifteen days thereafter if the appellees file any such brief. (Because Lackey's missteps have required the appellees to file two briefs already, and perhaps a third, we will consider these circumstances in assessing brief costs if Lackey's appeal is affirmed on the merits.) If Lackey fails to correct his papers, then we will consider whether to affirm the judgment because of repeated noncompliance with the Rules. *Calaway v. Dickson*, 360 Ark. 463, 464-65, 201 S.W.3d 931, 932 (2005).

Rebriefing Ordered.

PITTMAN, C.J., and GRIFFEN, J., agree.

Jonathon MILLER *v.* STATE of Arkansas

CA CR 07-501 269 S.W.3d 400

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

Gary McDonald, for appellant.

Dustin McDaniel, Att'y Gen., by: *Carolyn Boies Nitta*, Ass't Att'y Gen., for appellee.

D.P. MARSHALL JR., Judge. This case is about a criminal defendant's right to a speedy trial. Jonathon Miller was arrested on 12 September 2005 on drug charges. His case was set for trial on three dates in the spring and summer of 2006, but was not tried on any of those dates. On 4 October 2006, one year and twenty-two days after he was arrested, Miller had his day in court. A jury convicted him of the drug charges. He now appeals that conviction, arguing that the State violated his right to a speedy trial. After our *de novo* review, *Cherry v. State*, 347 Ark. 606, 609, 66 S.W.3d 605, 607 (2002), we agree.

Because Miller was released on bond before trial, his arrest date started the one-year, speedy-trial clock. Ark. R. Crim. P. 28.2(a). In Miller's motion to dismiss, he showed that his case did not go to trial until more than one year after he was arrested. Miller thus presented a prima facie case of a speedy-trial violation. The burden shifted to the State to show that the delay resulted from Miller's conduct or was otherwise justified. *Ferguson v. State*, 343 Ark. 159, 167, 33 S.W.3d 115, 120 (2000); Ark. R. Crim. P. 28.1(b).

The circuit court first concluded that two periods of delay were excludable because they resulted from pretrial motions. Before Miller's case went to trial, the State moved for a speedy-trial exclusion stating that the case did not go to trial on 27 June 2006 because of a congested docket. Miller also moved to reveal the identity of a confidential informant, to sever his offenses, and for sanctions. In its order denying Miller's motion to dismiss, the circuit court excluded thirty days for the State's motion, and held that Miller's motions had also "tolled speedy trial for at least thirty days." Either exclusion, if proper, would bring Miller's trial within the required one-year period.

The State, however, did not demonstrate that any delay resulted from any of the pretrial motions. The words of Rule 28.3(a) make clear that actual delay is the criterion. That Rule excludes:

> *The period of delay resulting from other proceedings concerning the defendant, including but not limited to* an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, *hearings on pretrial motions*, interlocutory appeals, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty

> (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period.

Ark. R. Crim. P. 28.3(a) (emphasis added).

In *Ferguson, supra*, our supreme court discussed the meaning of "hearings on pretrial motions." It stated that "the excluded period contemplated by the rule begins at the time the pretrial motion is made and includes those periods of delay attributable to the defendant until the motion is heard by the court and not more than thirty days thereafter." 343 Ark. at 170, 33 S.W.3d at 122. In *Ferguson*, for example, the parties filed numerous pretrial motions, and the circuit court granted at least one continuance so the parties could obtain information relevant to the pretrial motions. After various hearings, the circuit court took the motions under advisement and requested briefs from both parties before issuing its rulings. The proceedings on the motions delayed the trial. 343 Ark. at 171, 33 S.W.3d at 123.

This case is different. Here, no delay resulted from the pretrial motions. The State did not respond to Miller's motions, nor did the court rule on them, until the day of Miller's trial. Miller did not respond to the State's motion until two days before the trial. No pretrial hearings about the motions took place. There is nothing in the record to indicate that the circuit court granted any continuance as a result of these pretrial motions. The circuit court never took any of the motions "under advisement," and therefore the Rule's 30-day maximum exclusion for the court's consideration of motions simply does not apply.

The act of filing a pretrial motion does not toll the speedy-trial period. Some delay attributable to the defendant must actually result from the motion. If we were to hold otherwise, then the State could postpone a defendant's trial for more than a year any time the State or the defendant filed any motion — even if the motion caused no delay. *Ferguson*, 343 Ark. at 170-71, 33 S.W.3d 122-23. The circuit court's reading of Rule 28.3 would undermine the State's obligation to bring Miller to trial within twelve months of the date of his arrest absent the limited circumstances outlined in the Rule. *Zangerl v. State*, 352 Ark. 278, 288, 100 S.W.3d 695, 701 (2003).

The circuit court also concluded that a period of time was excludable because the court's trial calendar was congested. The court's decision on this issue, however, does not satisfy Rule

28.3(b)'s requirements. Though the order describes the circuit court's busy schedule during part of the summer in 2006, it does not address any prejudice that might have resulted to Miller from this delay, nor does it explain why Miller was not brought to trial on any of the open days on the trial calendar. The court's ruling about docket congestion was therefore insufficient. *Berry v. Henry*, 364 Ark. 26, 30-32, 216 S.W.3d 93, 96-97 (2005); Ark. R. Crim. P. 28.3(b)(1)-(3).

Miller was not required to "bring himself to trial or to bang at the courthouse door." *Gwin v. State*, 340 Ark. 302, 306-07, 9 S.W.3d 501, 504 (2000). The State did not show that its delay in trying Miller either resulted from his conduct or was otherwise justified. The circuit court's contrary conclusion was error. We therefore reverse Miller's conviction, and dismiss this case. Ark. R. Crim. P. 28.1(c) and 30.1.

VAUGHT and MILLER, JJ., agree.

Beverly J. TATE *v.* DIRECTOR, DEPARTMENT of WORKFORCE SERVICES

E 07-107 269 S.W.3d 402

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

Appellant, pro se.

Phyllis A. Edwards, for appellee.

D.P. MARSHALL JR., Judge. Beverly Tate challenges the Board of Review's decision that she was not entitled to unemployment benefits because the University of Arkansas fired her with cause for insubordination. Ark. Code Ann. § 11-10-514(a)(1) (Supp. 2007). Whether Tate's actions constituted misconduct in connection with her work was a fact question for the Board to answer. *Terravista Landscape v. Williams*, 88 Ark. App. 57, 64, 194 S.W.3d 800, 804 (2004). The question for this court is whether substantial evidence supports the Board's decision. *Ibid.* It does.

During the six months that Tate was in her last position at the University, she arrived late for work several times. At first, Tate wanted to make up for her tardiness, which was usually about fifteen minutes, by working during her break or her lunch time. Tate's supervisor instructed her that she could not do so, and instead must use some of her leave time to cover the tardiness. Tate questioned this interpretation of University policy. Tate and her supervisor consulted with the Associate Vice-Chancellor for Human Resources, who confirmed the supervisor's interpretation. When Tate was late again, her supervisor reminded her of the rules. Tate again sought to avoid using up her leave time and wanted to work during her breaks. Her supervisor refused, and suggested that Tate consult the supervisor's boss under the University's "open-door" policy. Tate did so. He declined to intervene, e-mailing Tate that she should sort the matter out with her supervisor.

A few weeks later, Tate was late two days in a row. When her supervisor told her to use leave time for this tardiness, Tate again said that she would just make up the time by working through her breaks. The supervisor refused, and told Tate that her attitude on this matter and others needed to improve. When Tate asked the supervisor to put that in writing, the supervisor discharged Tate.

This record contains substantial evidence that supports the Board's decision. Asking questions about an employer's policy is not insubordination. Asking the employer to change or interpret the policy is not insubordination. But after the questions are asked and the requested accommodation is rejected, then an employee who refuses to accept the employer's decision about the rules for the workplace is insubordinate. Tate would not take no for an answer. She never indicated to her supervisor that she would comply with her instructions. Substantial evidence supports the Board's decision that Tate's repeated attempt to disregard the University's time policies ripened into misconduct. *Terravista Landscape, supra.*

Affirmed.

PITTMAN, C.J., GLADWIN, ROBBINS, GLOVER and VAUGHT, JJ., agree.

HEFFLEY, BAKER and MILLER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. At the time of her termination, Ms. Tate was classified as an employee with more than seven years of full-time service. She had worked in hourly and work study capacities at the University in addition to the salaried position from which she was terminated. Nothing in the record indicates any disputes regarding Ms. Tate's timekeeping practices pursuant to the University's policy until she was transferred and placed under Ms. Seller's supervisory authority. The dispute that led to termination arose when Ms. Seller required Ms. Tate to use her leave time, that could be taken only in fifteen minute intervals, to address two sequential late arrivals of less than fifteen minutes. In presenting her understanding of her employer's policy, Ms. Tate explained that she had witnessed the University's progressive employment practices over a twelve-year time span. In expressing her understanding of the University's approach to work schedules, she quoted the following excerpt from an article entitled "U of A Receives Silver Family Friendly Award:"

> As the university works to help employees maintain a work-life balance, it offers "a lot of work-time options, everything from flexible hours, compressed workweeks, permanent part time and telecommuting," Taylor (Barbara Taylor, associate vice chancellor for human relations) said. "As an employer, the university strives to provide its employees with convenience and many choices."

Regarding flexible hours, Ms. Tate included the following provision from the employment handbook:

> You and your supervisor may agree to a work week with a time schedule that differs from the regular daily schedule if it serves both your needs and those of the University. The schedule must not create a pattern of overtime work or cause undue hardship for your work unit. Any flex-time agreements that you make must be put in writing and be signed by you and your supervisor.

Ms. Tate related in her history of Ms. Seller's application of the University's policy to her an incident that occurred within the first month of Ms. Tate being transferred to Ms. Seller's supervision. In that instance, Ms. Seller refused to authorize overtime worked by Ms. Tate. Instead, Ms. Seller adjusted Ms. Tate's leave time, rather than paying overtime. Ms. Tate also explained that she was normally five to ten minutes early to work each day and that on occasion would begin working thirty minutes earlier than the scheduled day.

Furthermore, Ms. Tate explained that she followed the University's open-door policy in pursuing a clarification of Ms. Seller's application of the policy:

> [T]he university does have an open-door policy, and employees are, and can, and the option is available to employees to ask and to question, and that's exactly what I was doing, and that is not insubordinate and not disrespectful to take advantage of the open-door policy. It's in the university handbook.

Ms. Seller not only acknowledged the employer's open-door policy but stated that she encouraged Ms. Tate to talk to Don Peterson, Ms. Seller's supervisor. Nevertheless, she maintained that the reason for Ms. Tate's termination was the insubordination and disrespect that she showed toward Ms. Seller.

Of particular importance to the issue before us are three exhibits regarding the use of breaks. The first is an email from Ms. Seller to Barbara Taylor making the following request: "Barbara, Beverly and I have a question about work breaks. Can you please explain the law requirements and then the University's position on them?" The second is the response from Ms. Taylor to Ms. Seller and copied to Ms. Tate. This email is several pages and begins with the following statement: "The answer to your question is a

somewhat complicated one, as it involves both the Federal Fair Labor Standard Act (FSLA) and state regulations." The last email is from Ms. Seller to Ms. Tate that states simply: "Yes, if you need breaks, you can take one mid morning not to exceed 15 minutes and one mid afternoon not to exceed 15 minutes."

Ms. Arbuthnot testified that Ms. Tate was terminated, not for her usage of the time, but for "continually arguing about the time usage." Ms. Seller testified that "Beverly was terminated for insubordination and disrespect to my position as her supervisor, not for being tardy, but for continually arguing with me about the use of her breaks to shorten her day, to fill in time that she was late." Ms. Tate testified that she questioned the policy regarding the time usage as applied by Ms. Seller because she believed that the application was inappropriate to her position as a salaried employee. The Board of Review found that Ms. Tate "was not discharged for 'questioning' time keeping practices or for 'being late.' She was discharged for being insubordinate." The majority's affirmance is in direct contradiction to the evidence in this case and the public policy that is our duty to protect.

Statutes are to be construed with reference to the public policy which they are designed to accomplish. *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977); *Ark. Tax Comm'n v. Crittenden County*, 183 Ark. 738, 38 S.W.2d 318 (1931). As the supreme court stated in *Little Rock Furniture Mfg. Co. v. Commr. of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957), our Employment Security Act must be given an interpretation in keeping with the declaration of state policy. The intent of the Arkansas Legislature controls the construction of our unemployment security laws. *Feagin v. Everett*, 9 Ark. App. 59, 66, 652 S.W.2d 839, 843 (1983). In addition, the Employment Security Act is remedial in nature and must be liberally construed in order to accomplish its beneficent purpose. *Graham v. Daniels*, 269 Ark. 774, 601 S.W.2d 229 (Ark. App.1980).

Unemployment benefits are intended to benefit employees who lose their jobs through no fault or voluntary decision of their own. They are not intended to penalize employers or reward employees, but to promote the general welfare of the State. *Wacaster v. Daniels*, 270 Ark. 190, 194, 603 S.W.2d 907, 910 (Ark. App. 1980). The policy of the Arkansas Employment Security Act is "to encourage employers to provide more stable employment" and to accumulate "funds during periods of employment from

which benefits may be paid for periods of unemployment." Ark. Code Ann. § 11-10-102(2) (Repl. 2002).

Our supreme court has explained that the purpose of the eligibility and disqualification provisions of an unemployment compensation statute is to protect the state unemployment compensation fund against claims of individuals who would prefer benefits to jobs. *Garrett v. Cline*, 257 Ark. 829, 832, 520 S.W.2d 281, 284 (1975) (citations omitted). The eligibility and disqualification provisions, being in pari materia, are to be construed together. *Id.* at 832-33, 520 S.W.2d at 284.

Arkansas Code Annotated section 11-10-514(a)(1) (Repl. 2002) provides, "If so found by the Arkansas Employment Security Department, an individual shall be disqualified for benefits if he or she is discharged from his or her last work for misconduct in connection with the work. "Misconduct," for purposes of unemployment compensation, involves (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has a right to expect; and (4) disregard of the employee's duties and obligations to his employer. *Rossini v. Director*, 81 Ark. App. 286, 101 S.W.3d 266 (2003). To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith errors in judgment or discretion. *Id.* Instead, there is an element of intent associated with a determination of misconduct. *Blackford v. Director*, 55 Ark. App. 418, 935 S.W.2d 311 (1996). There must be an intentional and deliberate violation, a willful and wanton disregard, or carelessness or negligence of such a degree or recurrence as to manifest wrongful intent or evil design. *Rossini v. Director, supra.* Misconduct contemplates a willful or wanton disregard of an employer's interest as is manifested in the deliberate violation or disregard of those standards of behavior which the employer has a right to expect from its employees. *Blackford v. Director, supra.*

The employer has the burden of proving misconduct by a preponderance of the evidence. *Arkansas Midland R.R. v. Director*, 87 Ark. App. 311, 191 S.W.3d 544 (2004). Additionally, the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board. *Williams v. Director*, 79 Ark. App. 407, 88 S.W.3d 427 (2002).

In this case, the evidence showed that the law governing the University's policy was complicated and that the use of breaks was flexible. Nevertheless, the Board found that Ms. Tate's attempts to clarify the use of breaks was insubordination, although the board also found that she was not terminated for questioning the policy. Despite this flawed circular reasoning, the majority affirms.

Nothing in this record indicates that Ms. Tate is attempting to receive unemployment benefits in lieu of work. It is our duty to interpret the statutes regarding misconduct and determine whether the evidence can support the Board's determination. Nothing in this record can support the Board's finding that Ms. Tate was insubordinate and that her insubordination manifested a wrongful intent or evil design against her employer.

Accordingly, I dissent.

HEFFLEY and MILLER, JJ., join.

Janice PARKER *v.* COMCAST CABLE CORPORATION

CA 07-158 269 S.W.3d 391

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

Appellant, pro se.

Rieves, Rubens & Mayton, by: *David C. Jones*, for appellees.

SARAH HEFFLEY, Judge. Appellant Janice Parker appeals the decision of the Arkansas Workers' Compensation Commission denying her claim for benefits based on a finding that she was not performing employment services when she injured her back. Appellant contends that the Commission's decision is not supported by substantial evidence and that the Commission erred by not admitting her proffered exhibits into evidence. We disagree and affirm.

Appellant had been working for appellee Comcast Corporation since 1997 as a customer service representative when on May 8, 2004, she tripped and injured her back. Appellant usually worked on weekdays from 7:00 a.m. to 4:00 p.m., but she also worked overtime on weekends. The accident occurred on a Saturday morning just before 7:00 a.m. as appellant was preparing to work an overtime shift from 7:00 a.m. to 12:00 p.m. Appellant testified that the building was locked on the weekends and that it was necessary for her to use a key card to gain entry to the building. Comcast as well as other tenants leased office space in this building that was open to the public during regular business hours.

After arriving that morning, appellant first went to get a soda in the Comcast break room located on the ground floor, where she also had to use her key card to get inside. She then proceeded to the elevator and selected the third floor where her office in the call center was located. Appellant tripped as she was alighting from the elevator on the third floor. Appellant was not sure why she had stumbled, but when she looked back at the elevator it was not level with the floor.

After gathering herself, appellant used her key card to enter the call center. She then clocked in by entering her code into her telephone and began working. Appellant notified her supervisor about the incident, and she sought medical treatment with her regular doctor for lower lumbosacral discomfort that afternoon and again on Monday.

An MRI of her lumbar spine, which revealed a large posterior disc protrusion with severe stenosis at L4-5, was taken on May 12, 2004. Appellant was referred to Dr. Scott Schlesinger, a neurosurgeon, who performed a surgical decompression and discectomy at that level on June 8, 2004. A subsequent MRI showed a recurrence of the disc herniation at L4-5, which was again surgically repaired by Dr. Schlesinger on October 14, 2004. In

May 2005, Dr. Schlesinger reported that appellant had reached maximum medical improvement with a permanent restriction of light duty based on a functional capacity evaluation, and he assigned an anatomical impairment rating of twelve percent.

Soon thereafter, appellant presented to Dr. Schlesinger with continued complaints of pain, and another MRI was performed on June 3, 2005. This MRI revealed a disc herniation at L5-S1 with an extruded disc fragment that impinged on the S1 nerve root and thecal sac. After discussing treatment options with Dr. Schlesinger, appellant planned to have a discectomy.

At appellee's request, appellant was evaluated by Dr. Steven Cathey on August 23, 2005. In a report of that date, Dr. Cathey concluded that the herniation at L5-S1 was a new finding that was not related to the May 2004 injury at L4-5.

Although appellee had initially accepted appellant's claim as compensable and had paid all appropriate benefits, after deposing appellant it took the position that appellant had not sustained a compensable injury on May 8, 2004, because she was not performing employment services at the time of the accident.[1] Based on Dr. Cathey's report, appellee maintained that, in any event, it was not responsible for paying benefits associated with the herniation at L5-S1 because it was not related to the accident that occurred on May 8, 2004. Appellant contended, however, that she was performing employment services at the time of the May 2004 accident and that the herniation at L5-S1 was a natural progression of the original injury.

After a hearing, an administrative law judge determined that appellant was not performing employment services at the time of the accident, and thus denied appellant's claim for further benefits. In pertinent part, the law judge found:

> The claimant was merely en route to her work station where she had to sign in by telephone to begin her duties. The claimant had not actually begun any work activities at the time of the incident nor did she have to pick up mail, invoices or other business papers on her way to her office. While the claimant was on the premises where her employer is housed, she was in the public space of the elevator and hallway before actually entering her work area.

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[1] Appellee did not seek reimbursement of any benefits it had paid.

On appeal, the Commission affirmed and adopted the law judge's decision. Hence this appeal.

Appellant first argues that the evidence does not support the Commission's decision that she was not performing employment services at the time of the accident. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Jones v. Xtreme Pizza*, 97 Ark. App. 206, 245 S.W.3d 670 (2006). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mays v. Alumnitec Inc.*, 76 Ark. App. 274, 64 S.W.3d 772 (2001). When an appeal is taken from the denial of a claim by the Commission, the substantial-evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for the denial of relief. *McDonald v. Batesville Poultry Equipment*, 90 Ark. App. 435, 206 S.W.3d 908 (2005).

In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2007). A compensable injury does not include an injury which was inflicted upon the employee at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii). An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007). We use the same test to determine whether an employee is performing employment services as we do when determining whether an employee is acting within the course and scope of employment. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest, directly or indirectly. *Id.*

Prior to Act 796 of 1993, the premises exception to the going-and-coming rule[2] provided that, although an employee at the time of injury had not reached the place where his job duties

[2] The going-and-coming rule ordinarily denies compensation to an employee while he is traveling between his home and his job, reasoning that employees having fixed hours and

were discharged, his injury was sustained within the course and scope of his employment if the employee was injured while on the employer's premises or on nearby property either under the employer's control or so situated as to be regarded as actually or constructively a part of the employer's premises. *Hightower v. Newark Public School System,* 57 Ark. App. 159, 943 S.W.2d 608 (1997). In *Hightower,* however, we held that the statutory requirement of the 1993 Act that an employee must be performing employment services at the time of the injury eliminated the premises exception to the going-and-coming rule.

In the instant case, the appellant was injured getting off an elevator in a common area of the building in which Comcast was one of the tenants, but before she reached her work station to clock in and begin work. Appellant's injury may have been compensable under the former premises exception, but the critical inquiry under current law is whether she was performing employment services when the injury occurred. *See Moncus v. Billingsley Logging,* 366 Ark. 383, 235 S.W.3d 877 (2006); *Hightower, supra.*

Applying the current standard in *Hightower, supra,* we affirmed the Commission's decision that the employee was not performing employment services when she slipped and fell on ice in the employer's parking lot. Similarly in *Srebalus v. Rose Care, Inc.*, 69 Ark. App. 142, 10 S.W.3d 112 (2000), we held that an employee who stepped in a pothole on the employer's parking lot did not sustain an injury covered under workers' compensation.

In other circumstances, we have considered injuries sustained by employees who were entering the workplace to have occurred while the employee was performing employment services. In *Shults v. Pulaski County Special School District,* 63 Ark. App. 171, 976 S.W.3d 399 (1998), the employee was responsible for checking the alarm system when he arrived at work, and he fell while entering the building to perform that task. In reversing the Commission's denial of benefits, we recognized that merely entering the employer's premises was not sufficient to bring an employee within the employment-services provision. However, we held that the employee in that case was not merely entering the premises when the injury occurred but that he was engaged in an

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places of work are generally not considered to be in the course of their employment while traveling to and from work. *Wright v. Ben M. Hogan Co.*, 250 Ark. 960, 468 S.W.2d 233 (1971).

activity (checking the alarm) that carried out the employer's purpose and advanced the employer's interests.

In *Foster v. Express Personnel Services*, 93 Ark. App. 496, 222 S.W.3d 218 (2006), Foster worked in accounts receivable on the second floor of the employer's premises, and her duties included processing credit card receipts and e-checks that she had to retrieve from the cashier's desk in a separate area. Employees entered the building through the service bay, and there were times when Foster was questioned by other employees in the service-bay area. Her duties also required her to visit the service-bay area as needed at other times during the work day, and she was considered to be on the job when she entered the service-bay doors. On the day of the accident, Foster slipped and fell just after she had arrived at work and was walking in the service-bay area on her way to the cashier's desk to collect credit card receipts. On these facts, we held that Foster was entitled to benefits because she was injured in an area where employment services were expected of her.

Also in *Caffey v. Sanyo Manufacturing Corp.*, 85 Ark. App. 342, 154 S.W.3d 274 (2004), the employee was required to produce an identification badge when she entered the employer's parking lot and then had to walk to a second guard shack to display her badge before entering the plant to clock in. The employee fell in the hallway just five feet shy of the clock-in station and some 200 feet from her work station. We held that the employee's claim was compensable because these preliminary requirements advanced the employer's interest.

Appellant asserts that the facts of this case compare favorably with those in *Caffey*, likening her use of a key card to the security requirements of the employer in that case. However, we cannot equate the requirement of undergoing security checks with the necessity of swiping a key card to unlock a door. In our view, appellant was merely on her way to work, and there was no testimony that she had any job-related responsibilities as she walked through the building. The facts of this case are more like those in *Hightower, supra,* and *Srebalus, supra,* and it is our conclusion that substantial evidence supports the Commission's decision that appellant was not performing employment services when she tripped while emerging from the elevator.

We thus reject the notion that the requirement of having to unlock the door renders this claim compensable. Had appellant tripped during regular business hours when the door was

unlocked, there would be no question that appellant's claim would not be compensable. We decline to create a distinction that would render a claim compensable just because the door to the building was locked. Moreover, to accept appellant's argument would erode the legislature's intent to do away with the premises exception.

Appellant also contends that this case is controlled by the decision in *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006), in which the supreme court reversed the denial of benefits when the employee was injured while returning from an authorized break. In this regard, appellant points out that she, too, had gone to the break room immediately prior to her accident. *Wallace*, however, is clearly distinguishable because here the appellant was not on a break when she went to get a soda - she had yet to begin her work day.

Appellant also asserts that the disc herniation found at L5-S1 was causally related to the May 2004 accident. Because we are affirming the Commission's decision that this incident did not arise out of and in the course of appellant's employment, it is not necessary for us to address this issue.

Appellant's final argument is that the Commission erred by excluding exhibits concerning a complaint made to OSHA about the elevator and appellee's response to a letter received from OSHA. Appellant contends that the exhibits were "direct evidence to the appellee's notification of faulty equipment (elevator) by OSHA" and showed "reasonable and logical workplace injury prevention and remedies; relevant evidence that shows the nature and condition of the employee's workplace; that the site of the injury was considered an on-the-job injury by Employer; federal protection of the right of employee(s) to engage in (legal) notification(s) of the faulty equipment to a governmental agency (OSHA) without fear of workplace or legal ramifications; employers (Comcast) response to a legal inquiry from a governmental agency (OSHA), which could impact past, present and future safety of appellant's workplace." Appellant does not explain why these matters are relevant to a workers' compensation claim. When an appellant fails to make a convincing argument or to cite authority in support of it, we will not address the argument on appeal. *Jones Truck Lines v. Pendergrass*, 90 Ark. App. 402, 206 S.W.3d 272 (2005). We note only that we have held that employ-

ees in workers' compensation cases no longer have standing to assert safety violations with the passage of Act 796 of 1993. *Vittitow v. Central Maloney, Inc.*, 69 Ark. App. 176, 11 S.W.3d 12 (2000).

Affirmed.

GLOVER and BAKER, JJ., agree.

James BRYANT *v.* JIM ATKINSON TILE

CA 07-374 269 S.W.3d 383

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

Joe O'Bryan, for appellant.

Jim Atkinson, for appellee.

SARAH HEFFLEY, Judge. James Bryant appeals from the judgment of the Circuit Court of Lonoke County granting Atkinson Tile a materialman's lien on Bryant's property. This case presents two questions: first, must notice be provided to the property owner under Ark. Code Ann. § 18-44-115 (Supp. 2007) before a subcontractor may obtain a valid lien on the property and, second, if the answer to that question is yes, when must notice be provided? We

hold that, in order for a subcontractor to acquire a lien on residential real property pursuant to Ark. Code Ann. § 18-44-101 (Repl. 2003), notice must be provided under Ark. Code Ann. § 18-44-115 (Supp. 2007) "prior to the supplying of any materials or fixtures." Because no such notice was provided in this case, we reverse that part of the circuit court's judgment finding that Atkinson Tile acquired a lien on the Bryants' property.

Mr. and Mrs. Bryant entered into a contract with Craig Williams, d/b/a The Craig Williams Company (hereinafter, "Williams"), to build their home in Lonoke. Williams hired Jim Atkinson Tile to install tile and countertops in the Bryants' home. Mr. Atkinson's work was substantially completed on March 19, 2005. On May 19, 2005, Mr. Atkinson mailed to Mr. Bryant an invoice reflecting a $5,999.26 balance due on the work and a notice of intent to file a lien on the Bryants' property if payment was not received. On February 6, 2006, Jim Atkinson Tile filed a complaint against Mr. Bryant and Williams requesting judgment against them, jointly and severally, in the amount of $5,999.26. Mr. Bryant filed an answer and cross-claim against Williams, requesting judgment against Williams in the amount of $15,391.35 for money advanced by the Bryants for materials required to finish the home and for money loaned to Williams pursuant to a promissory note, on which Williams was in default.

After a hearing, the circuit court denied Jim Atkinson Tile's request for a personal judgment against Mr. Bryant but granted judgment against Williams in the amount of $5,999.26 and held that the judgment was secured by a mechanic's and materialman's lien on Mr. and Mrs. Bryant's home. The circuit court also granted Mr. Bryant's cross-claim in the amount of $15,391.35 against Williams. The court then granted judgment in favor of Mr. Bryant against Williams in the amount of the two liens acquired by subcontractors on his property: $5,999.26 for the Atkinson Tile lien and $10,645.25 for a lien filed by Cadena Contracting, Inc.[1] The circuit court held that Ark. Code Ann. § 18-44-115 did not bar the lien in this case because Atkinson Tile was a subcontractor, not a contractor. Mr. Bryant filed a motion for new trial, which was deemed denied on December 21, 2006.

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[1] In a separate case, the circuit court granted another subcontractor of Williams, Cadena Contracting, Inc., a lien on the Bryants' property. That case has also been appealed to this court. *See Bryant v. Cadena Contracting, Inc.*, 100 Ark. App. 377, 269 S.W.3d 378 (2007).

The issue before us is whether the circuit court properly construed Arkansas's lien statutes. We review issues of statutory construction de novo. *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). It has long been held that mechanic's and materialmen's liens are in derogation of common law. *Books-a-Million, Inc. v. Ark. Painting and Specialties Co.*, 340 Ark. 467, 470, 10 S.W.3d 857, 859 (2000). They were created by the legislature, and, because they are in derogation of common law, we construe these lien statutes strictly. *Id.* Atkinson Tile did not enter into a contract with the Bryants but only with Williams. Absent this statutorily created lien, Atkinson Tile has no right to recover anything from the Bryants.

Arkansas Code Annotated section 18-44-101 states that every "contractor, subcontractor, or material supplier . . . who supplies labor, services, material . . . in the construction or repair of an improvement to real estate . . . by virtue of a contract with the owner, proprietor, contractor, or subcontractor, or agent thereof, *upon complying with the provisions of this subchapter*, shall have, to secure payment, a lien upon the improvement and on up to one (1) acre of land upon which the improvement is situated . . .." Ark. Code Ann. § 18-44-101(a) (Repl. 2003) (emphasis added). This subchapter contains two separate notice provisions. *Books-a-Million,* 340 Ark. at 470, 10 S.W.3d at 860. These notice requirements are for the benefit and protection of the owner. *Id.* Both are required in order to acquire a lien under section 101(a).

The first notice provision, found in Ark. Code Ann. § 18-44-114, requires every person "who may wish to avail himself or herself of the benefit of the provisions of this subchapter" to give ten days' notice to the owner before filing the lien that he or she holds a claim, "setting forth the amount and from whom it is due." Ark. Code Ann. § 18-44-114(a) (Supp. 2007). It is undisputed that Atkinson Tile gave this ten-day notice to the Bryants. It is the second notice, required by Ark. Code Ann. § 18-44-115, that was not given in this case. This provision provides in pertinent part as follows:

> 18-44-115. Notice to owner by contractor
>
> (a)(1) *No lien may be acquired by virtue of this subchapter unless the owner or his or her authorized agent has received,* by personal delivery or by certified mail, *a copy of the notice* set out in subsection (c) of this section.

(2) The notice required by this section shall not require the signature of the owner or his or her authorized agent in an instance when the notice is delivered by certified mail.

(b)(1)(A) *It shall be the duty of the contractor to give the owner or his or her authorized agent the notice* set out in subsection (c) of this section *on behalf of all potential lien claimants* under his or her contract *prior to the supplying of any materials or fixtures.*

(B) Any potential lien claimant may also give notice.

(2) However, no lien may be claimed by any supplier of material or fixtures unless the owner or agent has received at least one (1) copy of the notice, which need not have been given by the particular lien claimant.

(c) The notice set forth in this subsection may be incorporated into the contract or affixed to the contract and shall be conspicuous, worded exactly as stated in all capital letters, and shall read as follows:

"IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH PERSON SUPPLYING MATERIAL OR FIXTURES IS ENTITLED TO A LIEN AGAINST PROPERTY IF NOT PAID IN FULL FOR MATERIALS USED TO IMPROVE THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY MATERIALS OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES PROVIDED UNDER THE CON-

TRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.

SIGNED: _____

_____

ADDRESS OF PROPERTY

DATE: _____

I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER OR AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.

_____

CONTRACTOR"

Ark. Code Ann. § 18-44-115 (Supp. 2007) (emphasis added).

There was no dispute that Williams, the contractor in charge of building the Bryants' home, did not provide this notice to the Bryants. Atkinson Tile argued at trial, and the circuit court agreed, that Atkinson Tile, as a subcontractor, was only required to provide the ten-day notice pursuant to Ark. Code Ann. § 18-44-114. The court determined that only the contractor was required to provide the notice in Ark. Code Ann. § 18-44-115 and, therefore, it had nothing to do with this case. We disagree.

Arkansas Code Annotated section 18-44-101 requires a subcontractor to "compl[y] with the provisions of this subchapter" in order to acquire a lien. One of the provisions in the subchapter is Ark. Code Ann. § 18-44-115(a), which states that "[n]o lien may be acquired by virtue of this subchapter unless the owner or his or her authorized agent has received . . . a copy of the notice set out in subsection (c) of this section." This provision puts the burden on the contractor to provide the notice on behalf of all potential lien claimants under the contractor's contract but also allows any potential lien claimant to give notice as well. *See* Ark. Code Ann. § 18-44-115(b)(1). In either case, the notice must be given "prior to the supplying of any materials or fixtures." *Id.* No

materialman's lien arises unless notice under this section is given *before* the materials have been supplied.

The supreme court answered the question before us with regard to the materialman's lien of a subcontractor on commercial real estate in *Books-a-Million, Inc. v. Ark. Painting and Specialties Co.*, *supra*. Arkansas Code Annotated section 18-44-115(e) governs the notice requirements for liens on commercial real estate and requires a notice to be sent by the material supplier or laborer entitled to the lien within seventy-five days from the time that the labor was supplied or the materials were furnished. The court held in *Books-a-Million* that the notice provision must be complied with strictly and that the notice required under Ark. Code Ann. § 18-44-115 was not sent in a timely manner — that is, within seventy-five days of completion of the work. Therefore, the court reversed the trial court's judgment granting a lien on the property to the subcontractor.

We hold that the provisions in Ark. Code Ann. § 18-44-115 governing the notice requirements for liens on residential real estate must also be complied with strictly. In this case, there is no evidence that Mr. Bryant received a notice from either Williams, Atkinson Tile, or any other subcontractor "prior to the supplying of any materials or fixtures." Therefore, no lien was validly created. We reverse and remand the circuit court's determination that the judgment against Williams was secured by a mechanic's and materialman's lien on the Bryant's home. In accordance with this opinion and our opinion issued today in *Bryant v. Cadena Contracting, Inc.*, 100 Ark. App. 377, 269 S.W.3d 378 (2007), we also direct the circuit court to vacate its order granting Mr. Bryant judgment against Williams in the amount of the two liens acquired by subcontractors on his property.

Reversed and remanded.

GLADWIN, J., agrees.

BIRD, J., concurs.

SAM BIRD, Judge, concurring. I concur in the court's decision that, because no notice was provided to appellant as required by Ark. Code Ann. § 18-44-115, Jim Atkinson Tile did not acquire a valid materialman's lien on the Bryant's property. I write separately, however, to express my concern that, if neither the general

contractor nor the first supplier of materials or fixtures on a project provides a valid section-115 notice, the statute appears to make it impossible for any subsequent supplier of materials or fixtures to acquire a materialman's lien, regardless of the subsequent supplier's diligence.

Arkansas Code Annotated section 18-44-115(b)(1)(A) puts the burden for providing the notice on the contractor, but allows "any potential lien claimant" to also give notice, presumably to provide a means by which a potential lien claimant can avail himself of the benefits of the statute where the general contractor has not given the required notice. Ark. Code Ann. § 18-44-115(b)(1)(B). However, the effect of this statute appears to be to foreclose the ability of a subcontractor who supplies materials or fixtures after the commencement of construction on the project to protect himself by providing his own section-115 notice, as this notice would not have been given "prior to the supplying of any materials or fixtures." *See* Ark. Code Ann. § 18-44-115(b)(1)(A). I question whether this was the intent of the legislature when it adopted the section-115 notice requirement in 1979, and I would encourage the General Assembly to clarify the intent of Ark. Code Ann. § 18-44-115(b)(1)(B) to prevent further confusion in this area.

ARKANSAS DEPARTMENT of HEALTH & HUMAN SERVICES *v.* C.M., Minor Child

CA 06-434 269 S.W.3d 387

Court of Appeals of Arkansas
Opinion delivered December 5, 2007

Gray Allen Turner, Office of Chief Counsel, for appellant.

Teresa McLemore, attorney ad litem, for appellee.

KAREN R. BAKER, Judge. The Arkansas Department of Health and Human Services appeals from an order appointing Dale Casto to represent the minor child in an administrative appeal and for the Department to pay Mr. Casto's attorney fees because the child was in the Department's custody. On appeal, the Department argues that the circuit court abused its discretion when it ordered the Department to pay for an attorney for the minor child in an unrelated case. We disagree and affirm.

The facts of this case are as follows. Two minor children, C.M. and A.P., have been in the custody of the Department of Health and Human Services since 2001. Since that time, the parent's rights have been terminated. At a post-termination review hearing on November 30, 2005, the children's attorney ad litem, Teresa McLemore, informed the court that, as a result of alleged sexual misconduct on the part of C.M. against his sister A.P., he had been given notice that he had the right to an administrative hearing. At this time, C.M. was nine years old. Ms. McLemore requested that C.M. be appointed an attorney to represent him at the administrative hearing. The trial judge entered an order stating that Dale Casto was to represent C.M. at the administrative hearing. In a second order, the trial judge stated that, because C.M. was a juvenile in the care of the Department and was unable to pay for an attorney, the Department was financially responsible for Mr. Casto's attorney fees. From this order, the Department brings this appeal.

In equity matters, such as juvenile proceedings, the standard of review on appeal is de novo, although we do not reverse unless the trial court's findings are clearly erroneous. *See Moiser v. Ark. Dep't of Human Servs.*, 95 Ark. App. 32, 233 S.W.3d 172 (2006).

"A finding is clearly erroneous when, although there is evidence to support the finding, after reviewing all of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Brewer v. Ark. Dep't of Human Servs.*, 71 Ark. App. 364, 368, 43 S.W.3d 196, 199 (2001).

DHS contends that the circuit court did not have subject-matter jurisdiction to enter this order because DHS, as a state entity, enjoys sovereign immunity from suit. Article 5, § 20, of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." Suits against the State are expressly forbidden by this provision. *Ark. Dep't of Human Servs. v. T.B.*, 347 Ark. 593, 67 S.W.3d 539 (2002). The Department of Human Services is a State agency, and it maintains that when the trial court ordered that DHS was financially responsible for C.M.'s attorney fees for the administrative hearing, it made DHS a defendant and, thus, violated the Sovereign Immunity clause of the Arkansas Constitution. We disagree.

DHS cites to *Arkansas Department of Human Services v. State*, 312 Ark. 481, 850 S.W.2d 847 (1993), in support of its sovereign immunity argument. That case seems to indicate that sovereign immunity shelters DHS from suit; however, that case dealt with probation fees and restitution. Arkansas Code Annotated section 16-13-326(a) (Supp. 2007) provides for a juvenile court's authority to assess a probation fee; however, this statute is silent on assessing a probation fee against a *custodian*. However, the supreme court in *Arkansas Department of Human Services v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998), found that Ark. Code Ann. § 9-27-332(1) (Repl. 1993), which authorizes the court to order "family services" when a family is found to be in need of services, was, in effect, a waiver of DHS's sovereign immunity. Unlike the statutes at issue in the *State* case, the Juvenile Code expressly empowers the court to order cash assistance. *See R.P.*, 333 Ark. at 531, 970 S.W.2d at 233.

Arkansas Code Annotated section 9-27-334(a)(1)(A) (Repl. 2002) states that, "[i]f a juvenile is found to be dependent-neglected, the circuit court may enter an order making any of the following dispositions . . . Order family services . . ." "Family services" means relevant services, including, but not limited to: child care; homemaker services; crisis counseling; cash assistance; transportation; family therapy; physical, psychiatric, or psychological evaluation; counseling; or treatment, provided to a juvenile or his family. Ark. Code Ann. § 9-27-303(23)(A) (Repl. 2002);

R.P., 333 Ark. at 532, 970 S.W.2d at 233. Family services are provided in order to (i) prevent a juvenile from being removed from a parent, guardian, or custodian; (ii) reunite the juvenile with the parent, guardian, or custodian from whom the juvenile has been removed; or (iii) implement a permanent plan of adoption, guardianship, or rehabilitation of the juvenile. Ark. Code Ann. § 9-27-303(23)(B). Every six months the court shall review a case of dependency neglect or families in need of services. Ark. Code Ann. § 9-27-337(a) (Repl. 2002). In each case in which a juvenile has been placed in an out-of-home placement, the court shall conduct a hearing to review the case sufficiently to determine the future status of the juvenile. Ark. Code Ann. § 9-27-337(b)(1)(A). The court shall determine and shall include in its orders the following: whether the case plan, services, and placement meet the special needs and best interest of the juvenile, with the juvenile's health and safety specifically addressed; and whether the state has made reasonable efforts to provide family services. Ark. Code Ann. § 9-27-337(b)(1)(B). The court shall also project a date for the juvenile to return home or, if there is no projected date for return home, the projected dates for other alternatives and what those alternatives are. Ark. Code Ann. § 9-27-337(b)(1)(C)(i). As in *State* and *R.P.*, the General Assembly clearly intended to waive sovereign immunity in a situation, such as the one before us, where assistance was needed to pay for an attorney to represent a child who was in the custody of the Department in an unrelated adjudication hearing.

In the case at hand, the circuit judge recognized that if C.M., at the age of nine, is adjudicated and placed on the sex offender list, his chances of adoption will be greatly diminished. Providing him with the proper representation at the administrative hearing, in order to keep him off the sex offender list, will greatly assist in C.M.'s adoption and permanency planning. Furthermore, C.M. is entitled to an attorney at the hearing. *See* Ark. Code Ann. § 25-15-213(1) (Repl. 2002) (stating that "[a]ny person compelled to appear before any agency or representative thereof shall have the right to be accompanied and advised by counsel. Every party shall have the right to appear in person or by counsel."). Based on the foregoing, we affirm the court's order finding DHS responsible for attorney fees for a child in the Department's custody.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

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[redacted]