ARK
APP.

Carl BAGLEY *v.* Michelle Bagley WILLIAMSON

CA 07-359 269 S.W.3d 837

Court of Appeals of Arkansas
Opinion delivered December 12, 2007

[redacted]

Booth Law Firm, PLC, by: *Frank W. Booth,* for appellant.

Gean, Gean & Gean, by: *Roy Gean, III,* for appellee.

SAM BIRD, Judge. This case arises from an order of the Crawford County Circuit Court denying appellant Carl Bagley's motion to terminate his child-support obligation for his adult son, Shawn Bagley, who is mentally retarded. On appeal, appellant argues that the trial court erred in concluding that no material change in circumstances had occurred and in requiring him to continue paying child support for Shawn. We agree and reverse the trial court's order.

Appellant and appellee, Michelle Bagley Williamson, were divorced in 1996, and appellee was awarded custody of Shawn, then a minor. Appellant was ordered to pay child support.[1] In March 2003, when Shawn was seventeen years old, appellee filed a motion to modify the divorce decree increasing the amount of child support owed by appellant and extending his obligation to pay child support beyond Shawn's eighteenth birthday because Shawn was a "special needs" child. On June 16, 2003, the trial court granted the motion, finding that Shawn was a "special needs" child, which the court held justified extending the child-support obligation beyond his eighteenth birthday and increasing appellant's obligation to pay child support to $90 per week.

On February 22, 2005, the trial court entered an order denying appellant's request to terminate child support but granted appellant's motion to modify, finding that Shawn had begun receiving SSI benefits of $560 per month since the June 2003 order. Accordingly, the trial court reduced appellant's child-support obligation to $41.50 per week. On April 12, 2006, appellant filed another motion to terminate child support, claiming that a material change in circumstances had occurred since the February 2005 order in that Shawn was no longer living in appellee's home but in a group home for people with special needs.

At a hearing on the matter, appellee testified that Shawn's SSI check covered his group-home housing expenses, transporta-

[1] Another child was born of the marriage but is now an adult and not the subject of this appeal.

tion, phone bill, and pharmacy expenses. She also testified that the group home gave Shawn about $10 cash every week or every other week. She stated that there was about $50 or $100 a month left from the SSI check after the group-home expenses were paid, although it was unclear from her testimony if this amount was used to pay for Shawn's phone and pharmacy expenses. She then testified that Shawn worked part-time at Braum's and received approximately $150 every two weeks, which went directly into his personal checking account. She testified that this money was Shawn's discretionary spending money. The bank records and appellee's testimony indicated that appellee withdrew various amounts from Shawn's checking account between June and the end of September for Shawn's expenses: $80; $40; $100; $20; $60; $30; $30; $30; $40; $40. She could not remember exactly for what purpose these cash withdrawals were spent; however, she said that she did not give all of the money withdrawn directly to Shawn but gave him "maybe 10/20 dollars at a time." She stated that Shawn spent about $100 a week on his personal needs, which included shoes, clothes, paper, and CDs. The balance in Shawn's checking account at the time of the hearing was $1300.

The trial court found that the fact that Shawn had moved to a group home was not "sufficient to show a change in circumstances to terminate the support." While the trial judge noted that it was "a hard question to answer that — that Mr. Bagley's paying and Ms. Bagley's not," he indicated that Ms. Bagley started with custody and care of Shawn and that the previous judge and the parties "apparently . . . reviewed or went over this before, entered an order that found that all of this was justified" because Shawn, although eighteen years old, was "not an adult mentally." The trial judge then stated that it was "obvious [Shawn] has more expenses," but the judge also noted that he did not know what Shawn's expenses were for. He suggested that the cash transactions were a problem and that there might be a better way for appellee to keep track of Shawn's actual expenses. Nevertheless, the trial court entered an order on January 17, 2007, denying appellant's petition to terminate child support, finding that the fact that Shawn had moved from appellee's home to a group home was not sufficient to show a change in circumstances to terminate appellant's support.

On appeal, appellant argues that Shawn's move into a group home from appellee's home constitutes a sufficient change in circumstances to warrant termination of appellant's child-support

obligation and that the trial court clearly erred in holding otherwise. Our law puts the burden on a party seeking modification of a child-support obligation to show a material change of circumstances sufficient to warrant the modification. *Morehouse v. Lawson*, 94 Ark. App. 374, 376, 231 S.W.3d 86, 87 (2006). A trial court's determination as to whether there is a sufficient change in circumstances to warrant a modification or termination of child support is a finding of fact, and we will not reverse its decision unless it is clearly erroneous. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993).

It is unclear from the trial court's order whether it found that Shawn's move from appellee's home to a group home was not a change in circumstances, or whether it found that this was in fact a change in circumstances but that the change was not sufficient to warrant termination of appellant's child-support obligation. Therefore, in order to review the trial court's decision, we first hold that Shawn's move to a group home from appellee's home was a change in circumstances and, if the trial court found otherwise, its finding on this issue is clearly erroneous. Having made this preliminary holding, we turn to the trial court's finding that this change of circumstances was not sufficient to warrant termination of appellant's child-support obligation.

The general rule in Arkansas is that a parent is legally obligated to support his or her child at least until the time the child reaches majority. *Rogers v. Rogers*, 83 Ark. App. 206, 210, 121 S.W.3d 510, 512 (2003). Indeed, an obligor's duty to pay child support automatically terminates by operation of law on the later of the date that the child reaches eighteen years of age or should have graduated from high school. Ark. Code Ann. § 9-14-237 (Supp. 2005). However, the duty to support a child does not cease at majority *if* the child is mentally or physically disabled in any way at majority *and* needs support. *Id.* (citations omitted). A determination of whether continued support is proper must be made on the basis of the facts of the particular case. *See Petty v. Petty*, 252 Ark. 1032, 1036, 482 S.W.2d 119, 121 (1972).

In *Petty*, the supreme court reversed the trial court's finding that the parties' eighteen-year-old daughter, Kay, was not disabled. Kay had suffered from grand mal epilepsy from the age of two. Kay took medication twice daily to prevent convulsions, could not drive a car, lived with her mother while attending college, and was admittedly in need of specialized training in order

to obtain employment. The court concluded that, at the time of trial, Kay was unable to earn a livelihood and was in more need of a specialized education than a normal student for her to maintain herself in the future. The court noted, however, that, when she became "financially capable of taking care of herself, a different situation will exist." *Id.* at 1037, 482 S.W.2d at 121.

Neither the supreme court nor this court has held that a parent is obligated to support a disabled or special-needs child for life. Case law makes clear that the determination of whether continued support is proper must be made on the basis of the facts of the particular case and that such an obligation will be imposed only if the adult child needs the continued support. *Id.*; *Rogers*, *supra* (holding that child who maintained a 3.8 GPA in first two years of college, lived independently, had been employed, and was able to travel did not need support in spite of possible scholastic limitations following a car accident that occurred when child was in high school).

It is undisputed that Shawn is a "special needs" individual. It is also undisputed that Shawn no longer lives with appellee — as he did when the court last modified appellant's support obligation — but in a group home. Thus, appellee is no longer responsible for Shawn's housing, utilities, food, transportation, or phone bills. All of these expenses are now paid to the group home by Shawn's SSI check. Appellee admitted that Shawn's pharmacy bills were also covered expenses. Indeed, she admitted that, between his part-time job and the remaining money left from his SSI check after his expenses were paid, Shawn had approximately $400 per month to use for personal expenses. She guessed that he spent about $100 per week on personal expenses, although she could not document these expenses.

While Shawn is admittedly a special-needs person, there has been no showing that he needs continuing financial support from his parents. When the trial court ordered appellant to pay $41.50 in child support in February 2005, Shawn was living at home with appellee, who was providing his housing, utilities, food, and transportation. However, appellee is no longer incurring expenses for any of these items on Shawn's behalf because Shawn is now living in a group home with other special-needs children and adults. All of his needs, except for personal-spending items, are covered by his SSI check, which is sent directly to the group home. He has approximately $300 in earned income and a small amount left from his SSI check after his other expenses are paid for personal

items. Under the present record, we hold that the trial court erred in finding that Shawn's move into a group home from appellee's home did not constitute a sufficient change in circumstances to warrant termination of appellant's child-support obligation. Accordingly, we reverse the trial court's decision and remand with directions to terminate appellant's child-support obligation.

Reversed and remanded.

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

Carmen GRAY *v.* Karl GRAY

CA 07-584 269 S.W.3d 834

Court of Appeals of Arkansas
Opinion delivered December 12, 2007

James Law Firm, by: *Patricia A. James*, for appellant.

Amy Blackwood, for appellee.

LARRY D. VAUGHT, Judge. Appellant Carmen Gray appeals the trial court's order awarding appellee Karl Gray sole

custody of the parties' three minor children. We hold that the trial court's findings are not clearly against the weight of the evidence and affirm.

This is the second appeal of this child-custody case and, therefore, some factual and procedural background is necessary. Karl and Carmen were divorced in December 1999 and, at that time, Carmen had primary custody of their three children — Trevor, Katie, and Taylor.[1] In May of 2002, an order was entered awarding the parties "true joint legal and physical custody." The parties, who both lived in the central Arkansas area, exchanged the children on a weekly basis. Despite the weekly exchange, the children remained in the same school district and daycare facility.

In September 2004, Carmen moved to Missouri to live with her parents due to financial problems. The children stayed with Karl. Although Carmen continued to see her children after her relocation, her time with them was reduced. To see the children, Carmen drove eight hours round-trip to pick them up and return them. She testified that, following the move, she was no longer allowed to participate in decisions regarding the children and that Karl made important changes without consulting her.

In December 2004, Karl filed a motion seeking sole legal custody based primarily on Carmen's relocation to Missouri. She responded with a counterclaim seeking sole legal custody. Both parties alleged that Carmen's move constituted a material change in circumstances that required a change in custody. On August 8, 2005, the trial court held a hearing on the motions and on December 12, 2005, entered an order finding that neither party had shown a material change in circumstances to warrant a change of joint legal custody to sole legal custody. While the trial court found that the parties were to continue the joint legal custody arrangement, it further found that Karl should be designated as the primary custodian for purposes of school attendance.

Carmen appealed to this court and contended that the trial court clearly erred in finding that no material change in circumstances had occurred and requested that we award her full custody of her three children. In an opinion handed down September 6, 2006, we reversed and remanded the case, holding that the joint legal and physical custody arrangement shared by the parties was

[1] At the time of the August 8, 2005, hearing, the children were fourteen, nine, and seven years old, respectively.

impossible to maintain once Carmen moved several hundred miles away; that cooperation by the parties was lacking after Carmen moved; and therefore it was clear error for the trial court to find that a material change in circumstances did not exist requiring a change of custody. *Gray v. Gray*, 96 Ark. App. 155, 239 S.W.3d 26 (2006). Further, we directed the trial court to award custody based on its determination of the best interests of the children. *Gray*, 96 Ark. App. at 159, 239 S.W.3d at 30.

On remand, the trial court entered an order on April 10, 2007, granting Karl's motion for a change of custody, finding that Carmen's move to Missouri constituted a material change of circumstances wherein the parties could no longer act as joint custodial parents. The trial court further found that:

> It is in the best interests of the three minor children that they remain with their father due to his stability, the fact that the children have always lived in Little Rock, attended the same school systems and because they do well in school. Further Trevor Gray testified that he wished to remain with his father and . . . that it is in the best interests of the children that they remain in the same household together and not be separated from one another.

Carmen appeals from the April 2007 order arguing only that the trial court erred in awarding Karl full custody of the parties' three minor children based upon its finding that it was in the best interest of the children.

In child custody cases, we review the evidence de novo, but we will not reverse the findings of the court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). We have often stated that we know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children. *Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003). A finding is clearly against the preponderance of the evidence 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. *Mason*, 82 Ark. App. at 140, 111 S.W.3d at 859. Finally, in child-custody cases, the primary consideration is

the welfare and best interests of the child involved; all other considerations are secondary. *Walker v. Torres*, 83 Ark. App. 135, 118 S.W.3d 148 (2003).

Carmen argues that the trial court's findings were clearly against the weight of the evidence because Karl interfered with her relationship with the children, he made unilateral decisions regarding the children, he did not share the children's school information with her, and he was not cooperative with transporting the children back and forth to Missouri. Carmen also points to evidence that the attorney ad litem concluded that it was in the best interests of Katie and Taylor to be in Carmen's custody and for Trevor to remain in Karl's custody. Carmen further alleges that Karl gathered the children to discuss the custody issue, used abusive and degrading language towards them, and maintained an inappropriate relationship with his girlfriend in the presence of the children.

Even when taking into consideration the arguments made by Carmen, we hold that there are other facts in this case that clearly support the trial court's findings on the issue of the best interests of the children. First and foremost, there was a substantial amount of evidence that the children, who have essentially been in the sole custody of Karl since Carmen moved, are doing well in school, at home, and in their extra-curricular activities. The children have a stable home environment as they have lived in the same home for more than five years. The children have a stable academic environment as they have all attended schools in the same school district or daycare facility, and the evidence was that they are performing well in school. The two older children, Katie and Trevor, have played on the same athletic teams for many years. Additionally, Trevor testified that he wanted to live with his father and that he did not want to be separated from his sisters.

In addition, other evidence reflects that Carmen lacks financial stability while Karl has exhibited financial stability. Both Carmen and Karl live with their parents. However, Carmen relies completely upon her parents for financial support, while Karl provides a significant amount of financial support for his children. Carmen has demonstrated an inability to hold down a job, while Karl has held the same job as an emergency-room nurse for at least the past five years. Finally, the evidence shows that Carmen also lacks the motivation to improve her perilous financial situation. She moved to Missouri in September 2004 to live with her parents,

but almost one year later she was still unemployed and had not yet attended any classes in an effort to obtain a vocational degree.

Therefore, based upon the standard of review and the facts presented in this case, we cannot say that the trial court's findings were clearly against the preponderance of the evidence. Accordingly, we affirm.

Affirmed.

MARSHALL and MILLER, JJ., agree.

Rebecca CHANDLER *v.* ARKANSAS APPRAISER LICENSING & CERTIFICATION BOARD

CA 07-193 269 S.W.3d 827

Court of Appeals of Arkansas
Opinion delivered December 12, 2007

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Koch Law Firm, by: *Reggie Koch*; *Carol D. Nokes*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Warren T. Readnour*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. Appellant Rebecca Chandler, a certified residential appraiser, appeals from an order of the Pulaski County Circuit Court affirming an order by appellee Arkansas Appraiser Licensing & Certification Board. The Board suspended Chandler's license for six months, to be followed by a six-month probationary period. The Board also ordered Chandler to pay a civil penalty of $2,000 and complete two remedial courses and examinations.[1] Chandler raises three points for reversal. We affirm.

Background

The Board received a March 28, 2001, letter from the Arkansas Securities Department requesting review of several appraisals that Chandler prepared for Guaranty Lending, Inc., resulting from the Securities Department's investigation into Guaranty, together with a letter to the Securities Department from another appraiser, Tom Ferstl. The Board also received a referral from Fannie Mae concerning one of Chandler's appraisals.

On May 31, 2002, the Board served an order and notice of hearing on Chandler, alleging that Chandler had violated certain provisions of the Uniform Standards of Professional Appraisal Practice (Standards). Arkansas Code Annotated section 17-14-305(a)(1) (Repl. 2001) requires that appraisers comply with the Standards.[2] Among other things, the Standards require that the appraiser not commit a substantial error of omission or commission that significantly affects an appraisal; not render appraisal services

[1] We remanded Chandler's first appeal to the Board to make sufficient findings to allow proper review of its actions. *Chandler v. Arkansas Appraisers Licensing & Certification Bd.*, 92 Ark. App. 423, 214 S.W.3d 861 (2005).

[2] The Board has also adopted the Standards as part of its rules by reference.

in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affect the credibility of those results; analyze any current listing of the property, if available to the appraiser in the normal course of business; and analyze any sales within one year for residential property. In addition, an appraiser must clearly and accurately set forth the appraisal in a manner that will not be misleading and contains sufficient information to enable the intended user to understand the report properly. The Board conducted a hearing on May 20, 2003.

The Evidence

Jim Martin, the Board's executive director, testified that the Board's investigation was prompted by the letter from the Securities Department and another letter from Ferstl. He said that the normal procedure was to notify an appraiser within a reasonable time that a complaint had been filed. He admitted that Chandler was not promptly notified because the Securities Department indicated that they would not proceed until the FBI completed its investigation into Guaranty. Martin stated that the Board did likewise and did not notify Chandler, despite a "mandate" that the Board should not allow complaints to remain unresolved for more than one year. He said that he considered the FBI's involvement to be an unusual circumstance. After a meeting with two FBI agents in May 2002, Martin said that the Board was allowed to proceed with its investigation of Chandler. Martin stated that, after a preliminary investigation and a response from Chandler's attorney, two Board members found probable cause to employ investigators to review Chandler's appraisals at issue. This review was completed in February 2003, and Martin said that the decision was made to proceed with a hearing before the full Board.

Jay Hall, a licensed appraiser engaged by the Board to review three of Chandler's appraisals, testified that he conducted his review in accordance with the Standards. Regarding the appraisal of 1023 South Madison, he stated that Chandler failed to note a garage in her appraisal, failed to notice settlement problems, and misstated that the windows were wooden when they were aluminum. In his opinion, this resulted in Chandler's committing a substantial omission that significantly affected her appraisal. He also stated that Chandler further violated the Standards by failing to disclose to Fannie Mae sales data on the comparables used in the appraisal. Hall stated that, because of the comparables Chandler

used, her valuation was higher than it should have been and, thus, misleading. On cross-examination, he admitted that his review contained mistakes, such as his noting that the central heat and air did not work when only the central air was inoperable. He also noted that Chandler's report listed a gravel driveway while his report listed a concrete driveway when, in reality, it is a concrete driveway covered with gravel.

In his review of Chandler's appraisals of 1602 Welch and 2909 John Barrow Road, Hall stated that Chandler's appraisals were rendered in a careless or negligent manner because she made a series of errors that, when considered in the aggregate, would affect the credibility of the appraisal. He stated that Chandler's effective age of each home was too low and that the comparables used were not representative of the subject properties. He admitted that he was not able to inspect the interiors of either subject property. Hall pointed out other problems with the comparables. He admitted that the passage of time between the appraisal and the review is a factor in the accuracy of the review. Hall also stated that Chandler violated the Standards by listing, but failing to analyze, the $58,000 sales price on the Welch Street property.

Susan Benson, the other appraiser engaged by the Board, testified that she reviewed Chandler's appraisals of 1305 Booker, 5008 West 31st Street, and 5120 West 31st Street in accordance with the Standards after obtaining data from the relevant time period. She concluded that Chandler did not analyze all of the sales contracts concerning the Booker property. She also noted that Chandler used comparables that were in superior neighborhoods to the subject property and that this would significantly affect the appraisal. Concerning Chandler's appraisals of the West 31st Street properties, Benson stated that Chandler again used comparables from superior neighborhoods. She noted that it was a "high crime area," which reduces property value. She noted that Chandler failed to report a fireplace on one comparable or a basement on another but stated that these omissions would not affect the credibility of Chandler's reports. She also stated that Chandler's effective age for the homes was too low and that she failed to properly analyze neighborhood characteristics.

Although she testified that she was familiar with the Fannie Mae guidelines, Benson stated that she did not consider them applicable in conducting her reviews. She also described the neighborhoods as "high crime" even though Fannie Mae guidelines prohibit the use of terms that could be considered racial

stereotypes. She admitted that she did not inspect the interiors of the homes. In her opinion, Chandler's comparables from superior neighborhoods resulted in a higher value being shown and were thus misleading.

During her testimony, Chandler stated that she believed that her rights had been violated and that she was not given the opportunity to informally discuss the matter prior to proceeding to a hearing. She stated that, during the time covered by the investigation, she was under pressure because of family and professional obligations but that she conducted approximately 750 appraisals in 2000. She was able to complete such a large number of appraisals with the assistance of five appraisers whom she was mentoring and training. She stated that she personally inspected five of the six properties under scrutiny, the Welch Street property being inspected by one of her trainees. She also described her usual practice in obtaining data for an appraisal. She stated that she has changed some of her methods as a result of the investigation. Chandler stated that she was familiar with the Standards and the Fannie Mae guidelines and that she tries not to use comparables that do not meet those guidelines. She denied that Guaranty put pressure on her that her appraisals be for a minimum amount.

Chandler stated that she believed her appraisals to be credible but admitted to making mistakes by not including all relevant sales history. She also stated that the review appraisers also made mistakes in their reports, including violation of federal law. As an example, she admitted to not analyzing the sales contracts on the subject properties, which she said is an obvious violation of the standards. Other examples of mistakes she made included a mistake in the cost approach to the appraisal on 5120 West 31st Street and by not reporting all sales history as required by the Standards. She also conceded that pictures of some of the comparables showed that they appeared to be in better condition than the subject properties.

The Board found Chandler guilty of violating the Standards and imposed punishment. Following this court's remand, the Board held another hearing on February 14, 2006, and adopted more specific findings of fact. Those findings explained in great detail the problems revealed with each of Chandler's appraisals at issue. The final finding was that Chandler had provided her client with appraisals containing misleading statements, omissions, and inconsistencies. The findings were prepared by Jim Martin from the notice sent to Chandler in May 2002. The Board also adopted

the same punishment it had previously imposed — suspension of Chandler's license for six months, to be followed by a six-month probationary period, payment of a civil penalty of $2,000, and completion of two remedial courses and examinations. Chandler again sought judicial review. The circuit court affirmed the Board, and this appeal followed.

Standard of Review

It is not this court's role to conduct a de novo review of the circuit court proceeding; rather, our review is directed at the decision of the administrative agency. *Arkansas Dep't of Human Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). When reviewing administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, whether there is arbitrary and capricious action, or whether the action is characterized by abuse of discretion. *Arkansas Dep't of Human Servs. v. Schroder*, 353 Ark. 885, 122 S.W.3d 10 (2003).

To determine whether a decision is supported by substantial evidence, we review the whole record to ascertain if it is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* To establish an absence of substantial evidence to support the decision, the party challenging the decision must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusions. *Id.* Substantial evidence is valid, legal, and persuasive evidence. *Id.* To set aside an agency decision as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoned, without consideration and with a disregard of the facts and circumstances of the case. *See Partlow v. Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d 23 (1980).

Arguments of Appeal

Chandler first argues that the Board's decision was based on unlawful procedure that prejudiced her rights. During her testimony, Chandler asserted that her rights had been violated but did not specify how the violations occurred. She now asserts several procedural violations that allegedly occurred, such as the Board's failure to follow its own rules in failing to properly and timely notify her of the complaint made by the Securities Department and

the Board's using stale evidence in the form of appraisals made by investigators for the Board approximately two years after she performed the appraisals under scrutiny.

According to Chandler, the Board violated its own rules by considering the letter from the Arkansas Securities Department to be a "complaint" to be investigated because the letter did not state the issues of the complaint and the dates on which the events leading to the complaint occurred, as required by the Board's rules. Where the agency's failure to follow its own procedural rules is urged on appeal, the applicable question on review is "whether the [Board's] decision is based upon unlawful procedure." *Stueart v. Arkansas State Police Comm'n*, 329 Ark. 46, 50-51, 945 S.W.2d 377, 379 (1997). The Board's investigation of Chandler was proper because Ark. Code Ann. § 17-14-206 (Repl. 2001) allows the Board, after notice and a hearing, to take disciplinary action against an appraiser *on its own motion*, with or without a "proper" complaint. It is undisputed that the Board sent Chandler an order and notice of hearing identifying the date of the hearing and the allegations against her. Further, the Board did receive a proper complaint from Fannie Mae concerning one of Chandler's appraisals.

For the next part of this point, Chandler argues that the Board failed to timely inform her of the "complaint" from the Securities Department and that this prejudiced her rights. As noted above, the Board sent Chandler a proper order and notice of hearing setting forth the charges against her. Jim Martin testified that the Board attempts to follow a guideline that complaints not be allowed to remain unresolved for more than one year. However, the guideline or "mandate" is not part of the governing statutes or the Board's own rules. The only statutory authority imposing a time limit on the Board's investigations of appraisers is Ark. Code Ann. § 17-14-206(b) (Supp. 2007), which was enacted in 2005 and places a three-year limitation on investigations. Chandler makes no argument concerning this statute. Further, Martin stated that the request by the Securities Department and the FBI that the investigation be delayed while the FBI proceeded with its investigation constituted unusual circumstances warranting the delay.

As a further part of this point, Chandler argues that Hall and Benson made errors in their reviews of her appraisals and that these

errors render the Board's acceptance of their testimony arbitrary and capricious. Chandler, as the party challenging the Board's decision, has the burden of proving an absence of substantial evidence. *Williams v. Arkansas State Bd. of Physical Therapy*, 353 Ark. 778, 120 S.W.3d 581 (2003). To establish an absence of substantial evidence to support the decision, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.*

Chandler points out that Hall and Benson admitted that they did not inspect the interiors of all six homes they reviewed. Further, Hall admitted that he had missed some items such as one property having a concrete and gravel drive that he had labeled a concrete drive. He also stated that there were typographical errors in his report. Chandler also argues that, because Benson's reviews used the term "high crime area," Benson engaged in discriminatory "redlining" that is prohibited by state and federal law and, therefore, her reviews cannot constitute substantial evidence to support the Board's decision.

The fact that Hall and Benson made mistakes in their reviews goes to the weight to be given to their reviews and explanatory testimony; nevertheless, the reviews provided some evidence from which the Board could conclude that Chandler violated the Standards. Their testimony and reviews document the errors Chandler made in the six appraisals at issue. Even if we did not consider Benson's testimony, it would still leave Hall's testimony to support the Board's action. Further, Chandler admitted to a violation of the Standards in that she did not analyze the sales contract on one of the subject properties, as well as her agreement that pictures of at least one of the comparables appears to support the conclusion that the comparable was in superior condition to the subject property. It is the Board that determines the weight to be given to the evidence. *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999). In reviewing the record, we give the evidence its strongest probative force in favor of the agency's ruling. *Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001). We conclude that there is substantial evidence to support the Board's decision.

For her second point, Chandler argues that the Board violated Ark. Code Ann. § 25-15-210(a) (Repl. 2002) when it adopted the revised findings of fact without first reviewing the

transcript of the proceedings before voting in this case.[3] This issue is not preserved for our review. At the remand hearing, Chandler presented a document containing several objections to what she perceived to be violations of her rights. Nowhere mentioned in those objections is an objection to the Board members' not having reviewed the earlier proceedings prior to adopting the revised findings. Our supreme court has held that the failure to object because the members of an administrative body had not reviewed the transcript prior to voting on the matter precludes judicial review of the issue. *Ford Motor Co. v. Arkansas Motor Vehicle Comm'n*, 357 Ark. 125, 161 S.W.3d 788 (2004).

Chandler's third and final point challenges several of the Board's revised findings as not specific enough, not supported by the record, not constituting violations of the Standards, not affecting valuation, or misleading. Chandler focuses on each sentence in the Board's findings; (however, we do not engage in a de novo review of the Board's actions, and are not permitted to do so under the Administrative Procedure Act. *Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 994 S.W.2d 456 (1999). Chandler argues that, at most, the evidence proves that she made some mistakes in her appraisals and that it is human to make mistakes. However, the Board cannot discipline Chandler for merely making mistakes unless they demonstrate incompetence or are violations of the statutes and regulations pertaining to appraisers. *See* Ark. Code Ann. § 17-14-206(a)(4) (Supp. 2007). Instead, the focus should be on the Board's conclusion that Chandler violated the Standards or other Board rules and regulations. *See Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000). Chandler admitted that she had violated the Standards in at least one instance by failing to properly analyze the sales contract of one property as well as her agreement that some of the comparables she used appear to be

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[3] Section 25-15-210(a) provides as follows:

> When, in a case of adjudication, a majority of the officials of the agency who are to render the decision have not heard the case or read the record, the decision, if adverse to a party other than the agency, shall not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary thereto, prepared by the person who conducted the hearing.

superior to the subject properties. Therefore, the Board's decision is supported by substantial evidence.

Affirmed.

GLOVER and HEFFLEY, JJ., agree.

David Lance ELLIS *v.* STATE of Arkansas

CA CR 07-187 270 S.W.3d 377

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

Petty Law Firm, by: *D. Paul Petty*; *Smith & Moore, PLC*, by: *Susan Lusby*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Jake H. Jones*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. Appellant in this criminal case was convicted of four counts of rape of his minor stepdaughter, committed when she was between the ages of eleven and fourteen. The victim testified that the abuse occurred continuously over a period of several years, usually on the living room couch, when her mother was present. Appellant moved in limine to prevent any testimony that appellant's wife, the victim's mother, pled guilty to abusing her minor son. This was denied. On appeal, appellant argues that the trial court erred in allowing testimony by the victim that her brother knew about the abuse because he was involved in it, and testimony of a police officer that appellant's wife was in the county jail. We affirm.

Appellant's arguments hinge on his assertion that his wife's sexual abuse of the children was not relevant to his crime, or that any relevance is outweighed by the potential for unfair prejudice. He is wrong. Evidence of the depravity of appellant's wife was highly relevant, especially in light of the victim's testimony that the rapes continued for years in the open where her mother was present.

Appellant's wife had a legal duty to protect her daughter from sexual abuse if she knew or should have known it was occurring. *See* Ark. Code Ann. § 9-27-303(36)(A) (Supp. 2005). More importantly, Arkansas courts, in recognition of basic human nature, have long engaged the presumption that parents will care for their children, bring them up properly, and treat them with kindness and affection. *See, e.g.*, *Manuel v. McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988). The State needed to explain how these crimes could possibly have occurred in the presence of the victim's mother; therefore, the mother's depraved sexual abuse of her own children was highly relevant.

Abuse of another child in the same home has been held to be relevant and admissible even when perpetrated by the defendant. *See, e.g.*, *Limber v. State*, 264 Ark. 479, 572 S.W.2d 402 (1978).

> [T]he general rule is that evidence of other crimes by the accused, not charged in the indictment or information and not a part of the same transaction, is not admissible at the trial of the accused; however, evidence of other crimes is admissible under the *res gestae* exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense. *Haynes v.*

> *State*, 309 Ark. 583, 832 S.W.2d 479 (1992); *Young v. State*, 269 Ark. 12, 598 S.W.2d 74 (1980). Under the *res gestae* exception, the State is entitled to introduce evidence showing all circumstances which explain the charged act, show a motive for acting, or illustrate the accused's state of mind if other criminal offenses are brought to light. *Haynes v. State, supra.* Specifically, all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. *Haynes v. State, supra.* Where separate incidents comprise one continuing criminal episode or an overall criminal transaction, or are intermingled with the crime actually charged, the evidence is admissible. *See Ruiz & Van Denton v. State*, 265 Ark. 875, 582 S.W.2d 915 (1989); *Thomas v. State*, 273 Ark. 50, 615 S.W.2d 361(1981); *Henderson v. State*, 284 Ark. 493, 684 S.W.2d 231 (1985). *Res gestae* testimony and evidence is presumptively admissible. *Henderson, supra*; *Lair v. State*, 283 Ark. 237, 675 S.W.2d 361 (1984); *Love v. State*, 281 Ark. 379, 664 S.W.2d 457 (1984); *Hobbs v. State*, 277 Ark. 271, 641 S.W.2d 9 (1982).

Gaines v. State, 340 Ark. 99, 110, 8 S.W.3d 547, 554 (2000). Here, the testimony was essential to explain the charged act, it was therefore of great relevance, and, because it involved the crime of a third party rather than of the appellant himself, there was far less danger of unfair prejudice than would normally be the case.

Affirmed.

ROBBINS and BIRD, JJ., agree.

STERNE, AGEE & LEACH, INC. *v.* Kenneth WAY, Humnoke Farms, Inc., and Hutson Way

CA 06-1410 270 S.W.3d 369

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

Bequette & Billingsly, by: *Jay Bequette*; *Haskell Slaughter Young & Rediker, LLC*, by: *Peter J. Tepley*and *Latanishia D. Watters*, for appellant.

Stuart Law Firm, P.A., by: *Ginger Stuart Schafer*, for appellees.

JOHN MAUZY PITTMAN, Chief Judge. This is an appeal from a circuit court's denial of a motion to compel arbitration.[1] Appellant Sterne, Agee, & Leach, Inc., argues two points on appeal: (1) that the trial court erred in denying its motion to compel arbitration; and (2) in the alternative, if this court affirms the denial of its motion to compel arbitration, venue should be changed from Lonoke County to Pulaski County. We find no error, and we affirm.

This court reviews a circuit court's order denying a motion to compel arbitration de novo on the record. *Richard Harp Homes, Inc. v. Van Wyk*, 99 Ark. App. 424, 262 S.W.3d 189 (2007). Our review of the record reveals that Kenneth Way and Hutson Way hired attorney Keith Moser to handle their farm and other business interests. Moser organized Humnoke Farms, Inc., in April 2002 for the Ways, and some farmland was placed in the corporation's name. Moser brought about the sale of the farmland in December 2002, which realized $1,136,919.88 in proceeds. According to the parties' stipulated facts, Moser told the Ways that:

[1] An order compelling arbitration is an appealable order pursuant to Arkansas Rule of Appellate Procedure–Civil 2(a)(12) which provides, in pertinent part, that an appeal may be taken from "[a]n order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 [part of Arkansas's Uniform Arbitration Act] (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration)."

> (a) he would hold Humnoke's Sales Proceeds in the trust account of his law firm Moser & Associates (the "Moser Trust Account"); (b) the funds would earn five percent (5%) interest while they were in the Moser Trust Account; (c) the [Ways] would have the ability to withdraw the principal and/or interest of the Humnoke Sales Proceeds as needed; and (d) he would invest the Humnoke sales proceeds in an investment with a potentially higher yield as soon as one was available.

At the end of this quote, the parties stipulated to a footnote that stated: "[The Ways] contend that Moser was to notify [the Ways] of such an investment when he found one." The proceeds of the sale were deposited into Moser's trust account, and on several occasions, the Ways asked Moser when the new higher-yield investment would be made; he informed them that it would be "forthcoming."

On December 26, 2002, Moser withdrew $153,387.92 of the Humnoke sales proceeds and placed that money in an investment account that he opened with appellant Sterne, Agee in Humnoke's name. Moser gave Sterne, Agee a purported corporate resolution of Humnoke authorizing the opening of the account. Although he was not an officer of the corporation, Moser signed the document as president and secretary. The address that Moser provided to Sterne, Agee was not Humnoke Farms's actual address, but Moser's business address. The funds deposited in the Sterne, Agee account drew an interest rate of 6.5% per year. According to the Ways, they had no personal knowledge of the investments at Sterne, Agee and Moser had no authority to issue the resolution by which he established the account.

On November 19, 2003, Moser sent a spurious letter of instruction from Humnoke, which he signed as president, to Sterne, Agee, directing that the account be closed and that a check to Humnoke be issued for all of the money in the account, including the income it had generated. Sterne, Agee, sent a check made out to Humnoke for $164,990.67 to the address provided by Moser. At that time, the Ways had approximately $900,000 still on deposit with Moser. Moser fled this country and was later found in Madagascar. The Ways discovered Moser's theft and filed this action on April 15, 2004, against Moser & Associates, P.A., Moser, John Holleman IV, and Sharrock Dermott.[2] They amended their

[2] Holleman and Dermott were "of counsel" at Moser's law firm.

complaint to include negligence and conversion claims against Sterne, Agee on May 11, 2004, seeking the amount of the initial investment and the income it generated. They described that amount as "the amount which was fraudulently withdrawn from their account at Defendant Sterne, Agee & Leach, Inc., by Defendant Moser. . . ."

On June 21, 2004, Sterne, Agee filed a motion to compel arbitration under the Federal Arbitration Act or, in the alternative, for change of venue to Pulaski County. Appellees responded to the motion by arguing that arbitration should not be compelled because they were not signatories to the account agreement; they did not give actual or apparent authority to Moser to invest their funds with Sterne, Agee or to withdraw the funds; and they did not ratify Moser's actions. In their second amended complaint, filed July 22, 2004, appellees dropped their negligence claim and alleged that they did not authorize Moser to establish the account. Sterne, Agee renewed its motion to compel arbitration or, in the alternative, for change of venue on August 16, 2004. On April 18, 2006, the parties entered joint stipulations of fact.

On August 18, 2006, the court entered an order denying Sterne, Agee's motion to compel arbitration. The order stated:

> Motion to Stay Proceedings and for an Order to Compel Arbitration, or in the Alternative, Motion for Change of Venue filed by Separate Defendant Sterne, Agee & Leach, Inc.
>
> 11. Genuine issues of material fact and of law exist as to Separate Defendant Sterne, Agee & Leach, Inc.'s role in the loss of Plaintiffs' farm sale proceeds and whether Separate Defendant Sterne Agee & Leach, Inc., is liable to Plaintiffs for blindly accepting the word of Separate Defendant Moser, a good customer of Separate Defendant Sterne Agee & Leach, Inc., about Separate Defendant Moser's legal and corporate status when dealing with contracts and investments.
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> 12. Genuine issues of material fact exist as to whether Separate Defendant Sterne, Agee & Leach, Inc., had a binding contract with Plaintiffs and whether Separate Defendant Sterne, Agee & Leach, Inc., assisted Separate Defendant Moser in converting funds owed and belonging to Plaintiffs.
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> 13. Pursuant to Ark. Code Ann. § 16-108-202, the Court finds that Sterne, Agee & Leach has not proven there was an agreement to

arbitrate between Plaintiffs and Sterne, Agee & Leach, Inc., such that the petition to stay proceedings and compel binding arbitration is denied.

Sterne, Agee asserts that there are three reasons why the trial court committed error in denying its motion for arbitration. First, it argues that, by seeking the increase of the value of the funds invested with Sterne, Agee, appellees sought the benefit of the account agreement and thus are bound by the burdens of the contract, including the arbitration agreement. Second, it argues that Moser was acting as appellees' agent when he deposited the funds in the account. Third, it contends that, even if Moser was not authorized to enter into the account agreement, appellees ratified that agreement, including its arbitration clause, when they sought to recover not just the amount invested but also the amount earned on the investment.

Sterne, Agee emphasizes the strong national policy favoring the enforcement of arbitration agreements. *See Perry v. Thomas*, 482 U.S. 483 (1987). The liberal federal policy favoring arbitration agreements requires that any doubts regarding arbitrability should be resolved in favor of coverage under the agreement unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986). Sterne, Agee also correctly points out that even a party who has not signed an arbitration agreement can be compelled to arbitrate his claims, pursuant to contract and agency principles. *See Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185 (9th Cir. 1986). Furthermore, a non-signatory can be estopped from refusing to comply with an arbitration clause if he has received a direct benefit from the contract. *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000). Sterne, Agee contends that contract and agency principles, as well as estoppel, require appellees to be bound by this arbitration agreement.

We first address the issue of estoppel. Estoppel *in pais* is the doctrine by which a person may be precluded by his acts or conduct, or by failure to act or speak under circumstances where he should do so, from asserting a right which he otherwise would have had. The elements of equitable estoppel are these: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the

party asserting estoppel must rely on the other's conduct to his detriment. *King v. Powell*, 85 Ark. App. 212, 148 S.W.3d 792 (2004). A party who by his acts, declarations, or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled. *Id.* However, there is no estoppel in the absence of a change of position in reasonable reliance. *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000). Whether there has been actual reliance and whether it was reasonable are usually questions for the trier of fact. *Kearney v. Shelter Ins. Co.*, 71 Ark. App. 302, 29 S.W.3d 747 (2000). Because we find on de novo review that Sterne, Agee did not detrimentally rely on any action of appellees, estoppel is inapplicable.

Sterne, Agee next argues that the claims against it arise out of, or are related to, the account agreement and, therefore, are covered by the arbitration clause. In deciding whether a party has entered into an agreement to arbitrate under the FAA, courts are to apply general state law principles, giving due regard to the federal policy favoring arbitration. *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). The same rules of construction and interpretation apply to arbitration agreements as apply to contracts generally. *Hamilton v. Ford Motor Credit Co.*, 99 Ark. App. 124, 257 S.W.3d 566 (2007).

Here, contract principles would apply if there had been a contract between appellees and Sterne, Agee. The agreement's paragraph 22 provides that arbitration will apply to:

> Any controversy: (1) arising out of or relating to any of my accounts maintained individually or jointly with any other party, in any capacity, with you: or (2) relating to my transactions or account with any of your predecessor firms by merger, acquisition, or other business combination with the inception of such accounts: or (3) with respect to transactions of any kind executed by, through or with you, your officers; directors, agents and/or employees; or (4) with respect to this agreement or any other agreement entered into by you relating to my accounts or the breach thereof, shall be resolved by any arbitration conducted only at the NYSE, NASD, or AMEX or any self regulatory organization ("SRO") subject to the

> jurisdiction of the securities and exchange commission and pursuant to the arbitration procedures then in effect of any such SRO as I may elect.

Sterne, Agee argues that, in seeking to recover the entire amount of the funds plus their increase in value, and by alleging that Sterne, Agee owed appellees a duty to insure that it was transferring the funds to Humnoke and not to someone impersonating its officers, appellees recognized that the agreement covers the claims in this lawsuit. It notes that a plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994). It argues that, if it owed Humnoke any type of duty, that duty arose from the account agreement. However, we do not think that appellees have received any benefit from Sterne, Agee. Their claim to the increase in value of their property during the period of conversion is not inconsistent with their assertion that they did not authorize the account. It is true that, ordinarily, the proper measure of damages for conversion is the market value of the property at the time and place of its conversion. *Buck v. Gillham*, 80 Ark. App. 375, 96 S.W.3d 750 (2003). However, the circumstances of a case may require a different standard. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998).

Sterne, Agee also points out that, in their first amended complaint, appellees stated that they had been "damaged in the sum of $164,990.67, the amount which was fraudulently withdrawn from their account" with Sterne, Agee by Moser. It contends that appellees are bound by that pleading and cannot maintain an inconsistent position. *See International Harvester Co. v. Burks Motors, Inc.*, 252 Ark. 816, 481 S.W.2d 351 (1972). We do not think that this argument significantly advances Sterne, Agee's position. At most, the allegations in the withdrawn pleading are evidence of admissions; they are not conclusive. *See Belz-Burrows, L.P. v. Cameron Constr. Co.*, 78 Ark. App. 84, 78 S.W.3d 126 (2002).

From our examination of the record, we conclude that the arbitration clause was broad enough to cover the conversion claim if there were a contract between the parties. Whether they had such a contract will be determined by the principles of agency. Sterne, Agee asserts that Moser was acting with actual and apparent authority from appellees when he opened the account. It notes that

appellees admitted in their first amended complaint that they delegated actual authority to Moser to invest the Humnoke sales proceeds. It also argues that appellees conferred apparent authority on Moser by granting him the authority to invest the sales proceeds.

The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control and that the other consents to so act. *Reed v. Smith Steel, Inc.*, 77 Ark. App. 110, 78 S.W.3d 118 (2002). The two essential elements of an agency relationship are (1) that an agent have the authority to act for the principal, and (2) that the agent act on the principal's behalf and be subject to the principal's control. *Id.* If the facts are in dispute, agency is a question of fact to be determined by the finder of fact. *Id.* Agency can be proved by circumstantial evidence, if the facts and circumstances introduced into evidence are sufficient to induce in the mind of the finder of fact the belief that the relation did exist and that the agent was acting for the principal in the transaction involved. *Id.* The law makes no distinction between direct evidence of a fact and circumstances from which a fact can be inferred. *Id.*

In Arkansas, apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority that he has, or such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. *Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993). Ordinarily, whether an agent is acting within the scope of actual or apparent authority is a question of fact for the jury to determine. *Crail v. N.W. Nat'l Ins. Co.*, 282 Ark. 175, 666 S.W.2d 706 (1984). It is not clear from the stipulated facts that appellees conferred actual authority on Moser because they dispute having given him authority to invest the funds without their approval. It does not appear that Moser had actual authority to do what he did, because it is apparent that he was not acting on behalf of appellees in opening or closing the account. It has also not been established that Moser was acting within the authority appellees knowingly permitted him to assume. Also, there was no "holding out," as the principles of

apparent authority require. Thus, a fact question regarding Moser's agency remains to be tried before it can be determined whether the parties had a contract.

Sterne, Agee further argues that, even if appellees did not authorize Moser to open the Sterne account, they ratified the agreement because they are seeking to recover the benefits of Moser's actions (the interest on the investment). A principal may ratify an unauthorized contractual decision by an agent. Ratification refers to the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another without authority. *Arnold v. All-Am. Assur. Co.*, 255 Ark. 275, 499 S.W.2d 861 (1973). When a principal has knowledge of the unauthorized acts of his agent and remains silent, when he should speak, or accepts the benefit of such acts, he cannot thereafter be heard to deny the agency and will be held to have ratified the unauthorized acts. *Id.* Ratification may be implied rather than expressed and, thus, may be inferred from the acts and words of the principal. *Id.* Whenever the facts are in dispute, or are such that reasonable men could draw different conclusions, ratification is a question of fact for the jury; it is a question of law only when the facts are undisputed or unequivocal. *Id.* The doctrine of ratification, however, has no application if there was no agency relationship. *E.P. Dobson, Inc. v. Richard*, 17 Ark. App. 155, 705 S.W.2d 893 (1986). Thus, this issue also turns on the resolution of the fact question of whether Moser acted as appellees' agent.

In the alternative, Sterne asks this court to hold that the trial court should have granted its motion to transfer venue to Pulaski County. However, the trial court did not rule on Sterne's alternative motion to transfer venue. This court does not address issues on which an appellant fails to obtain a ruling. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

Even if the circuit court had ruled on the venue motion, we would not address it in light of the narrow scope of appellate review given to an interlocutory ruling. In *Coleman's Service Center, Inc. v. Southern Inns Management, Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993), this court noted that, when a trial court permits an interlocutory appeal on one issue and other issues remain to be decided, the issues raised in the appeal must be reasonably related to the order appealed from. This court stated that an interlocutory appeal may not be used as a vehicle to bring up for review matters

that are still pending before the trial court. As a general rule, an appeal from an interlocutory decision brings up for review only the decision from which the appeal was taken. In *Villines v. Harris*, 340 Ark. 319, 324, 11 S.W.3d 516, 519 (2000), the supreme court explained:

> When an appeal reaches a court via an order granting a preliminary injunction, the appellate court will not delve into the merits of the case further than is necessary to determine whether the trial court exceeded its discretion in granting the injunction.
>
> Here, we have a distinct basis and specific authority to hear the appeal from an injunction, and the extent of our review is dependent on the decision appealed from. Although we may regret our lack of ability to give a trial court sufficient guidance on remand so that it might avoid error, we cannot precipitately prevent such error by preempting the trial court's action. We have long held that our role, for better or worse, is to decline to issue advisory opinions. *See Seeco, Inc. v. Hales*, 330 Ark. 402, 414, 954 S.W.2d 234, 241 (1997). We are limited to a review of the record before us.

Accord Doe v. Ark. Dep't of Human Servs., 357 Ark. 413, 182 S.W.3d 107 (2004); *Custom Micro-Sys., Inc. v. Blake*, 344 Ark. 536, 42 S.W.3d 453 (2001).

Affirmed.

ROBBINS and BIRD, JJ., agree.

BULL MOTOR COMPANY *v.* Jason MURPHY

CA 07-183 270 S.W.3d 350

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

[Rehearing denied January 23, 2008.*]

* ROBBINS, GRIFFEN and MARSHALL, JJ., would grant rehearing.

Easely & Houseal, by: *B. Michael Easley*and *John I. Houseal*, for appellant.

Jesse B. Daggett, P.A., by: *Jesse B. Daggett*, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. An unknown thief took a new truck from the lot of appellant Bull Motor Company (BMC) and drove it for a short period of time before the

truck was recovered and returned to BMC. BMC subsequently sold the truck as "new" to appellee Jason Murphy without disclosing this history. Upon discovering the true history, Murphy filed suit. A jury awarded Murphy $7,000 in damages. In this appeal from that verdict, BMC raises four points for reversal. We affirm.

Background

On December 8, 2004, a thief stole a 2005 truck from BMC. The truck was recovered by the police ninety minutes later and had been driven forty miles. The truck was returned to BMC's lot. On January 4, 2005, Murphy purchased the truck as a "new" truck for $33,495. The salesman, Bo Henderson, was unaware that the truck had been stolen at the time of the sale and did not disclose the information to Murphy.

On March 10, 2005, Murphy filed suit, alleging that BMC breached the sales contract by not disclosing the prior theft of the truck. The complaint also asserted that the vehicle was worth $8,495 less because it had been stolen and driven by the thief. BMC denied the material allegations of the complaint and asserted that Murphy had not suffered any damages. BMC later moved for summary judgment, contending that Murphy suffered no damages in that he received a "new" vehicle because Ark. Code Ann. § 23-112-103(22) (Repl. 2004) defines a "new" vehicle as one whose title has not been transferred to an ultimate purchaser. The circuit court denied the motion, and the case proceeded to trial.

The Evidence

At trial, Murphy testified that he wanted a "new" vehicle — one that had not been stolen or wrecked. This was important to him, he said, because he was looking for dependable transportation to work and one would not know how the thief drove the vehicle. He opined that the vehicle he purchased was "used," not "new," because it had been stolen and driven by the thief. Murphy stated that, when he learned that the truck had been stolen, he called BMC and asked for another "new" vehicle but that they refused the request. At that time, he had driven the truck approximately 1,000 miles. Over BMC's objection, he testified that the rear end had to be replaced at 18,000 miles. He acknowledged that he did not know whether the thief's actions had any effect on the rear end. Murphy stated that he would not have bought the truck for the same price if he had known it to have been stolen. He said that the price would have had to be reduced some $8,000 to $10,000

before he bought the stolen truck. He also said that it did not matter how long the thief had the truck or how far it was driven because it was still a "used" truck. On cross-examination, he acknowledged that there was nothing wrong with the truck's interior or exterior or how it drove when he purchased it. He also said that the knowledge that the truck had been stolen had weighed on his mind.

Tony Bull, owner of BMC, testified that, after the truck was recovered, it was thoroughly inspected and tested with no damage found. He also said that he was sure that Bo Henderson did not know that the truck had been stolen and explained that it was simply a mistake that it was not disclosed to Murphy. He said that there was no effort to deceive Murphy and that he tried to rectify the situation by offering to extend the truck's warranty. He opined that, if the thief did any damage to the truck, it would have manifested itself within the first 2,000 miles. He did not know how the thief drove the vehicle but further opined that the truck's value was not affected by being driven for forty miles by the thief. Bull stated that the truck's being driven by the thief does not characterize it as a "used" vehicle because a "new" vehicle is one that has never been registered or titled. On cross-examination, Bull was unable to state how much the vehicle's value would be reduced if Murphy had taken the vehicle and driven it for one day before returning it.

Bo Henderson testified that he was unaware of the truck's having been stolen at the time he sold it to Murphy and asserted that he would have disclosed that fact to Murphy had he known it. According to Henderson, there was nothing in the truck's record to indicate that it had been stolen because it had not been damaged. He also said that the average customer would select the truck that had not been stolen and that it would probably have been necessary to reduce the price in order to sell the stolen truck. According to Henderson, an appropriate reduction would be $1,000 to $1,500.

Dean Sides, a car dealer in Newport, testified that a "new" vehicle is one that has not been sold or titled. He opined that the theft would not reduce the value of the truck. He described the thief's action as "not much more than a test drive." He also allowed that a dealer may have to discount the price because of the vehicle's tarnished reputation. He said that it would be something difficult to value.

James Smith, BMC's service manager, testified that he tested Murphy's truck and did not find any problems. He asserted that

any damage to the rear end of the truck would have immediately been discovered. He acknowledged that the computer did not check the rear differential and that there could be damage that went undiscovered.

Over BMC's objection, the circuit court gave AMI 2412 concerning ambiguity in the meaning of the term "new vehicle" and that it was the jury's job to determine what the parties meant by that term. The jury was also instructed on the statutory definitions of the term "new vehicle" and "used vehicle." The jury returned a verdict signed by ten jurors finding in favor of Murphy and awarding him $7,000 in damages. BMC filed a motion for new trial or judgment notwithstanding the verdict, asserting that there was no substantial evidence to support the award of damages or that BMC did not sell Murphy a "new motor vehicle." The motion for new trial was based on asserted error in allowing Murphy to testify that the truck needed axle repairs at 18,000 miles; that the testimony that the truck decreased in value by $8,495 was speculative; and that the damages award of $7,000 was against the preponderance of the evidence. The circuit court denied the motion. Judgment was entered on the jury verdict, and the circuit court awarded Murphy attorney's fees of $4,164. This appeal followed.

Arguments on Appeal

In its first point, BMC argues that the circuit court erred in denying its motion for summary judgment, its motion for a directed verdict, and its motion for judgment notwithstanding the verdict because the truck was, as a matter of law, "new."

We cannot address the summary-judgment issue. The denial of a motion for summary judgment is not an appealable order; even after there has been a trial on the merits, the denial order is not subject to review on appeal. *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000); *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991).

BMC's argument is that the meaning of the phrase "new vehicle" is determined, as a matter of law, by the statutory definition contained in section 23-112-103(22). We disagree. It is axiomatic that the laws in force when and where a contract is made and to be performed enter into and form part of the contract. This rule is limited, however, to laws that are *applicable* to the contract. *Union Indem. Co. v. Forgey & Hanson*, 174 Ark. 1110, 298 S.W. 1032 (1927); *see Wing v. Forest Lawn Cemetery Ass'n*, 15 Cal. 2d 472,

101 P.2d 1099 (1940); WILLISTON ON CONTRACTS § 3019 (2007). Arkansas Code Annotated section 23-112-103(22) is not applicable to an agreement of sale between an automobile dealer and a consumer. That statute is part of the Arkansas Motor Vehicle Commission Act, which was expressly intended to create an administrative agency to license persons and entities involved in the manufacture, distribution, and sale of motor vehicles so as to "[p]revent frauds, unfair practices, discrimination, impositions, and other abuses upon the citizens of Arkansas." Ark. Code Ann. § 23-112-102(b)(1).[1]

The purposes for the differing requirements are many, but chief among them is to prevent used auto dealerships from operating as fly-by-night businesses that engage in the sort of fraud commonly associated with such concerns. *See* Ark. Code Ann. § 23-112-601. It is instructive in this context to note that the definition of "used motor vehicle" in § 23-112-602(8) includes not only those vehicles that previously have been sold and titled, but also any vehicle that has been "so used as to have become what is commonly known as a secondhand or previously owned motor vehicle." Thus, the Act itself contemplates a vehicle that has never been titled but is nevertheless "secondhand" by virtue of the use or abuse to which it has been subjected — like the vehicle in this case.

The purpose of the rule incorporating applicable law into every contract is to comply with the federal constitutional prohibition against the enactment of laws impairing contractual obligations, not to impose by law a particular meaning to a term used in the agreement. *See Ellison v. Tubb*, 295 Ark. 312, 749 S.W.2d 650 (1988); *Robards v. Brown*, 40 Ark. 423 (1883).

Section 201 of the RESTATEMENT (SECOND) OF CONTRACTS makes this plain. It states:

> (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.

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[1] The dissenting judge's disagreement is founded on his mistaken notion that the Arkansas Motor Vehicle Commission Act is "applicable law" in the context of this case. His position is misguided. The reason that a "new vehicle" is defined in the Act is not to regulate sales by motor vehicle dealers to third parties, but instead to distinguish between "new motor vehicle dealers" and "used motor vehicle dealers." Both types of dealers must be licensed, and the applicable licenses have requirements that differ. *Compare* Ark. Code Ann. §§ 23-112-302 and 23-112-607.

(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

The Comment to this section deals with the precise situation that is before us in this case:

a. The meaning of words. Words are used as conventional symbols of mental states, with standardized meanings based on habitual or customary practice. Unless a different intention is shown, language is interpreted in accordance with its generally prevailing meaning. See § 202(3). Usages of varying degrees of generality are recorded in dictionaries, but there are substantial differences between English and American usages and between usages in different parts of the United States. Differences of usage also exist in various localities and in different social, economic, religious and ethnic groups. All these usages change over time, and persons engaged in transactions with each other often develop temporary usages peculiar to themselves. Moreover, most words are commonly used in more than one sense.

b. The problem of context. Uncertainties in the meaning of words are ordinarily greatly reduced by the context in which they are used. The same is true of other conventional symbols, and the meaning of conduct not used as a conventional symbol is even more dependent on its setting. But the context of words and other conduct is seldom exactly the same for two different people, since connotations depend on the entire past experience and the attitudes and expectations of the person whose understanding is in question. In general, the context relevant to interpretation of a bargain is the

context common to both parties. More precisely, the question of meaning in cases of misunderstanding depends on an inquiry into what each party knew or had reason to know, as stated in Subsections (2) and (3). See § 20 and Illustrations. Ordinarily a party has reason to know of meanings in general usage.

c. Mutual understanding. Subsection (1) makes it clear that the primary search is for a common meaning of the parties, not a meaning imposed on them by the law. To the extent that a mutual understanding is displaced by government regulation, the resulting obligation does not rest on "interpretation" in the sense used here. The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: "the courts do not make a contract for the parties." Ordinarily, therefore, the mutual understanding of the parties prevails even where the contractual term has been defined differently by statute or administrative regulation. But parties who used a standardized term in an unusual sense obviously run the risk that their agreement will be misinterpreted in litigation.

d. Misunderstanding. Subsection (2) follows the terminology of § 20, referring to the understanding of each party as the meaning "attached" by him to a term of a promise or agreement. Where the rules stated in Subsections (1) and (2) do not apply, neither party is bound by the understanding of the other. The result may be an entire failure of agreement or a failure to agree as to a term. There may be a binding contract despite failure to agree as to a term, if the term is not essential or if it can be supplied. See § 204. In some cases a party can waive the misunderstanding and enforce the contract in accordance with the understanding of the other party.

The generally prevailing meaning of a "new" vehicle does not include a vehicle that has been stolen. *See Greiner Motor Co. v. Sumpter*, 244 Ark. 736, 427 S.W.2d 8 (1968). Here, BMC had reason to know this, and Murphy had no reason to know that the definition of a new vehicle, contained in the Arkansas Motor Vehicle Commission Act for purposes of distinguishing between new and used car dealers, provided otherwise.

BMC's second point is that the circuit court erred in denying its motion for summary judgment, its motion for a directed verdict, and its motion for judgment notwithstanding the verdict because Murphy failed to prove the difference in the fair market value of the truck as represented and as received.

Again, we cannot consider the summary-judgment issue. BMC's argument is that the truck was not damaged and, therefore, Murphy's testimony as to the value of the truck being decreased was pure speculation. Here, contrary to BMC's argument, there was proof of damage to the vehicle other than in Murphy's mind. BMC witness Dean Sides testified that a vehicle that had been stolen and returned to the dealer undamaged would nevertheless have a tarnished reputation and that a reduction in price may be necessary to sell the vehicle. Bo Henderson testified that a reduction in price of $1,000 to $1,500 would be appropriate. Murphy testified that, in his opinion, the value of the truck had been diminished by between $8,000 and $10,000 by being driven by the thief. It is well-settled Arkansas law that the owner of personal property is qualified to give an opinion as to its value. *Walt Bennett Ford, Inc. v. Brown*, 283 Ark. 1, 670 S.W.2d 441 (1984). No special training or occupation is necessary to qualify a witness to estimate values. *Naples Rest., Inc. v. Coberly Ford*, 259 Cal. App. 2d 881, 66 Cal. Rptr. 835 (1968).[2] The sales contract established the fair market price of the truck and Murphy's testimony established the difference in the actual value at the time of purchase. Therefore, the jury could properly award Murphy $7,000 in damages.

For its third point on appeal, BMC contends that the circuit court erred in allowing Murphy to testify that the rear end on the truck had to be replaced at 18,000 miles. Murphy acknowledged that he did not know if the problem was caused by the thief. BMC objected to Murphy's testimony on the basis that it was irrelevant and that there was no proof that the problem was caused by the thief's actions. The circuit court overruled the objection, finding the testimony relevant. The standard of review on admission of evidence is abuse of discretion. *FMC Corp., Inc. v. Helton*, 360 Ark. 465, 202 S.W.3d 490 (2005).

The circuit court only ruled that the evidence was relevant; it did not address the other grounds of BMC's objection. We believe that the testimony was relevant because it showed the doubts Murphy had about the vehicle and why, in his opinion, the value was reduced from the contract price. Second, BMC also

[2] This case also held that the statutory definition of a "new" vehicle was not controlling where the vehicle had been stolen from the dealer's lot prior to the sale.

addressed the subject in its examination of its own witnesses, Tony Bull, Dean Sides, and James Smith. Here, BMC's witnesses discussed the likelihood of a vehicle's rear end needing replacement at 18,000 miles. In such circumstances, there is no prejudice. *See Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *Aaron v. State*, 300 Ark. 13, 775 S.W.2d 894 (1989).

BMC's final point is that the circuit court erred in instructing the jury based on AMI 2412, concerning an ambiguity in a contract term. Our courts have consistently held that 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. *See, e.g., Byme, Inc. v. Ivy*, 367 Ark. 451, 241 S.W.3d 229 (2006).

Here, the jury was instructed as to AMI 2412 as follows:

> The parties dispute the meaning of the term "new vehicle" in their contract. It is your duty to interpret the contract to give effect to what the parties intended when they made their agreement. In determining the meaning of the language, you must take into consideration the language of the contract, the circumstances surrounding the making of the contract, the subject of the contract, the purpose of the contract, the situation and relation of the parties at the time the contract was made, the parties' subsequent course of performance. You should give the words of the contract their plain, ordinary, and usual meaning, unless it is clear that certain words were intended to be used in a technical sense.

The jury was also instructed on the statutory definitions of "new" and "used" vehicles. Because we have held that the definition of the term "new vehicle" is not determined by reference to the statute but, rather, by the parties' intentions, the circuit court properly gave the disputed instruction because the jury was told to consider the circumstances in making the contract, that is, the fact that the truck was first driven by a thief for some forty miles prior to being sold to Murphy, to determine whether Murphy received a "new" truck.

Affirmed.

GLADWIN, BIRD, VAUGHT, and BAKER, JJ., agree.

ROBBINS and HEFFLEY, JJ., agree in part; dissent in part.

GRIFFEN and MARSHALL, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. Mr. Murphy knew when he bought his truck that there were 120 miles on its odometer and that the sticker price was $37,100, yet he bought it, paying $33,495. However, neither he nor the salesman knew that 40 of the 120 miles had been driven by a thief. Assuming that the trial court was correct, as affirmed by five judges of this nine-judge panel, that Mr. Murphy was indeed entitled to receive some damages because of these 40 unauthorized miles, an award of $7,000 defies reason and is clearly against the preponderance of the evidence. The trial court should have so found and granted a new trial, and we compound the injustice by failing to correct the error. See Ark. R. Civ. P. 59(a)(6).

I dissent.

HEFFLEY, J., joins.

D.P. MARSHALL JR., Judge, dissenting. This case should be retried, and I therefore respectfully dissent from the court's decision.

1. *New or Used?* The court is mistaken on this point, while Bull Motor is partly correct and partly mistaken. The parties' contract reflects that Murphy bought a "N" — for new — pick-up truck. He did. Arkansas has a comprehensive statutory scheme regulating motor vehicle dealers for the benefit of consumers and our state's economy. Ark. Code Ann. §§ 23-112-102 *et seq.*, and 23-112-601 *et seq.* Part of our code defines new motor vehicles and used motor vehicles. Ark. Code Ann. §§ 23-112-103(22) and (31)(A) and 23-112-602(10)(A). This truck was new — as a matter of law — because no entity had ever transferred the title to an ultimate purchaser. Ark. Code Ann. § 23-112-103(22).

The new/used issue was a question of law for the circuit court to answer against the background of this existing law, not a question of fact for the jury. The court cites the governing precedent but does not follow it. "The laws which are in force at the time when, and the place where, a contract is made and to be performed, enter into and form a part of it. This is only another mode of saying that parties are conclusively presumed to contract with reference to the existing law." *Robards v. Brown*, 40 Ark. 423, 427 (1883). Our Supreme Court has applied this unremarkable holding as recently as *Woodend v. Southland Racing Corp.*, 337 Ark. 380, 384, 989 S.W.2d 505, 507 (1999).

This legal principle has work to do, as the court says, in cases implicating the Contract Clause where the law has changed since the parties struck their bargain. *E.g., Ellison v. Tubb*, 295 Ark. 312, 316(17, 749 S.W.2d 650, 652-53 (1988). But contrary to the court's suggestion, this principle applies in other contexts too. For example, *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 963-65, 395 S.W.2d 555, 556-57 (1965), was a breach-of-contract action brought by a grain dealer against a farmer. The case turned on whether the farmer was a "merchant" under the U.C.C. The point is that our statutes embody our State's public policy. *State Farm Mut. Auto. Ins. Co. v. Henderson*, 356 Ark. 335, 342-43, 150 S.W.3d 276, 280 (2004). Where, as here, the contract arises in an area regulated by existing State law, the applicable statutes must be applied when deciding what the parties' chosen words mean. *Woodend, supra* (a betting contract); *Cook Grains, Inc., supra* (a commercial contract); *Union Indemnity Co. v. Forgey & Hanson*, 174 Ark. 1110, 1112, 298 S.W. 1032, 1033 (1927) (a bond). None of these cases involve the Contract Clause.

"In other words, a statutory provision relating to the subject-matter of a contract, by operation of law enters into and becomes part of the contract." *Union Indemnity Co.*, 174 Ark. at 1112, 298 S.W. at 1033. We must therefore conclusively presume that the parties contracted with reference to the Arkansas Motor Vehicle Commission Act, and in particular to the definitions in the statute. *Ellison*, 295 Ark. at 316-17, 749 S.W.2d at 652-53. If the terms of this Act are not part of every contract for the sale of motor vehicles in this state, then the purpose of this important regulatory scheme will be defeated. It cannot be the law in Arkansas today that the subjective intentions of buyers and sellers determine whether vehicles are new or used. A dealer and a buyer cannot contract around the statute by agreeing that a titled vehicle is "new" or that a never-titled vehicle is "used."

The *Greiner Motor* case makes this point as a matter of history. 244 Ark. 736, 737, 427 S.W.2d 8, 9 (1968). The court relies on Justice George Rose Smith's 1968 opinion for the proposition that "[t]he generally prevailing meaning of a 'new' vehicle does not include vehicles that have been stolen." In that case, the court held that the new/used issue was for the jury. 244 Ark. at 737, 427 S.W.2d at 9. The supreme court did so, however, against a different background of existing law. The General Assembly did not adopt the motor vehicle statutes now in place until 1975, seven years after *Greiner Motor* was decided. Act 388 of 1975. Forty years

ago, the definition of a vehicle as new or used was left to the seller and the buyer — and then to the jury if a dispute arose. Not any more.

The circuit court erred by not deciding the new/used issue for Bull Motor. Whether a contract is ambiguous is always a question of law for the court. *Western World Ins. Co. v. Branch*, 332 Ark. 427, 430, 965 S.W. 2d 760, 761 (1998). And the meaning of any ambiguous term is likewise always a question of law for the court, unless that meaning must be decided based on disputed extrinsic evidence. *Smith v. Prudential Property and Casualty Ins. Co.*, 340 Ark. 335, 341, 10 S.W.3d 846, 850 (2000).

Here, the parties' description of this truck as new was not ambiguous. The statute fixed the meaning of this term. Even if some ambiguity is assumed, resolving the term's meaning did not turn on disputed extrinsic evidence. All the material facts — the theft, the salesman's lack of knowledge, Murphy's lack of knowledge — were undisputed. The statute's words are also clear. As Murphy candidly acknowledged during the arguments about a directed verdict, "[i]f you want to consider this a new vehicle under the Arkansas code as defined, we will stipulate to anybody that wants to read it, it was a new vehicle under the code." Therefore, the circuit court made a reversible error by leaving the new/used issue alive. As Bull Motor correctly argues, the court erred by instructing the jury to decide this illusory ambiguity.

Bull Motor, however, was not entitled to judgment as a matter of law on Murphy's complaint. Murphy got a new truck. But it was a new truck that had been stolen. Bull Motor's nondisclosure of this material fact was a breach of the parties' contract. *Currier v. Spencer*, 299 Ark. 182, 185-86, 772 S.W.2d 309, 311-12 (1989). The nondisclosure was also a constructive fraud. *Roach v. Concord Boat Corp.*, 317 Ark. 474, 476-77, 880 S.W.2d 305, 306-07 (1994). However the claim was pleaded, here again all the material facts — theft, nondisclosure, justifiable reliance, and purchase — were undisputed. Apart from its statutory defense, Bull Motor essentially conceded liability for the incomplete information that tainted the parties' deal. Murphy knew that he was buying a truck with one hundred and twenty miles on it. What he did not know was that a thief had put forty of those miles on the truck. The real question for the jury was Murphy's damages: how did the thief's forty miles affect the pick-up's fair market value at the time Murphy bought the truck?

2. *The Damages.* $7,000.00 in damages for a forty-mile trip by a thief is clearly against the preponderance of the admissible evidence. Giving the credible evidence its greatest possible weight, the proof supports damages of only $1,000.00 to $1,500.00. The circuit court correctly instructed the jury that Murphy was entitled to damages representing the difference between the vehicle's contract price and the vehicle's market value at the time of the breach. AMI 2519–Civil (Ed. 2007). The breach occurred at the sale, when Bull Motor failed to tell Murphy about the theft. The only credible evidence on this difference in value was Bull Motor's salesman's admission on cross-examination that a price reduction of $1,000.00 to $1,500.00 would have been appropriate. Over Bull Motor's objection, Murphy testified that, in his opinion, the truck's value was reduced between $8,000.00 and $10,000.00 by being driven by the thief. Based solely on that testimony, the jury awarded him $7,000.00. Because Murphy provided no rational basis for his figures, however, the damage award should not stand.

Our cases have consistently held that an owner is qualified to give an opinion about the value of his own personal property. *Walt Bennett Ford, Inc. v. Brown*, 283 Ark. 1, 4, 670 S.W.2d 441, 443 (1984). This rule of law is sensible and settled. But the owner's opinion on value must be based on something more than speculation. It cannot be "plucked from the air without any fair and reasonable basis." *Ark. State Highway Comm'n v. Steen*, 253 Ark. 908, 914, 489 S.W.2d 781, 784 (1973). Our law allows an owner to testify about the value of his property because he has shopped for it, paid for it, repaired it, and lived with it. This is the reason behind this rule of law. But as the maxim states, *cessante ratione legis, cessat ipse lex*: the reason of the law ceasing, the law itself ceases.

Had Murphy been testifying about the truck's value in an accident case arising after he had owned the vehicle for some time, then of course he could give his opinion about the truck's value. This testimony would be based on his experience. *Cf. Minerva Enterprises, Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992). That, however, is not what happened. The circuit court allowed Murphy to testify about the value of the truck *at the time of sale* as a new truck that had been stolen. But Murphy gave no testimony showing that he had any basis to speak about the truck's actual value at that time. Murphy never had the vehicle appraised after he learned of the theft. He did no comparison shopping to see what a similar new truck that had been stolen would sell for. He did no repairs when he bought the truck — because, he acknowledged,

there was nothing wrong with it then. Murphy had no foundation for his opinion about the actual value of this new but stolen truck.

This would be a different case if Murphy had provided expert testimony to support his calculation of damages. *Cf. Moore Ford Co. v. Smith*, 270 Ark. 340, 604 S.W.2d 943 (1980). It would also be different if Murphy had taken the truck to a repairman, who could have provided a list of damaged parts and an estimate to repair them. *Cf. Zahn v. Sherman*, 323 Ark. 172, 913 S.W.2d 776 (1996); *Walt Bennett Ford, supra*. Nothing like this ever happened. Murphy simply had no fair or reasonable basis for his testimony about how much the price of the truck should have been reduced because of the theft.

The record shows the basis for Murphy's damages testimony, and that basis further undermines his speculative numbers. Murphy claimed that he was harmed by the uncertainties he felt knowing that his truck had been stolen. Murphy testified:

- "If [Bull Motor had] had the truck and it'd been $5,000.00 off, I wouldn't of bought it. . . . it wouldn't be worth it, wondering what — what's ever going to tear up on the truck, how it'd been drove."

- "When I hear a noise, that's what I wonder, what did he do to this truck. . . . it makes me wonder what's going to — what's going to go out at 37,000 [miles]."

Murphy's damage numbers were the fruit of his fears. This contract verdict rests on a buyer's speculations about the future, not competent proof of fair market value at the time of sale. We should therefore reverse this judgment and remand for a new trial. Murphy deserves compensation based on competent evidence about the fair market value of his new but stolen truck on the day that he bought it.

GRIFFEN, J., joins.

ROBBINS and HEFFLEY, JJ., join part 2.

J. MICHAEL ENTERPRISES, INC. *v.* Robert OLIVER

CA 07-537 270 S.W.3d 388

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

[Rehearing denied January 23, 2008.]

Matt Bishop, for appellant.

Dossey & Burke, PLC, by: *Jerry B. Dossey*, for appellee.

SAM BIRD, Judge. J. Michael Enterprises, Inc. (JME), brings this appeal from a judgment of the Benton County Circuit Court quieting title to thirty-nine acres in appellee Robert Oliver. The court also awarded Oliver $2,500 in punitive damages and $5,000 in attorney's fees. JME raises three points on appeal in which it challenges the quieting of title in Oliver on the basis that Oliver had

not paid the taxes on the property for seven years and that the tax deed to Oliver contained an invalid description, as well as the award of punitive damages. Finding no merit in any of these points, we affirm.

Stipulated Background Facts

In 1964, Paula Weir took title by warranty deed to forty acres described as the Southeast Quarter of the Northeast Quarter of Section 9, Township 18 North, Range 29 West, in Benton County. In 1965, Weir had a survey conducted which carved a one-acre tract out of the forty-acre tract. Weir and her husband executed a deed of trust to the one-acre tract. The deed of trust was foreclosed by the lender and the lender purchased the one-acre tract at the foreclosure sale. In 1970, Lulu Woodington purchased the one-acre tract from the lender. In July 1996, Woodington filed suit against Weir seeking to quiet title to the one-acre tract. A decree quieting title in Woodington was entered in August 1996, and an amended order was entered on September 23, 1996. The description in the decree was different from the 1965 survey description.

In 1987, Weir successfully sued to set aside an earlier tax sale of the thirty-nine-acre tract on the basis of an improper tax sale. The complaint alleged that the legal description was improper and that the proceedings to quiet title after the tax sale were defective in that Weir was not made a party to those proceedings.

Weir failed to pay the property taxes on the property after 1989, and the property was forfeited to the State of Arkansas. In November 1996, Oliver received a tax deed to the thirty-nine-acre tract. The description of the property contained in the tax deed was "SE 1/4 NE 1/4 EXC 1 A NW1/4 PT," together with references to the appropriate section, township, and range as shown by the notation "9 18N 29W." In January 1997, Oliver and Woodington exchanged quitclaim deeds in which each quitclaimed his or her interest in the other's property. In other words, Woodington quitclaimed whatever interest she had in the thirty-nine-acre tract to Oliver, and he did the same in regards to the one-acre tract. Woodington then conveyed the one-acre tract to Eric Cabledue by warranty deed also recorded on January 2, 1997. On December 1, 2005, Weir and her husband each executed quitclaim deeds to the entire forty-acre tract to JME. The deeds were recorded on December 5, 2005.

Oliver filed suit seeking to quiet title to his thirty-nine acre tract. He asserted that he had paid the taxes on the property for

more than seven years under color of title. The complaint also asserted that JME's action in obtaining and recording the quitclaim deeds from the Weirs was a violation of Ark. Code Ann. § 5-37-226 (Supp. 2007) and sought treble actual and punitive damages as provided by that section. JME answered, denying the material allegations of the complaint. JME also filed a counterclaim in which it sought a declaratory judgment that the tax deed to Oliver was invalid based on the legal description being legally insufficient.

The Evidence

At trial, Oliver testified that he had paid all of the property taxes owed on the thirty-nine-acre tract since he purchased the property at the tax sale. Oliver also said that he paid the back taxes owed on the property. Both Oliver and Eric Cabledue testified that the exchange of deeds between Oliver and Lulu Woodington was necessitated when Woodington was attempting to sell her one-acre tract to Cabledue and it was discovered that the description of her tract was incorrect. Cabledue said that he had paid all of the taxes on his property since he acquired it. Cabledue also considered the quitclaim deeds executed by Paula Weir and her husband to JME to be a cloud on his title.

Title examiner Phil Bronson testified that, after the exchange of quitclaim deeds between Oliver and Woodington, he issued a title insurance policy for Woodington's conveyance to Cabledue. He also said that he relied on assessment cards and other records showing the assessment and payment of taxes on property. According to Bronson, the records show that Oliver was paying the taxes on thirty-nine acres of the forty-acre tract. On cross-examination, he acknowledged that he could not tell from the legal description of the tax deed or the information in the Assessor's Office where Cabledue's one-acre tract was located within the forty acres. He asserted that the same legal description on Oliver's tax deed and the records in the Assessor's Office describe two different thirty-nine-acre tracts because of the changed description of the excepted one-acre tract.

Thurstle Mullen, the president and sole stockholder in JME, testified that JME does not have any specific business and that he purchases property in the corporate name. He described JME as a shell company that owns real estate. Mullen said that he prepared the deeds that the Weirs executed to convey their interest to JME after he determined that the tax deed to Oliver did not describe any lands. He acknowledged that he was unaware of Cabledue's

ownership of the one-acre tract when he obtained the quitclaim deeds from the Weirs. Mullen also could not say that he had researched the tax assessment records before obtaining the quitclaim deeds. He said that, when he did his research, the records showed that Oliver was paying taxes on thirty-nine acres of the forty-acre tract but not which thirty-nine acres.

Shirley Sandlin, the recently retired Benton County Assessor, testified that the assessor's office keeps records on maps and cards and that any parcel within the county can be located. She said that the card for the forty-acre tract shows the exchange of deeds between Oliver and Woodington and that the entire forty-acre tract has been assessed in the names of either Oliver or Cabledue since 1997. She said that the Oliver and Cabledue tracts cannot be confused with each other. Sandlin had used the legal description contained in the deed from Woodington to Oliver in assessing Oliver's property. She described the problem as being with only ten acres in the northeast portion of the forty-acre tract. She added that Oliver's legal description never changed on the card in the assessor's office because all of Oliver's land is located within the quarter-quarter description.

Greg Hoggatt, the Tax Collector for Benton County, testified that both Oliver and Cabledue had paid the taxes on their respective parcels since 1997. He said that Oliver's tax sale purchase included paying the taxes owed for the years 1990 through 1995.

The Circuit Court's Ruling

The circuit court ruled from the bench and found that Oliver had met his burden of proving his title. The court noted that the parcel number could have been used to obtain the history for the entire forty-acre tract and its correct description. The court also found that both the tax deed and the quitclaim deed from Woodington to Oliver constituted color of title for Oliver and that Oliver had paid the property taxes for more than seven years.

On January 17, 2007, Oliver filed a motion pursuant to Ark. Code Ann. § 5-37-226(a) (Supp. 2007). That statute makes it unlawful to file any instrument of record clouding or affecting the title or interest of the true owner with the intent of clouding the title or procuring money from the true owner. Under subsection (c), an owner who brings suit to remove the cloud from his title is entitled to three times actual damages, punitive damages, and costs, including attorney's fees. JME filed a response to the motion.

In its written judgment entered on January 31, 2007, the circuit court, in addition to the findings relative to quieting title in Oliver, found that JME procured the quitclaim deeds from the Weirs for the purpose of obtaining money from Oliver and awarded Oliver $2,500 in punitive damages and $5,000 in attorney's fees. On March 1, 2007, JME filed a motion to modify the judgment pursuant to Ark. R. Civ. P. 60, as well as a notice of appeal from the judgment. On March 30, 2007, the circuit court entered an amended judgment. JME filed an amended notice of appeal on April 9, 2007.

Standard of Review

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). However, we will not reverse the circuit court's findings in such actions unless the findings are clearly erroneous. *See id.* A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been committed. *Id.*

Arguments on Appeal

JME's first and second points, which we address together, are that the circuit court erred in quieting title in Oliver because the legal description contained in the tax deed to Oliver was insufficient, and that, because of the indefiniteness of the description, Oliver could not rely on either the tax deed or the quitclaim deed from Woodington as color of title. We disagree.

A tax deed is sufficient if the description itself furnishes the key through which the land might be definitely located by proof *aliunde*. *Liggett v. Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987). A tax deed may be declared invalid for want of a sufficient legal description of the land involved. *Payton v. Blake*, 362 Ark. 538, 210 S.W.3d 74 (2005); *see also Gardner v. Johnson*, 220 Ark. 168, 246 S.W.2d 568 (1952) (invalidating a deed containing the description: "SW corner NE 1/101 N.Y. 63, 4 NE 1/4 Section 1, Township 7 North, Range 4 West, 5 acres E of R"); *Sutton v. Lee*, 181 Ark. 914, 28 S.W.2d 697 (1930) (recognizing as invalid the description: "Parts of lots 3 and 4 in block 36 in the city of Hot Springs, Arkansas"); *Walls v. Mills*, 149 Ark. 670, 225 S.W. 225 (1920) (invalidating a deed containing the description: "Pt. NW NW Section 7 Township 12 S, Range 29 W. 11.16 acres").

Unlike the cases cited above, the description here is sufficient because Oliver owns thirty-nine of the forty acres in the quarter quarter and the question is the location of the one acre he does not own. That can easily be determined by reference to the records in the assessor's office. Therefore, the tax deed could properly be considered color of title.

In its argument directed to the Woodington deed to Oliver as color of title, JME relies on *Bailey v. Jarvis*, 212 Ark. 675, 208 S.W.2d 13 (1948), and *Weast v. Hereinafter Described Lands*, 33 Ark. App. 157, 803 S.W.2d 565 (1991), for the proposition that one cannot "manufacture" color of title. Those cases have no application here because the exchange of deeds between Woodington and Oliver was necessary to align the legal description of Woodington's property with its actual placement on the ground, as shown by exhibit 22. The Woodington quitclaim to Oliver contains proper metes-and-bounds descriptions of both the forty-acre tract and the one-acre tract belonging to Cabledue.

JME also argues that, because the descriptions in Oliver's and Cabledue's deeds are insufficient, Oliver cannot prove the exact thirty-nine acres on which he has been paying the property taxes. However, the testimony was that the description contained in the exchange of quitclaim deeds has been used to assess the property since 1997 and that the taxes have been paid on this assessment since that time.

In JME's third and final point, it argues that the circuit court erred in awarding Oliver $2,500 in punitive damages and $5,000 in attorney's fees, pursuant to Ark. Code Ann. § 5-37-226(a).[1] Section 5-37-226(a) requires a two-prong test: first, that

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[1] Section 5-37-226(a) provides:

(a) It is unlawful for any person with the knowledge of the instrument's lack of authenticity or genuineness to have placed of record in the office of the recorder of any county any instrument:

(1) Clouding or adversely affecting:

(A) The title or interest of the true owner, lessee, or assignee in real property; or

(B) Any bona fide interest in real property; and

(2) With the intent of:

the instrument be filed with knowledge that it is not genuine or authentic and, second, that the filing is with the intent either to cloud or adversely affect the owner's interest in the property or with the intent to procure money from the owner in order to clear the title. JME argues that neither prong has been met and that Oliver offered no proof of his actual damages and, therefore, an award of punitive damages is improper. The circuit court made an express finding that JME obtained the quitclaim deeds from the Weirs for the purpose of obtaining money from the true owner. The court did not make a finding that the instrument was filed with knowledge that it was not genuine or authentic. However, such a finding was implicit when the court awarded punitive damages pursuant to section 5-37-226. Also, both findings are supported by the evidence that JME prepared the quitclaim deeds to the entire forty acres, despite the one acre having been carved out in 1965; that JME was simply a shell company; and that there were no revenue stamps on its quitclaim deeds. Arkansas Code Annotated section 26-60-110(b) provides, subject to exceptions not applicable here, that no instrument evidencing a transfer of title shall be recorded without the attachment of the revenue stamps. Further, the letter attached to Oliver's complaint implies that JME was seeking money from Oliver in order to clear Oliver's title.

Oliver did not offer any proof as to his loss or damages during the trial; he did offer an affidavit stating the amount of attorney's fees he incurred in prosecuting the suit. JME, citing *Hale v. Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992), argues that an award of punitive damages without an award of compensatory damages cannot stand. However, that rule has no application in the present case because the award was not based on a common-law cause of action; rather, it was based on a statutory remedy. As such,

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(A) Clouding, adversely affecting, impairing, or discrediting the title or other interest in the real property which may prevent the true owner, lessee, or assignee from disposing of the real property or transferring or granting any interest in the real property; or

(B) Procuring money or value from the true owner, lessee, or assignee to clear the instrument from the records of the office of the recorder.

the circuit court could have awarded punitive damages without first having awarded compensatory damages.

Affirmed.

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

Wael ABDIN *v.* Delores ABDIN

CA 07-140 270 S.W.3d 361

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

Hatfield & Lassiter, by: *Richard F. Hatfield*, for appellant.

McMath Woods, P.A., by: *Will Bond*, for appellee.

DAVID M. GLOVER, Judge. Appellant, Wael Abdin, appeals from an order refusing to award him expenses and fees for attempting to probate a lost will. We find no error and affirm.

Mike Abdin died on March 15, 2000, shortly after returning home from a trip to his native Israel. His widow, appellee Delores Abdin, probated a 1984 will that named her executrix and left most of Mike's estate to her or the couple's two daughters. Thereafter, Mike's brother, appellant Wael Abdin, filed a petition to probate a lost will that Mike allegedly executed in the Arabic language while visiting Israel in January 2000. This will left nothing to Mike's wife and daughters. We described it in a prior appeal, *Abdin v. Abdin*, 94 Ark. App. 12, 223 S.W.3d 60 (2006) (*Abdin I*), as follows:

> An English translation of the typed will shows it to be rather unusual by Western standards. It is made "In The Name of Allah Most Gracious Most Merciful," and it makes no precise bequest of money or property to any person. Instead, it provides for "the amount of money and property I have specified for my three sisters (and a Share for my family) according to the Islamic law of Allah and His Messenger," with the "biggest share" going to "my sister Hala." It also contains several provisions stating that the testator "would like" for the following to occur: 1) Wael to invest Hala's share for her; 2) Wael to buy a house and "make it an Islamic trust," to be leased, with the proceeds going to his other sisters; 3)

> "you to build a Mosque" in Jerusalem named after Mike; 4) Wael to send someone to perform the Hajj obligation on behalf of Mike and his mother; 5) his brothers and sisters to buy a new store for his younger brother, Muhannad. Finally, the will states that the testator had:
>
> > left some signed checks with my brother Hani, so you may make use of them after I pass away.... From the family share, I would like you to build a DeWan (Hall or a Family Center) and to name it after my father's name....

Abdin I, 94 Ark. App. at 13-14, 223 S.W.3d at 61-62.

Following a hearing on July 20 and 21, 2004, the circuit court found that Wael failed to prove Mike's signature on the Israeli will. The court refused to admit the will to probate, and we affirmed in an opinion issued January 16, 2006. *Abdin I, supra.*

After our decision in *Abdin I*, Wael returned to circuit court and filed a petition to recover over $100,000 in expenses and fees incurred in his unsuccessful attempt to probate the lost will. He relied on Ark. Code Ann. § 28-48-109(a) (Repl. 2004), which provides:

> When any person nominated in a will as executor or the administrator with the will annexed, in good faith defends the will or prosecutes any proceedings for the purpose of having it admitted to probate, whether successful or not, he or she shall be allowed out of the estate his or her necessary expenses and disbursements including reasonable attorney's fees in such proceedings.

This statute permits two classes of litigants to recover necessary expenses and attorney fees incurred in the unsuccessful defense or probate of a will: 1) a person nominated in a will as executor; or 2) an administrator with the will annexed. The trial court found that Wael fell into neither of these categories and dismissed Wael's petition. Wael appeals from that ruling.

Probate cases are reviewed de novo on appeal, and we do not reverse the trial court's decision unless it is clearly erroneous. *Cloud v. Brandt*, 370 Ark. 323, 259 S.W.3d 439 (2007). A trial court's conclusion on a question of law is given no deference on appeal. *N.W. Ark. Recovery, Inc. v. Davis*, 89 Ark. App. 62, 200 S.W.3d 481 (2004).

We first address Wael's argument that he was a "person nominated in a will as executor." He concedes that the lost will named no executor and did not expressly nominate him as such. However, he claims that the will's language manifested an intent that he act as executor. He points to the will's request that he secure his older sister's share and invest it for her; that he buy a house, place it in an "Islamic trust," lease it, and have the rent paid to two other sisters; and that he send someone to perform the Hajj obligation on behalf of Mike and his mother. He also claims that the request that an unspecified person, "you," build a mosque, use the signed checks, and build a dewan, refers to him and manifests the same intent. As authority, he cites *In re Parker's Estate*, 202 Cal. 138, 259 P. 431 (1927), *Des Portes v. Des Portes*, 157 S.C. 407, 154 S.E. 426 (1930), and *Estate of Baird v. Baird*, 196 Cal. App. 3d 957, 242 Cal. Rptr. 246 (1987), for the proposition that a person may be deemed an executor if the testator asks him to perform duties normally associated with a personal representative.

We make no ruling as to whether section 28-48-109(a) applies when a person's nomination as executor is implied rather than expressed. Instead, we hold that, even if such an interpretation were permitted under our strict construction of attorney-fee statutes, *see City of Little Rock v. Quinn*, 35 Ark. App. 77, 811 S.W.2d 6 (1991), we are not persuaded that the will in this case clothed Wael, even impliedly, with the status of an executor. While the will asked Wael to perform several tasks that are in the nature of an executor's duties, it made similar requests of an unnamed person, "you." The will's overall language indicates that "you" may well have included all of Mike Abdin's brothers and sisters rather than Wael alone. One provision asked that "you, brothers and sisters" buy a new store for a younger brother "because you as you know my father and my mother used to love him very much. . . ." Another provision stated that the testator "would like that all of you have a good relationship with my wife and with my daughter[s]." A subsequent paragraph provided that the testator "left some signed checks with my brother Hani, so you may make use of them. . . ." Given these provisions, the trial court could reasonably have interpreted the will as a series of requests to various family members without naming an executor. Thus, no clear error occurred. *See Metzgar v. Rodgers*, 83 Ark. App. 354, 128 S.W.3d 5 (2003) (holding that the trial court's findings regarding

ambiguous provisions of a will are not overturned unless clearly erroneous).[1]

We likewise agree with the trial court's finding that Wael did not qualify as an administrator with the will annexed. When a decedent leaves a will that does not nominate an executor, or the person named as executor cannot serve, the court appoints an administrator with the will annexed to perform the duties connected with settlement of the estate. *See Whitlow v. Patterson*, 195 Ark. 173, 112 S.W.2d 35 (1938); *Gordon v. Greening*, 121 Ark. 617, 182 S.W. 272 (1916). *See also* 34 C.J.S. *Wills* (947 (1998). In order to have an administrator with the will annexed, the will must first have been deemed valid and duly admitted to probate. *See* 34 C.J.S. *Wills* § 947 (1998); *Luckey v. Superior Court*, 209 Cal. 360, 287 P. 450 (1930).

The lost will in this case was never deemed valid and duly admitted to probate; consequently, it is not possible for Wael to qualify as an administrator with the will annexed. Wael recognizes this but argues that section 28-49-109(a) inconsistently permits recovery of expenses and fees for a legal impossibility: the unsuccessful probate of a will by an administrator with the will annexed. In fact, no such inconsistency exists. The statute applies not only to the unsuccessful probate of a will but to the unsuccessful defense of a will as well. It reads: "When any person nominated in a will as executor or the administrator with the will annexed, *in good faith defends the will or prosecutes* any proceedings for the purpose of having it admitted to probate . . . ." (Emphasis added.) It is perfectly conceivable that an administrator with the will annexed, properly appointed after probate, could be called upon to defend the will. If his defense were unsuccessful, the statute would apply and allow him to recover his necessary expenses and fees from the estate.

Based on the foregoing, we affirm the trial court's ruling that Wael lacked the capacity to seek fees and expenses under section 28-48-109(a). Our holding makes it unnecessary to address Wael's argument that he propounded the lost will in good faith and

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[1] Although the trial court did not elaborate on its basis for finding that Wael was not nominated in the will as executor, we may uphold the court's finding if it is correct for any reason. *Fritzinger v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003).

Delores's argument that Wael's fee petition was untimely under Ark. R. Civ. P. 54(e).

Affirmed.

HEFFLEY and BAKER, JJ., agree.

Walter John WILLIAMS *v.* Kimberly Williams RAMSEY

CA 07-221 270 S.W.3d 345

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

Naif S. Khoury, for appellant.

Boyer, Schrantz, Rhoads & Teague, P.A., by: *Johnnie Emberton Rhoads*, for appellee.

DAVID M. GLOVER, Judge. This case, involving a thirteen-year-old child, represents the latest battle in a long court war between the parents following the entry of the divorce decree on September 17, 1993. Their daughter had been born only a few months earlier, on May 21, 1993. Primary custody of the child was awarded to the mother, appellee Kimberly Williams Ramsey. In this latest chapter of the couple's history of prolonged acrimony, appellee filed a petition/amended petitions for contempt, which included a request for modification of appellant Walter John Williams's visitation. The first petition in this regard was filed on November 1, 2005, and the last amended petition was filed on December 29, 2005. The hearing on the petitions began on June 20, 2006, and continued on June 28, 2006. The court's order was entered on August 7, 2006, finding that appellant was in contempt of prior court orders and also that appellant's visitation should be reduced to one Saturday a month, with summer visitation eliminated. This appeal followed. We affirm the trial court's decision with respect to contempt, but reverse and remand on the reduction in visitation.

Visitation Reduction

For his first point of appeal, appellant contends that the trial court erred in reducing his visitation with his child, particularly in light of Dr. Martin Faitak's testimony that a reduction or change in visitation would not be beneficial to the child. We agree.

In *Sharp v. Keeler*, 99 Ark. App. 42, 56-57, 256 S.W.3d 528, 538 (2007), this court set forth the standard of review concerning modifications to visitation:

> In reviewing domestic-relations cases, this court considers the evidence de novo, but will not reverse the trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. It is well settled that the trial court maintains continuing jurisdiction over visitation and may modify or vacate such orders at any time on a change of circumstances or upon

> knowledge of facts not known at the time of the initial order. It is also well settled under Arkansas law that reversal is warranted where a trial court modifies visitation where no material change in circumstances warrants such a change. While visitation is always modifiable, our courts require a more rigid standard for modification than for initial determinations in order to promote stability and continuity for the children, and to discourage repeated litigation of the same issues. The party seeking a change in visitation has the burden below to show a material change in circumstances warranting the change in visitation. The main consideration in making judicial determinations concerning visitation is the best interest of the child. Important factors to be considered in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. The fixing of visitation rights is a matter that lies within the sound discretion of the trial court.

As we often have repeated, the trial judge is the person in the best position to observe the parties and evaluate the witnesses, their testimony, and the child's best interest. *Id.*

Here, the trial court reduced appellant's visitation from every other weekend to one Saturday a month, with summer visitation eliminated. In reaching that conclusion, the trial court explained that the rules "that were put in place were not put in place to restrict Mr. Williams as an effort to punish him, but rather to stop a pattern of undermining, alienation, and problems that were being created for this child as a result of the behaviors. This Court has seldom gone as far as I've gone in this case. But what little support, what little cooperation I feel like I've gotten from Mr. Williams has been, primarily, such as the counseling efforts he made, window dressing."

In the August 7, 2006 order, the trial court found, *inter alia*, "that the defendant has undermined the relationship of the minor child and the plaintiff by calling his wife 'Mommy' to the minor child and calling the plaintiff 'Kim' to her. The defendant has undermined the minor child's relationship with her therapist, Dr. Martin Faitek. Further, he has undermined the minor child's acceptance of taking needed medication." Summarizing the order, the following items were of concern to the trial court: 1) that appellant only now agrees to get counseling and make the child

take her medication, which had been previously ordered; 2) that appellant continues to believe that it is best for the child to live with him and call his wife "Mommy"; 3) that appellant has engaged in a consistent pattern of behavior violating the court's orders; 4) that because of appellant's actions, the child still holds out hope that she will be allowed to live with him, which destabilizes her home situation; 5) that his actions show a focus on himself rather than the child. In light of the foregoing, the trial court determined that a material change of circumstances had occurred and that it was in the child's best interest to modify visitation.

It seems clear from the record of this case that appellant has effectively been a troublemaker concerning the interrelationships among himself, the child, and appellee. It is difficult under such circumstances to segregate conduct that establishes contempt from conduct that justifies a change in custody or visitation. In *Sharp v. Keeler*, 99 Ark. App. at 56, 256 S.W.3d at 538, which involved a change of custody, supervised visitation, and contempt, we explained:

> On this point, the dissent argues that this case was one of contempt, not change of custody. *It is not either/or; it is both.* We cannot ignore the fact that the trial court did hold Sharp in contempt on two separate bases. The record reflects that the court specifically noted that if it thought placing Sharp in jail for several days would cure the problem, then it would indeed simply be a contempt issue, but that this was in fact more.

(Emphasis added.) In *Sharp*, the offending parent's conduct was described as rising to the level of harassment and torment. We affirmed the change in custody, which was based on the trial court's determination that the mother acted in ways that were detrimental to the child and that parental alienation on her part constituted a material change of circumstances that warranted a change of custody. We reversed the trial court, however, and remanded on the issue of the change to supervised visitation, explaining:

> In short, we find that there was no evidence to support the trial court's decision that Sharp should only receive four hours of supervised visitation per week, and we hold that that decision was clearly against the preponderance of the evidence. We direct that the trial court award Sharp the same unsupervised visitation that Keeler enjoyed prior to the change of custody. . . .

99 Ark. App. at 58, 256 S.W.3d at 539.

Here, it is perfectly understandable that the trial court has grown frustrated and weary of dealing with a father who appears to put himself above the best interests of his child and who seems determined to act like a child himself in dealing with his own child and his ex-wife. However, even recognizing the father's bad conduct, we cannot overlook the evidence that was before the trial court, and we have concluded that it does not rise to the level that would constitute a change of circumstances, especially in light of the fact that Dr. Faitak testified that a reduction in visitation would not be beneficial to the child. We, therefore, reverse the trial court's decision to reduce visitation and order the trial court to reinstate the prior visitation schedule.

Contempt

For his remaining issue, appellant contends that there was insufficient evidence presented to show that he willfully and intentionally violated the court's previous orders sufficient to be held in contempt and placed in jail. We disagree.

As our supreme court explained in *Arkansas Department of Health & Human Services v. Briley*, 366 Ark. 496, 500, 237 S.W.3d 7, 9-10 (2006):

> We begin by distinguishing civil and criminal contempt:
>
> Contempt is divided into criminal contempt and civil contempt. Criminal contempt preserves the power of the court, vindicates its dignity, and punishes those who disobey its orders. Civil contempt, on the other hand, protects the rights of private parties by compelling compliance with orders of the court made for the benefit of private parties. This court has often noted that the line between civil and criminal contempt may blur at times. Our Court of Appeals has given a concise description of the difference between civil and criminal contempt. ("Criminal contempt punishes while civil contempt coerces.") In determining whether a particular action by a judge constitutes criminal or civil contempt, the focus is on the character of relief rather than the nature of the proceeding. Because civil contempt is designed to coerce compliance with the court's order, the civil contemnor may free himself or herself by complying with the order. This is the source of the familiar saying that civil contemnors "carry the keys of their prison in their own

> pockets." Criminal contempt, by contrast, carries an unconditional penalty, and the contempt cannot be purged.

(Citations omitted.)

Here, both types of contempt were imposed by the trial court. The trial court incarcerated appellant for ten days, which commenced immediately for calling his wife "Mommy" and for failing to give the child her medication. Furthermore, the trial court also ordered appellant to remain in jail after his ten-day incarceration until he paid $1500 in previously ordered attorney fees. The initial ten-day period of incarceration falls under the category of criminal contempt because it carried an unconditional penalty, *i.e.*, it could not be purged. The period of incarceration that followed falls within the category of civil contempt because it was designed to coerce appellant to pay the monies for attorney's fees that he had been previously ordered to pay. He was able to free himself by complying. Appellant challenges only the initial ten-day period of incarceration.

The standard of review of a case of criminal contempt is well-settled: an appellate court views the record in a light most favorable to the trial judge's decision and sustains that decision if it is supported by substantial evidence. *Conlee v. Conlee*, 370 Ark. 89, 257 S.W.3d 543 (2007). Where a person is held in contempt for failure or refusal to abide by a judge's order, the reviewing court will not look behind the order to determine whether it is valid. *Id.*

In making his argument, appellant focuses his attention upon a July 20, 2005 order that was not actually entered until December 28, 2005, which was after the instant contempt proceedings were initiated. With respect to that order, he contends that "the order was not in writing for the appellant to refer to in order to insure he was in compliance with the ruling of the Court." He then proceeds to go through this order and explain why he was not in contempt of it. What he neglects to mention, however, and does not include in his addendum, is an order that was entered on May 12, 2005.

In the May 12, 2005 order, the trial court provided that both parties were to give the child her medication as prescribed and that appellant was to refer to appellee as "Mommy," and not to refer to the step-mother as "Mommy." In its August 7, 2006 order finding appellant in contempt, the trial court specifically found that appellant had violated the court's order concern-

ing reference to his wife as "Mommy" to the minor child and failing to give the minor child her medication when she was with him on visitation. Viewing the record in a light most favorable to the trial judge's decision, we conclude that it is supported by substantial evidence. For example, appellee testified that in November 2005, appellant came to her door to return the child after a visit, and that in front of her and the child, appellant told the child that he would try to talk "Mommy," referring to the step-mother, into getting leather seats for the car they were going to buy. Likewise, appellant's explanation for not requiring the child to take her medication was, in part, "I've seen her take it sometimes. Sometimes, I've turned my back and done something else. I'm not going to say that every single time I've watched her put the medicine in her mouth." The trial court was in the best position to judge the credibility of these witnesses, and in such matters we defer to the trial court.

Reversed in part and affirmed in part.

HEFFLEY, J., agrees.

BAKER, J., concurs.

KAREN R. BAKER, Judge, concurring. I agree that a violation of the court's previous directives does not compel a change in custody. *See Sharp v. Keeler*, 99 Ark. App. 42, 256 S.W.3d 528 (2007) (Baker, J., dissenting) (citing *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003)). Examining Mr. Williams's individual acts, they each appear to be almost trivial; however, taken as a whole, a continuing failure to abide by the trial court's orders could well provide a basis for the trial court to curtail Mr. Williams's opportunity to influence the child with his behavior. Certainly, if Mr. Williams persists in this behavior despite the trial court's punishment of the violations by its contempt powers his conduct will, at some point, affect the best interest of the child. *See Carver, supra* (appellant's interference with visitation was so extreme that the best interest of the children required that they be removed from the situation).

In light of the fact that appellant contends that the trial court erred in reducing his visitation with his child, *particularly in light of Dr. Martin Faitek's testimony that a reduction in visitation would not be beneficial to the child*, I emphasize that the trial judge was entirely correct in her determination that Dr. Faitek's expert opinion is not dispositive of the case. A trial judge does not have to accept an

expert's opinion. *See generally Northwest Arkansas Recovery Inc. v. Davis*, 89 Ark. App. 62, 200 S.W.3d 481 (2004) (citing *Gibson Appliance Co. v. Nationwide Ins. Co.*, 341 Ark. 536, 20 S.W.3d 285 (2000)) (stating that fact-finders are not bound to accept an expert opinion as conclusive, but should give it whatever weight they think it should have and may disregard any opinion testimony if they find it to be unreasonable).

Furthermore, while I concur in the decision to reverse and remand with instructions to reinstate the previous visitation schedule based on the facts now before us, a significant period of time has passed while this appeal has proceeded. If the situation has changed, the trial court is always free to enter such orders as may be necessary to protect the best interest of the child.

MAMO TRANSPORTATION, INC. *v.* DIRECTOR, DEPARTMENT of WORKFORCE SERVICES

E 06-331 270 S.W.3d 379

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

[Rehearing denied January 23, 2008.]

Thomas B. Staley, for appellant.

Allan Franklin Pruitt, for appellee.

DAVID M. GLOVER, Judge. Appellant, Mamo Transportation, Inc., appeals the Board of Review's decision that it is required to pay unemployment taxes on the drivers it engages because it failed to meet the three-prong test set forth in Arkansas Code Annotated section 11-10-210(e) to determine if its drivers are independent contractors. The Board of Review found that Mamo met the first prong but did not meet the second prong, and because of that it was unnecessary to address the third prong. On appeal, Mamo argues that it met the criteria of the second prong. We affirm the Board of Review's determination that Mamo did not meet the second prong and is therefore liable for payment of unemployment taxes.

Arkansas Code Annotated section 11-10-210(e) (Supp. 2005) provides:

> (e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:
>
> (1) Such individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and
>
> (2) The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
>
> (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Overview

Mamo provides "drive-away" services for its customers throughout all forty-eight contiguous states and into Canada. Mamo contracts with drivers to deliver large vehicles to its

customers, *i.e.*, tractor-trailers, buses, and motor homes, where conventional hauling is not financially efficient. Mamo, which is headquartered in Indiana and has dispatch offices in Indiana, Pennsylvania, North Carolina, and Arkansas, has a list of approved drivers. An approved driver calls one of the dispatch offices when he wants to work to determine if there is a trip he wants to take. Mamo gives the driver the amount it is willing to pay per mile for the trip, and the driver is free to attempt to negotiate a better deal. If the driver and Mamo are able to agree on a price, the driver makes the trip. Mamo's profits are derived from the difference between what the customer pays Mamo and what Mamo pays the driver. Mamo does not have exclusive contracts with any driver; testimony indicated that eighty-eight percent of the drivers had at least two other carrier contracts in addition to Mamo. There was testimony that Mamo does not train its drivers; that the drivers are responsible for paying their own taxes; that the drivers pay their own expenses, including meals, lodging, fuel for the vehicle being delivered, and transportation home after delivery; that drivers choose how much to work; and that drivers are responsible for the first $1000 in damages if there is an accident, with Mamo's liability insurance paying the balance owed. Three Mamo drivers testified that they considered themselves to be independent contractors.

Case History

This case arose when one of Mamo's drivers, Sylvia Jones-Allen, filed for unemployment benefits after Mamo cancelled her contract on the basis that she was a high-risk driver. Jones-Allen was making her third trip for Mamo during her first ninety days under contract when she caused over $9,000 in damages to a vehicle by driving it under a bridge that was too low for the vehicle. When she applied for unemployment benefits, Jones-Allen identified herself as an independent contractor. Mamo agreed with this designation. However, the Board of Review found that Mamo was not exempt from paying Arkansas unemployment taxes because it did not meet all three prongs of Arkansas Code Annotated section 11-10-210(e). Mamo now brings this appeal.

Discussion

In *American Transportation Corporation v. Director*, 39 Ark. App. 104, 106, 840 S.W.2d 198, 199 (1992) (citations omitted), our court held:

> In order to obtain the exemption contained in the Act, it is necessary that the employer show to the satisfaction of the Director that the requirements of all three subsections have been met. Therefore, if there is sufficient evidence to support a finding that any one of the three requirements were not met, the case must be affirmed. In reviewing decisions of the Board of Review, this court views the evidence in the light most favorable to the Board's findings, giving them the benefit of every legitimate inference that can be drawn from the testimony, and will affirm the determination of the Board if its findings are supported by substantial evidence. The issue to determine is not whether the evidence would support some different finding, but whether it supports the finding actually reached by the Board.

In the present case, Mamo does not make the argument that its drivers are not paid wages; therefore, the only issue on appeal is whether Mamo meets the second prong of section 11-10-210(e), whether the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed. This second prong itself is a two-part alternative test — the test is met if the service is performed either outside the usual course of business *or* if the service is performed outside of all the places of business of the enterprise for which the service is performed.

In *Home Care Professionals of Arkansas, Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.3d 536 (2006), this court held that the appellant, HCP, was not exempt from paying unemployment taxes because it had failed to satisfy subparagraph two of the statutory exemption. HCP maintained a list of caregivers who provided home-care services for the elderly; when it first began, HCP provided direct home-care services for the elderly, but it had eventually evolved into a home-care referral service. Clients contacted HCP and stated what home-care services were needed; HCP collected a fee for the service up front and then found a caregiver willing to perform the necessary services. The client and caregiver negotiated a schedule and the terms of employment; once the caregiver completed the services and turned in a time sheet, HCP distributed the funds collected from the client less its forty percent referral fee. Caregivers on HCP's referral list signed independent-contractor agreements with HCP, and caregivers were responsible for their own transportation and supplies. After a schedule was arranged between the client and the caregiver, HCP

administered the schedule, including scheduling replacements if the caregiver was unable to work. HCP's caregivers were not required to be exclusively listed with HCP.

This court, in affirming the Board's decision that HCP had failed to meet the second prong of the independent-contractor test, quoted the Board's analysis of the second prong of that test:

> In the instant case, caring for the elderly is necessary to [HCP's] business, and thus providing in-home services is within [HCP's] usual course of business. Since the evidence does not establish that [HCP] receives a monetary benefit when a simple referral is made, but only when a service by a caregiver is performed for a client, a finding that providing in-home services is within [HCP's] usual course of business is particularly appropriate.
>
> In regard to the place of business aspect of the second part of the test, an employer's place of business has been found to include not only the location of a business's office, but also the entire area in which a business conducts business. *See Missouri Association of Realtors v. Division of Employment Security*, 761 S.W.2d 660 (Mo. App. 1988); *Employment Security Commission of Wyoming v. Laramie Cabs, Inc.*, 700 P.2d 399 (Wyo. 1985); and *Vermont Institute of Community Involvement, Inc., v. Department of Employment Security*, 436 A.2d 765 (Vt. 1981). More specifically, the representation of an entity's interest by an individual of a premises renders the premises a place of the employer's business. *See Carpetland*, [*Carpetland U.S.A. v. Illinois Dep't of Employment Security*, 206 Ill. 351, 776 N.E.2d 166 (Ill. 2002)]. In the instant case, the caregivers represent [HCP's] interest on the client's premises, not just in a tangential fashion, (*e.g.*, satisfactory work by the caregiver may result in future referral), but in the most direct sense, that of performing the very service by which [HCP] profits.

95 Ark. App. at 198-99, 235 S.W.3d at 540-41. The Board determined that the caregivers represented HCP's interest on the clients' premises, thereby making the clients' premises a place of business. This court adopted that determination.

Other jurisdictions have reached the same conclusion. In *O'Hare-Midway Limousine Service, Inc. v. Baker*, 596 N.E. 2d 795 (1992), the Appellate Court of Illinois rejected O'Hare-Midway's argument that the limousine drivers performed their work outside its usual course of business. The appellate court held that while the

driving did not take place at the office, the usual course of a limousine dispatching service was not limited to office space and because the drivers represented the interests of O'Hare-Midway whenever they picked up passengers, *the usual course of business was on the roadways traveled.* (Emphasis added.) Likewise, in *Employment Security Commission of Wyoming v. Laramie Cabs, Inc.*, 700 P.2d 399 (1985), cited in *Home Care Professionals, supra*, the Supreme Court of Wyoming held that the essence of the taxi cab business was conducted in cabs between the customer's origin and destination, not in the company office, and the supreme court concluded that the vehicles that provided the service had to be considered a place of business of the taxicab company. The Supreme Court of North Dakota determined in *Midwest Property Recovery, Inc. v. Job Service of North Dakota*, 475 N.W.2d 918 (1991), that "the places of enterprise" of Midwest, who was in the business of repossessing vehicles, necessarily extended to where the repossessions took place.

In the present case giving the statutory language its plain meaning and viewing the evidence in the light most favorable to the Board's findings, we hold that the Board's decision is supported by substantial evidence. Mamo provides drivers to transport vehicles for its customers. As in *Home Care Professionals, supra*, Mamo does not receive a monetary benefit until the service, here, driving and delivering the vehicle, is performed; therefore, such delivery is in the usual course of business. Regarding the "place of business" aspect of the test, by comparison to *O'Hare-Midway Limousine, supra*, and *Laramie Cabs, supra*, the roadways are where services are performed, and the drivers represent Mamo's interests on those roadways.

Affirmed.

PITTMAN, C.J., GRIFFEN, and MARSHALL, JJ., agree.

HART and MILLER, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I agree with Judge Miller that this case must be reversed. However, I write separately to draw attention to an unsettling trend in this area of the law that I believe will have far-reaching consequences that apparently have not been considered by the majority. I submit that ratifying the Board of Review's construction of the facts of this case has all but completely annulled the status of independent contractor in this state.

At issue in this case is only the second prong of the three-part test set forth in Arkansas Code Annotated section 11-10-210(e), whether the service performed is "outside the usual course of business" or "outside of all the places of business of the enterprise for which the service is performed." The Board of Review has erred in its findings on both of these factors.

First it errs when it finds that "the course of business for both Mamo and the drivers is providing the delivery of vehicles." This conclusion can only rest on an absurdly broad view that completely misses essential distinctions. It is rather like saying that the Earth is exactly the same as Saturn because they are both planets. It is obvious to me that while both Mamo and the drivers have a role in moving large vehicles, Mamo's sole business is matching the owners of large vehicles that need to be moved with drivers capable of moving them. There was not a shred of evidence that Mamo actually moved the vehicles itself. Likewise, the drivers actually moved the vehicles, but, at least in the context of their relationship with Mamo,[1] had no role in the matching of their skills to the needs of the owners of the vehicles. These distinctions are pivotal. To ignore them is tantamount to saying that a theatrical agent is in the business of performing on stage, when his only role was to get his client the part.

The Board of Review also erred in finding that "Mamo's places of business consist not only of its office, but the roadways on which the drivers transport the vehicles." This finding is remarkable in that the testimony indicated that Mamo performed its role only in its offices, which the drivers did not visit. This finding rests not upon inductive reasoning based upon an examination of the business, but rather on the Board's circular logic that necessarily originated from its flawed conclusion that the drivers were employees, *i.e.*, that if the drivers were employees, then the place of business was everywhere they transported vehicles. The Board tries to support this dubious conclusion by stating that because Mamo "profits" from the drivers' efforts, the transport of the vehicles "constitutes the essence of Mamo's services to its customers." Again, that conclusion is not a product of logic. The theatrical agent earns his money from the actor's performance, but it does not make the agent an actor.

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[1] There is, however, testimony that the drivers were free to make their own arrangements with the owners of large vehicles for subsequent transports. Essentially, the drivers were free to cut out the middleman for subsequent trips.

The majority's reliance on *Home Care Professionals of Arkansas, Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.3d 536 (2006), hereinafter "HCP," to affirm the Board's "source of profit" rationale is also troubling. In the first place, I believe that HCP was wrongly decided and I would take this opportunity to overrule it. However, while I can accept the consequences of *stare decisis*, I cannot accept the *extension* of the flawed HCP holding that this court has announced today in the instant case. HCP is clearly distinguishable from the case at bar. As the majority notes, HCP originally provided direct home-care services and only later "evolved" into a referral service. The HCP court found it significant that HCP's Articles of Incorporation declared that its "purpose is to provide home-care for the elderly." I suppose the State of Arkansas has the right to rely on the official declarations that a business makes to the secretary of state. In the instant case, there is no equivalent declaration of corporate purpose. Additionally, HCP required its independent contractors to sign noncompetition covenants that "protects" its customer list. Mamo imposed no such restriction on the drivers.

The prudent course would be to limit HCP to situations where an entity has held itself out as providing a particular service and restricting access to clients. Instead the majority has written an opinion that is as potentially far-reaching as it is ill-advised. I have already discussed how actors may now potentially be viewed as the employees of their agents. Arguably, this reasoning would apply to all employment agencies as well. However, I believe the reach of this opinion is far greater. There are hundreds of poultry farmers in this state that raise chickens under contract with Tyson Foods. Are they now "employees" of Tyson? Could the rice farmers in this state suddenly be declared "employees" of Riceland? I suspect that the court of appeals has unwittingly opened a Pandora's Box.

I believe that this case should be reversed and remanded to the Board of Review.

BRIAN S. MILLER, Judge, dissenting.

I. Introduction

This case requires us to determine the meaning of the phrase "places of business," which is found in Arkansas Code Annotated section 11-10-210, the statute defining "employment," when determining which work relationships are subject to unemployment taxation. The majority's determination that Mamo's places

of business include every alley, roadway, highway, and freeway in the United States and Canada is too broad, leading to an unreasonable result that is unsupported by the plain language of the statute.

There is no doubt that Arkansas Code Annotated section 11-10-210 is a very broad statute that requires almost every entity utilizing independent contractors in the State of Arkansas to pay unemployment taxes for those contractors. To reach this result, the statute broadly defines employment as almost any service provided, "irrespective of whether the common law relationship of master and servant exists." Ark. Code Ann. § 11-10-210(e).[1] The statute, however, exempts a small number of work relationships from the definition of "employment," and that is the issue presented by this case.

II. Background

Appellant Mamo Transportation, Inc. contracts with its customers to deliver large vehicles where conventional hauling is not financially efficient. It then contracts with drivers to deliver the large vehicles for its customers. Sylvia Jones-Allen contracted with Mamo to deliver vehicles for Mamo's customers. Mamo was not required to assign deliveries to Jones-Allen and she was not required to accept deliveries from Mamo. Jones-Allen was under contract for approximately three months, during which time she made only three deliveries. She had an accident on her third delivery and Mamo decided not to assign any future deliveries to her. Jones-Allen then filed a claim for unemployment benefits.

It is undisputed that Jones-Allen was a common-law independent contractor and was not Mamo's employee. Jones-Allen wrote that she was an independent contractor on her application for unemployment benefits. She was free to decide when and if she would deliver vehicles for Mamo's customers and Mamo was free to decide when and if it would use her to deliver vehicles for its customers. She was free to contract with whomever she wanted, whenever she wanted, including Mamo's competitors. Mamo was

[1] Citizens, however, remain free to independently contract for their labor and the courts recognize independent contractor relationships when, among other things, determining liability for contract and tort disputes. *See, e.g., Reynolds Health Care Servs., Inc. v. HMNH, Inc.*, 364 Ark. 168, 217 S.W.3d 797 (2005) (breach of contract); *Draper v. Conagra Foods, Inc.*, 92 Ark. App. 220, 212 S.W.3d 61 (2005) (tort).

free to contract with other independent contractors whenever it wanted and was not required to ever assign a delivery to Jones-Allen. Mamo did not train her or provide her with the tools of her trade. She paid her own taxes and paid her own expenses, including lodging, meals and fuel. Mamo did not direct her as to how to deliver the vehicles and she was free to deliver the vehicles in any manner she chose.

While all of this is true, Arkansas' unemployment compensation act is not limited by the common law definition of employment. As pointed out by the majority, Arkansas Code Annotated section 11-10-210(e) provides:

> (e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:
>
> (1) Such individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and
>
> (2) The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and
>
> (3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Mamo does not dispute that Jones-Allen received wages, a term which is defined broadly as "all remuneration paid for personal services. . . ." Ark. Code Ann. § 11-10-215 (Supp. 2007). Mamo, therefore, had to satisfy this three-prong test to be exempted from paying unemployment taxes for Jones-Allen. The Arkansas Department of Workforce Service determined that Mamo met the first prong of the test as provided in section 11-10-210(e)(1). The Department, however, found that Mamo failed to satisfy the second prong, which required Mamo to show that the service provided by Jones-Allen was "performed outside of all the places of business of the enterprise for which the service is performed," as required by section 11-10-210(e)(2). Because Mamo was required to satisfy all three

prongs of the test, the Department did not address the third prong, which is found in section 11-10-210(e)(3).

The majority, citing *Home Care Professionals of Arkansas, Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.3d 536 (2006), and a number of cases from other states, found the Department's logic sound and affirms. I disagree and would reverse.

III. Mamo Transportation, Inc. was not Sylvia Jones-Allen's Employer

A. The Enterprise For Which Service is Performed

The essential question is, did Jones-Allen perform all of her service "outside of all of the places of business of the enterprise for which the service is performed?" *See* Ark. Code Ann. § 11-10-210(e)(2). Although it was not addressed by the Board, we must begin by determining what was the "enterprise for which the service [was] performed" by Jones-Allen? *See id.* Was Mamo the enterprise for which Jones-Allen performed service or was each of Mamo's customers the enterprise? The record is clear that Mamo contracted to deliver the vehicles for its customers and then contracted with its subcontractors to make the deliveries. Mamo was not a transportation broker but was a licensed carrier, and its obligations to its customers were "farmed out" to its drivers. *See Transplace Stuttgart, Inc. v. Carter*, 98 Ark. App. 418, 255 S.W.3d 878 (2007). Because Mamo was ultimately responsible to its customers for the service provided by Jones-Allen, Mamo was the enterprise to which Jones-Allen provided service. Had Mamo been a transportation broker, Jones-Allen's claim for benefits would have been a non-starter because the enterprise to which she provided service would have been the customer, not Mamo.

B. Mamo's Places of Business

Although Mamo was the enterprise to which Jones-Allen provided service, Mamo was exempt from paying unemployment taxes for her because she did not perform those services for Mamo at any of its places of business. *See* Ark. Code Ann. § 11-10-210(e)(2). We should not read anything into the statute but we must read the statute literally and give its words their ordinary and usually accepted meaning in common language. *Phillips v. Ark. Dep't of Human Servs.*, 85 Ark. App. 450, 158 S.W.3d 691 (2004); *Brandon v. Ark. Pub. Serv. Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999). Mamo's places of business, using the usually accepted

meaning in common language, are its facilities, which are located in Osceola, Indiana; Little Rock, Arkansas; Charlotte, North Carolina; and Bloomsburg, Pennsylvania. The record is clear that Jones-Allen performed no services for Mamo at any of these facilities. Therefore, her services were performed outside of all of Mamo's places of business.

The majority's holding that Mamo's places of business include every alley, roadway, highway, and freeway in the United States and Canada does not comport with the common meaning of the language found in the statute. Had the legislature intended to cover every conceivable place in which Mamo provided services, the statute would have required Mamo to show that the service is "performed outside of all of the places in which the enterprise performs services," not "outside of all the places of business of the enterprise."

In support of its expansive reading of the statue, the majority relies on *Home Care Professionals of Arkansas, Inc. v. Williams, supra.* In *Home Care Professionals*, we held that the appellant, HCP, was not exempt from paying unemployment taxes for the in-home caregivers that it assigned to its clients. *Id.* It is arguable that *Home Care Professionals* was wrongly decided. *See id.* (Baker, J., dissenting). We, however, will save that issue for another day, because this case is clearly distinguishable from *Home Care Professionals.*

As the majority opinion points out, in *Home Care Professionals* we adopted the Board's determination that "the caregivers represented HCP's interest on the client's premises, thereby making *the clients' premises* a place of business." *Home Care Professionals, supra.* (Emphasis added.) Although we extended the phrase "places of business" to include the homes of HCP's clients, we did not extend that phrase to include every conceivable place that the caregivers traveled in an effort to serve HCP's clients. And that is the rub of the case before us; the majority's opinion takes the next step of expanding the phrase "places of business" to include a greater number of places, none of which would be considered places of business by the ordinary reasonable person.

The majority extends the phrase "places of business" beyond well defined places such as the homes and business locations of customers. It reaches out and applies it to every conceivable place in which an independent contractor could possibly provide a service for its prime contractor's customers. In the present case,

this specifically includes every alley, roadway, highway, and freeway in the United States and Canada. Although seemingly absurd, the majority's definition also includes all of the railways and waterways in, and all of the air space above the United States and Canada. This is the case because Mamo's independent contractors were not restricted in the method by which they could have the vehicles delivered. Although it may have caused financial ruin, Jones-Allen could have arranged to have the vehicles delivered by some method other than driving. Therefore, Mamo's places of business include every possible shipping route in the United States and Canada. Not only is this unreasonable, it is not what the legislature intended. Indeed, it contradicts the common meaning of the language of the statute.

There is also a secondary distinction between this case and *Home Care Professionals*. Although Jones-Allen was clearly an independent contractor, it is not clear whether the caregivers in *Home Care Professionals* were truly independent. For example, in addition to referring its caregivers to its customers, HCP also administered the care-givers' work schedules. *Id.* When a caregiver was unable to make a scheduled in-home visit, HCP was responsible for finding a replacement to meet the caregiver's obligation. *Id.* Additionally, the caregivers' contracts with HCP contained non-compete clauses, which restricted the ability of its caregivers to contract for their labor once their relationship with HCP concluded. *Id.*

The majority also relies on a number of cases from foreign jurisdictions to support its interpretation of section 11-10-210(e)(2). I will not give a detailed analysis of those cases, because I stand firm in deferring to the common meaning of the language of section 11-10-210(e)(2). Moreover, there are cases from other jurisdictions which are in direct opposition to the results reached by the foreign cases cited by the majority. *See, e.g., Commissioner of Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc.*, 68 Mass. App. Ct. 426, 862 N.E.2d 430 (2007) (finding that the services provided by taxi drivers occurred outside of the business premises of the taxi company).

IV. Conclusion

This court's interpretation of the phrase "places of business" should be constrained to the common meaning of that phrase. For this reason, Mamo's places of business are its facilities in Osceola,

Indiana; Little Rock, Arkansas; Charlotte, North Carolina; and Bloomsburg, Pennsylvania. Because Jones-Allen never provided services to Mamo at these facilities, I would reverse the decision of the Department of Workforce Services.

THE STEAK HOUSE and Farmers Insurance Group *v.* Misty L. WEIGEL

CA 07-34 270 S.W.3d 365

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

Huckabay, Munson, Rowlett & Moore, P.A., by: *Sarah Presson* and *John O. Payne*, for appellants.

Frederick S. Spencer, for appellee.

D.P. MARSHALL JR., Judge. While working at The Steak House, Misty Weigel allegedly sustained a left-knee injury. The Steak House contested her claim, arguing that it had no notice of the injury and that no objective proof showed a compensable knee injury. The administrative law judge rejected The Steak House's arguments and awarded Weigel benefits. The Commission affirmed and adopted the ALJ's findings. On appeal, The Steak House argues that the Commission committed errors in admitting evidence and determining witnesses' credibility at the hearing. The Steak House also argues that substantial evidence does not support the Commission's finding of a compensable knee injury. The Steak House's first two arguments lack merit. The Commission does need to make an additional finding, however, about whether Weigel's "guarding" constituted objective medical evidence. We therefore reverse and remand for additional findings on compensability.

I.

About a week after she began working at The Steak House, Weigel alleged that she felt her knee "crack" when she turned to reach for a spray bottle to wipe off tables at the restaurant. She claimed that she felt an instant throbbing sensation. Weigel also said that she reported the incident to the restaurant's owner, Jay Winham, the same day, and discussed the injury with him several more times during the next two weeks. Valerie Ross, Weigel's friend and co-worker at The Steak House, testified that she observed the injury and saw Weigel report the injury to Winham.

Weigel went to the emergency room at Baxter Regional Medical Center about ten days after her injury. She received crutches and a knee immobilizer, and was told to follow up with her family doctor. Weigel was eventually referred to Dr. Anthony McBride, an orthopedic surgeon. Dr. McBride's notes indicate that: "McMurray's testing is impossible secondary to guarding but it [is] apparently more intense on the medial side than the lateral side. Lachman's is negative but once again, she is guarding." Dr.

McBride recommended an MRI of Weigel's left knee. This test, however, was not done at that time.

Jay Winham, The Steak House's owner, testified that Weigel never told him that she injured herself at work until she filed her claim for workers' compensation benefits in June 2005. The Steak House denied Weigel's claim based on lack of notice and no objective proof of a knee injury. The ALJ conducted a two-part hearing in this matter. After the initial hearing, the ALJ left the record open to allow testimony from Mr. Winham, who was unable to attend the first hearing. Between the two hearing dates, Weigel underwent an MRI of her knee. Weigel gave notice before the second hearing that she wanted to introduce this MRI report. The ALJ admitted the belated report, over The Steak House's objection, because Weigel "had no financial means to obtain [the MRI] herself until she was approved for SSI and Medicaid after the first hearing held on February 1, 2006."

In his opinion, the ALJ found that Weigel suffered a compensable left-knee injury and that she promptly notified Winham of the injury. The Commission adopted the ALJ's opinion in its entirety.

II.

The Steak House argues that the Commission based its compensability finding on erroneous evidentiary rulings. We disagree.

The decision to admit the belated MRI report was entirely within the ALJ's discretion, and he did not abuse that discretion. Ark. Code Ann. § 11-9-705(c)(3) (Supp. 2007). Weigel had a good reason for waiting until after the first hearing to undergo an MRI — she could not afford it until then. The Commission should be liberal, rather than stringent, about the admission of evidence. *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 69, 61 S.W.3d 856, 860 (2001). And we see no abuse of discretion in the admission of this report before the second hearing. *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 144, 959 S.W.2d 753, 756 (1998).

The Steak House also argues that the Commission erred by allowing Weigel to cross-examine Winham about other instances where Winham denied receiving notice about an alleged work injury. Evidence of similar occurrences is generally admis-

sible only when the proposing party demonstrates that the other events arose out of the same or substantially similar circumstances. Ark. R. Evid. 401; *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 188, 718 S.W.2d 92, 93 (1986). The Commission, however, is not bound by the Rules of Evidence. Instead, the Commission must adhere to basic rules of fair play, such as recognizing the right of cross-examination and the necessity of having all evidence in the record. *Brewer v. Tyson Foods, Inc.*, 10 Ark. App. 88, 90, 661 S.W.2d 423, 424 (1983).

The ALJ analyzed this issue correctly. He ruled that:

> Mr. Spencer's questions appeared to have been designed to uncover possible instances of Mr. Winham asserting an alleged lack of notice to Mr. Winham under substantially similar circumstances to the circumstances presented in this case (i.e., employees of Mr. Winham allegedly notifying Mr. Winham of work-related injuries and Mr. Winham asserting that he never received notice from the injured employees during the time frame alleged by the employees).

We see no abuse of the Commission's broad discretion in evidentiary matters. *Brown, supra.*

III.

The Steak House next argues that the ALJ erred in determining the credibility of witnesses at the hearing. The Steak House claims that its witness, Mr. Winham, was more credible than Weigel and Ross about all matters, including the conflicting testimony about notice. Based on his assessment of the parties' credibility, the ALJ found that Weigel gave Winham prompt notice about her injury. The Commission adopted that finding. Because the determination of the credibility and weight to be given to a witness's testimony is solely for the Commission, The Steak House's argument on this point is without merit. *Williams v. Brown's Sheet Metal/CNA Ins. Co.*, 81 Ark. App. 459, 462, 105 S.W.3d 382, 384 (2003).

IV.

The Steak House next argues that substantial evidence does not support the Commission's finding that Weigel sustained a compensable injury. To get benefits, Weigel had to prove the

following: (1) that she suffered an injury arising out of and in the course of her employment with The Steak House; (2) that the injury was caused by a specific incident identifiable by time and place of occurrence; (3) that the injury caused internal or external physical harm to her body, which required medical services or resulted in disability or death; and (4) that the injury was established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(A)(i) & (4)(D) (Supp. 2007).

The Steak House claims that Weigel failed to meet the statute's objective-findings requirement. The Commission based its compensability decision on the "guarding" noted by Dr. McBride in a March 2005 medical record. The Commission concluded that guarding "is an objective finding within Act 796 of 1993." In reaching this conclusion, the Commission relied on a medical-dictionary definition equating guarding with muscle spasms, and on several prior Commission opinions, all of which concluded that guarding is an objective finding. This court, however, has stated in *dicta* that muscle guarding is "subjective criteria and not objective findings." *Polk County v. Jones*, 74 Ark. App. 159, 161, 47 S.W.3d 904, 905 (2001). Because the Commission decided the compensability of Weigel's injury on "guarding" alone, whether guarding is a subjective or an objective finding is the dispositive issue.

We hold that muscle guarding is sometimes involuntary and sometimes voluntary. Many of the medical authorities we have examined indicate that guarding is often an involuntary response,[1] and thus would be an objective finding that would satisfy the statute. But some medical authorities indicate that

[1] STEDMAN'S MEDICAL DICTIONARY 750 (26th ed. 1995) (defining "guarding" as a spasm of muscles to minimize motion or agitation of sites affected by injury or disease); WILLIAM E. PRENTICE AND MICHAEL L. VOIGHT, TECHNIQUES IN MUSCULOSKELETAL REHABILITATION 311 (Ed. 2001) (describing muscle guarding as a protective response in muscle that occurs due to pain or fear of movement); FLORENCE PETERSON KENDALL ET AL., MUSCLES: TESTING AND FUNCTION WITH POSTURE AND PAIN 52 (5th ed. 2005) (Nature's way of providing protection for a muscle injury is by "protective muscle spasm" or "muscle guarding" in which the muscles become rigid to prevent painful movements); MELLONI'S ILLUSTRATED MEDICAL DICTIONARY 257 (4th ed. 2002) (defining "guarding" as a spasm of muscles at the site of injury or disease occurring as the body's protection against further injury).

guarding can be a voluntary response to pain,[2] and thus would be a subjective finding. Some other jurisdictions have acknowledged medical opinions stating that guarding can be a voluntary act. *E.g.*, *DeLuca v. Brown*, 6 Vet. App. 321, 323 (1993) ("The [doctor's] impression was: '. . . that the restricted mobility found was in part due to voluntary guarding.'").

We hold that the Commission's conclusion in this case — that "guarding is an objective finding" — sweeps too broadly. Our contrary *dicta* in *Polk County* that guarding is subjective does too, and we disavow it. Guarding can be beyond the patient's control or within the patient's control. This issue is therefore a matter of fact on which the Commission should make a specific finding case by case based on the medical evidence. The Commission's opinion here lacks a finding about whether Dr. McBride concluded that Weigel's guarding was voluntary or involuntary. We do not know whether the guarding notation was a subjective or an objective finding. This fact question is for the Commission, not our court.

We therefore reverse and remand for the Commission to make additional findings of fact about Weigel's guarding. We also note that, though the Commission did not rely on the belated MRI report in determining compensability, it should consider that report on remand because we have held that the ALJ properly admitted this evidence.

Reversed and remanded.

PITTMAN, C.J., agrees.

GRIFFEN, J., concurs.

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[2] BERNARD M. ABRAMS, M.D., PHYSICAL EXAMINATION OF THE PAIN PATIENT, 11 JOURNAL OF BACK AND MUSCULOSKELETAL REHABILITATION 183-99 (Dec. 1998) ("A finding of spasm of the paraspinal muscles can occasionally be found in volitional muscle guarding rather than involuntary reflex guarding."); MICHAEL E. GEISSER, PHD, SURFACE ELECTROMYOGRAPHY AND LOW BACK PAIN, 35 BIOFEEDBACK 15 (Spring 2007) (discussing other authors' suggestions that guarding is a volitional response).

Betty BOLDING *v.* David NORSWORTHY,
Executor of the Estate of Harold Deaton Norsworthy, Deceased

CA 07-469 270 S.W.3d 394

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

[Rehearing denied January 23, 2008.]

Compton, Prewett, Thomas & Hickey, LLP, by: *Floyd M. Thomas, Jr.*, for appellant.

Vickery & Carroll, P.A., by: *Ian W. Vickery*, for appellee.

SARAH HEFFLEY, Judge. Appellant Betty Bolding appeals the trial court's order awarding ownership of approximately $50,000 in bank account funds to her late brother's estate. Appellant contends that the trial court erred in its determination that she was not entitled to the funds as a joint owner with right of survivorship. We find no error in the trial court's judgment and affirm.

The dispute in this case concerns a savings account opened on April 6, 1987, in the name of Harold Deaton Norsworthy, appellant's brother. The signature card on the account contained the signatures of both Harold Norsworthy and appellant. On February 15, 2006, Harold Norsworthy passed away, and appellant withdrew all of the funds in the account, approximately $50,000, and placed them in her own personal account. On June 19, 2006, David Norsworthy, son of the decedent and executor of the decedent's estate, filed a complaint in Union County Circuit Court, arguing that appellant was not a joint owner of the account and that the money in the account should be returned to the estate. Appellant answered the complaint and alleged that she was the rightful owner of the money as the account was held in joint tenancy with right of survivorship.

A bench trial on the matter was held on February 23, 2007. Rodney Landes, Jr., president of the bank at which the account was held, testified that it was possible to have a single owner of an account but have several people sign on the account. Mr. Landes also read the language of the signature card at issue, which stated in pertinent part:

> A, Mr. Harold D. Norsworthy
>
> and B,
>
> and C,
>
> as joint tenants with right of survivorship, and not as tenants in common, and not as tenants by the entirety, *the undersigned hereby apply for a savings account* in First Federal Savings and Loan Association of El Dorado [now First Financial Bank] *and for the issuance of evidence thereof in their joint names, described as aforesaid.* You are directed to act pursuant to any one or more of the *joint tenant signatures shown below* in any manner in connection with this account and without limiting the generality of the foregoing to pay without any liability for such payment to anyone or the survivor or survivors

> at any time. This account may be pledged in whole or in part as security for a loan made by you to one or more of the undersigned. Any such pledge shall not operate to sever or terminate either in whole or in part the joint tenancy estate and relationship reflected in or established by this contract. It is agreed by the signatory parties with each other and by the parties with you that any funds placed in or added to the account by any one of the parties are and shall be conclusively intended to be a gift and delivery at that time of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account.
>
> . . .
>
> A. /s/ Harold Norsworthy P.O. Drawer C
> Smackover, AR 71762
>
> B. /s/ Betty Bolding
>
> C.

(Emphasis added.) As the card illustrates, there was only one name that was "aforesaid," but there were two names as the "undersigned." Mr. Landes explained that his impression was that Harold Norsworthy was the owner of the account and appellant was an authorized signer, meaning she had the authority to write checks on the account.

Appellant testified that her brother added her name to the account in order to compensate her for caring for him in his later years, and her brother had never told her that she was to distribute the money to his children at his death. When questioned about the creation of the account in 1987, appellant first asserted that she did not sign the signature card at the bank and did not accompany her brother to the bank. But appellant later admitted that she had testified in an earlier deposition that she had been cleaning her brother's house one day and "I found this thing that had my name and his on the bank deposit — I mean, on the deposit slip, so he had me sign the paper at the bank, which he didn't tell me exactly what it was then."

In a judgment filed March 23, 2007, the trial court gave credence to Mr. Landes's testimony that the bank recognizes a distinction between ownership of an account and access to an account. The trial court concluded that the signature card that created the account was ambiguous, as it makes reference to the "undersigned," which would include appellant, and then makes a contradictory reference to the joint names as "aforesaid," which

would refer only to the decedent. The court therefore considered other factors, such as: (1) the social security number listed on the account was that of the decedent; (2) the account was funded by the decedent; (3) appellant did not contribute to the account or pay taxes on its interest earnings; (4) there is no other writing to indicate appellant's ownership of the funds or a gift to her through survivorship of the decedent. The court acknowledged that appellant had the power to withdraw the funds in the account, but concluded "that power does not equate to ownership of the funds." The court found that ownership of the funds rested with the estate and ordered appellant to remit the remaining funds to appellee. Appellant then filed a timely notice of appeal to this court.

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the findings of the circuit court, but whether the circuit court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Parker v. BancorpSouth Bank*, 369 Ark. 300, 253 S.W.3d 918 (2007). 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. *Id.* Disputed facts and determinations of credibility are within the province of the fact-finder. *Simmons v. Dixon*, 96 Ark. App. 260, 240 S.W.3d 608 (2006).

On appeal, appellant argues that the trial court erred because Ark. Code Ann. § 23-37-502 (Repl. 2000) creates a conclusive presumption that opening a savings account in the name of two or more persons is evidence that both parties intended to vest title in the account to the survivor upon the death of the other. Section 23-37-502 provides:

> Savings accounts may be opened in any association or a federal association in the names of two (2) or more persons . . . and the savings accounts may be held as follows:
>
> (1)(A) If the person opening the savings account fails to designate in writing the type of account intended, or if he designates in writing to the association that the account is to be a "joint tenancy" account or a "joint tenancy with right of survivorship" account, or that the account shall be payable to the survivors of the persons named in the account, then the account and all additions thereto shall be the property of those persons as joint tenants with right of survivorship.
>
> . . .

> (C) The opening of the account in this form shall be conclusive evidence in any action or proceeding to which either the association or the surviving parties is a party, of the intention of all of the parties to the account to vest title to the account and the additions thereto in the survivors.

Appellant argues that in this case, her signature and the decedent's signature on the bottom of the bank card is sufficient to satisfy the statute and create the presumption of right of survivorship.

Appellant's argument in this regard begs the question, however, of whether this particular writing sufficiently designated the account as a joint tenancy with right of survivorship. Appellant fails to address the trial court's finding that the document was ambiguous, and instead only argues that the trial court erred in conducting a "factual inquiry" into the ownership of the funds. But our case law has made clear that where there is uncertainty of meaning in a written instrument, an ambiguity is present, and parol evidence may be admitted to prove an independent, collateral fact about which the written contract was silent. *Alexander v. McEwen*, 367 Ark. 241, 239 S.W.3d 519 (2006). We find that the trial court's finding of ambiguity and subsequent consideration of extraneous evidence was not clearly erroneous.

Appellant also argues that there was not sufficient evidence presented to show that the decedent intended the funds to pass to his estate and that the trial court improperly imposed what amounts to a constructive trust without evidence to support such an action. As to the sufficiency of the evidence, that argument has been addressed in the point above. As to the imposition of a constructive trust, we agree with appellee that the argument is without merit, as the trial court simply ordered the funds returned to the estate and made no indication that it was creating a constructive trust. Overall, we find that the trial court's findings in this case were not clearly erroneous, and we accordingly affirm the judgment.

Affirmed.

GLOVER and BAKER, JJ., agree.

Anthony HUNTER and Elaine Hunter *v.*
Timothy M. HAUNERT

CA 07-439 270 S.W.3d 339

Court of Appeals of Arkansas
Opinion delivered December 19, 2007

Blair & Stroud, by: *H. David Blair* and *Michelle C. Huff*, for appellants.

Murphy, Thompson, Arnold, Skinner & Castleberry, by: *Tom Thompson* and *Casey Castleberry*, for appellee.

BRIAN S. MILLER, Judge. This case involves the right of appellants, Anthony and Elaine Hunter, to change the surname of their minor son, J.H., from Haunert to Hunter, and to terminate appellee Timothy M. Haunert's visitation rights with J.H. While seemingly simple, this case is complicated by several facts. First,

Anthony impregnated Elaine while she was married to Haunert. Second, J.H. was born while Elaine and Haunert were married and Haunert, for all intents and purposes, was the only father J.H. had for the first two years of his life, until Elaine divorced Haunert and married Anthony. Third, the divorce decree entered by Elaine and Haunert found that Haunert stood *in loco parentis* to J.H.; ordered that Haunert have visitation with J.H.; and required Haunert to pay child support and provide medical insurance for J.H.

The Hunters petitioned the Independence County Circuit Court to change J.H.'s surname to Hunter and to terminate Haunert's visitation rights. The trial court denied the Hunters' petition and found that the marriage of Anthony and Elaine was not a material change of circumstances warranting the termination of Haunert's visitation rights. The court also denied the Hunters' petition to change J.H.'s surname.

On appeal, the Hunters argue that: (1) the court erred by denying their petition to change J.H.'s surname; (2) the court infringed upon their Fourteenth Amendment Due Process rights by permitting Haunert to have visitation with J.H., against their wishes; (3) the court erred in finding that their marriage was not a material change of circumstances warranting the termination of Haunert's visitation rights.

We agree that the Hunters' marriage was not a material change in circumstances warranting the termination of Haunert's visitation rights. We also hold that the Hunters' rights to due process are not violated by the order of the trial court. Therefore, we affirm the trial court's ruling that Haunert is permitted to continue his visitation with J.H. The trial court, however, erred in denying the Hunters' petition to change J.H.'s surname to reflect the name of his parents, by whom he is being raised. Therefore, we reverse on that point.

I. Background

Elaine and Haunert were married in 1988 and lived together until their separation in August 2002. Their divorce decree (DR-02-384-4) was entered on March 4, 2003. During their marriage, two children were born: T.H. (d.o.b. 8-18-91) and J.H. (d.o.b. 5-1-00). Although Haunert was not the biological father of either child, the divorce decree specifically found that Haunert had stood *in loco parentis* to the children and the decree ordered Haunert to pay child support and to maintain health insurance for the chil-

dren. Elaine married Anthony on April 29, 2004, and a paternity test established Anthony as the father of J.H.

Haunert filed a petition for contempt on July 21, 2005, alleging that Elaine was refusing him visitation with the minor children. The parties conferred and resolved their conflict by consent order on September 1, 2005. That order reaffirmed the parties' original agreement permitting Haunert to have visitation with J.H. and T.H. It also allowed Haunert to make up the visitation that he had missed.

Elaine and Haunert then petitioned and counter-petitioned the court concerning various issues from visitation to custody, culminating in Elaine's June 14, 2006, petition to terminate Haunert's visitation rights with J.H. Approximately one week later, the Hunters petitioned to have Anthony adjudicated the biological father of J.H., to have J.H.'s surname changed to Hunter, and to amend J.H.'s birth certificate to reflect that Anthony was his father.

II. The Hearing

A hearing on the petitions was held on August 28, 2006. Prior to this hearing, the parties agreed that Haunert would have custody of T.H., who was neither Anthony's nor Haunert's biological son. At the hearing, Haunert testified that although he was not the biological father of the children, he had paid child support and had maintained health insurance on the children. He also stated that the Hunters had denied him visitation on at least four occasions. He further stated that he has a father-son relationship with J.H.; that he has been J.H.'s father since he was born; that J.H. calls him "dad"; that he buys J.H. clothes and attends his baseball games; that his family considers J.H. his child and treats him as such; that he purchased a dirt bike for J.H.; and that it was not in J.H.'s best interest to have his last name changed.

T.H. testified that he and J.H. have a good relationship. He said that J.H. refers to Haunert as "dad" and to Anthony as "step-dad." He said that he and Anthony have a bad relationship and that he has not been in the Hunters' house in months.

Haunert's neighbor, Linda Dickerson, testified that J.H. was "crazy about" Haunert. She said that Haunert and J.H. have a wonderful relationship and that she had not seen anything that would suggest that Haunert was not capable of raising his children.

Anthony testified that J.H.'s surname should be changed to Hunter because J.H. is confused as to why his surname is Haunert.

Anthony said that he, Elaine, and all of his seven children, except J.H., carry the Hunter surname. Anthony stated that J.H. is very close to his siblings and that he knew he was J.H.'s father from the time he was born. Moreover, J.H. has lived with Anthony and Elaine since their marriage in 2004. Anthony also testified that he supports Elaine in whatever decisions she makes regarding whether Haunert should continue to have visitation with J.H.

Elaine testified that J.H. has always known Anthony as his father as proven by the fact that J.H. did not visit Haunert on Father's Day in 2005. She said that J.H. is confused by having to call two men "dad" and that Haunert undermines the Hunters' parenting decisions. She stated that she wants a "normal life" and that having to send J.H. to Haunert's house, which she believes is somewhat unsafe, infringes on her and Anthony's parental rights. She stated, however, that Haunert pays child support and that she has never given him any of the money back.

The trial court found that there was insufficient proof to support the Hunters' petition to change J.H.'s surname. The court entered an order (1) denying the Hunters' request to terminate Haunert's visitation with J.H.; (2) terminating child support; (3) granting full custody of T.H. to Haunert; (4) holding Elaine in contempt and ordering her to pay $500 attorney's fee to Haunert; (5) denying the petition to change J.H.'s surname; (6) ordering Haunert to get rid of J.H.'s dirt bike; and (7) granting Haunert the right to attend J.H.'s parent-teacher conferences and school functions. This appeal followed.

III. Standard of Review

We review domestic-relations cases de novo on the record, and we will not reverse the trial court's findings unless they are clearly erroneous. *Robinson v. Ford-Robinson*, 362 Ark. 232, 208 S.W.3d 140 (2005). A trial court's finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed. *Id.* We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Id.* This deference is even greater in cases involving children, as a heavier burden is placed on the judge to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.*

IV. Change of Surname

The Hunters first argue that the trial court erred when it refused to change J.H.'s surname to Hunter. When a party seeks to have a child's surname changed, the following factors should be considered:

> (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (6) the existence of any parental misconduct or neglect.

Huffman v. Fisher (*Huffman I*), 337 Ark. 58, 987 S.W.2d 269 (1999). Where a full inquiry is made by the trial court regarding the implication of these factors and a determination is made with due regard to the best interest of the child, the trial court's decision will be upheld where it is not clearly erroneous. *Gangi v. Edwards*, 93 Ark. App. 217, 218 S.W.3d 339 (2005). The burden of proof is on the moving party to demonstrate that the name change is in the best interest of the child. *Id.* The court also has the discretion to consider other factors when determining what surname would be in the best interest of the child. *See Bell v. Wardell*, 72 Ark. App. 94, 34 S.W.3d 745 (2000). In its letter opinion, the trial court determined that insufficient evidence was presented to support the name change. We disagree.

The trial court erred by denying the Hunters' petition to change J.H.'s surname to Hunter. Three of the *Huffman* factors are relevant to this case. Factor three, which focuses on the length of time the child has borne a given name, weighs in favor of keeping J.H.'s surname the same. This is true because J.H. has borne the name Haunert all of his life. Factors two and five, however, clearly weigh in favor of the proposed name change. Changing J.H.'s surname will help preserve and develop his relationship with his biological parents, Anthony and Elaine, both of whom carry the Hunter name. J.H. may also be subjected to difficulties, harassment, or embarrassment simply because he bears a name different from that of his parents and siblings. Indeed, J.H. is being raised in the home with his biological parents and a younger sibling, all of whom carry the name Hunter. He should be

allowed to bear their name. For these reasons, we reverse and remand with instructions to enter an order granting the name change.

V. Due Process

The Hunters next argue that, as J.H.'s parents, they have a fundamental liberty interest in deciding who has visitation with J.H. *See Troxel v. Granville*, 530 U.S. 57 (2000). They argue that the trial court's refusal to terminate Haunert's court ordered visitation with J.H. infringes upon their Fourteenth Amendment right to due process. The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property, without due process of law. *Id.* The Supreme Court of the United States has held that parents have a fundamental right to make decisions concerning the care, custody, and control of their children. *Id.*

The Hunters have waived their due process argument. Elaine and Haunert entered their divorce decree on March 4, 2003. The decree was entered by consent and provides that Haunert stood *in loco parentis* to J.H. It ordered visitation between Haunert and J.H. and Elaine never asserted that the decree violated her due process rights. Although visitation between Haunert and J.H. continued after Anthony and Elaine were married, Anthony never objected to it, although he knew that J.H. was his biological son. Indeed, less than one month before filing the petition to terminate Haunert's visitation rights, Elaine entered a consent order reaffirming Haunert's visitation rights. Anthony and Elaine also continued to accept child support checks for J.H. and allowed Haunert to pay for J.H.'s medical insurance well after their marriage.

We would affirm even if the Hunters had not waived their due process argument because *Troxel* is distinguishable from the present case. In *Troxel*, the Supreme Court held that the State of Washington's grandparent-visitation statue was unconstitutional. 530 U.S. at 67. Consequently, the trial court's order granting visitation to grandparents, over the objection of the child's mother, was reversed. The grandparents in *Troxel* never stood *in loco parentis* to the grandchild, and the award of visitation was based on a statute and not a divorce decree.

In *Robinson*, 362 Ark. at 239, 208 S.W.3d at 143, the Arkansas Supreme Court distinguished *Troxel*. Unlike *Troxel*, in which grandparents sought visitation, "the visitation in [*Robinson*]

arose out of a custody determination in a divorce proceeding rather than from a lawsuit brought by nonparents pursuant to a statute." *Id.* at 234, 208 S.W.3d at 143. The court further held that:

> Moreover, and critical to our review in this case, the party awarded visitation in this case was found by the circuit court to stand *in loco parentis* to the child. In other words, the court granted visitation to a person considered to be, in all practical respects, a non-custodial parent.

Id. at 239, 208 S.W.3d at 143, 144. It is undisputed that Haunert's visitation arose out of a divorce proceeding and was not brought pursuant to a statute. It is also undisputed that Haunert stood *in loco parentis* to J.H. Therefore, the precedent established in *Robinson* applies and the trial court did not err in denying the Hunters' petition to terminate Haunert's visitation with J.H.

VI. *Material Change of Circumstances*

Finally, the Hunters argue that the trial court erred in concluding that their marriage was not a material change of circumstances warranting the termination of Haunert's visitation rights with J.H. The trial court maintains continuing jurisdiction over visitation and may modify or vacate those orders at any time when it becomes aware of a change in circumstances or of facts not known to it at the time of the initial order. While visitation is always modifiable, courts require more rigid standards for modification than for initial determinations in order to promote stability and continuity for the children and in order to discourage repeated litigation of the same issues. *Id.* The party seeking a change in the visitation schedule has the burden to demonstrate a material change in circumstances that warrants a change in visitation. *Id.* The best interest of the children is the main consideration. *Id.* The trial court found that no material change in circumstances existed to warrant a modification of the visitation schedule.

The trial court did not err in denying the Hunters' petition to terminate Haunert's visitation with J.H. The Hunters' marriage was not a material change in circumstances sufficient to modify Haunert's visitation rights. *See Middleton v. Middleton*, 83 Ark. App. 7, 113 S.W.3d 625 (2003). Further, terminating Haunert's visitation rights would not be in J.H's best interest. This is true because J.H. has known Haunert as his father his entire life and has enjoyed visitation with Haunert since his mother and

Haunert divorced. His older brother, T.H., whom he has known since birth and with whom he has a good relationship, lives with Haunert. The record indicates that T.H. is not welcome in the Hunters' home and, therefore, terminating Haunert's visitation would also disallow J.H. the opportunity to maintain his relationship with T.H. For these reasons, we affirm on this point.

Affirmed in part; reversed and remanded in part, with instructions.

MARSHALL and VAUGHT, JJ., agree.

Jeremy WALDRIP *v.* GRACO CORPORATION; FirstComp Insurance Company

CA 07-345 270 S.W.3d 891

Court of Appeals of Arkansas
Opinion delivered January 9, 2008

Cullen & Co. PLLC, by: *Tim Cullen*, for appellant.

Frye Law Firm, P.A., by: *Cynthia E. Rogers*, for appellees.

JOSEPHINE LINKER HART, Judge. Appellant, the employee-claimant, appeals from the decision of the Arkansas Workers' Compensation Commission finding that he failed to meet his burden of proving by a preponderance of the evidence that marijuana did not substantially occasion his injury. He contends that the Commission's decision was not supported by substantial evidence. We affirm the Commission's decision.

A compensable injury does not include an "[i]njury where the accident was substantially occasioned by" the use of illegal drugs. Ark. Code Ann. § 11-9-102(4)(B)(iv)*(a)* (Supp. 2007). Further, the "presence" of illegal drugs "shall create a rebuttable presumption that the injury or accident was substantially occasioned by" the use of illegal drugs. Ark. Code Ann. § 11-9-102(4)(B)(iv)*(b)*. And finally, an "employee shall not be entitled to

compensation unless it is proved by a preponderance of the evidence that the . . . illegal drugs . . . did not substantially occasion the injury or accident." Ark. Code Ann. § 11-9-102(4)(B)(iv)*(d)*.

On appeal, we view the evidence in a light most favorable to the Commission's decision and affirm if the decision is supported by substantial evidence. *Woodall v. Hunnicutt Constr.*, 340 Ark. 377, 12 S.W.3d 630 (2000). When, as here, the Commission denies coverage because the claimant failed 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.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* It is the function of the Commission to determine the credibility of the witnesses and the weight to be given to their testimony. *Id.* Whether the rebuttable presumption is overcome by the evidence is a question of fact for the Commission to determine. *Id.*

According to the decision of the administrative law judge (ALJ), whose opinion was adopted by the Commission, an employee-employer-carrier relationship existed on January 25, 2005, when appellant suffered an injury resulting in the amputation of the fingers of his left hand as well as a portion of that hand. The injury occurred during the operation of a press used in the manufacture of gun magazines. During the operation of the press, one person feeds metal into the press, a second operates the press by pressing two buttons simultaneously, and a third catches the product after it is stamped out by the press. Though appellant normally worked in another department, around 11:00 a.m. that day, he was asked to help operate the press by catching the finished product as it was stamped out by the press. Craig Westbrook demonstrated the task to appellant and then observed appellant as he also performed the task. According to appellant, Westbrook instructed him never to put his hand in the press.

Appellant worked at the press for approximately one hour, and after a lunch break, continued to perform his job. But during operation of the press after lunch, material placed in the press became snagged. After the problem was corrected, the press was restarted, and appellant, whose hand was in the press, was injured. Approximately twenty-five hours after the injury, a urine sample was taken from appellant, which showed the presence of marijuana metabolites in an amount greater than 500 ng/mL.

Appellant's expert witness testified that while the urine test does indicate the presence of marijuana metabolites, it does not indicate when appellant used the marijuana, nor whether appellant was impaired at the time of the accident. Appellees' expert witness, however, testified that a report of more than 100 ng/mL of marijuana metabolites in the urine demonstrated an 83% likelihood that the blood level of the THC active compound was above 1 ng/mL, and that this would demonstrate an impaired condition. Further, he testified that given that the level was greater than 500 ng/mL, there would be more than a 95% chance that claimant was impaired at the time of his injury, which would affect judgment, reaction time, perception, cognitive function, and motor control.

In its decision, the Commission adopted the ALJ's decision, which accorded great weight to the testimony of appellees' expert witness. Furthermore, the Commission considered appellant's testimony that he had not smoked marijuana for six days and found that it was not credible, noting that appellant admitted to smoking two to four marijuana cigarettes a day and that he had been smoking marijuana for the five years prior to the accident. Also, the Commission noted that appellant's own expert witness indicated that appellant probably had smoked marijuana within the three or four days prior to the accident, that someone with 500 ng/mL of marijuana metabolites should not work around a press, and that appellant's act of putting his hand in the press despite instructions to the contrary could be consistent with short-term memory loss caused by marijuana. Further, the Commission discounted the testimony of the three witnesses who were present on the day of the injury and who indicated that appellant had not been acting impaired that day.

Appellant challenges the Commission's order. He asserts that the presence of metabolites does not create a rebuttable presumption that the injury or accident was substantially occasioned by the use of illegal drugs, and he relies on his own expert witness's testimony that one could not determine, based on a urine test indicating the presence of metabolites, whether appellant was impaired. He attacks the testimony of appellees' expert witness, contending that it was speculative and not stated with any degree of certainty. Further, he contends that the accident occurred because of his lack of experience and knowledge about the press, and that the direct cause of his injury was the other employee's act of pressing the two buttons to activate the press, when it should

have been apparent to him that appellant's hand was not clear of the machine. He also observes that none of the witnesses testified that appellant seemed impaired.

This court has previously concluded that testing positive for marijuana metabolites is sufficient to establish a rebuttable presumption that the employee's injury was substantially occasioned by the use of marijuana. *Wood v. West Tree Service*, 70 Ark. App. 29, 14 S.W.3d 883 (2000); *see also Flowers v. Norman Oaks Constr. Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000) (noting that both the Arkansas Supreme Court and this court have held that the presence of drugs or alcohol established only by metabolites or a slight amount of drugs or alcohol was sufficient to raise the rebuttable presumption and shift the burden of proof to the claimant to rebut the presumption). Moreover, in this case, appellees' expert witness testified that the levels of metabolites in appellant's urine demonstrated that appellant had the THC active compound in his blood. Accordingly, we are compelled to conclude that the rebuttable presumption was created.

As for his assertion that we should not credit the testimony of appellees' expert witness, we observe that the Commission was faced with competing expert testimony, and as noted above, it is the Commission's function to weigh the testimony. The Commission gave greater weight to the appellees' expert witness, who opined that there was a 95% chance that appellant was impaired at the time of the accident, and we cannot say that the testimony was, as appellant contends, not substantial.

Finally, appellant asserts that there were other factors that could have independently caused the injury. As noted above, the employee must prove by a preponderance of the evidence that the illegal drugs did not substantially occasion the injury or accident. Ark. Code Ann. § 11-9-102(4)(B)(iv)*(d)*. The phrase "substantially occasioned" by the use of illegal drugs requires that there be a direct causal link between the use of the drugs and the injury in order for the injury to be noncompensable. *ERC Contractor Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (1998). Here, the Commission credited the testimony that appellant was impaired, that he placed his hand in the press despite instruction to the contrary, and that this was consistent with appellant having impaired judgment from intoxication from marijuana. Thus, we conclude that the Commission's opinion displays

a substantial basis for the denial of relief, as it could conclude that appellant failed to prove that his use of illegal drugs did not substantially occasion his injury.

Affirmed.

PITTMAN, C.J., and GLADWIN, ROBBINS, and BIRD, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. The defining issue in this appeal is whether the Workers' Compensation Commission correctly applied the statutory presumption contained in Ark. Code Ann. § 11-9-102(4)(B)(iv) (Repl. 2002) when it denied benefits to an injured worker after a urine test revealed the presence of marijuana metabolites one day following his workplace injury. The Commission concluded, based on the presence of marijuana metabolites in the worker's urine, that the employer proved the "presence . . . of illegal drugs" so as to justify the rebuttable presumption that the appellant's accident was substantially occasioned by the use of illegal drugs. Because the Commission reasoned that appellant failed to overcome the presumption, it ruled that his injury was not compensable. I would reverse and hold that the presence of a metabolite, which is not an illegal drug, does not justify a presumption that the accident was substantially occasioned by an illegal drug.

Arkansas Code Annotated section 11-9-102(4)(B)(iv)(a) excludes from the definition of "compensable injury" any injury "where the accident was substantially occasioned by the use of . . . illegal drugs." The *presence* of an *illegal drug in the body* creates a rebuttable presumption that the injury or accident was substantially occasioned by that illegal drug. Ark. Code Ann. § 11-9-102(4)(B)(iv)(b). The burden then switches to the claimant to prove by a preponderance of the evidence that the *illegal drug* did not substantially occasion the accident or injury. *See* Ark. Code Ann. § 11-9-102(4)(B)(iv)(d).

It is well-settled that we are to strictly construe the provisions of the workers' compensation code. *See* Ark. Code Ann. §§ 11-9-704(c)(3) (Repl. 2002); 11-9-1001 (Repl. 2002); *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006). The doctrine of strict construction requires us to use the plain meaning of statutory language. *Wallace, supra.* If a term or phrase is not defined by the code, it falls upon the appellate court to define the

terms or phrases in a way that neither broadens nor narrows the scope of the workers' compensation code. *Id.*

In *Brown v. Alabama Electric Co.*, 60 Ark. App. 138, 959 S.W.2d 753, *review denied*, 334 Ark. 35, 970 S.W.2d 807 (1998), and *Graham v. Turnage Employment Group*, 60 Ark. App. 150, 960 S.W.2d 453, *review denied*, 334 Ark. 32, 970 S.W.2d 808 (1998), I dissented from our court's decisions which held that the presence of marijuana metabolites was sufficient proof to trigger the statutory presumption that workplace accidents were substantially occasioned by the use of marijuana. The supreme court denied review in those cases. As I contended almost ten years ago, I reaffirm today that our decisions in this area flagrantly misapply the strict construction standard.

It is beyond argument that a *metabolite* is not the same thing as a *drug*. *Compare* drug, n.1, *Oxford English Dictionary Online*, http://dictionary.oed.com (accessed Nov. 26, 2007) (hereinafter "*OED Online*") ("An original, simple, medicinal substance, organic or inorganic, whether used by itself in its natural condition or prepared by art, or as an ingredient in a medicine or medicament" and "Now often applied without qualification to narcotics, opiates, hallucinogens, etc.")[1] *with* metabolite, n., *OED Online* ("A substance that is a substrate or product of a metabolic reaction, or that is necessary to a metabolic reaction"). Therefore, to find that the presence of a metabolite is the same thing as the presence of a drug requires this court to impermissibly broaden the plain and ordinary definition of "drug," which we have been forbidden to

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[1] *See also* Ark. Code Ann. § 5-64-101(13)(A) (Supp. 2007) (part of the Uniform Controlled Substances Act):

> (13)(A) "Drug" means a substance:
>
> (i) Recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them;
>
> (ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
>
> (iii) Other than food intended to affect the structure or any function of the body of humans or animals; and
>
> (iv) Intended for use as a component of any article specified in subdivisions (13)(A)(i), (ii), or (iii) of this section.

do by the Arkansas General Assembly. *See* Ark. Code Ann. § 11-9-1001. In this instance, our decisions have not only impermissibly broadened that plain and ordinary meaning but turn on construing the word "drug" to mean something that it does not mean. However, at no point has the majority opinion, or any other majority opinion by the Commission or appellate courts in Arkansas, ever offered a different definition of the term "drug." The same holds true concerning the technical word "illegal."

Further, the presence of a metabolite in a person's system is merely proof that a drug was in a person's system *at some point in the past.* Equating proof of a metabolite in the system to the presence (i.e., current existence) of a drug in the system also requires us to stretch the meaning of the statute. *Compare* proof, n., *OED Online* ("Something that proves a statement; evidence or argument establishing a fact or the truth of anything, or belief in the certainty of something; an instance of this"); *with* presence, n., *OED Online* ("The fact or condition of being present"). The construction taken by the Commission and affirmed by the majority operates to presume that a workplace injury to *any* employee with metabolites in his urine has been "substantially occasioned" by the presence of "illegal drugs" although metabolites are neither drugs nor illegal. This is contrary to the intent of the General Assembly, which intended to disqualify those persons who are injured on the job while under the influence of *illegal drugs.* We can derive proof of this intent by the General Assembly's use of the phrase *substantially occasioned. See* occasion, v. *OED Online,* ("To be the occasion or cause of; to give rise to, cause, bring about, esp. incidentally"). To hold that the General Assembly intended to disqualify anyone with a history of drug use would, again, require that we impermissibly broaden the scope of the Act.

Instead, the statute provides that the presumption is triggered only by proof showing the *presence* of *illegal drugs* or other illicit substances in the employee's body. Neither *proof* of past illegal drug use nor the presence of a *metabolite* is sufficient to invoke that presumption, as (1) it does not fit the plain meaning of the language used by the legislature and (2) that construction operates to potentially deny workers' compensation benefits to injured workers based on past use of illegal drugs alone and without requiring any other proof that the past drug use made specific workplace injuries more likely. In other words, the statute cannot correctly be construed to support a finding that a workplace

injury was "substantially occasioned by the use of . . . illegal drugs" absent evidence showing the "presence" of "illegal drugs."

The statute now under consideration is the successor to what was originally Ark. Stat. Ann. § 81-1305. That statute provided, in material part, as follows:

> Every employer should secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of employment, without regard to fault as a cause of such injury; *provided, that there shall be no liability for compensation under this Act [§§ 81-1301 - 81-1349] where the injury or death from injury was substantially occasioned by intoxication of the injured employee[.]*

(Emphasis added.)

When the General Assembly enacted the present statute as part of Act 796 of 1993, it clearly shifted the focus from proof that a workplace injury or death "was substantially occasioned by *intoxication* of the injured employee." Rather than requiring proof of "intoxication," the statute now creates a rebuttable presumption that a workplace injury or death has been "substantially occasioned by the use of . . . illegal drugs." However, the presumption is triggered, according to the plain wording of the statute, not by proof of past use of illicit substances, but only by proof of the *presence* of illegal drugs. Otherwise, the General Assembly would have made the presumption dependent simply upon proof of past use of prohibited substances instead of proof that prohibited substances are present for purposes of determining whether those substances substantially occasioned disputed workplace injuries and fatalities.

Contrary to the majority's assertion, our supreme court has never held that the presence of metabolites satisfied the statutory requirement that "illegal drugs" be present so as to invoke the presumption under Ark. Code Ann. § 11-9-102(4)(B)(iv). In *Ester v. National Home Centers, Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998), the claimant's drug test returned positive for opiates and cocaine metabolites. In holding that the Commission properly applied the presumption, the supreme court observed that the appellant admitted using cocaine three days before the drug test; the metabolites in his system merely corroborated his testimony.

In *Woodall v. Hunnicutt Construction*, 340 Ark. 377, 12 S.W.3d 630 (2000), the claimant's urine test was positive for cocaine metabolites. The appellant in that case admitted smoking crack

cocaine the night before the incident and admitted that he tested positive for a drug screen on the date of the accident. The Commission found that appellant's accident was substantially occasioned by the use of cocaine, and the supreme court affirmed the Commission. In so holding, the supreme court remarked that the appellant's confessions invoked the presumption that the accident was substantially occasioned by cocaine use and did so without holding that the presence of metabolites invoked the presumption.

In *Flowers v. Norman Oaks Construction Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000), our supreme court affirmed the denial of benefits after emergency-room personnel noted that the claimant smelled of alcohol after the accident and the claimant admitted to drinking beer the evening before the accident. It held that the Commission's finding of alcohol was supported by substantial evidence, stating, "[B]oth this court and the court of appeals have held that the presence of drugs or alcohol established only by metabolites or a slight amount of the drugs or alcohol was sufficient to raise the rebuttable presumption and shift the burden of proof to the claimant to rebut the presumption." *Id.* at 480, 17 S.W.3d at 476. However, that statement was merely dictum. The presumption was invoked in that case because of the observations of third parties, not the presence of metabolites.

When it enacted Act 796 of 1993, the General Assembly declared that "many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state." Ark. Code Ann. § 11-9-1001. The courts and the Commission were further instructed, "In the future, if such things as . . . the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statues need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts." *Id.* However, the decisions involving application of this statute constitute judicial mischief that has operated for almost a decade to wrongly disqualify people who have been injured in the workplace. The Commission (including its administrative law judges) and the judges of this court and the supreme court know quite well that metabolites are not illegal and that metabolites are not drugs. Nevertheless, for almost a decade we

have disqualified injured workers from receiving workers' compensation benefits by claiming metabolites to be what they plainly are not and what they have never been, i.e., illegal drugs. One can only hope that our supreme court will finally correct this blatant exercise at judicial legislating rather than perpetuate it. Barring such corrective action by our supreme court, the General Assembly should do so.

Those who decry judicial legislating should take note of our decisions regarding this statute, particularly as those decisions have been made in the face of the strict construction standard and the explicit declaration by the General Assembly regarding its intent when the statute was enacted. If our decisions regarding this statute are legitimate exercises in "strict construction," one wonders why we behave differently in performing "strict construction" regarding other provisions of Act 796 of 1993. How is it, for example, that "strict construction" operates loosely to permit the Commission and appellate courts to construe things that are neither illegal nor drugs as "illegal drugs," but requires a much more exacting analysis when the Commission and appellate courts assess what is an "objective finding" for purposes of establishing a compensable injury? Perhaps even more to the point at hand, why does testimony about the presence of something that is neither illegal nor a drug qualify to trigger the statutory presumption, yet testimony from co-workers about the injured worker's mannerisms and comportment is somehow inadequate to rebut that presumption?

A discernible, and troubling, disparity is evident in the way the Commission and appellate courts have chosen to analyze the proof on this subject. On this subject of workers' compensation law, our "strict construction" disregards the plain and ordinary meaning of the words "illegal" and "drugs." On this subject, we seem unmindful of, if not dismissive toward, reputable sources of authority on those subjects, including the established meaning — both in ordinary usage and the Arkansas Code — of the operative term "drug." Instead of analyzing the issue according to traditional methods of statutory construction by which we respect the existing meaning of terms of art such as "illegal drugs," in this area of workers' compensation law the Commission and appellate courts have resorted to a decidedly uncritical approach to resolving what is, at bottom, a rather elementary issue of logic and statutory construction: whether proof of the presence of something that is not an illegal drug will justify presuming that a disputed workplace

injury or death was substantially occasioned by an illegal drug. If metabolites qualify to trigger the rebuttable presumption despite the fact that they are neither illegal nor drugs, what prevents the Commission and courts from holding that the presumption is triggered by proof of *non-illegal drug use* by an injured worker, even without showing the "presence" of illegal drugs in connection with a specific claim? After all, the majority opinion and our previous decisions allow the statutory presumption to be triggered by proving the presence of non-illegal and non-drug metabolites.

Until the supreme court and/or General Assembly correct our colossal error, the responsibility for illuminating its glaring fallacies and for, possibly, reversing the troubling effect of those decisions, will rest with the attorneys who represent injured workers and with the Commission and its administrative law judges. The Commission (with its administrative law judges to whom evidence in workers' compensation claims is initially presented) is the initial gatekeeper of evidence. As such, testimony such as that from Dr. Light and Mr. Thompson should be rigorously challenged during voir dire to demonstrate that it is not relevant to prove whether an illegal drug is *present* in a person's body. After all, relevant evidence is that evidence that is more likely to render a proposition true. If it is undeniably true that a marijuana metabolite is not a drug and is not illegal, then any testimony about the presence of marijuana metabolites is worthless to prove the proposition on which the statutory presumption rests (that a disputed workplace injury or death was "substantially occasioned by . . . illegal drugs."). Otherwise, in a case in which a statutory presumption depended upon proof that a result was substantially occasioned by gasoline, for example, persons such as Dr. Light and Mr. Thompson might be allowed to present "expert" opinion testimony about the presence of carbon monoxide to establish a rebuttable presumption regarding the presence of gasoline. If such plainly fallacious reasoning is attacked and fully litigated at the Commission level based on the tests in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Farm Bureau Mutual Ins. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), it should certainly fail.

In the instant case, the Commission relied on Dr. Light's testimony to find that 500 nanograms of marijuana metabolites in appellant's urine demonstrated that his injury was substantially occasioned by the use of illegal drugs despite the fact that metabolites are neither drugs nor illegal. Because I know the difference

between metabolites and illegal drugs, it is clear to me that the proof shows merely the presence of marijuana metabolites, substances that are neither illegal nor drugs. As such, the employer failed to prove "the presence of . . . illegal drugs" so as to trigger the rebuttable presumption that the workplace injury in this case was "substantially occasioned by . . . illegal drugs." Thus, I would either reverse the Commission and remand for a determination of benefits or, alternatively, reverse and remand with instructions that the Commission reconsider the evidence in light of our opinion.

I respectfully dissent.

GMAC MORTGAGE CORPORATION *v.*
Sandra Dedrick FARMER, et al.

CA 07-438 270 S.W.3d 882

Court of Appeals of Arkansas
Opinion delivered January 9, 2008

Wilson & Associates, PLLC, by: *John P. Marks* and *Charles T. Ward, Jr.*, for appellant.

Bridges, Young, Matthews & Drake, PLC, by: *Cary E. Young* and *Tanya B. Spavins*, for appellees.

DAVID M. GLOVER, Judge. Appellees Sandra Dedrick Farmer, Charles W. Dedrick, LaVera Faye Dedrick, and Joseph C. Dedrick are the grandchildren of Millridge Dedrick, Sr., and his wife, Vera, both deceased. This case originated when these grandchildren and their spouses, the remaining appellees, petitioned the trial court to partition the real property at issue in this case by sale and to distribute the proceeds according to the interests of the parties. The appellee grandchildren asserted ownership of the property as heirs of Millridge Dedrick, Sr., and "as tenants in common with Vedell Dickson," to whom Lorraine Dedrick, Millridge Dedrick, Sr.'s, surviving second wife, conveyed her dower interest in the property. Vedell Dickson's interest in the property was encumbered by various means that traced through other respondents in the underlying action, including appellant GMAC, the only one of those parties that has appealed the decision granting summary judgment to appellees.

On December 13, 2005, appellees moved for summary judgment on their petition, asking the trial court to confirm their title to the property, subject to Dickson's one-third interest in the property for the life of Lorraine Dedrick under Arkansas Code Annotated section 28-11-301 (Repl. 2004). On December 30, 2005, GMAC, while not challenging any of the facts asserted by appellees, responded by contending that Lorraine conveyed a one-half interest in fee simple to Dickson under section 28-11-307 (Repl. 2004) because Millridge, Sr., died leaving no surviving children — just grandchildren. On January 6, 2006, appellees replied by noting that GMAC had raised a question of law, not fact.

On February 6, 2006, GMAC filed a cross-motion for summary judgment, once again asserting that the material facts were undisputed and that the only remaining issue was one of law, and asking the trial court to determine which statute applied, 28-11-301 or 28-11-307. On February 14, 2006, appellees responded to the cross-motion, reaffirming that the only significant issue was one of law — not fact.

On February 24, 2006, GMAC — for the first time — by letter notified the trial court that it had located a contract for sale of the property. Then, on February 27, 2006, GMAC attached a copy of an unrecorded land-sale contract, dated September 7, 1996, to its reply in its own cross-motion for summary judgment. In the land-sale contract, Millridge, Sr., as owner of the property, and Lorraine, as his wife, contracted to sell the property in question to Vedell Dickson. The contract contained the provision that it was binding on the parties' heirs and assigns. In addition, GMAC contended that the contract had been completed because there was a check from Dickson to Lorraine and there was the warranty deed from Lorraine to Dickson, and that the existence of the contract created a question of fact that precluded summary judgment. Based on the discovery of the contract, GMAC also filed an entirely new motion for summary judgment. In their response, appellees maintained that the land-sale contract had been untimely and improperly raised and therefore could not defeat their original motion for summary judgment.

On October 12, 2006, the trial court held a hearing on all of the motions for summary judgment. On November 17, 2006, the trial court entered its summary judgment in favor of appellees. The trial court made no finding with respect to the land-sale contract. GMAC subsequently filed a post-judgment motion, requesting

that the trial court reconsider its summary judgment in favor of appellees and that the trial court make specific findings concerning why the land-sale contract did not create a genuine issue of fact in the case. The trial court did not rule on the post-judgment motion, and it was therefore deemed denied after the passage of thirty days. This appeal then followed.

GMAC challenges the trial court's grant of summary judgment to appellees on three bases (1) that appellees failed to make a prima facie showing of entitlement to partition as a matter of law, 2) that GMAC raised a genuine issue of material fact regarding whether appellees had title to the property they sought to partition, and 3) that the trial court should have applied Arkansas Code Annotated section 28-11-307, rather than section 28-11-301, in deciding this case. We affirm.

Background Facts as Set Forth in Appellees' Motion for Summary Judgment

In their brief in support of their motion for summary judgment, appellees set forth the following pertinent facts of the case, which they described as undisputed.

Title to the property at issue was originally obtained by Millridge Dedrick, Sr., and Vera Dedrick (Vera), his wife, in October 1950 by warranty deed. Millridge, Sr., and Vera had one child, Millridge, Jr. Appellees are the children of Millridge, Jr., and the grandchildren of Millridge, Sr., and Vera. Vera predeceased both her husband and her son, and Millridge, Sr., subsequently married a woman by the name of Lorraine. Millridge, Jr., died in March of 1997, and Millridge, Sr., died shortly thereafter in July 1997. Millridge, Sr., was survived by his second wife, Lorraine, and his grandchildren by Millridge, Jr. Title to the property was never conveyed to Lorraine. However, on or about October 29, 1999, Lorraine conveyed to Vedell Dickson what purports to be the entire title to the property by warranty deed. Vedell Dickson subsequently encumbered the property.

The appellees attached to their motion for summary judgment affidavits in support of the above-asserted facts. In particular, they also attached a certified copy of the redemption deed obtained after the payment of delinquent taxes and recorded in the real-estate records of Jefferson County, Arkansas.

Redemption Deed

For its first point of appeal, GMAC contends that appellees failed to make a prima facie showing of entitlement to partition of the property as a matter of law and that the trial court therefore erred in granting them summary judgment. GMAC bases its argument on the fact that appellees "attached a redemption deed by which the Commissioner of State Lands conveyed fee title to the property to Vedell Dickson." GMAC now explains that the redemption deed was presented by appellees only as proof of their payment of taxes, and that they did not discuss the effect of the redemption deed on their claim of title. GMAC contends, although it did not do so below, that "the redemption deed has much greater significance than just being evidence of tax payments," and that "it is a conveyance of title and, as such, rebuts and contradicts petitioners' prima facie case of entitlement to summary judgment by creating a genuine issue of material fact as to whether their title is sufficient to support a partition." GMAC further contends that its failure to raise this argument below is of no moment because appellees failed to carry their burden of making a prima facie case, which meant that the burden of going forward to establish an issue of material fact never shifted to GMAC . We disagree.

In *Inge v. Walker*, 70 Ark. App. 114, 118-20, 15 S.W.3d 348, 351-52 (2000), which GMAC cites in support of its argument, our court explained:

> Arkansas Rule of Civil Procedure 56(e) provides:
>
> > When a motion is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate*, shall be entered against him. (Emphasis added.)
>
> The Arkansas Supreme Court recently reviewed the law in regard to summary judgment in *New Maumelle Harbor v. Rochelle*, 338 Ark. 43, 991 S.W.2d 552 (1999):
>
> > In these cases, we need only decide if the granting 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. The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. All proof submitted must be viewed in a light most favorable to the party *resisting* the motion, and any doubts and inferences must be resolved *against the moving party*. Our rule states, and we have acknowledged, that summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to summary judgment as a matter of law.

338 Ark. at 45-46, 991 S.W.2d at 553 (quoting *Sublett v. Hipps*, 330 Ark. 58, 62, 952 S.W.2d 140, 142 (1997), quoting *Milam v. Bank of Cabot*, 327 Ark. 256, 261-62, 937 S.W.2d 653, 656 (1997)) (emphasis added). Once a moving party establishes prima facie entitlement to summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a genuine issue of material fact. *New Maumelle Harbor, supra*. Prima facie evidence is "[e]vidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which *if not rebutted or contradicted*, will remain sufficient" Black's Law Dictionary, 1190 (6th. ed 1990) (emphasis added).

In *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999) (quoting *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998)), the supreme court explained further:

> The law is well settled that 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. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998), *supp. opinion on denial of reh'g*, 332 Ark. 189 (1998). 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 appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* This court views 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. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

339 Ark. at 153-54, 3 S.W.3d at 686-87.

Summary judgment is not granted simply because the opposing party fails to respond to the motion for summary judgment. *See Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994), which held:

> Summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be litigated. *Hickson v. Saig*, 309 Ark. 231, 828 S.W.2d 840 (1992). A summary judgment should not be granted where reasonable minds could differ as to the conclusions they could draw from the facts presented. *Lee v. Doe et al*, 274 Ark. 467, 626 S.W.2d 353 (1981). The burden of proving there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed favorably to the party *resisting the motion. Wyatt v. St. Paul Fire & Marine Ins.*, 315 Ark. 547, 868 S.W.2d 505 (1994). *Any doubts and inferences must be resolved against the moving party. Wyatt, supra*; *Pinkston v. Lovell*, 296 Ark. 543, 759 S.W.2d 20 (1988); *Cross v. Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991).
>
> The burden in a summary judgment proceeding is on the moving party and cannot be shifted when there is no offer of proof on a controverted issue. *Wyatt, supra*; *Collyard v. American Home Assurance Co.*, 271 Ark. 228, 607 S.W.2d 666 (1980). When the movant makes a prima facie showing of entitlement, the respondent must meet proof with proof by showing genuine issue as to a material fact. *Wyatt, supra*; *Harrell v. International Paper Co.*, 305 Ark. 490, 808 S.W.2d 779 (1991).

318 Ark. at 429-30, 885 S.W.2d at 895-96 (emphasis added). 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. *Cash v. Lim*, 322 Ark. 359, 908 S.W.2d 655 (1995); *Wolner v. Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986); *Collyard v. American Home Assurance Co.*, 271 Ark. 228, 607 S.W.2d 666 (1980). The failure to file counteraffidavits does not in itself entitle the moving party to a summary judgment. *However, the effect is to leave the facts asserted in the uncontroverted affidavit supporting the motion for summary judgment accepted as true for purposes of the motion.*

Cameo Jewelry v. Sweetser, 247 Ark. 477, 446 S.W.2d 228 (1969); *Ashley v. Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1969).

(Emphasis added.)

The problem with GMAC's argument under this point is that GMAC did respond to appellees' motion for summary judgment, and in doing so it not only failed to raise the issue it now asserts on appeal, but acknowledged that the facts asserted by appellees were not disputed, the dispute being only over the applicable law relating to dower and curtesy. Although GMAC has developed a rather ingenious argument to excuse its failure to raise an issue concerning appellees' title below, we are not convinced by it. Under the circumstances of this case, appellees' attachment of the redemption deed to its motion for summary judgment did not undercut its prima facie showing of entitlement to partition of the property. Consequently, because this issue was not raised before the trial court, we do not address it in this appeal.

Land-Sale Contract

For its second point of appeal, GMAC contends that its introduction of the unrecorded land-sale contract in its reply to its own cross-motion for summary judgment established a genuine issue of material fact that should have prevented the entry of summary judgment on appellee's behalf. We disagree.

Rule 56. Summary judgment, provides in pertinent part:

(c) Motion and Proceedings Thereon.

(1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits. The adverse party shall serve a response and supporting materials, if any, within 21 days after the motion is served. The moving party may serve a reply and supporting materials within 14 days after the response is served. For good cause shown, the court may by order reduce or enlarge the foregoing time periods. *No party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise.* The court, on its own motion or at the request of a party, may hold a hearing on the motion not less than 7 days after the time for serving a reply. For good cause shown, the court may by order reduce the foregoing time period.

> (2) The judgment sought shall be rendered forthwith *if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion.* A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability.
>
> . . . .
>
> (e) *Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*
>
> (f) *When Affidavits Are Unavailable.* 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 refuse the application for judgment or 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.

(Emphasis added.)

Here, GMAC injected the unrecorded land-sale contract into the summary-judgment process for the first time on February 24, 2006, in a letter to the trial court by which GMAC notified the trial court that the contract had been found. This was after GMAC had responded to appellees' motion for summary judgment without challenging any of the asserted facts and merely contending that Lorraine had conveyed a one-half fee simple interest in the property rather than a one-third life interest as argued by appellees. On February 27, 2006, GMAC attached the unrecorded land-sale contract, dated September 7, 1996, as an exhibit to its reply in its own cross-motion for summary judgment. The contract was not accompanied by any form of affidavit.

Thus, at the end of the day, what we have is an exhibit that was attached to GMAC's reply to its own cross-motion for summary judgment — with no supporting affidavit to establish its authenticity. In addition, GMAC submitted the land-sale contract after having acknowledged in response to appellees' motion for summary judgment that there were no genuine issues of material fact. We have concluded that under the circumstances of this case the land-sale contract was submitted too late, and it was not submitted in a proper fashion. Thus, it did not create a genuine question of material fact that would preclude the entry of summary judgment.

Section 28-11-301 versus Section 28-11-307

For its final point of appeal, GMAC contends that the trial court erred in holding that Arkansas Code Annotated section 28-11-301 controls this case because the trial court should have applied section 28-11-307. We disagree.

Arkansas Code Annotated section 28-11-301 provides:

> Land generally.
>
> (a) *If a person dies leaving a surviving spouse and a child or children,* the surviving spouse shall be endowed of the third part of all the lands for life whereof his or her spouse was seized, of an estate of inheritance, at any time during the marriage, unless the endowment shall have been relinquished in legal form.
>
> (b) A person shall have a dower or curtesy right in lands sold in the lifetime of his or her spouse without consent of the spouse in legal form against all creditors of the estate.

Section 28-11-307 provides:

> Dower or curtesy when no children.
>
> (a)(1) *If a person dies leaving a surviving spouse and no children,* the surviving spouse shall be endowed in fee simple of one-half (1/2) of the real estate of which the deceased person died seized when the estate is a new acquisition and not an ancestral estate and of one-half (1/2) of the personal estate, absolutely, and in his or her own right, as against collateral heirs.

> (2) However, as against creditors, the surviving spouse shall be invested with one-third (1/3) of the real estate in fee simple if a new acquisition, and not ancestral, and of one-third (1/3) of the personal property absolutely.
>
> (b) If the real estate of the deceased person is an ancestral estate, the surviving spouse shall be endowed in a life estate of one-half (1/2) of the estate as against collateral heirs and one-third (1/3) as against creditors.

(Emphasis added.)

Here, Millridge Dedrick, Sr., died leaving a surviving spouse but his only child, Millridge Dedrick, Jr., predeceased him. Millridge Dedrick, Jr., however, died leaving surviving children — Millridge, Sr.'s grandchildren. The opening clause of section 28-11-307 provides: "If a person dies leaving a surviving spouse and no children . . . ." The opening clause of section 28-11-301 provides: "If a person dies leaving a surviving spouse and a child or children . . . ." Thus, the meaning of the terms "child" and "children" in the quoted statutes is important in deciding this case because we have the interplay between the dower rights of Lorraine Dedrick and the descent and distribution rights of Millridge, Sr.'s grandchildren.

Approximately one hundred years ago, in *Starrett v. McKim*, 90 Ark. 520, 119 S.W. 824 (1909), our supreme court was faced with determining whether the word "children" included "grandchildren" in a predecessor dower statute, Kirby's Digest section 2709. The court concluded that it did. In all significant respects, that predecessor statute was the same as our current section 28-11-307. In *Starrett*, our supreme court described the controversy as one "between a widow on the one side and grandchildren of a decedent on the other, as to dower interest of the former in lands (not the homestead) left by said defendant. The widow claimed one-half of the land in fee simple, and the grandchildren insist that she takes only an estate for life in one-third of the land." The court framed the issue as, "Does the word 'children' as used in the statute include grandchildren?" In deciding that it did, the supreme court explained:

> It must be conceded that the word "children," either in a popular or technically legal sense, does not include grandchildren, and its meaning is confined to descendants of the first degree; and

> it is undoubtedly the rule that where this word is used in a statute it must be construed to mean only descendants of the first degree unless it is apparent from the context that a broader meaning was intended.
>
> An analysis of the language of the entire section of the statute shows clearly that the word was used in the broad sense to include descendants of any degree, in contradistinction to collateral heirs. The purpose of the statute is to prescribe the dower interest of a widow as against collateral heirs, when there are no descendants, and as against creditors; and it is divisible into four separate provisions, the first two relating to land which was a new acquisition of the husband, and the last two to lands which were ancestral. The first provision is that, as against collateral heirs, the widow shall take one-half of the land in fee simple when it is a new acquisition, and one-half of the personal property; the second is that, as against creditors, she shall take one-third of such lands in fee simple, and one-third of the personal property; the third is that, as against collateral heirs, the widow shall take a life estate in one-half of the ancestral lands; and fourth, that, as against creditors, she shall take a life estate in one-third of such lands.
>
> If any other construction be given to the word "children," the use of the words "as against collateral heirs" would be entirely superfluous, for under our statute of descents collateral heirs take nothing in any event when direct descendants of the decedent in any degree are left.

90 Ark. at 522-23, 119 S.W. at 824-25.

In 1994, our supreme court decided the case of *McCoy v. Walker*, 317 Ark. 86, 876 S.W.2d 252. *McCoy* involved homestead rights and the interpretation of Arkansas Code Annotated section 28-1-102(a)(1), which defines "child" under the probate code. Section 28-1-102(a)(1), provides: " 'Child' denotes a natural or adopted child, but does not include a grandchild or other more remote descendant or an illegitimate child except such as would inherit under the law of descent and distribution[.]" In *McCoy*, our supreme court concluded that the General Assembly did not intend for grandchildren to be included in the definition of "child" under section 28-1-102(a)(1) with respect to homestead rights, even though homestead rights are not part of the probate code. In addition, our supreme court concluded that the General

Assembly intended for the clause, "except such as would inherit under the law of descent and distribution," to only modify "illegitimate children."

In appealing the trial court's decision to this court, GMAC relies upon *McCoy*, *supra*, and appellees rely upon *Starrett*, *supra*. We acknowledge that in *McCoy*, *supra*, our supreme court applied the statutory definition of "child" from our probate code to a homestead situation, which is not covered by the probate code. However, we decline to apply that definition in the instant case involving dower, which is not included in the probate code either. Instead, we have concluded that *Starrett*, *supra*, remains good law and controls the instant case. We, therefore, affirm the trial court in its application of section 28-11-301 to the facts of this case.

Affirmed.

HEFFLEY and BAKER, JJ., agree.

Geraldine RESHEL, Reshel Limited Partnership, & Reshel Enterprises *v.* Keith MOSER, Jewell, Moser, Fletcher & Holleman, Jewell & Moser, P.A., & Moser & Associates, P.A.

CA 07-531 270 S.W.3d 877

Court of Appeals of Arkansas
Opinion delivered January 9, 2008

Dover Dixon Horne, PLLC, by: *Thomas S. Stone* and *Nona Robinson*, for appellant.

DAVID M. GLOVER, Judge. This is a one-brief case in which appellants appeal from the trial court's dismissal of their claims against one of the corporate defendants named in their complaint, Jewell, Moser, Fletcher, & Holleman, P.A. Appellants contend that 1) the trial court erred in dismissing their claims based upon a lack of subject-matter jurisdiction, and 2) the trial court erred in denying their motion for default judgment against that particular defendant. We agree with appellants' first point of appeal, that the trial court erred in dismissing their claim based upon a lack of subject-matter jurisdiction, and we, therefore, reverse and remand to the trial court for it to assume jurisdiction and render a decision on this matter. We do not address the second point because an initial decision on the motion for default judgment lies with the trial court having jurisdiction, not an appellate court.

By judgment entered February 20, 2007, the trial court determined that it lacked subject-matter jurisdiction over Jewell, Moser, Fletcher, & Holleman, P.A. because the corporation was at that time before the trial court in a pending judicial dissolution and receivership. In paragraph two of the judgment, the trial court specifically noted that it was making "no finding as to the liability of Jewell, Moser, Fletcher, & Holleman, P.A.," and it dismissed without prejudice all claims against that defendant. The trial court found that the remaining defendants named in the complaint breached their contract with the plaintiffs, breached their fiduciary duty to plaintiffs, and were negligent with respect to actions promised to plaintiffs. The trial court then entered judgment in the amount of $418,833.69 against those remaining defendants — Keith Moser; Jewell & Moser, P.A.; Jewell & Moser, Professional

Association; and Moser & Associates, P.A. The instant appeal involves only the dismissal of these same claims against appellee Jewell, Moser, Fletcher, & Holleman, P.A. based upon the trial court's determination that it lacked subject-matter jurisdiction.

The two statutes under consideration in this appeal are Arkansas Code Annotated sections 4-27-1405(b)(5) (Repl. 2001) and 4-27-1432(c)(1)(ii) (Repl. 2001), which provide:

> 4-27-1405. Effect of dissolution.
>
> . . . .
>
> (b) Dissolution of a corporation does not:
>
> . . . .
>
> (5) prevent commencement of a proceeding by or against the corporation in its corporate name [.]
>
> 4-27-1432. Receivership or custodianship.
>
> (a) A court in a judicial proceeding brought to dissolve a corporation may appoint one (1) or more receivers to wind up and liquidate, or one (1) or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. *The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all of its property wherever located.*
>
> . . . .
>
> (c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. *Among other powers:*
>
> *(1) the receiver . . . (ii) may sue and defend in his own name as receiver of the corporation in all courts of this state[.]*

(Emphasis added.)

In particular, Arkansas Code Annotated section 4-27-1432(a), provides that "[t]he court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all of its property wherever located." The trial court apparently felt constrained by section 1432(a) from asserting jurisdiction. But, that same statute, in subsection (c)(1)(ii), contains the additional provision: "Among other powers: (1) the receiver . . . (ii) may sue and defend in his own name as receiver of the corporation *in all courts of this state*[.]"

We have concluded that the trial court erred in determining that it lacked subject-matter jurisdiction. Reading the two statutory sections together, we find nothing from the fact that the trial court had a pending judicial dissolution and receivership before it concerning Jewell, Moser, Fletcher, & Holleman, P.A. that would prohibit it, or "all courts of this state," where appropriate, from asserting subject-matter jurisdiction over this defendant in the instant matter.

As mentioned previously, we do not address appellants' second point of appeal in which they contend that the trial court erred in denying their motion for default judgment against Jewell, Moser, Fletcher, & Holleman, P.A. With subject-matter jurisdiction established, the grant or denial of a motion for default judgment is a decision that the trial court will have to make in the first instance upon remand.

Reversed and remanded.

HEFFLEY and BAKER, JJ., agree.

Charles R. BARNES *v.*
GREENHEAD FARMING COMPANY, INC.,
and AIG Claims Services

CA 07-729 270 S.W.3d 873

Court of Appeals of Arkansas
Opinion delivered January 9, 2008

[Rehearing denied February 13, 2008.]

James A. McLarty, III, for appellant.

Worley, Wood & Parrish, P.A., by: *Melissa Wood*, for appellees.

LARRY D. VAUGHT, Judge. Appellant Charles Barnes appeals from the Arkansas Workers' Compensation Commission's decision finding that he did not suffer compensable back and right hip, leg, and foot injuries. Specifically, he argues that there is a lack of substantial evidence supporting the Commission's decision. We agree and reverse.

Barnes, now forty-seven years old, worked as an excavator operator for appellee Greenhead Farming Company for eighteen years. On May 11, 2005, Barnes was sitting on an excavator that began to slide off its trailer. Afraid the excavator would turn over with him in it, Barnes jumped through the windshield out of the excavator and fell six feet to the ground. Barnes was taken to the emergency room where he was treated by Dr. Dewakar Pulisetty, who diagnosed Barnes with a fractured left ankle. Dr. Pulisetty ordered Barnes to walk with crutches for twelve weeks.

Approximately four weeks after his injury, and still on crutches, Barnes returned to part-time work Greenhead Farms. On December 12, 2005, Barnes was released to return to work at full duty and did so, however, he testified that he was unable to perform his job as well as he did prior to his injury because of his right-side complaints. Later, Barnes was issued a 21% impairment rating to his left lower extremity.

In February 2006 and still experiencing pain in his right hip, leg, and foot, Barnes sought and paid for medical treatment from Dr. Nicole Lawson. Dr. Lawson recommended an MRI, and it showed right disk protrusions at the L5-S1 with possible impingement upon the right S1 nerve root; a diffuse disk bulge at L5-S1 impinging on the exiting bilateral L5 nerve root; and a slight extraforminal broad based disk protrusion at L2-3 with possible impingement at the right L2 nerve root.

The administrative law judge found that Barnes met his burden of establishing that he sustained compensable back and right hip, leg, and foot injuries on May 11, 2005. The ALJ also found that medical benefits in connection with the treatment of these injuries were reasonable and necessary and the responsibility of Greenhead Farms. On appeal, the Commission reversed, finding that Barnes did not prove that he sustained a compensable injuries to his low back, right hip, leg, and foot on May 11, 2005, and that Barnes was not entitled to medical benefits for those injuries.

The only question for this court to review is whether the decision of the Commission, denying benefits to Barnes, is supported by substantial evidence. We find that it was not and reverse.

We review decisions of the Commission to see if they are supported by substantial evidence. *Jordan v. J.C. Penney Co.*, 57 Ark. App. 174, 944 S.W.2d 547 (1997). Substantial evidence is relevant evidence, which a reasonable mind might accept as adequate to support a conclusion. *Jordan*, 57 Ark App. at 176, 944 S.W.2d at 549. The issue is not whether we might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. *Id.* If reasonable minds could reach the result shown by the Commission's decision, we must affirm. *Id.*

The record is limited to the testimony of Barnes, Shelley Evins (Barnes's supervisor and the general manager of Greenhead Farms since 1990), and the medical evidence. Based on this

evidence, the Commission stated, "we find that it would require conjecture and sheer speculation to causally link the claimant's alleged back, right hip, leg problems to his work incident of May 11, 2005 . . . ." The Commission then set forth findings in support of this conclusion. For example, the Commission found that "[t]he instant claimant has an extensive prior history of chronic back problems preceding his May 11, 2005 injury, as the claimant has admitted to being involved in several motor vehicle and four-wheeler accidents, and the medical records demonstrate the same." A careful review of the record demonstrates that this finding is not supported by the evidence.

Barnes recalled that in May 1994 that he experienced low back pain while riding a four-wheeler — but there was no fall or accident. Barnes was diagnosed with an "acute lumbar sprain, recurrent" and received no follow-up medical treatment. Barnes also recalled that in September 2002 he was involved in a one-vehicle accident where he ran off the road and struck a tree. The medical record that corresponds with this accident reflects that Barnes complained of stiffness in his right shoulder, chest, and right leg. He made no low back complaints, and according to the record, Barnes had no other medical treatment following this incident. Barnes did not recall flipping over backward on a four-wheeler in November 1992, but the medical record reflects that he presented at the emergency room with complaints of abdominal and neck pain. Again, there were no complaints of back pain.

Therefore, what the medical evidence actually shows is that, prior to May 2005, Barnes complained of back pain one time in May 1994 (eleven years prior), that he had no diagnosis other than an acute lumbar sprain, and that he had no follow-up medical treatment. This does not support the Commission's finding that Barnes had "an extensive prior history of chronic back problems."

Not only does the medical evidence wholly fail to demonstrate "an extensive prior history of chronic back problems," Barnes's testimony at the hearing was that he did not suffer from back or right leg problems prior to the May 2005 incident. Moreover, Barnes's testimony was corroborated by his supervisor who also testified that he was unaware of any prior back problems suffered by Barnes. Evins testified that Barnes often worked seventy-plus hour weeks as a heavy machine operator and that he would not be able to do that type of work with chronic back

problems. In contrast, Evins testified that after the May 2005 incident, Barnes has not been able to fully perform his job.

Another finding made by the Commission was that Barnes's testimony, that he reported low back and right-side complaints within a week of his fall, was incredible and not supported by the medical evidence.[1] The Commission further found that there was no "documented report" of Barnes's back complaints until six months after the work incident. Again, a review of the record demonstrates that these findings are also unsupported.

Barnes's testimony was that, within a week of his fall and thereafter, he reported to two representatives of the workers' compensation carrier that he was having right hip, leg, and foot pain. Barnes also testified that more than once he requested medical treatment for these right-side complaints from both of these representatives, but he was told by them that the pain was from putting too much weight on the right side and that the pain would go away once he got off the crutches. Neither of the representatives from the carrier scheduled any medical appointments for him in response to his complaints. Barnes further testified that he reported his right-side complaints to the carrier-selected physicians as well but that these doctors would not treat him. He testified he specifically requested that Drs. Charles Varela and Stephen Eichert, both selected by the workers' compensation carrier, to examine him for his right-side complaints, but both refused without explanation.

After twelve weeks, and no longer using the crutches, Barnes continued to have pain in his right hip, leg, and foot. He again contacted the representative of the workers' compensation carrier to report his continued pain despite the fact he was off the crutches. He again requested medical treatment. The representative of the carrier advised she would have to "talk to them." Ultimately, the adjuster told Barnes that he could not see a doctor because "it had been too long."

Noticeably absent at the hearing was testimony from the representatives of Greenhead Farms' workers' compensation car-

[1] While the Commission found Barnes's testimony incredible, we note that Evins, Barnes's long-time supervisor, specifically testified that Barnes is one of Evins's most trusted employees. Evins further testified that he trusts Barnes to carry signed corporate checks for days. We also note that the ALJ, who presided over the hearing, also found that Barnes was a credible witness.

rier. If Barnes had been untruthful about lodging multiple reports of right-side complaints, both of the representatives from the carrier could have testified and controverted Barnes's testimony. They did not. The absence of testimony from these witnesses, who were within the control of Greenhead Farms, raises the presumption that their testimony would have been unfavorable to Greenhead Farms. *See Rutherford v. Casey*, 190 Ark. 79, 77 S.W.2d 58 (1934); *National Life Ins. Co. v. Brennecke*, 195 Ark. 1088, 115 S.W.2d 855 (1938); *Canal Ins. Co. v. Hall*, 259 Ark. 797, 536 S.W.2d 702 (1976); *APCO Oil Co. v. Stephens*, 270 Ark. 715, 606 S.W.2d 134 (1980).

Not only did Barnes's testimony go uncontroverted by Greenhead Farms, but it was corroborated by Evins, who testified that after the accident, Barnes reported his right-side complaints. Evins observed that Barnes was unable to fully perform his job like he had prior to the accident. Some of the most critical testimony offered by Evins was that he contacted the adjuster for the workers' compensation carrier directly because he had concerns about the quality of Barnes's medical care. Evins did not think that Barnes was ready to return to part-time work when the carrier wanted him to. Evins said that while he did not have part-time work available, he found work for Barnes to do at the carrier's insistence. Evins also urged the carrier to have Barnes's right leg and foot examined by a physician. Because the carrier never provided medical treatment for those complaints, Evins testified that "I just didn't think that they were providing the medical benefits they should."

It is true that complaints to Barnes's right side or back did not appear in the medical records until November 2005. However, we note that each of the doctors seen by Barnes up until that time were selected by Greenhead Farm's carrier. We also note that even when the physicians selected by the carrier, Drs. Eichert and Varela, did finally document Barnes's right-side complaints, their reports reflect that they only treated Barnes for his left foot fracture and still did not offer any treatment for Barnes's right-side complaints.

Soon after Dr. Varela released Barnes from treatment, in December 2005, Barnes wasted no time seeking treatment from Dr. Nicole Lawson. Interestingly, Dr. Lawson, the first physician not selected and paid by Greenhead Farms' workers' compensation carrier, noted Barnes's right-side complaints in her report and

ordered an MRI, which demonstrated objective findings consistent with Barnes's continued complaints.

In sum, based on the medical evidence, the testimony elicited at the hearing, the absence of testimony from Greenhead Farms controverting same, and the Commission's unsupported findings of fact, we hold that fair-minded persons could not reach the conclusion of the Commission to deny benefits for Barnes's low back and right hip, leg, and foot injuries. Accordingly, we reverse and remand the Commission's for an award of benefits consistent with this opinion.

Reversed and remanded.

MARSHALL and MILLER, JJ., agree.

Ann Warmack BROOKSHIRE, et al. *v.*
Robert H. ADCOCK, Jr., et al.

CA 07-522 270 S.W.3d 879

Court of Appeals of Arkansas
Opinion delivered January 9, 2008

[Rehearing denied February 20, 2008.]

Eichenbaum, Liles & Heister, P.A., by: *Christopher O. Parker*; *Warner, Smith & Harris, PLC*, by: *P.K. Holmes, III*, for appellants.

Dover Dixon Horne, PLLC, by: *Mark H. Allison* and *Garland W. Binns, Jr.*, for appellees Farmers Bank of Greenwood and Wilkinson Banking Corporation.

Dustin McDaniel, Att'y Gen., by: *Erika Gee*, Ass't Att'y Gen., for appellee.

SARAH HEFFLEY, Judge. Appellants, minority stockholders in the Farmers Bank of Greenwood, were involved in a "freeze-out" by the majority stockholder, Wilkinson Banking Corporation, and a dispute arose over the value placed on their shares. The administrative process to establish the value of the shares lasted approximately twenty-one months, and appellants now appeal the Bank Commissioner's decision to not award interest on the value of their shares during the delay. We find that appellants should have been awarded interest and reverse.

This case began when Ed Wilkinson, president of Farmers Bank, announced a stockholder meeting to be held on September 23, 2003, to consider a plan of exchange in which all shares not already owned by Wilkinson Banking Corporation would be acquired by Wilkinson for a cash payment of $5600 per share. The plan of exchange was adopted at the shareholder meeting, and the Arkansas Bank Commissioner approved the plan on September 30, 2003. Appellants disputed the tendered value for their shares and pursued their statutory rights as dissenters under Ark. Code Ann. § 23-48-603 (Repl. 2000). Appellants sought an increased value of the shares and interest for the period of time between September 30, 2003, and payment. During this period of dispute, the $5600 tendered for each share remained in a non-interest-bearing account.

On May 16, 2005, the Commissioner decided that the final valuation of the shares was $7270 per share, but he denied appellants' request for interest, stating that because the issue of interest was not addressed in section 23-48-603, the Commissioner was not authorized to award interest in addition to the valuation. Appellants filed an appeal in the Pulaski County Circuit Court, which affirmed the agency's decision on March 14, 2007. Appellants then filed a timely notice of appeal to this court.

Decisions of the Banking Board and Commissioner are subject to the Arkansas Administrative Procedure Act, which allows this court to review the decision of the administrative agency notwithstanding the decision rendered by the circuit court. *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). In an appeal from an administrative order, this court's review is directed to the agency's decision, not the circuit court's. *Id.* This court reviews the entire record and gives the evidence its strongest probative force in favor of the agency's ruling. *Id.* Arkansas Code Annotated section 25-25-212(h) (Repl. 2002) provides that this court may reverse or modify the agency's decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error of law; (5) not supported by substantial evidence of record; or (6) arbitrary, capricious, or characterized by abuse of discretion.

Under Ark. Code Ann. §§ 23-48-601 through 23-48-605 (Repl. 2000 and Supp. 2007), the legislature set out the process for reorganization through a plan of exchange, allowing a state bank to adopt a plan of exchange of all the outstanding capital stock held by the stockholders for the consideration designated in the section to be paid or provided by a bank-holding company that acquires the stock. A minority shareholder's dissent from the plan of exchange is not sufficient to disallow the plan; rather than permitting deadlock, the statute authorizes the majority to proceed with its plan while providing for dissenters' appraisal rights. Under Ark. Code Ann. § 23-48-603, once the plan has been approved by the majority stockholders and the Commissioner, the dissenters may go through a separate process to have the value of their stock determined. If the dissenters and the bank still disagree, the Commissioner then makes an appraisal determination that is binding on both parties.

In this case, appellants assert that they should receive six-percent interest on the value of their shares during the delay in making the value determination, which would amount to over $300,000. Appellants point out that on September 30, 2003, they lost their rights as shareholders and that the bank was unjustly enriched by the use of this money for twenty-one months. Appellants contend that they have been involuntary lenders to the bank and that, according to Ark. Code Ann. § 23-48-603, the full value of the acquired stock is a debt that the bank owes them. To support their argument, appellants cite *Fitzgerald v. Investors Preferred Life Ins. Co.*, 258 Ark. 966, 530 S.W.2d 195 (1976), which involved a merger of two life insurance companies. The dissenting stockholders sought the value of their preferred stock before the merger. On appeal, they challenged the trial court's refusal to allow interest on the value of the stock between the date of the merger and the date of judgment. Our supreme court reversed, stating:

> The trial court refused to allow interest on the value of the stock between the date of the merger and the date of judgment. In this we think the trial court erred. Ark.Stat.Ann. § 66-4249 (Repl.1966), provides that a dissenting stockholder ceases to be a stockholder on the date of the merger and that the surviving corporation must make a tender of the fair cash value of the dissenting stock within 30 days of the merger. Since the tender in this instance was less than the fair cash value and the merger, in effect, destroyed the stockholder's rights, simple justice would require that the assessment of interest from the last day of the statutory tender date to the time of judgment should be awarded. We so hold, notwithstanding the contrary holdings from other jurisdictions with similar statutory provisions. We have consistently held that in cases of conversion the defendant is liable for interest from the date of conversion, *Bradley Lumber Co. v. Hamilton*, 117 Ark. 127, 173 S.W. 848 (1915). Ark. Stat. Ann. § 66-4249 (Repl.1966), places on the surviving corporation both the duties of determining the fair cash value and the making of a tender. To deny interest in the circumstances before us would encourage the surviving corporation to shave its estimate of fair cash value since it would have the benefit of the earnings of the money due to the dissenting stockholders during the period before judgment.

Id. at 967-68, 530 S.W.2d at 196-97.

Appellants argue that because Ark. Code Ann. § 23-48-603 was enacted after the supreme court's decision in *Fitzgerald*, it can

be presumed that it did not intend to require a different result in cases involving reorganization of state banks. The legislature is presumed to know the decisions of the supreme court, and it will not be presumed in construing a statute that the legislature intended to require the court to pass again upon a subject where its intent is not expressed in unmistakable language. *Martin v. Pierce*, 370 Ark. 53, 257 S.W.3d 82 (2007).

In response, appellees argue that appellants' reliance on *Fitzgerald* is misplaced because its holding has been significantly limited by subsequent cases, such as *Woodline Motor Freight v. Troutman Oil Co.*, 327 Ark. 448, 938 S.W.2d 565 (1997). Appellees also distinguish *Fitzgerald* by pointing out that, in that case, the court had statutory authority to award interest on its judgment, whereas the Commissioner lacks such authority. Appellees argue that the Commissioner's interpretation of the banking statute should not be overturned because the statute makes no provision for an award of interest on minority shares purchased under a plan of exchange.

We find appellants' argument on this point persuasive and disagree with the assertions made by appellees.[1] The *Woodline* decision, contrary to appellees' assertion, did not limit *Fitzgerald*, and we see no meaningful distinction between a determination of fair value by the bank commissioner and a determination of fair value made by a circuit court. And while appellees are correct that the statute in question makes no provision for an award of interest, neither does the statute prohibit such an award. As in *Fitzgerald*, "simple justice" requires that appellants be awarded interest on the value of their stock during the delay in valuation, a period of almost twenty-one months during which appellants no longer possessed rights as shareholders yet had not been paid. Accordingly, we reverse and remand for the trial court to enter an order consistent with this opinion.

Reversed and remanded.

GLOVER and BAKER, JJ., agree.

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[1] We also note that we are equally unpersuaded by appellees' attempt to compare the interest awarded in this case to an award of prejudgment interest.

William G. BORN *v.* Emmett P. HODGES
and Sharon C. Hodges

CA 07-526 271 S.W.3d 526

Court of Appeals of Arkansas
Opinion delivered January 16, 2008

Sanford Law Firm, PLLC, by: *Josh Sanford*, for appellant.

Iris L. Muke, for appellees.

KAREN R. BAKER, Judge. Appellant William G. Born challenges the trial court's disposition of real property in a mortgage foreclosure action asserting that the trial court did not have authority to order the defendant in this case to sign a quitclaim deed to the party bringing the foreclosure action and that a trial court does not have authority to order the Clerk of the Court to perform any act that a trial court could not lawfully compel a party to perform. For the reasons stated herein, we reverse and remand.

The order appealed from was entered pursuant to appellant's failure to answer the complaint and the appellees' motion for default judgment with appellant's response to that motion. Appellees Emmett and Sharon Hodges filed a complaint against Mr. Born on June 6, 2006, and served Mr. Born by a process server on June 7, 2006, at Mr. Born's place of employment. The complaint alleged that appellant was in default on a contract providing owner financing for the purchase price of real estate owned by appellees as sellers. According to appellees' reply to Mr. Born's Response to Motion for Default Judgment, the original complaint in this action was filed in Yell County,[1] but a notice of dismissal was filed and Mr. Born was notified of the dismissal when he was served with notice of the Johnson County filing. The trial court granted appellees' motion for default judgment, ordered appellant to vacate the premises and execute a quitclaim deed transferring the property to appellees within ten days of the court's order, and

[1] The copy of the mortgage attached as exhibit "A" to the complaint filed in Johnson County contains a handwritten modification. The word "Johnson" is typed into the blank left open on the form to identify the county in which the real property is located. Johnson has a handwritten line drawn through it with the word "yell" handwritten above. No initials are present by the handwritten modification. The copy of the mortgage has no writing typed or handwritten in the certificate of record space and no marks indicating that the document was filed at the Johnson County courthouse. A handwritten modification is also present on the document entitled "REAL ESTATE PURCHASE MONEY NOTE" attached as exhibit "B" to the complaint which contains a hand-drawn line through "Johns," leaving the "on" intact, with "yell" handwritten in above the "Johns." While appellees argue on appeal that no mortgage was ever filed of record, the record contains a file-marked copy of a mortgage with a completed certificate of record from Johnson County with no handwritten modifications. The complaint filed in Johnson County on June 6, 2006, states that the real property involved is located in Johnson County. The complaint also states that the attached exhibits of the mortgage and note are true and correct copies of the original documents. Neither party raises arguments regarding these discrepancies. Our disposition of this case does not require us to address any issues arising from those inconsistencies and nothing in this opinion should be deemed to preclude the parties or the trial court from addressing such.

ordered the clerk of the court to issue a proper deed to appellees if appellant had not fully executed the quitclaim deed pursuant to the court's order.

Appellees argue that we must apply an abuse of discretion standard in reviewing the appropriateness of the default judgment in this case; however, our standard of review depends on the grounds upon which the appellant is claiming that the default judgment should be set aside. *Nationwide Ins. Enter. v. Ibanez*, 368 Ark. 432, 246 S.W.3d 883 (2007). In cases where the appellant claims that the default judgment is void, the matter is a question of law, which we review de novo and give no deference to the circuit court's ruling. *Id.* In all other cases where we review the motion to set aside a default judgment, we do not reverse absent an abuse of discretion. *Id.* In the case before us, appellant argues that the trial court exceeded its authority and unlawfully ordered appellant to quitclaim his interest in the property. The general rule is that a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void. *Ivy v. Office of Child Support Enforcement*, 99 Ark. App. 341, 260 S.W.3d 328 (2007); *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995). In this case, appellant argues that the trial court had no authority to grant the relief entered by the judgment. Accordingly, our review of this matter is de novo.

When a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend as provided by the Rules of Civil Procedure, a default judgment may be entered against him. *See* Ark. R. Civ. P. 55(a). Default judgments are not favorites of the law and should be avoided when possible. *B & F Engineering v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). A default judgment may be a harsh and drastic result affecting the substantial rights of the parties. *CMS Jonesboro Rehabilitation, Inc. v. Lamb*, 306 Ark. 216, 812 S.W.2d 472 (1991); *Burns v. Madden*, 271 Ark. 572, 609 S.W.2d 55 (1980). Pursuant to Rule 55(c) of the Arkansas Rules of Civil Procedure, a default judgment may be set aside for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment.

In reviewing appellees' complaint, we note that paragraph one of the complaint identifies appellees as "Grantees" and appellant as "Grantor" and requests the following relief: "WHERE-

FORE, the Grantors request entry of judgment against the Grantee for the principal amount of the note and mortgage . . . as well as costs and all sums the Grantors may be required to expend for additional expenses incurred in this foreclosure proceeding to secure the property. . . . If such judgment is not paid or settled in full within the time allowed by this Court, the property should be returned to the Grantors by Warranty Deed executed by Grantor." The complaint appears to identify the parties rather indiscriminately, interchanging the nominatives. It is not necessary to our disposition of this case to examine the inconsistency in the identities. It is sufficient to recognize that the prayer for relief in the appellees' complaint acknowledged that the action was a foreclosure proceeding that sought the execution of a warranty deed.

Our foreclosure statutes provide for the sale of the property subject to the mortgage, not the execution of a deed:

> (b) In the foreclosure of a mortgage, a sale of the mortgaged property *shall be ordered in all cases.*
>
> (c) In an action on a mortgage or lien, the judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally.

Ark. Code Ann. § 18-49-103 (Repl. 2003) (emphasis supplied).

Appellant argues that appellees had the right to pursue a judgment for the indebtedness, disregarding their secured interest in the property — essentially, suing only on the note, citing *Haney v. Phillips*, 72 Ark. App. 202, 35 S.W.3d 373 (2000), or they could proceed in rem having the right to foreclose the mortgage interest and have the court order the public sale of the property. *Id.* In *Haney*, this court found that the trial court had erred by applying the election-of-remedies doctrine to preclude a foreclosure. We held that the remedies sought by the holder of the mortgage were not inconsistent. Under the law, he was entitled to pursue either one of them, or both in succession, until the debt was satisfied. *Haney*, *supra*.

While appellant's reliance on *Haney* may be misplaced, his citation to Arkansas Code Annotated Section 18-49-103(b) and his statement that the trial court had no power or authority, either at law or equity, to seize his full interest and compel him to convey that interest to appellees is well taken. The filing of appellees'

complaint initiated a foreclosure proceeding on an alleged debt asserted to be secured by a mortgage on real property. The complaint requested an order compelling the execution of a deed to satisfy the alleged mortgage. The trial court was without authority to order appellant or the clerk to execute a deed transferring title of the property to satisfy the alleged mortgage. Accordingly, we must reverse and remand for proceedings consistent with this opinion.

For the foregoing reasons, we reverse and remand.

GLOVER, J., agrees

HEFFLEY, J., concurs.

SARAH J. HEFFLEY, Judge, concurring. I agree that the trial court's order must be reversed. However, my reasoning differs slightly from the view expressed in the prevailing opinion.

The appellant in this case is not contesting the entry of a default judgment against him. Instead, he is challenging the relief granted by the trial court upon his default, which was that he was ordered to execute a quitclaim deed to appellees, and failing that, for the Clerk of the Court to issue a deed to them. Appellant's failure to file a timely answer to the complaint does not prevent him from challenging the remedy ordered by the trial court. A default judgment establishes liability but not the amount of damages. *Young v. Barbera*, 366 Ark. 120, 233 S.W.3d 651 (2006). While a defaulting defendant cannot introduce evidence to defeat the plaintiff's cause of action, the defendant retains the right to cross examine the plaintiff's witnesses, to challenge the sufficiency of the evidence, and to introduce evidence in mitigation of damages. *Id.*

Here, appellant's failure to file a timely answer established that he was in default on the note and mortgage. However, he was and remains well within his rights to contest the relief flowing from his failure to pay the amounts due under the note and mortgage. Even in a default situation, a plaintiff cannot exact a remedy to which he is not entitled. Thus, contrary to appellees' argument, appellant's contention that appellees were not entitled to a return of the property is not a defense meant to defeat their cause of action. Nor is appellant raising this issue for the first time on appeal, as it was raised in his response to the motion for a default judgment and in his motion for reconsideration.

The trial court's order in this case worked a forfeiture. Forfeiture clauses contained in executory contracts for the sale of land are considered valid under Arkansas law. *White v. Page*, 216 Ark. 632, 226 S.W.2d 973 (1950); *Friar v. Baldridge*, 91 Ark. 133, 120 S.W. 989 (1909); *Abshire v. Hyde*, 13 Ark. App. 33, 679 S.W.2d 214 (1984). The problem here is that the "Mortgage with Power of Sale" did not contain a forfeiture clause. Both it and the note provided that, upon default, the property would be sold at public auction with the proceeds to be applied first to the expenses of sale, then toward payment of the remaining debt, with appellant receiving any surplus. Unquestionably, appellees were not entitled to an outright return of the property with the result being that appellant forfeit all the monies he had paid.

For these reasons, I concur in the decision to reverse the trial court's order.

Michael BELL *v.* STATE of Arkansas

CA CR 06-871 272 S.W.3d 110

Court of Appeals of Arkansas
Opinion delivered January 23, 2008

Self Law Firm, by: *Joseph C. Self*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Carolyn Boies Nitta*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. A Union County jury found Michael Bell guilty of various drug offenses, for which he received a total seventy-three-year term in the Arkansas Department of Correction. He does not challenge the sufficiency of the evidence to support the convictions. Rather, he contends that the trial court erred in allowing the jury to consider a sentencing enhancement for selling drugs within 1000 feet of a city park. He also argues that the trial court erred in sentencing him to consecutive terms of imprisonment without demonstrating that it exercised discretion in doing so. We affirm, holding (1) that appellant waived the issue of the sentencing enhancement by not properly raising it below and (2) that the trial court properly exercised its discretion in running appellant's sentences consecutively.

On February 17, 2005, the State charged appellant with three counts of delivery of cocaine, one count of possession of cocaine with intent to deliver, and one count of possession of drug paraphernalia. A jury trial was held on December 5, 2005. At the close of the evidence, the court instructed the jury to consider whether appellant committed the offenses within 1000 feet of a city park. The criminal information, however, did not state that he would be susceptible to the enhancement. The jury found appellant guilty on all five counts. It recommended a three-year

sentence on the charge of possession of drug paraphernalia and fifteen-year sentences each on the possession-of-cocaine charges. It also recommended that he serve an additional ten years for committing the offenses within 1000 feet of a city park and that all of the sentences be served consecutively. After the jury was discharged, appellant requested time to do research regarding whether he could ask the court to consider a sentence different from the jury verdict. After the court denied the request, he made an oral motion to run the sentences concurrently. The court denied appellant's motion and followed the jury's recommendation, resulting in a seventy-three-year term of imprisonment.

First, appellant argues that the trial court erred in allowing the jury to consider the sentencing enhancement under Ark. Code Ann. § 5-64-411(a)(1) (Repl. 2005), which provides for an additional ten-year term of imprisonment for selling drugs within 1000 feet of a city park. He contends that the State did not put him on notice that it was seeking the enhancement. While he acknowledges that he did not raise the issue before the trial court, he argues that this was a void or illegal sentence.

Allegations of a void or illegal sentence are a matter of the court's subject-matter jurisdiction, which may be raised for the first time on appeal. *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005); *Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005). Where the law does not authorize the particular sentence pronounced by a trial court, the sentence is unauthorized and illegal, and the case must be reversed and remanded. *Sullivan v. State*, 366 Ark. 183, 234 S.W.3d 285 (2006). While illegal sentences include sentences that are outside of the statutory range, the term "illegal sentence" refers to any sentence that the trial court lacks the authority to impose. *Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007).

[redacted] However, appellant is not asserting that the State did not have the right to pursue the sentencing enhancement; he argues that he did not have notice. Questions regarding notice must be raised at trial to preserve the issue for appellate review. *See Middleton v. State*, 311 Ark. 307, 842 S.W.2d 434 (1992) (acknowledging that a conviction for an uncharged crime is a violation of due process, but holding that the issue was waived because it was being raised for the first time on appeal); *Cheshire v. State*, 80 Ark. App. 327, 95 S.W.3d 820 (2003) (acknowledging that due process requires a probationer to be informed of the conditions of his probation he is alleged to have violated, but holding that the denial

of that right must be presented to the trial court for it to be preserved for appellate review). Because appellant's failure to raise the issue of notice about the sentencing enhancement at trial precludes this court from addressing it here, we affirm on this point.

Nonetheless, we are troubled by the trial court presenting this issue to the jury. The decision to charge appellant with a sentencing enhancement lies within the discretion of the prosecuting attorney, not the trial judge. *Compare State v. Knight*, 318 Ark. 158, 162, 884 S.W.2d 258, 260 (1994) ("The Arkansas Constitution provides that the duty of charging an accused with a felony is reserved to the grand jury or to the prosecutor. . . . We have consistently held that a circuit judge does not have the authority to amend the charge brought by the prosecuting attorney."). By instructing the jury to consider the sentencing enhancement, the trial judge took the discretion away from the prosecuting attorney and violated appellant's right to know the charges brought against him. While appellant's failure to preserve the point precludes us from determining whether the trial judge's actions constitute reversible error, we emphasize that such conduct is not viewed favorably on appellate review if it is timely challenged at trial.

Next, appellant contends that the trial court erred in sentencing him to consecutive terms of imprisonment without demonstrating that it exercised discretion in doing so. He contends that the trial court was mechanically imposing consecutive terms of imprisonment and gave no indication that it exercised any discretion in doing so.

Although the criminal code vests the choice between concurrent and consecutive sentences in the judge, not the jury, there must be an exercise of judgment by the trial judge, not a mechanical imposition of the same sentence in every case. *Ford v. State*, 99 Ark. App. 119, 257 S.W.3d 560 (2007). In making the decision between concurrent and consecutive sentences, the trial judge should make it clear that it is her discretion being exercised when entering the sentences, not the jury's. *Id.* The question of whether multiple sentences will be served concurrently or consecutively is a decision left to the sound discretion of the trial court, not to be altered on appeal absent a clear abuse of that discretion. *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992). The appellant assumes a heavy burden of demonstrating that the trial court failed to give due consideration to the exercise of its discretion in the matter of the consecutive sentences. *Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997).

We affirm, as nothing in the record indicates that the trial court mechanically imposed the recommendation of the jury. 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), and we are not satisfied that this record is sufficient to establish such a showing. After discharging the jury, appellant requested time to file a motion for a verdict different from the jury's recommendation. After the State objected and encouraged the court to follow the recommendation, the court stated that it knew of no legal reason that it should not proceed. It then allowed appellant to make an oral motion to run the sentences concurrently, heard the State on the oral motion, and stated that it would follow the jury's recommendation. Nothing in this exchange shows that the trial court failed to exercise discretion in determining whether to run the sentences consecutively or concurrently.

Affirmed.

ROBBINS and MARSHALL, JJ., agree.

James BOYSTER *v.* Teresa SHOEMAKE

CA 07-593 272 S.W.3d 139

Court of Appeals of Arkansas
Opinion delivered January 23, 2008

Jerry Pruitt, for appellant.

Walters, Gaston, and Ridgley, by: *Bill Walters*, for appellee.

WENDELL L. GRIFFEN, Judge. On April 23, 2007, the Sebastian County Circuit Court entered an order finding that appellee Teresa Shoemake presented proof of a boundary line by acquiescence between property belonging to her and appellant James Boyster. Appellant asserts that the circuit court clearly erred in making that finding, contending that appellee failed to prove that there was any mutual assent in establishing the boundary line. We affirm, holding that the circuit court did not clearly err in finding that appellee presented sufficient evidence of mutual recognition of a boundary line by acquiescence. However, we remand the case with instructions to amend the decree by adding a more specific description of the boundary line between the parties' land.

The parties are adjacent landowners in southern Sebastian County, with appellee's property located south of appellant's. Appellee, who acquired title to the property in 1996, alleged that the parties had acquiesced to an old fence north of the true boundary line. According to her testimony, the boundary-line dispute arose in summer 2005 when she lost several hunting dogs on her property. When she went to the disputed area on her four-wheeler to find the dogs, appellee saw that the fence had been cut, rocks had been picked up, and trees had been cut down. She saw appellant's wife and asked, "What are you guys doing?" Appellee then learned that appellant had surveyed the property and discovered that the fence line was not on the boundary. Appellee described the fence as an old, rusty fence that had grown into the trees and stated that the fence had been on the property her entire

life. She noted that her property was enclosed by fence on the west, north, and east sides. A highway was located on the south boundary of her property.

Appellee testified that her grandmother acquired the property in 1942 and that the property passed to her grandfather in 1945 after her grandmother's death. Appellee was born in 1959, and she recalled visiting the property frequently. She noted that in the 1960s, the property on the other side of the fence was used as pasture land. She never saw anyone other than her family use the property south of the fence. Her family's side of the fence contained trees, which had not been used for anything other than Christmas trees and recreation.

Appellee stated that the Shockleys sold their property to Bryan Tatum, appellant's immediate predecessor in interest. She recalled a conversation with him where he acknowledged the fence line as the boundary line. During that conversation, he asked her if he could dig across her property and install a water line. After several days, she allowed him to dig across if he would brush hog the property. Appellee stated that she had a good relationship with Tatum and that he never questioned her about the fence being the property line.

Appellee also presented the testimony of many others. Jackie Paxton hunted on the property with appellee's father, Bob Higginbotham, and testified that Higginbotham instructed him that the property ended at the fence line. Paxton described the fence as in "decent" condition, and did not see evidence of anyone north of the fence making use of the property south of the fence. Alan Jones also hunted on the property with his grandfather and testified that his grandfather told him that appellee's property extended to the fence line. Tommy Dale Jones cut Christmas trees from the property and testified about the north property being used as pasture. Margaret Ann Williams, who moved to the area in September 1997, never saw evidence of anyone north of the fence using the property south of the fence.

Pamela Sullivan was formerly married to Robert Shockley and was familiar with the tract now owned by appellant. She testified that she and her former husband ran a dairy farm operation on the north tract until the 1980s. She and her husband then moved to Greenwood and started subdividing and selling the property. The first piece was sold to Tatum, and she did not return to the property on a regular basis after that point. Sullivan had no recollection of the fence on the property.

Tatum testified that he purchased his property from the Shockleys sometime after 2000. He stated that his ten acres were clear-cut timber and described the land as a "veritable nightmare," as it took two or three weeks of heavy dozer work to clear it. He denied seeing a fence on the property except for one on five acres of part of the property. Tatum recalled approaching appellee to discuss an easement over her property. He stated that she originally refused to allow the easement, but the two later agreed that he could install the water line if he brush hogged her property. He did not recall discussing the fence line or any other boundary with appellee.

Appellant testified that he looked at the property before purchasing it from Tatum and that Tatum's property appeared to have been recently bulldozed. He stated that he found a fence while measuring the property, but that a person could not walk down the road and see the fence because the fence was in poor condition. When seeing the fence, he opined that it was constructed to keep something on or off the nearby highway. He also noted that he never saw anyone use the property south of the fence and that he never discussed the property line until the instant dispute.

In an order dated March 17, 2006, the circuit court found that appellee established a boundary line by acquiescence and quieted title to the disputed tract in her name. Appellant prosecuted an appeal, but that appeal was dismissed for lack of a final order, as the circuit court failed to address a conversion claim. *See Boyster v. Shoemake*, CA 06-744 (Ark. App. Mar. 14, 2007) (not designated for publication). The circuit court addressed the claim in its final judgment entered April 24, 2007, and appellant filed a timely notice of appeal.

For his sole point on appeal, appellant contends that the circuit court clearly erred in finding that the fence line was established as the boundary line by acquiescence. He argues that mutual assent to the boundary line is a key component of establishing a boundary line by acquiescence and asserts that appellee failed to prove that there was any mutual assent.

Although we review equity cases de novo on the record, we do not reverse unless we determine that the circuit court's findings of fact were clearly erroneous. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that

a mistake has been committed. *Conner v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004). In reviewing the circuit court's findings, we give due deference to the circuit judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.*

The mere existence of a fence or some other line, without evidence of mutual recognition, cannot sustain a finding of boundary by acquiescence. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978); *Robertson, supra.* However, silent acquiescence is sufficient, as the boundary line is usually inferred from the parties' conduct over so many years. *Warren, supra*; *Hicks v. Newton*, 255 Ark. 867, 503 S.W.2d 472 (1974). A boundary by acquiescence may be established without the necessity of a prior dispute or adverse use up to the line. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972). For a party to prove that a boundary line has been established by acquiescence, that party must show that both parties at least tacitly accepted the non-surveyed line as the true boundary line. The mere subjective belief that a fence is the boundary line is insufficient to establish a boundary between two properties. *Webb v. Curtis*, 235 Ark. 599, 361 S.W.2d 87 (1962).

Appellant discusses *Robertson, supra*, in support of his argument for reversal. In *Robertson*, we affirmed a finding that the appellant failed to prove a boundary by acquiescence despite testimony that members of his family maintained the disputed property, that no one else claimed the disputed property, and that everyone in appellant's family considered the fence to be the boundary line. The record contained very little testimony regarding the construction of the fence. While the appellant relied on the appellee's silence regarding the issue, we noted that the appellee was not silent on the matter, telling another party not to mow the disputed tract. There was also an absence of testimony showing that anyone on the appellee's side of the property considered the fence to be the property line.

Appellant compares the evidence in the instant case to that in *Robertson* and contends that appellee failed to present any evidence that he or any of his predecessors in interest consider the fence line to be the boundary. He is mistaken, as appellee testified that Tatum acknowledged the fence as the boundary line. While appellant describes this as "self-serving testimony," it was within the province of the circuit court to find her credible, and our standard of review requires us to defer to the circuit court's reliance on her testimony. *Conner, supra.* In addition to appellee's

testimony that Tatum acknowledged the fence as the boundary line, testimony from appellee and her witnesses established that no one north of the fence used the property south of the fence and that property north of the fence was pasture, while property south of the fence was woods. Appellee presented sufficient evidence to establish that appellant and his predecessors in interest recognized the fence line as the boundary between the two properties.

Because the circuit court did not err in finding that appellee established that the fence line between the two properties was the boundary by acquiescence, we affirm. However, the trial court order in this case lacks a specific description of the boundary line. A final order in a boundary line dispute must describe the boundary line between disputing land owners with sufficient specificity that it may be identified solely by reference to the decree. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997); *Penland v. Johnston*, 97 Ark. App. 11, 242 S.W.3d 635 (2006). In *Jennings v. Buford*, 60 Ark. App. 27, 35, 958 S.W.2d 12, 16 (1997), we noted that the decree there lacked a specific description on the boundary line in question, but we noted that the line described in that case was specifically described as "the meandering fence 'reflected by the Askew survey.' " We held that the lack of specificity in the order was not reversible error, but was a mere omission or oversight that could be corrected pursuant to then Rule 60(a)[1] of the Arkansas Rules of Civil Procedure. Accordingly, we granted leave to the lower court to amend the decree by adding a more specific description of the boundary line between the parties' land. We recently did the same in *Adams v. Atkins*, 97 Ark. App. 328, 249 S.W.3d 166 (2007), when the order identified the boundary line as reflected in the Higby survey as the true and correct boundary line between the properties in question. In the present case, the order also lacks a specific description of the boundary between the properties, but the order clearly references a survey identifying the established boundary line as the fence on the south side of the old Slaytonville Road. As we did in *Jennings* and *Adams*, we grant leave to the circuit court to amend the decree by adding a more specific description of the boundary line between the parties' land.

Affirmed and remanded with instructions.

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[1] Now Rule 60(b). *See* Rule 60, Addition to Reporter's Notes, 2000 Amendment.

PITTMAN, C.J., GLADWIN, ROBBINS, and BIRD, JJ., agree.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. *Res est misera ubi jus est vagum et uncertum.* I submit that the common law concerning real property remained for more than a century and a half much the same as it existed in England on March 24, 1606, the date specified in our reception statute. See Ark. Code Ann. 1-2-119 (Repl. 1996). However, in the last decade, particularly where the common law regarding acquiescence is concerned, it has morphed into an unrecognizable state, courtesy of the Arkansas Court of Appeals. To arrive at its current low-water mark, I believe the majority has made mistakes of both fact and law.

While I do not usually recount facts when I write a dissent, I believe that I must do so in this case to correct what I believe is an overly simplistic understanding of the nature and situation of the parties' real-estate. This case involves a disputed trapezoid-shaped piece of rugged, unimproved land. One side of the trapezoid measures 234.5 feet along the Boysters' western boundary and the parallel side measures 69.6 feet along their eastern boundary. A gravel road bounded on the south by the remnants of a fence cuts across the Boysters' property at approximately a thirty-degree angle. The disputed property lies within the legal description in the deed to ten acres of land that the Boysters acquired from Bryan Tatum in June 2004.

Tatum had been the owner of record since 2000 when his ten-acre plot was subdivided from what had been a 400 acre dairy farm owned by the Shockley family. Not surprisingly, much of the land comprising the dairy farm was open pasture land. However, the disputed land lies in the far southwest corner of the dairy farm, and it was apparently too rugged and tree-covered to use as pasture. It was variously described by Shoemake and her witnesses as "bobcat country," "a cliff," and "pretty much nature." The rugged character of the land was confirmed by ground-level and aerial photographs that were entered into evidence. Significantly, there was not a shred of disagreement among the witnesses, including Shoemake herself, that the fence was constructed to "hold cattle." I do not believe it requires a great leap of logic to surmise that the fence was constructed for no other purpose than to keep the dairy cows from the "cliff."

It is true that Shoemake presented testimony from herself, relatives, a family friend, and a neighbor who occasionally walked

on the property, that Shoemake and her grandfather regarded the fence as the boundary. Also true, as the majority notes, not one of Shoemake's witnesses testified that they saw any activity — not even cows grazing — on the part of any owners of record of the disputed property, on either side of the fence. However, I simply cannot offend common sense by assigning this fact any legal significance whatsoever. When one has a 400 acre dairy farm, how much time would any one be expected to spend on the few acres of land that was unsuited for grazing cows?

The majority is correct when it acknowledges that the only evidence of *mutual recognition* of the fence as a boundary came from Shoemake's testimony that Tatum "knew" that the disputed tract was her property. However, even crediting this testimony as we must under the standard of review, it establishes acquiescence for less than seven years. It is therefore less than the seven-year limitation period required for adverse possession, and presumably much less than the "many years" that the parties must treat a fence line to establish a boundary by acquiescence. *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993).

Our supreme court has repeatedly held that the mere existence of a fence without evidence of mutual recognition is insufficient to establish a boundary by acquiescence. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978); *Fish v. Bush*, 253 Ark. 27, 484 S.W.2d 525 (1972); *Carney v. Barnes*, 235 Ark. 887, 363 S.W.2d 417 (1962). However, today the majority has overruled this clear precedent to hold that proof of the *mere existence* of an old fence is sufficient evidence to establish a boundary by acquiescence.

Finally, I believe it is worth noting that the majority's decision today represents, at best, a pyrrhic victory for Shoemake. As noted previously, the disputed tract of land is trapezoid-shaped because the fence cuts across the Boysters' land at an angle. All of the Boysters' land lies north of a portion of just one of Shoemake's four forty-acre parcels. The remainder of that forty and three others border the almost 400 acres that comprised the old dairy farm. While the fence line favors Shoemake where her property borders the Boysters, farther to the east, it dips significantly into the surveyed description of her property. I submit that because of judicial estoppel, Shoemake will not be able to assert that the fence line is not the property line if Shockley or his successors choose to assert title to the property on their side of the fence.

I respectfully dissent.

ESTATE OF Kikendel Jermaine BANKS, Alan Banks, Individually and as Administrator of the Estate of Kekendel Jermaine Banks *v.* Dr. Timothee T. WILKIN

CA 06-1285 272 S.W.3d 137

Court of Appeals of Arkansas
Opinion delivered January 23, 2008

Warren Law Firm, by: *Althea E. Hadden*, for appellant.

Womack, Landis, Phelps, McNeill & McDaniel, P.A., by: *Paul McNeill* and *Jeff Scriber*, for appellee.

DAVID M. GLOVER, Judge. The underlying action in this case involves medical malpractice and wrongful death in the demise of Kikendel Jermaine Banks. Appellant, Alan Banks, is the personal representative of the estate. He appeals from the trial court's grant of summary judgment in favor of appellee, Timothee Wilkin, a doctor involved in the decedent's care. With the grant of summary judgment, the trial court dismissed the action with prejudice, finding that the original complaint was a nullity because it was filed before

appellant's letters of administration were issued by the county clerk and that the statute of limitations had run, making refiling impossible. We reverse and remand.

The decedent died on August 21, 2002, and, therefore, the statute of limitations expired on August 21, 2004. The order of appointment for appellant and the acceptance of the appointment were both filed on April 12, 2004. Although the order of appointment provided "that Letters of Administration shall be issued to said personal representative upon filing of Acceptance of Appointment," no such letters were ever issued to appellant. On August 13, 2004, the complaint in this action was filed. On October 6, 2005, appellee filed his motion for summary judgment, contending that appellant lacked standing to bring the action because he filed the complaint prior to the issuance of letters of administration, that such letters remained unissued, and that the statute of limitations had expired. The trial court granted the motion for summary judgment, and this appeal followed. Appellant contends that the trial court erred in granting summary judgment, and we agree.

Standard of Review

The standard of review regarding summary judgment is whether the evidentiary items presented by the moving party in support of the motion left a question of material fact unanswered and, if not, whether the moving party is entitled to judgment as a matter of law. *Sparks Reg'l Med. Ctr. v. Blatt*, 55 Ark. App. 311, 935 S.W.2d 304 (1996). The appellate court views all proof in the light most favorable to the party opposing the motion, resolving all doubts and inferences against the moving party. *Id.* Even if none of the material facts are in dispute, however, if we cannot say that the appellee was entitled to judgment as a matter of law, then summary judgment is not appropriate. *See id.*

Here, it is undisputed that not all of the decedent's heirs at law were named as plaintiffs in this action. Consequently, the complaint's viability stands or falls on whether the appellant took the necessary steps to bring the action as personal representative of the estate. Arkansas Code Annotated section 28-40-102 (Repl. 2004), provides in pertinent part:

> (b) The [probate] proceedings shall be deemed commenced by the filing of a petition, *the issuance of letters*, and the qualification of a personal representative. The proceeding first legally commenced is extended to all of the property in this state.

(Emphasis added.) In arguing that appellant lacked standing to bring the action, appellees depend entirely upon the fact that no letters of administration were issued prior to filing the complaint — and in fact have never been issued — and that the statute of limitations has now expired. The trial court accepted appellee's position on the law, but we have concluded that it erred in doing so.

Act 438 of 2007 (codified as Ark. Code Ann. § 28-48-102 (Supp. 2007)) was approved on March 22, 2007, and it became effective on July 31, 2007. It was enacted for the purpose of clarifying the effect of a probate order and the purpose of letters of administration. The act specifically provides that "[l]etters of administration are not necessary to empower the person appointed to act for the estate," and that "[t]he order appointing the administrator empowers the administrator to act for the estate, and any act carried out under the authority of the order is valid." In *Steward v. Statler*, 371 Ark. 351, 266 S.W.3d 710 (2007), our supreme court held that Act 438 was procedural, and, therefore, that it was intended to be applied retroactively. The court explained:

> Until the enactment of Act 438, it has been well-settled law, since Ark. Code Ann. § 28-40-102(b) was enacted in 1949, that letters of administration are necessary to vest in a personal representative or special administrator the authority to sue or be sued. In *Jenkins* . . ., our court explicitly stated that "[n]othing can be read into either [Ark. Code Ann. § 28-40-102(b)] or [Ark. Code Ann. § 28-40-104] which would authorize a personal representative to sue or be sued until such time as he has received letters of administration." The Arkansas Court of Appeals reiterated the law in *Filyaw* . . ., with the pronouncement that "[u]ntil the issuance of the letters, appellant [personal representative] had no standing under *Jenkins* to file suit."[1]
>
> However, the General Assembly's enactment of Act 438 repeals the Arkansas Probate Code's long-standing provision establishing the

[1] While it is unnecessary for us to state our position regarding what the "well-settled law" has been in this regard, we do note the discussion of this issue in the concurring opinion in *Steward, supra*, and, in particular, its discussion in footnote 5 concerning our court's decision in *Green v. Nunez*, 98 Ark. App. 149, 253 S.W.3d 11 (2007).

> legal commencement of a probate proceeding, . . . by implication. While it is true that repeals by implication are not favored, . . . , a repeal by implication does transpire when there exists an "invincible repugnancy" between the earlier and the later statutory provisions.
>
> Here, the later statute, Act 438 declares letters of administration to be unnecessary so long as there is an order appointing the administrator; whereas, the earlier statute, . . . conditions the legal commencement of a probate proceeding upon the issuance of letters.

Id. at 355-56, 266 S.W.3d at 714.

Consequently, in light of Act 438 of 2007 and the supreme court's determination in *Steward v. Statler, supra,* that the act is to be applied retroactively, it is clear that it is the order of appointment, not the letters of administration, that empowers the personal representative to act on behalf of the estate. Here, the complaint was filed after the order of appointment was filed. Consequently, the trial court erred as a matter of law in dismissing the complaint. We therefore reverse and remand this matter to the trial court for reinstatement of the complaint.

Reversed and remanded.

BIRD and VAUGHT, JJ., agree.

Richard and Mary ROBERTS *v.*
GREEN BAY PACKAGING, INC.,
and William Rhodes

CA 07-60 272 S.W.3d 125

Court of Appeals of Arkansas
Opinion delivered January 23, 2008

Kelly Law Firm, PLC, by: *A.J. Kelly*, for appellants.

Brazil, Adlong & Winningham, PLC, by: *William C. Brazil*, for appellee William Rhodes.

Howard C. Yates, for appellee Green Bay Packaging, Inc.

D.P. MARSHALL JR., Judge. The parties own adjoining tracts of land in rural Van Buren County. Global Road crosses the Robertses' property, and Mr. Rhodes's and Green Bay's use of the road has caused friction. The Robertses filed this suit alleging that Mr. Rhodes, Green Bay, and a John Doe had destroyed trees while widening the road. The circuit court concluded that the parties settled the litigation and entered an "Agreed Decree," which dismissed all claims and counterclaims against all the parties. The Robertses appeal. They argue that no final settlement agreement was ever reached or, in the alternative, that the decree contains terms to which they never agreed. We reverse and remand because we are firmly convinced that the parties never reached a mutual agreement on the settlement terms. Ark. R. Civ. P. 52; *Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 227, 737 S.W.2d 672, 674 (1987) (standard of review).

About a week before a scheduled trial, the Robertses' attorney sent all counsel a two-page letter dated 1 July 2005 proposing settlement terms. The proposal offered Green Bay and Mr. Rhodes a thirty-foot easement to be delineated in a survey, gave the Robertses full access to Global Road plus an easement across Green Bay's land in a connecting road to State Highway 16, and prohibited interference with the Robertses' petition to remove Global Road from the county-road system. The proposal also called for gates on the road and for Mrs. Rhodes, who was not a party to the suit, to agree to the settlement in writing. The circuit court then removed the case from the trial docket. The record contains no contemporaneous explanation of why. When the parties later fell out about whether a settlement had been reached, the lawyers for Mr. Rhodes and Green Bay said that the case was not tried because the parties had settled, while the lawyer for the Robertses said that the parties had agreed to agree but not come to final terms. After the trial date came and went, a survey was done and the lawyers exchanged letters about Green Bay's desire for an easement wider than thirty feet at several points along the road.

A few months later, Mr. Rhodes expressed frustration with the delay, accused the Robertses of backing out of the settlement, and moved to enforce it. The motion did not specify the parties' terms, but stated that they had reached a settlement shortly before the trial date. Green Bay joined the motion to enforce. The Robertses opposed the motion, stating that some but not all issues had been resolved before trial and no final settlement had yet been reached. The Robertses then submitted a proposed decree to all counsel that tracked (with some variation) the July 1st letter. Mr. Rhodes's counsel rejected it outright as "not even close to what we agreed to." Green Bay's counsel later drafted a decree that differed in many respects from the July 1st letter. This decree created mutual easements in two "offshoots" from Global Road, gave the Robertses a "right of use" rather than an easement along Green Bay's road, attempted to describe two places on Global Road where the easement would be wider than thirty feet, and contained no signature line for Mrs. Rhodes.

In due course, the circuit court held a hearing on the motion to enforce. No one testified. All the lawyers, as officers of the court, explained what had happened. Counsel for Green Bay and Mr. Rhodes said there was a settlement. Counsel for the Robertses said that they tried to reach a final settlement but could not do so. Over two objections from the Robertses, the court received into evidence the July 1st letter proposal, the parties' correspondence, and the proposed decrees. The Robertses did not object to the lack of a sponsoring witness for these documents or challenge their authenticity. Instead, they argued (1) that their admission offended Rule 408's bar against evidence of settlement negotiations, and (2) that the other parties — despite outstanding discovery and a motion to compel disclosure of what exhibits they planned to offer at the hearing — had refused to disclose this proposed evidence.

[redacted] We reject the Robertses' contentions that the court abused its discretion by considering the documents about settlement. *Gailey v. Allstate Ins. Co.*, 362 Ark. 568, 575, 210 S.W.3d 40, 45 (2005) (standard of review). Arkansas Rule of Evidence 408 prohibits using offers of compromise to prove liability or the invalidity or amount of a claim. *McKenzie v. Tom Gibson Ford, Inc.*, 295 Ark. 326, 332-33, 749 S.W.2d 653, 657 (1988). The Rule, however, allows evidence of settlement negotiations to prove other things. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 437, 834 S.W.2d 136, 141 (1992). Mr. Rhodes and Green Bay did not offer the documents on issues related to liability. The issue at the

hearing was whether the parties had agreed to settle, and all these documents were competent proof on that issue. We do not condone Mr. Rhodes's and Green Bay's failure to tell the Robertses about their planned exhibits before the hearing, but we see no reversible error on this point. Like the circuit court we discern no prejudice from this omission. The Robertses were part of this back and forth about all settlement details, and the other parties' likely exhibits about those negotiations could not have been a surprise.

On the merits, we conclude that the circuit court clearly erred because it made a contract for these parties when they had tried but failed to make one. Our law favors and encourages settlement agreements. *Williams v. Davis*, 9 Ark. App. 323, 325, 659 S.W.2d 514, 515 (1983). But, like any other contract, the terms of a settlement agreement must be definitely agreed upon and reasonably certain. *Key v. Coryell*, 86 Ark. App. 334, 341, 185 S.W.3d 98, 103 (2004). A mutual agreement, as evidenced by objective indicators, is essential. *See generally Ward v. Williams*, 354 Ark. 168, 180, 118 S.W.3d 513, 520 (2003). This element is missing here.

The record contains no writings, testimony, or agreements in open court showing that the parties mutually assented to all material settlement terms in the "Agreed Decree." Green Bay's and Mr. Rhodes's counsel stated at the hearing that they accepted the July 1st proposal from the Robertses' counsel. Lawyers' statements that a settlement exists, however, are insufficient in the face of denials by opposing counsel and a lack of testimonial or other competent evidence. *Williams*, 9 Ark. App. at 325-26, 659 S.W.2d at 515-16. While Green Bay and Mr. Rhodes contend that they accepted the July 1st letter, which was in evidence, Mr. Rhodes rejected unequivocally the proposed decree based on that letter. Moreover, even if the July 1st proposal was accepted, the circuit court's "Agreed Decree" did not comport with the letter's terms. Instead, the "Agreed Decree" tracked the proposed decree drafted by Green Bay's lawyer, adding some provisions to the Robertses' proposal and eliminating others.

We are left with the firm conviction that the circuit court clearly erred by entering the decree. *Country Corner*, 22 Ark. App. at 227, 737 S.W.2d at 674. We therefore reverse and remand for trial.

ROBBINS and GRIFFEN, JJ., agree.

Ron SHAMLIN, Sr., et al. *v.*
QUADRANGLE ENTERPRISES, INC.

CA 07-308 272 S.W.3d 128

Court of Appeals of Arkansas
Opinion delivered January 23, 2008

Terrence Cain, for appellants.

Jensen Young & Houston, PLLC, by: *Perry Y. Young*, for appellee/cross-appellant.

LARRY D. VAUGHT, Judge. This appeal involves the wrongful cutting of timber from land owned by appellee Quadrangle Enterprises, Inc. (Quadrangle). Quadrangle sued appellants Ron Shamlin, Sr., Ron Shamlin, Jr., and Arkansas Timber & Logging (ATL), the company owned by Shamlin Sr., as well as Kenneth Harper and his company, Real Estate Development, Inc. (REDI), under Ark. Code Ann. § 18-60-102 (Repl. 2003). The jury awarded

Quadrangle $11,500 for the value of its timber, trebled under the statute to $34,500. The Shamlins and Harper were made jointly and severally liable for this award. The jury also awarded Quadrangle its costs of remediation of $12,000, apportioning 85% to Harper and 15% to Shamlin Jr. Finally, the jury awarded $1,000 for additional timber taken by Harper and trebled it to $3,000, as well as punitive damages of $25,000. The Shamlins raise four points on appeal. Quadrangle cross-appeals from the circuit court's order extending the time for the Shamlins to file the record, contending that the Shamlins had not ordered the record from the court reporter when they filed their notice of appeal. We affirm on both direct appeal and cross-appeal.

Quadrangle owns over 1,000 acres in Saline County. Its lands surround a tract of approximately forty-seven acres that belongs to Harper. On May 6, 2003, Harper and ATL entered into a written agreement whereby ATL was to cut and sell the timber on part of Harper's tract. ATL was a sole proprietorship owned by Shamlin Sr., but Shamlin Jr. managed its day-to-day operations. As such, he executed the contract with Harper on behalf of ATL. The contract included a legal description of the acreage from which ATL was to cut and remove timber. The contract also contained language certifying that Harper had title to the property and was solely responsible for marking the boundaries of the property.

An ATL crew began cutting and removing the timber off Harper's property. Shortly after completing the work, Harper called Shamlin Jr. to ask ATL to come back and remove the timber from other property he had recently purchased. The ATL crew returned to what Harper represented was his property and spent two weeks logging approximately seventeen to twenty acres. During the latter stages of this second job, Harper went to the job site and realized that ATL was logging Quadrangle's property. Although he thought ATL was logging the wrong property, Harper did not stop the ATL crew nor did he notify Quadrangle.[1]

On March 8, 2004, Quadrangle filed suit against Harper, REDI, Shamlin Jr., and ATL, alleging causes of action for trespass to land and conversion of timber under section 18-60-102. The complaint sought damages jointly and severally against the defen-

[1] As a result of this incident, criminal charges were filed against Shamlin Jr. He ultimately pled guilty to the charges and was sentenced to 120 months' probation and ordered to pay restitution of $21,485.

dants, treble damages, and punitive damages.[2] The Shamlins denied the material allegations of the complaint.

On December 19, 2005, Quadrangle filed a motion for partial summary judgment as to liability against the Shamlins and ATL, arguing that Shamlin Jr. was liable for his own actions in the trespass upon Quadrangle's land and that Shamlin Sr. was liable under the doctrines of negligent supervision and *respondeat superior.* The Shamlins argued that summary judgment was improper because the Civil Justice Reform Act of 2003 (CJRA), codified at Ark. Code Ann. §§ 16-55-201 to 16-55-220 (Repl. 2005), abolished joint and several liability except upon a finding that Shamlin Jr. and Harper acted in concert, which they asserted was a fact question for a jury.

At the hearing on the motion for summary judgment, the Shamlins again raised the issue of whether the CJRA abolished joint and several liability. By order entered on February 21, 2006, the circuit court granted Quadrangle's motion for partial summary judgment on liability as to Shamlin Jr. However, the court denied the motion as to Shamlin Sr. "on the present state of the pleadings, subject to review in the event [Quadrangle] amends its pleading." The circuit court noted that the pleadings did not sufficiently allege that Shamlin Jr.'s actions were taken during the course and scope of his employment with ATL and Shamlin Sr.

Quadrangle filed its third amendment to the complaint on January 30, 2006, in which it alleged that ATL was a sole proprietorship of Shamlin Sr. and that all actions taken by the Shamlins and ATL, particularly Shamlin Jr., were taken within the course and scope of employment in the service of Shamlin Sr. The Shamlins admitted that ATL was a sole proprietorship but denied the remaining allegations of the amendment to the complaint.

By order entered on June 29, 2006, the circuit court reconsidered and granted Quadrangle's motion for summary judgment as to the liability of Shamlin Sr. The court found that Shamlin Sr. would be liable to the same extent as Shamlin Jr. on the basis of *respondeat superior.* The court also found that the CJRA did not affect Quadrangle's trespass and conversion claims nor its claims for treble or punitive damages. The court did find that the

[2] The complaint was later amended to add Shamlin Sr. as a defendant and, again, to add a cause of action for negligent supervision against Shamlin Sr.

CJRA would require apportionment as to Quadrangle's remediation costs for the damage to its land.

A jury trial was held August 8 through 10, 2006, as to Quadrangle's damages, as well as the apportionment of damages on Quadrangle's remediation costs. The case was submitted to the jury on a "Specific Verdict Form," consisting of a series of interrogatories. The jury answered the interrogatories as follows:

> 1. Did the Plaintiff Quadrangle Enterprises, Inc. demonstrate by a preponderance of the evidence that Kenneth Harper, individually and as agent of Real Estate Development, Inc. was responsible in whole or in part for damages caused by the trespass onto Plaintiff's lands, including the cutting and conversion of the Plaintiff's timber?
>
> Yes.
> (if no, you may skip questions 5, 6, 8 and 10, and your answer to question 9 as concerns Kenneth Harper should be $0)
>
> 2. Did the Plaintiff Quadrangle Enterprises, Inc. demonstrate by a preponderance of the evidence that Arkansas Timber & Logging had sufficient notice in advance of the activity on Plaintiff's lands that Ron Shamlin, Jr. posed an elevated risk of committing the type of activities of which Plaintiff complains, and that it ignored that risk?
>
> Yes.
>
> 3. How much was the Plaintiff Quadrangle Enterprises, Inc. proximately damaged on account of the value of the harvested and converted timber east of the Real Estate Development, Inc. property?
>
> $11,500
>
> 4. How much was the Plaintiff Quadrangle Enterprises, Inc. proximately damaged on account of the costs of remediation of that property from which timber had been harvested (east of the Real Estate Development, Inc. property), and/or by the lessening of the value of that property as a result?
>
> $12,000
>
> 5. How much was the Plaintiff Quadrangle Enterprises, Inc. proximately damaged on account of the value of the harvested and

converted timber as it stood "on the stump" south of the Real Estate Development, Inc. property?

$1,000

6. Did Kenneth Harper demonstrate by a preponderance of the evidence that he reasonably had probable cause to believe that the Plaintiff's lands were his own or that of Real Estate Development, Inc.?

No

7. Did Ron Shamlin, Jr. demonstrate by a preponderance of the evidence that he reasonably had probable cause to believe that the Plaintiff's lands were those of his own or of Arkansas Timber & Logging?

No

8. Do you find that the Plaintiff has demonstrated by a preponderance of the evidence that Kenneth Harper and Ron Shamlin, Jr. acted in concert in trespassing onto Plaintiff's lands and converting Plaintiff's timber, i.e., that they each entered into a conscious agreement to pursue a common plan or design to trespass and remove timber, and each actively took part in that common plan or design?

No
(if yes, skip question 9 and go directly to question 10)

9. If your answer to question no. 8 was in the negative, please state the respective fault of each party (total = 100%):

85% — Kenneth Harper and 15% — Ron Shamlin, Jr.

10. Did the Plaintiff demonstrate by clear and convincing evidence that Kenneth Harper knew or ought to have known that his conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences; or that he intentionally pursued a course of conduct for the purpose of causing injury or damage?

Yes

11. Did the Plaintiff demonstrate by clear and convincing evidence that Ron Shamlin, Jr. knew or ought to have known that his conduct would naturally and probably result in injury or damage and that he or she continued the conduct with malice or in reckless disregard of the consequences; or that he intentionally pursued a course of conduct for the purpose of causing injury or damage?

No

12. If your responses to questions 10 or 11, or both, were "yes," how much in total punitive damages do you award the Plaintiff?

$25,000

13. Did any damages suffered by the Plaintiff Quadrangle proximately result from a breach of contract between Ron Shamlin, Sr. d/b/a Arkansas Timber & Logging and Real Estate Development, Inc.?

No
(If your answer is "no," you may skip question 14)

14. If your prior answer was "yes," how much of the damages suffered by Plaintiff Quadrangle that you have awarded against Ron Shamlin, Sr. d/b/a Arkansas Timber & Logging was proximately caused by a material breach of the agreement between Real Estate Development, Inc. and Arkansas Timber & Logging?

$____

Based on the jury's answers to these interrogatories, the circuit court entered judgment finding that the Shamlins, Harper, and REDI were jointly and severally liable for the conversion of Quadrangle's timber; that the timber was worth $11,500 and trebling the award pursuant to Ark. Code Ann. § 18-60-102; that the Shamlins, Harper, and REDI were jointly and severally liable for litigation costs of $1,005; and that the Shamlins were jointly and severally liable for $1,800, or 15% of Quadrangle's remediation costs. Quadrangle was also awarded judgment against Harper and REDI in the sum of $38,200, reflecting $10,200 as Harper's 85% share of the remediation costs; $1,000, trebled to $3,000, for additional timber conversion; and $25,000 in punitive damages. The Shamlins filed a timely notice of appeal.

On December 11, 2006, the Shamlins, represented by different counsel, filed a motion for extension of time to file the record. On December 21, 2006, Quadrangle objected to the extension and asserted that the Shamlins had violated Rules 5 and 6(b) of the Arkansas Rules of Appellate Procedure–Civil in that they had not ordered the transcript from the court reporter prior to filing their notice of appeal. On December 22, 2006, the circuit court held a hearing where the court reporter testified that she learned of the notice of appeal's being filed within one or two days of its filing, that she called the Shamlins' attorney and left a message, and that she never heard from the attorney again. She also testified that the Shamlins' present counsel contacted her to inquire about whether satisfactory financial arrangements had been made and that she was satisfied with those arrangements. The circuit court granted the extension of time. Quadrangle cross-appeals from that order.

We first address Quadrangle's cross-appeal because it relates to the jurisdiction of this court to hear this appeal. *See Conlee v. Conlee*, 366 Ark. 342, 235 S.W.3d 515 (2006) (holding that the timely filing of the record on appeal is a jurisdictional requirement to perfecting an appeal). On cross-appeal, Quadrangle argues that the circuit court erred in extending the time for the Shamlins to file the record with the clerk of this court because, at the time the Shamlins filed their notice of appeal, they had not made financial arrangements for the transcript with the court reporter. The argument is that, if the circuit court erred in granting the extension, the Shamlins did not timely file the record, thereby depriving this court of jurisdiction. The requirement for ordering the transcript is found in Ark. R. App. P.–Civil 3(e) and 6(b). The standard of review regarding a circuit court's decision to grant an extension to file an appeal is abuse of discretion, and we will not reverse absent an abuse of that discretion. *DeViney v. State*, 299 Ark. 471, 772 S.W.2d 607 (1989); *Henderson Methodist Church v. Sewer Improvement Dist.*, 294 Ark. 188, 741 S.W.2d 272 (1987).

Rule 3(e) of the Rules of Appellate Procedure states that a notice of appeal "shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been ordered by the appellant." The procedural steps outlined in Rule 3(e) require only substantial compliance, provided that the appellee has not been prejudiced by the failure to comply strictly with the rule.

Rogers v. Tudor Ins. Co., 325 Ark. 226, 925 S.W.2d 395 (1996). Both the supreme court and this court have held that there is no substantial compliance when the transcript is not actually ordered or when the notice of appeal declares that the transcript has been ordered when, in fact, it has not been. *See DeViney*, 299 Ark. at 473, 772 S.W.2d at 608; *McElroy v. American Med. Int'l, Inc.*, 297 Ark. 527, 763 S.W.2d 89 (1989); *Hudson v. Hudson*, 277 Ark. 183, 641 S.W.2d 1 (1982); *Daffin v. Seymore*, 14 Ark. App. 163, 685 S.W.2d 539 (1985).

On the other hand, in *Johnson v. Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986), the appellant's notice of appeal contained a statement that the transcript had been ordered. There was an apparent misunderstanding between the appellant's attorney and the court reporter about whether the transcript had been requested — the attorney had told his client to order the transcript from the court reporter so that the attorney would not become financially responsible for the transcript's cost. Because the attorney had not totally ignored Rule 3(e), the supreme court held that there was substantial compliance with the rule. The holding in *Carpenter* further turned on the absence of any prejudice to the appellee even though there was a minor delay in ordering the transcript.

More recently, the supreme court decided *Helton v. Jacobs*, 346 Ark. 344, 57 S.W.3d 180 (2001). There, the notice of appeal stated that no financial arrangements had been made with the court reporter but that the appellants were willing to pay up to 50% of the transcript cost in accordance with Ark. Code Ann. § 16-13-510(c) (Repl. 1999). The appellee moved to dismiss the appeal. The supreme court denied the motion and held that there was substantial compliance with Rule 3(e) because the appellants had, in fact, ordered the transcript and tendered a $100 deposit to the court reporter.

■ We find that elements of both lines of cases are present here. First, the Shamlins' former attorney did nothing beyond filing the notice of appeal without having ordered the transcript. The court reporter testified that she learned of the notice of appeal's being filed either the day it was filed or the next day but that she never heard from the attorney about ordering the transcript. On the other hand, the Shamlins' present counsel has done all that he could to perfect the appeal: he communicated with the court reporter to make sure financial arrangements were in place and filed an appropriate motion for an extension of time to file the record. The court reporter testified that she was satisfied that

arrangements were in place before Quadrangle objected to the extension. Finally, Quadrangle does not explain how it is prejudiced by the failure to timely order the transcript. Absent some kind of convincing argument showing prejudice, we will not hold that it exists. *Johnson, supra.* Accordingly, we hold that the circuit court did not abuse its discretion and affirm the order granting the extension of time to file the record.

The Shamlins' first point on appeal is that the circuit court erred in granting summary judgment against Shamlin Jr. because the court found him strictly liable for trespass, a standard that has not been adopted in Arkansas. The Shamlins rely on the supreme court's decision in *Arkansas Louisiana Gas Co. v. Central Utilities Constructors, Inc.*, 278 Ark. 101, 643 S.W.2d 566 (1982), holding that Arkansas would not adopt a rule of strict liability in trespass. That case does not have any application to an action under section 18-60-102, because of the nature of the statutory action. In *Laser v. Jones*, 116 Ark. 206, 172 S.W. 1024 (1915), the court held that the right of action provided for in what is now section 18-60-102 is not the common-law action for trespass upon real estate, but a statutory action whereby the owner of property may recover as damages treble the value of such property against one who willfully destroys it. The fact that the statutory remedy was different from the common law action for trespass was reiterated in *Peek v. Henderson*, 208 Ark. 238, 185 S.W.2d 704 (1945), and *Bailey v. Hammonds*, 193 Ark. 633, 101 S.W.2d 785 (1937). Thus, there was no error in granting summary judgment against Shamlin Jr.

In their second point, the Shamlins argue that summary judgment in favor of Quadrangle was improperly granted on the basis that there was a material issue of fact of whether Shamlin Jr. was an employee or an independent contractor. According to the Shamlins, this determination is important because, ordinarily, one employing an independent contractor is not liable for the contractor's negligence committed in the performance of the contracted work. *See Stoltze v. Arkansas Valley Elec. Coop. Corp.*, 354 Ark. 601, 127 S.W.3d 466 (2003); *Blankenship v. Overholt*, 301 Ark. 476, 786 S.W.2d 814 (1990); *Draper v. ConAgra Foods, Inc.*, 92 Ark. App. 220, 212 S.W.3d 61 (2005). In other words, if Shamlin Jr. were found to be an independent contractor, Shamlin Sr. would not be liable to Quadrangle. However, whether Shamlin Jr. was an independent contractor or an employee of ATL is irrelevant under section 18-60-102. In *Lewis v. Mays*, 208 Ark. 382, 186 S.W.2d

178 (1945), a person who engaged a timber cutter was held liable under what is now section 18-60-102 for the acts of the timber cutter, without regard to the status of the cutter as an employee or independent contractor. The supreme court reasoned that the party engaging the timber cutter became a joint tortfeasor with the timber cutter because the actions of the timber cutter were taken "by the advice or direction" of the employer. 208 Ark. at 385, 186 S.W.2d at 180 (quoting 27 Am. Jur. *Independent Contractors* § 40). The holdings in *Hinton v. Bryant*, 236 Ark. 577, 367 S.W.2d 442 (1963), and *Lewis v. Phillips*, 223 Ark. 380, 266 S.W.2d 68 (1954), are to the same effect.

ATL was a sole proprietorship belonging to Shamlin Sr. It had no separate identity apart from Shamlin Sr. *See* 1 Z. Cavitch, *Business Organizations* § 1.04[1], at 1-23 (Matthew Bender 2000). Therefore, when Shamlin Jr., operating on behalf of ATL, trespassed on Quadrangle's lands, they were acting as one person, Shamlin Sr., and became liable as joint tortfeasors.

The Shamlins' third and fourth points both discuss whether the CJRA abolished joint and several liability in the circumstances of this case, as well as whether Quadrangle could recover both treble damages and punitive damages. We will separate the issues and discuss the CJRA under the third point and the damages issue under the fourth point.

The CJRA, in section 16-55-201(a), provides as follows: "In any action for personal injury, medical injury, *property damage*, or wrongful death, the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint." (Emphasis added.) The circuit court ruled that the CJRA did not affect the Shamlins' liability for conversion of the timber under section 18-60-102. The Shamlins argue that the CJRA applies and, therefore, they cannot be held jointly and severally liable because of the jury's finding that they and Harper did not act in concert. We disagree because the Shamlins' argument is overly broad. As relevant to this case, the CJRA applies only to causes of action involving "property damage." In determining whether the CJRA applied in the present case, the circuit court had three choices in construing the statute: (1) it could look to the nature of the cause of action — conversion of the value of the timber — and determine that the CJRA did not apply because it is not among the causes of action specifically listed as being affected by the CJRA; (2) it could look at the actual nature of the damages claimed and determine that some of the damages should be apportioned, such as

those for the cost of repairing the land, while also determining that other damages, such as the value of the timber converted, should not be apportioned; or (3) it could determine that the CJRA overrode the common law and applied to any cause of action involving any degree of property damage.

We review issues of statutory interpretation de novo, as it is for the appellate courts to decide what a statute means. *Baker Refrigeration Sys., Inc. v. Weiss*, 360 Ark. 388, 201 S.W.3d 892 (2005). Thus, although we are not bound by the circuit court's interpretation, in the absence of a showing that the circuit court erred, its interpretation will be accepted as correct on appeal. *Id.* We believe that the circuit court correctly applied the CJRA by apportioning the damages because its interpretation comported with our rules of statutory construction. It is a well settled rule of statutory construction in Arkansas jurisprudence that a statute will not be interpreted as changing the common law absent an irreconcilable conflict or clear expression of the intent to do so. *Thompson v. Bank of America*, 356 Ark. 576, 157 S.W.3d 174 (2004); *State v. One Ford Automobile*, 151 Ark. 29, 235 S.W.378 (1921).

Conversion is a common-law tort action for the wrongful possession or disposition of another's property. *See France v. Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987). However, such an action does not necessarily involve damage to property, which would bring it within the reach of the statute. Therefore, the CJRA does not automatically apply to actions under section 18-60-102. The CJRA clearly evinces an intent to alter the common law regarding joint and several liability for the causes of action listed, such as personal injury or property damage. It does not, however, display such an intent regarding causes of action involving the conversion of property. Therefore, we cannot say that the circuit court erred in finding the Shamlins jointly and severally liable with Harper and with each other for the value of Quadrangle's timber.

In their fourth point, the Shamlins argue that the judgment entered in this case was improper because it awarded Quadrangle both punitive damages and statutory treble damages. However, the jury did not award punitive damages against the Shamlins; instead, the jury's award of punitive damages was directed against Harper and his company. Because both punitive damages and treble damages were not awarded against the Sham-

lins, they do not have standing to raise the issue on appeal. *See McDonald's Corp. v. Hawkins*, 315 Ark. 487, 868 S.W.2d 78 (1994).

Affirmed on direct appeal; affirmed on cross-appeal.

BIRD and GLOVER, JJ., agree.

David LEWIS *v.* STATE of Arkansas

CA CR 06-1455 272 S.W.3d 113

Court of Appeals of Arkansas
Opinion delivered January 23, 2008

Charles D. Hancock, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

BRIAN S. MILLER, Judge. Appellant David Lewis entered a negotiated plea of guilty to six felony charges in exchange for a sentence recommendation of 360 months. Lewis, however, failed to appear at his sentencing hearing. After Lewis was eventually apprehended, the trial court denied Lewis's motion to withdraw his plea, and sentenced Lewis to a prison sentence of 864 months. On appeal, Lewis argues that the trial court erred when it denied his motion to withdraw his guilty plea before the court entered a sentence that deviated from the sentence contemplated by the plea negotiations. Lewis also argues that the sentences imposed by the trial court for possession of marijuana with intent to deliver and possession of cocaine with intent to deliver were illegal because they exceed the maximum punishment permitted by Arkansas law. We agree that the trial court erred when it denied Lewis's motion to withdraw his guilty plea, and for this reason, we reverse and remand.

Lewis was charged with the following criminal acts in the Arkansas County Circuit Court: (1) possession of a controlled substance with the intent to deliver, specifically marijuana, a class "C" felony, carrying a penalty of four to twenty years; (2) possession of a controlled substance with intent to deliver, specifically crack cocaine, two counts, a class "Y" felony, carrying a penalty of ten to eighty years; (3) possession of a controlled substance, specifically hydrocodone, a class "B" felony, carrying a penalty of five to forty years; (4) possession of marijuana, a class "D" felony, carrying a penalty of zero to six years; (5) possession of hydrocodone with intent to deliver, a class "Y" felony, carrying penalty of ten to eighty years or life; (6) battery in the second degree, two counts, class "D" felonies, carrying penalties of zero to six years; (7) possession of drug paraphernalia, a class "C" felony, carrying a penalty of three to ten years; (8) fleeing on foot,

a class "A" misdemeanor, carrying a penalty of up to one year in jail; and (9) resisting arrest, a class "A" misdemeanor, carrying a penalty of up to one year in jail. Negotiations with the State concluded with Lewis agreeing to plead guilty to three counts of possession of cocaine with intent to deliver, one count of possession of marijuana with intent to deliver, and two counts of battery in the second degree. In exchange for the plea, the State agreed to recommend to the court that Lewis receive a total of 360 months in prison.

The trial court was informed of the terms of the plea agreement and agreed to sentence Lewis according to the plea agreement. The court accepted Lewis's guilty plea on December 7, 2005. Before releasing Lewis until the date of the sentencing hearing, the court told Lewis:

> Now, I am sure that Mr. Barrett [defense counsel] has explained to you that if for any reason you do not show up for sentencing as scheduled . . . , and if you do not have a very very good reason for not showing up, having already accepted your pleas of guilty to charges, I will consider myself to be free to sentence you to any term of years that I could sentence you to if you had simply entered pleas of guilty with no recommended sentence. Do you understand that?

Lewis acknowledged that he understood and was released until February 6, 2006. Lewis, however, failed to appear for sentencing and a warrant was issued for his arrest.

Lewis was arrested on June 27, 2006, and his sentencing hearing was finally held on August 28, 2006. At the hearing, the trial court informed Lewis that the court was no longer bound by the sentencing recommendation because Lewis had failed to appear at the original sentencing hearing. Counsel for Lewis objected and verbally moved the court to permit Lewis to withdraw his guilty plea. The State did not object to defense counsel's motion and announced that it was prepared for trial. The trial court denied Lewis's motion to withdraw his guilty plea and sentenced Lewis to a prison term of 864 months. Lewis filed a timely appeal.

Lewis relies on Rules 25.3 and 26.1 of the Arkansas Rules of Criminal Procedure in support of his argument that the trial court abused its discretion when it failed to permit him to withdraw his guilty plea. We hold that the court erred pursuant to both rules and therefore we reverse and remand.

The trial court erred by failing to call upon Lewis to either affirm or withdraw his plea at the sentencing hearing. Rule

25.3 permits the parties to a criminal action to inform the court of the terms of plea negotiations before a plea is taken. Ark. R. Crim. P. 25.3(b). The court may then indicate whether it will concur in the proposed disposition. *Id.* The rule further provides that:

> If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.

Id. The trial court was informed that the plea agreement required Lewis to enter a plea of guilty in exchange for 360 months in prison. Once the court indicated to the parties that he would concur in the proposed disposition, and Lewis entered a guilty plea based on the agreement, the court was required by Rule 25.3(b) to either sentence Lewis according to the agreement or permit Lewis to withdraw his plea. The court erred in failing to do so.

The trial court also erred pursuant to Arkansas Rules of Criminal Procedure Rule 26.1, when it denied Lewis's request to withdraw his plea. That rule provides that a criminal defendant has an absolute right to withdraw a plea of guilty or nolo contendere before the plea is accepted by the court. Ark. R. Crim. P. 26.1(a). A plea of guilty or nolo contendere may not be withdrawn after the judgment is entered. *Id.* During the time between the entry of the plea and the entry of the judgment, the trial court has discretion to permit a defendant to withdraw a plea of guilty or nolo contendere. *Id.* In deciding whether to permit a defendant to withdraw his plea, the court must determine whether the plea withdrawal is required to correct a manifest injustice. *Id.* The rule further provides, in pertinent part:

> (b) Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that:
>
> . . .
>
> (v) he or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial court had

> indicated its concurrence and the defendant did not affirm the plea after receiving advice that the court had withdrawn its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

Ark. R. Crim. P. 26.1(b)(v).

In *Williams v. State*, 272 Ark. 207, 613 S.W. 2d 94 (1981), the Arkansas Supreme Court reversed the trial court for refusing to permit a defendant to withdraw his guilty plea under conditions similar to the conditions in this case. In that case, the defendant was charged as an habitual offender with felony theft of property. *Id.* Plea negotiations concluded with the defendant agreeing to plead guilty in exchange for a suspended sentence. *Id.* The court was informed of the agreement before the defendant entered his plea of guilty. *Id.* After taking the plea, the court scheduled a sentencing hearing, at which the defendant failed to appear. *Id.* The defendant was later arrested and the State withdrew its sentence recommendation. *Id.* The defendant moved the court to hold the State to its bargain or allow him to withdraw his plea. *Id.* The court denied the motion and sentenced the defendant to twenty years' imprisonment. *Id.* The supreme court reversed, holding that:

> [t]he defendant is entitled to be assured that a plea withdrawal will be mandatory where the prosecutor fails to follow through with his end of the bargain. It would be inherently unfair for the judge to only bind one of the parties to the bargain.
>
> Rule 26.1(b)(iv) contemplates that the trial judge will hold both parties to the plea agreement or release both.

Id. at 209, 613 S.W.2d at 95-96.

Williams and this case are distinguished only by the fact that the State withdrew the sentence recommendation in *Williams*, while here the trial court, *sua sponte*, deviated from the terms of the plea agreement entered by Lewis. This distinction is important only because it required the court in *Williams* to apply Rule 26.1(b)(iv), while we are required to apply Rule 26.1(b)(v). The analysis to be applied in both cases, however, is indistinguishable. When the *Williams* analysis is applied to this case, it is clear that the trial court erred by failing to permit Lewis to either affirm or withdraw his guilty plea. Therefore we reverse on this point.

Because we are reversing, we do not address Lewis's argument that his sentences were illegal.

Reversed and remanded.

GLOVER, MARSHALL, and VAUGHT, JJ., agree.

HEFFLEY and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. This appeal arises from the sentences appellant David Lewis received after he pleaded guilty to the offenses of possession of cocaine with intent to deliver (3 counts), possession of marijuana with intent to deliver, and second-degree battery (2 counts). Appellant asserts two points of error on appeal: (1) The trial court erred by not allowing Mr. Lewis to withdraw his guilty plea when he did not receive the sentence he negotiated after the court accepted the plea and recommendation; (2) Mr. Lewis's sentence of sixty years' incarceration for possession of cocaine with intent to deliver, and his sentence of fifteen year's incarceration for possession of marijuana with intent to deliver are beyond the maximum punishment allowed by statute.

The relevant part of Rule 26.1 of the Arkansas Rules of Criminal Procedure upon which appellant relies states the following with respect to plea withdrawal:

> (a) A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right before it has been accepted by the court. A defendant may not withdraw his or her plea of guilty or nolo contendere as a matter of right after it has been accepted by the court; however, before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his or her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea. A plea of guilty or nolo contendere may not be withdrawn under this rule after entry of judgment.
>
> (b) Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that:
>
> . . . .

(iv) he or she did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not to oppose the concessions as promised in the plea agreement; or

(v) he or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial court had indicated its concurrence and the defendant did not affirm the plea after receiving advice that the court had withdrawn its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

Ark. R. Crim. P. 26.1; *Folk v. State*, 96 Ark. App. 73, 238 S.W.3d 640 (2006).

Appellant entered pleas of guilty pursuant to a negotiated plea agreement on December 7, 2005. At that hearing, the trial court told the appellant that he would accept the State's recommendation for sentencing if appellant appeared for the sentencing, but that if appellant failed to appear without a good excuse, the court would not be bound by the recommendation. He repeated the condition that appellant was required to be present at the sentencing hearing as a fulfillment of appellant's part of the bargain:

> COURT: Mr. Lewis, I am going to accept your pleas of guilty. I am going to find each of the pleas to have been voluntarily, intelligently, and knowingly made. It has been requested, and I am going to accede to that request, that sentencing be deferred in this case to February 6, 2006, at 1:00 p.m. in Stuttgart, at which time I will sentence you in accord with the sentence recommendation. Now, I am sure that Mr. Barrett [appellant's counsel] has explained to you that if for any reason you do not show up for sentencing as scheduled on February 6, 2006, and if you do not have a very, very good reason for not showing up, having already accepted your pleas of guilty to charges, I will consider myself to be free to sentence you to any term of years that I could sentence you to if you had simply entered pleas of guilty with no recommended sentence. Do you understand that?
>
> APPELLANT: Yes, Sir.

COURT: And, likewise, I believe that if you did not show and there was no good reason for your absence, that Mr. Dittrich [the prosecutor] would certainly file the . . . well, he won't nolle prosse those charges until the sentencing is complete. So, as long as you understand that we will defer the sentencing until February 6, at 1:00 p.m., at which time I will follow the recommendation and sentence you in accordance therewith, provided you hold up your end of the bargain.

APPELLANT: Yes, sir.

Appellant did not appear at his sentencing hearing and evaded authorities for five months before being apprehended and returned for sentencing. When he was returned for sentencing, the court reiterated to appellant that appellant's compliance with the court's express condition that appellant return for the scheduled sentencing hearing was the determining factor as to whether appellant received the recommended sentence. Pursuant to the agreement, because appellant failed to appear at the scheduled sentencing hearing without reasonable excuse, the court was not bound to the recommendation. Appellant asked to withdraw his plea. The trial court refused his request noting that appellant's appearance at the sentencing hearing was exactly the condition upon which acceptance of the sentence recommendation was prefaced.

The plea agreement recommended a sentence of 360 months with many of the charges nol prossed. Instead, the trial court sentenced him for offenses charged in two separate cases in the Arkansas County Circuit Court as follows. In No. CR 2004-250 he was sentenced to a term of 900 months in the Arkansas Department of Correction. This was broken down into 180 months (presumptive 42) for possession of marijuana with intent to deliver and 720 months (presumptive 160) for possession of cocaine with intent to deliver. In No. 2005-55 he was sentenced to a term of 864 months. This was broken down into 720 months (presumptive 120) for possession of cocaine with intent to deliver; 72 months (presumptive 54) for battery II; 72 months (presumptive 54) for a second count of battery II; and 720 months (120 presumptive) for possession of cocaine with intent to deliver. The judgment and commitment orders were attached thereto. The 2005 charges indicate a criminal history of 3 while the 2004 indicates a level 4. The orders indicate that some of the sentences are a departure, but each one contains a "N/A" in response to the

query of whether the defendant was charged as an habitual offender. The State supplemented the addendum by adding two departure reports as to why the sentences should be increased.

Appellant first argues that the trial court erred by not allowing appellant to withdraw his guilty plea when he did not receive the sentence he negotiated after the court accepted the plea and recommendation. Under the facts of this case, the trial court accepted the plea agreement with the express condition that appellant appear for the sentencing hearing which had been continued by request to February 6, 2005. Appellant knew that the acceptance of the plea agreement included the condition that he appear at that time; nevertheless, he chose to not attend the scheduled sentencing hearing, nor did he provide an explanation for his failure to appear. The trial court had specifically cautioned appellant that if he did not appear for the hearing the judge would be free to sentence him as if no recommendation had been made.

In essence, the condition to appear at the sentencing hearing was a requirement of the bargain in the negotiated plea. The trial judge admonished the defendant: "I accept the sentencing recommendation; however, if you fail to appear for the sentencing I will sentence you as if there were no recommendation." Appellant failed to perform his duty under the agreement in order to receive the agreed upon sentence. Put another way, the trial court did announce to appellant that he would accept the recommended sentence *only* if appellant returned for his scheduled sentencing. If appellant wished to preserve his right to a jury trial because he was unwilling to accept the trial court's condition that he appear for his scheduled sentencing, he could certainly have withdrawn his plea at that time.

The State analogizes this situation to the one in *Folk v. State*, 96 Ark. App. 73, 238 S.W.3d 640 (2006). In *Folk*, the State and Folk reached a plea agreement whereby Folk would quickly pay restitution to a bank and serve a five-year sentence. The court agreed to postpone sentencing until Folk had paid the money, and Folk's attorney stated that Folk could withdraw the plea if the court did not accept the State's recommendation. Folk then entered a no-contest plea and signed a plea statement in which he acknowledged that the court was not required to accept either the plea or the sentencing recommendation. *Id.* at 74, 238 S.W.3d at 641. The trial court accepted the plea and urged Folk to pay the restitution promptly. When Folk returned to court over a month later, he requested a new attorney. The court told Folk that it had

found him guilty based on his plea, but Folk's attorney explained that Folk had not been able to garner the money to pay the restitution and wanted to suggest another sentence. The judge did not allow Folk to withdraw his plea, but postponed sentencing to allow Folk time to find another attorney. Folk ultimately was sentenced by a jury and he did not object to the sentence or to the proceeding. On appeal, he argued that the trial court abused its discretion by not allowing him to withdraw his plea under Ark. R. Crim. P. 26.1. *Id.* at 75, 238 S.W.3d at 641.

This court rejected Folk's argument that Rule 26.1 gave him an absolute right to withdraw his plea based on the colloquy at the time that Folk entered his plea. The court further rejected Folk's assertion that his own failure to timely pay the restitution entitled him to withdraw his plea, specifically holding that he had not shown that he did not receive the benefit of his bargain. The court noted that neither the trial court nor the prosecutor had any control over Folk's ability to pay the restitution, so there was no manifest injustice under Rule 26.1. *See also Ellis v. State*, 288 Ark. 186, 703 S.W.2d 452 (1986) (holding the fact that circumstances beyond the control of the trial court and prosecutor prevent a defendant from getting the benefit of sentence concessions does not constitute "manifest injustice" allowing plea withdrawal where court did everything it could to persuade federal authorities to accept defendant to begin serving ten year federal sentence and receive credit for time served against ten year state sentence, but federal authorities refused acceptance).

Similarly, in this case neither the judge nor the prosecutor had any control over whether appellant appeared for sentencing as scheduled. The trial court told appellant that if he failed to appear for the sentencing hearing, as he was being set at liberty until the date of the hearing, that the court would not be bound to the recommendation but would be free to impose a sentence as if no agreement had been made. Appellant argues that when the trial court required appellant to appear at the sentencing hearing that the judge became an active participant in the plea negotiation. He claims that this "last second" addition to the agreement by the judge "is simply not binding" on appellant and argues that appellant "was in no position to say no and reject the additional conditions added by the trial court at the conclusion of the plea hearing on December 7, 2005."

I agree that appellant was in no position to reject the trial court's condition that he appear at the sentencing hearing. Appel-

lant's failure to appear at his own sentencing hearing constitutes a separate felony charge. Arkansas Code Annotated § 5-54-120 provides in relevant part:

> (a) A person commits the offense of failure to appear if he or she fails to appear without reasonable excuse subsequent to having been:
>
> (1) Cited or summonsed as an accused; or
>
> (2) Lawfully set at liberty upon condition that he or she appear at a specified time, place, and court.
>
> (b) Failure to appear is a Class C felony if the required appearance was to answer a charge of felony or for disposition of any felony charge either before or after a determination of guilt of the felony charge.

Ark. Code Ann. § 5-54-120 (Repl. 2005).

Contrary to appellant's argument that the judge's requirement that appellant appear for his sentencing hearing was "simply not binding" upon appellant, the duty to appear on the sentencing day was a duty imposed by law. The trial court's comments explained to appellant that duty and ensured that appellant understood both his legal duty and the effect that appellant's failure to appear would have on the sentencing by the court.

It is important to note that, in the case before us, the trial court's statements regarding sentencing were prospective in nature. The sentencing had been postponed by request to a proceeding separate and apart from the acceptance of the plea. This situation is unlike the circumstances of the sentencing in *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). In *Bradford*, the trial court concurred with the plea agreement and pronounced sentence in the first sentencing hearing on February 25, 2002, in accordance with the terms of that agreement. Subsequently, the trial court *sua sponte* ordered Bradford's appearance at a second re-sentencing hearing. The trial court's issuance of that order indicated that the court intended to change the sentence originally pronounced. Our supreme court held that it was clear that the trial court did not advise Bradford of his right to either affirm or withdraw his plea, or call upon him in open court to do so at the second sentencing hearing held on March 7, 2002. Under those

circumstances, where the trial court first imposed the agreed sentence, but then changed its position and re-sentenced the defendant, the trial court was required to advise the defendant of his right to either affirm or withdraw his guilty plea. *See Bradford*, 351 Ark. at 402, 94 S.W.3d at 909 (2003).

Although appellant does not rely upon *Bradford* in his argument, he does cite to Arkansas Rule of Criminal Procedure 25.3(b), relied upon in the *Bradford* analysis. The rule provides in relevant part:

> (a) The judge shall not participate in plea discussions.
>
> (b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate whether he will concur in the proposed disposition. If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.

Arkansas Rules of Criminal Procedure, Rule 25.3.

While the trial court in this case accepted the plea and stated that it intended to impose either the agreed plea sentence at the sentencing hearing if appellant appeared as scheduled or be free to impose any lawful sentence if defendant failed to appear for the sentencing hearing, the trial court did not sentence appellant at that time. Appellant was fully advised by the court when the judge accepted his plea that his failure to appear at the sentencing hearing would result in the imposition of any lawful sentence and that the court would not be bound to the lesser sentence. Subsequent to the court's admonition and explanation, appellant had the duty to either affirm or withdraw his guilty pleas. He affirmed and stated, "Yes, sir."

While the majority cites *Williams v. State*, 272 Ark. 207, 613 S.W.3d 94 (1981), to support its disposition of this case, the reasoning in *Williams* actually supports affirming the trial court's

decision. The majority reasons that *Williams* and the case before us are distinguished only by the fact that the State withdrew the sentence recommendation in *Williams*, while the trial court in this case *sua sponte* deviated from the terms of the plea agreement entered by Lewis. The majority's conclusion ignores our supreme court's following statement in *Williams*: "At this time the prosecuting attorney withdrew his recommended 30-year suspended sentence although *appellant had fulfilled the conditions agreed upon at the time the plea of guilty was entered and accepted by the court.*" *Williams*, 272 Ark. at 208, 613 S.W.3d at 95. (Emphasis added.) In *Williams*, the defendant had completed all the conditions agreed upon at the time the plea was entered and accepted by the court. The conditions agreed upon at the time of the plea agreement required the defendant to provide truthful information about another crime. While the defendant failed to appear at the sentencing hearing, his appearance was not an agreed condition for acceptance of the plea. In the case before us, appellant failed to fulfill the express condition that he appear at the sentencing hearing. Accordingly, we should find no error in the trial court's refusal to allow appellant to withdraw his plea.

Neither should we find error with the trial court's departure from the sentencing grid. Appellant urges us to find that the trial court's sentencing went beyond the statutory maximum and that we must reverse the illegal sentences. Contrary to appellant's assertions, the sentences are neither void nor illegal.

Sentencing for drug offenses in Arkansas is not governed by the ranges established for other offenses in § 5-4-401, but by ranges set forth in Ark. Code Ann. § 5-64-401 (Repl. 2005). Appellant was sentenced pursuant to the enhancement in Ark. Code Ann. § 5-64-408(a) (Repl. 2005) which provides:

> Any person convicted of a second or subsequent offense under this chapter shall be imprisoned for term up to twice the term otherwise authorized, fined an amount up to twice the otherwise authorized, or both.

At the sentencing hearing, the judge specifically stated that he was aware of appellant's prior drug convictions in two 1994 cases from the Arkansas County Circuit Court. Appellant did not dispute that finding, nor did he object to the applicability of section 5-64-408(a) allowing sentencing enhancements for drug offenses. Neither did appellant dispute the departure reports indi-

cating that departure from the range was warranted because of the following factors: (1) that three or more separate transactions involved the sale, transfer or possession with intent; (2) that the offense involved a high degree of planning or lengthy period or broad geographic area; (3) that the offender occupied a high position in the drug distribution hierarchy; and (4) that the offender had received substantial income or resources from the drug trafficking. Any defect in the departure form should have first been raised to the trial court for consideration and possible correction. The departure form is in the record and according to Arkansas Code Annotated § 16-90-804(a)(3) was required to be attached to the judgment and commitment form. We have no doubt that defense counsel had either received the form or easily could have availed himself of it and, hence, had ample time to broach any deficiency to the trial court. *See Woods v. State*, 323 Ark. 605, 611, 916 S.W.2d 728, 731-32 (1996).

In addition, the guilty plea statement clearly put appellant on notice that the sentencing range was from ten to eighty years' imprisonment for the cocaine charge. This range is consistent with the sentencing range of ten to forty years' imprisonment for a Class Y felony in Ark. Code Ann. § 5-64-401(a)(1)(A)(I), with the upper sentencing limit doubled under § 5-64-408(a). His sentence of sixty (60) years' imprisonment, thus, falls within the range allowed by § 5-64-408(a). Appellant signed the plea statement acknowledging that he could receive up to eighty (80) years for the cocaine charges contained in that information. His sentences of sixty (60) years on those counts is within the range allowed by the enhancement and, thus, are legal. Likewise, the normal sentencing range for possession of marijuana, a Schedule VI controlled substance, as a Class C felony is not less than four and no more than ten years' imprisonment. The enhancement allows for a twenty year maximum for a subsequent offense. Appellant only received a sentence of fifteen years for the possession of marijuana with intent to deliver charge, again, well within the appropriate range.

Appellant argues that proof of prior convictions, both felony and misdemeanor, and proof of juvenile adjudications shall follow the procedures outlined in Arkansas Code Annotated § 5-4-202 through 5-4-504. *See* Ark. Code Ann. § 16-97-104. These statutes address the imposition of sentences for habitual offenders. The judgment and commitment orders specifically identify that appellant was not sentenced as an habitual offender. Given that appellant

was not sentenced as an habitual offender, we should find no merit to his argument and affirm on all points.

Accordingly, I dissent.

HEFFLEY, J., joins.

Garland Ray PHILLIPS *v.* STATE of Arkansas

CA CR 07-391 272 S.W.3d 123

Court of Appeals of Arkansas
Opinion delivered January 23, 2008

Kathy L. Hall, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

BRIAN S. MILLER, Judge. Appellant Garland Phillips appeals the January 16, 2007, revocation of his suspended imposition of sentence by the Crawford County Circuit Court. Phillips argues that the trial court erred when it refused to consider whether

his failure to pay fines and restitution was "inexcusable." We agree and reverse and remand for further proceedings.

On September 20, 2005, Phillips pled guilty to one count of overdraft in case number CR 04-444-2. His sentence was suspended based on the following terms and conditions: that he pay $911.74 restitution at the rate of fifty dollars per month beginning on October 10, 2005; that, upon completing his restitution payments, he pay a $1250 fine and $150 in court costs at the rate of fifty dollars per month; that he provide a DNA sample; and that he pay a DNA fee of $250.

On February 16, 2006, Phillips pled guilty to two counts of battery in the second degree in case number CR 05-148-2. His sentence was suspended based on the following terms and conditions: that he pay a $750 fine and $150 in court costs at the rate of twenty-five dollars per month, beginning on March 6, 2006; that he provide a DNA sample; and that he pay a DNA fee of $250. The $250 DNA fee was later waived by court order.

The State petitioned to revoke Phillips's suspended imposition on May 22, 2006, alleging that Phillips violated the conditions of his suspended sentences by failing to pay fines, costs and restitution, and by failing to submit a DNA sample. At the December 12, 2006 revocation hearing, Janis Joslin, the Crawford County victim's witness coordinator, testified that Phillips had made no payments in CR 05-148-2 and only one payment in CR 04-444-2. Payment ledgers supporting this testimony were introduced into evidence without objection. Joslin also testified that Phillips had failed to report to the sheriff's office to submit to DNA testing.

Phillips testified that he had chronic obstructive pulmonary disease and his only income was the $660 per month that he received in disability payments; that he paid $250 per month in rent; that his electric bill was approximately $100 per month; and that he paid between $43 and $63 per month for medication. He also stated that, during the period at issue, he had paid off fines in Lonoke and Waldron and was currently paying fines in Alma at the rate of $100 per month. Phillips further testified that "I'm paying what I can. I'm doing the best I can. I'm not trying to not pay you. I just don't have the money to pay you."

At the close of the evidence, defense counsel argued that the court was required to consider Phillips's inability to pay. The trial court continued the case for approximately one month. When the

case was reconvened, the court found that the State met its burden by showing that Phillips failed to pay his fines and costs and it held that it was not required to consider whether Phillips was unable to pay the fines and costs. Specifically, the court held that:

> You were arguing that well he's got some circumstances that keep him from paying, you know, prohibiting him from paying and it's not willful then that may play into whether it's a contempt . . . But it appears to me if you enter a plea agreement and you say you will pay, and you don't pay as agreed then you violated the terms of that agreement . . .

The court ruled that Phillips violated his suspended sentence and sentenced Phillips to two years in prison with an additional four years suspended in each case to run concurrently. The judgment and commitment order was entered on January 26, 2007. This appeal followed.

A trial court may revoke a defendant's suspension at any time prior to the expiration of the period of suspension if it finds by a preponderance of the evidence that the defendant has *inexcusably* failed to comply with a condition of his suspension. Ark. Code Ann. § 5-4-309(d) (Repl. 2006); *Reese v. State,* 26 Ark. App. 42, 759 S.W.2d 576 (1988) (emphasis added). This court will not reverse the trial court's decision to revoke unless it is clearly against the preponderance of the evidence. *Williams v. State*, 351 Ark. 229, 91 S.W.3d 68 (2002). Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Richardson v. State,* 85 Ark. App. 347, 157 S.W.3d 536 (2004). The State need only show that the appellant committed one violation in order to sustain a revocation. *Id.*

Where the alleged violation is a failure to make payments as ordered, the State has the burden of proving by a preponderance of the evidence that the failure to pay was *inexcusable. Reese, supra* (emphasis added). Once the State has introduced evidence of non-payment, the burden shifts to the defendant to offer some reasonable excuse for his failure to pay. *Id.* Arkansas Code Annotated section 5-4-205(f)(3) (Repl. 2006) sets forth several factors to be considered by the trial court, including the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

The trial court erred in failing to consider whether Phillips's failure to pay was excusable. Although the State met its burden of showing that Phillips failed to pay his restitution, fines, and costs, there was evidence showing that Phillips had only $60 left after monthly expenses. This was sufficient evidence to require the court to consider whether Phillips's failure to pay was excusable. Therefore, we reverse and remand, and instruct the trial court to make findings as to whether Phillips's failure to pay was excusable.

The trial court did not rule on the State's argument that Phillips violated his probation by failing to submit a DNA sample. Therefore, we do not address that issue. It may, however, be addressed by the court on remand.

Reversed and remanded.

HART and HEFFLEY, JJ., agree.

Donald SPARROW *v.* ARKANSAS DEPARTMENT of HEALTH & HUMAN SERVICES, et al.

CA 07-555 272 S.W.3d 846

Court of Appeals of Arkansas
Opinion delivered January 30, 2008

Paul N. Ford, for appellant.

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

Carla Rogers Nadzam attorney ad litem, for the minor child.

ROBERT J. GLADWIN, Judge. Donald Sparrow brings this appeal from the order of the Craighead County Circuit Court finding his daughter K.S. dependent-neglected, based on allegations that he sexually abused K.S. He raises three points for reversal, contending that the circuit court erred in not dismissing the action on the basis that collateral estoppel barred the present action

where the issue of abuse had been litigated in another court; that the circuit court erred in denying him the right to confront K.S. by directing him to sit outside her view during her testimony; and that the circuit court erred in excluding, as hearsay testimony, a statement made by K.S. None of these points has merit. Therefore, we affirm.

Sparrow and his former wife, appellee Heather Scott, are the parents of K.S., born July 1, 1998. Sparrow and Scott were divorced in Lafayette County in 2000. Custody of K.S. was awarded to Scott, and Sparrow was afforded visitation. The docket sheet from the divorce court shows that there has been extensive post-divorce litigation.

The parents were before the divorce court in Lafayette County on August 28, 2006, for a hearing on Sparrow's motion for visitation. According to the order from that hearing, the court found "no credible evidence of child abuse" by Sparrow towards K.S. and ordered that visitation resume, to be supervised by K.S.'s paternal grandmother, Linda Sparrow.

According to an affidavit submitted in support of its petition, appellee Arkansas Department of Health and Human Services ("DHS") received a report on May 8, 2006, that K.S. was being sexually abused by Sparrow. The report was investigated and found to be true.

In September 2006, DHS received another report concerning K.S., alleging that, according to an order issued by the Lafayette County court, Sparrow's visits with K.S. were to be supervised by his parents but that they were failing to do so. The report also noted that K.S. was having psychosomatic symptoms such as nightmares and wetting the bed and that these manifestations began occurring since her last visit with Sparrow. The affidavit went on to note that K.S. reported that her father was physically violent toward her and that she did not want to see Sparrow. The affidavit further noted that, during an interview with K.S.'s school principal, Pam Clark, she reported that K.S. was sexually acting out.

On December 14, 2006, DHS filed a petition in the Craighead County Circuit Court, alleging that K.S. was dependent-neglected as a result of sexual abuse. The petition sought an order to provide safeguards for K.S.'s protection. The circuit court entered an *ex parte* order finding that K.S. was at imminent risk of being sexually abused by her father during visitation and ordering

that Sparrow have only supervised visitation at DHS. The court also set a probable-cause hearing for December 21, 2006.

At the probable-cause hearing, K.S. testified that she was afraid of her father because he had hurt her and had threatened her not to tell anybody about the abuse. She also testified that her father had touched her privates. She also indicated that there were times when she was left alone with her father and that she is sometimes afraid to be left alone with him. Sparrow did not attend the hearing in person; however, his attorney did. Counsel made a motion to dismiss the action on the basis of lack of jurisdiction and res judicata, which was overruled.

By order entered on January 18, 2007, the circuit court found probable cause to enter the *ex parte* order. The court ordered the termination of all visitation between K.S. and Sparrow unless supervised by DHS. The court also ordered Sparrow to obtain and follow the recommendations of a sexual-risk assessment, as well as to have a psychological evaluation. The circuit court later amended the probable-cause order to reflect that there would be no contact between K.S. and her father.

Sparrow and Scott returned to the Lafayette County divorce court for a hearing on January 25, 2007, on cross motions for contempt. At that hearing, K.S. testified that she loved her parents, adding that it was hard to testify with them watching her. K.S. testified that her father had not said or done anything bad to her. She also said that her mother never told her to make any of the allegations, except to tell the truth. K.S. denied being afraid of her father. K.S. also denied that Sparrow had done anything inappropriate to her while she was bathing, other than to scrub her down, which she said she could do herself. The Lafayette County court again found no credible evidence of child abuse, noting that K.S.'s testimony "clearly refutes all allegations of child abuse." The court held Scott in contempt for not allowing visitation with Sparrow and ordered her to pay for a transcript of K.S.'s testimony, as well as attorney's fees for Sparrow's attorney. The court ordered supervised visitation to resume.

The adjudication hearing in the present case was held beginning on February 27, 2007. Sparrow made a motion to dismiss the action, based on a lack of jurisdiction and on collateral estoppel. He argued that DHS was precluded from bringing the present dependency-neglect action because the issue of K.S.'s having been abused had been litigated in the Lafayette County

divorce action. The circuit court denied the motion to dismiss, finding that the two courts addressed separate issues: the Lafayette County court addressed issues concerning contempt, while the Craighead County court addressed the dependency-neglect issue.

K.S. testified that her father had touched her private parts with both his finger and with a Q-tip. She also said that there were instances where she was left alone with her father. K.S testified that her testimony in the Lafayette County court was not truthful in that she did not tell the court what her father had done to her or that he had threatened her. She explained that she did not tell the truth because her father was making faces at her and she "just freaked out." She also said that she wanted a "real supervisor" to watch over her because, otherwise, bad things would happen to her. On cross-examination, K.S. denied that she had been coached by her mother to make the accusations against her father. K.S. was also asked about whether she had practiced her testimony with the attorney ad litem or DHS social workers.

Sparrow testified that he had never abused K.S. in any manner. He also denied threatening K.S. or making faces at her during her testimony.

The circuit court issued a letter opinion on March 26, 2007, finding that K.S. was dependent-neglected and that it was in her best interests to restrict her visitation with Sparrow. The court noted that, except for her testimony in the Lafayette County court, K.S. had been consistent in her sexual-abuse allegations to doctors, social workers, and personnel at her school and before the circuit court in the present action. The court also found credible K.S.'s testimony that she testified falsely in the Lafayette County court because her father was present and making faces at her. The court noted that it had to admonish Sparrow for making hand and facial gestures in response to the testimony of witnesses or the questions from the attorneys. Sparrow was found to be "vague, reluctant and disingenuous" in his testimony. The court found that there was no evidence that Scott had coached K.S. to make false allegations against Sparrow. As a result of the finding that K.S. was dependent-neglected, the circuit court terminated all visitation between K.S. and Sparrow. An order memorializing the court's findings was entered on April 4, 2007. Sparrow filed a timely notice of appeal. He now raises three points for reversal.

In his first point, Sparrow, relying on *Arkansas Department of Human Services v. Dearman*, 40 Ark. App. 63, 842 S.W.2d 449 (1992), argues that the circuit court erred in denying his motion to

dismiss because the doctrine of issue preclusion bars the relitigation of issues of law actually litigated by parties in the first suit. In other words, Sparrow is arguing that DHS is precluded from bringing the present action because the issue of his abusing K.S. was litigated in the Lafayette County divorce court and that court found no evidence of abuse.

We agree that *Dearman* is factually similar to the present case. However, we find that it is not controlling under the circumstances of this case. In *Dearman*, the custodial father had filed a petition for contempt against the mother for failing to return the child from visitation. The mother filed a counterclaim for a change of custody, alleging that the father had sexually abused the child. The chancellor found the mother in contempt and dismissed her counterclaim. Three weeks later, DHS brought an action for emergency custody of the child. A DHS caseworker testified that the allegations of abuse on which its petition was based were the same allegations in the earlier action. This court held that DHS was collaterally estopped from relitigating this issue due to the previous decision. This court set out the elements of collateral estoppel as follows: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment.

We hold that Sparrow has failed in his burden of proving that the issues in the two cases were the same because he has failed to provide complete transcripts of both of the hearings in Lafayette County where the allegations of sexual abuse were raised. *See Fariss v. State*, 303 Ark. 541, 798 S.W.2d 103 (1990). In *Dearman*, there was testimony that the allegations in both cases were the same. Here, there is no such testimony to establish whether the elements of estoppel have been met, only the partial transcript of K.S.'s testimony.[1] This factor serves to distinguish the present case from *Dearman*. We do not know whether the specific allegations of abuse were the same in both cases or if there were additional instances of abuse about which K.S. was not questioned. It was Sparrow's burden to prove that the allegations were the same and that they had been fully litigated in Lafayette County.

[1] We note that K.S.'s therapist, Matthew Coven, testified that he testified in the Lafayette County court, but he could not recall what was asked of him in that proceeding.

Fariss, supra. Therefore, the circuit court did not err in denying Sparrow's motion to dismiss on the basis of collateral estoppel.

Sparrow's second point addresses the circuit court's requirement that, during K.S.'s testimony, Sparrow be seated outside of her view. Sparrow asserts that this was a violation of his right of confrontation. We cannot address this issue because it is not properly preserved for our review.

At the hearing, Sparrow's objection was that "there's no court authority. I mean, a party's entitled to have, to be present in a normal proceeding in normal fashions." Nowhere does he mention his right to confront K.S. It is well settled that a party cannot change the grounds for an objection on appeal but is bound on appeal by the scope and nature of the objections as presented at trial. *Foundation Telecomm. v. Moe Studio*, 341 Ark. 231, 16 S.W.3d 531 (2000). Further, Sparrow has failed to cite any authority to support his argument that a criminal defendant's Sixth Amendment confrontation rights apply in dependency-neglect cases. Assignments of error that are unsupported by convincing argument or authority will not be considered on appeal unless it is apparent without further research that they are well taken. *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005).

In his third point, Sparrow argues that the circuit court erred in excluding testimony concerning a statement K.S. made because the statement fell within an exception to the hearsay rule. At the adjudication hearing, Linda Sparrow was asked on direct examination whether she had heard K.S. deny any sexual allegation. She testified that "[K.S.] told her dad that she knew why she wasn't able to come." After a hearsay objection was sustained, Sparrow proffered the rest of K.S.'s statement as follows: "[K.S.] said further she doesn't understand why her mother is saying these things to people."

According to Sparrow, this testimony was admissible as an exception to the hearsay rule because it related to K.S.'s then-existing mental, emotional, or physical condition. *See* Ark. R. Evid. 803(3).[2] This court reviews evidentiary errors under an abuse-of-discretion standard. *See Arkansas Dep't of Human Servs. v. Huff*, 347 Ark. 553, 65 S.W.3d 880 (2002). The circuit court has broad discretion in its evidentiary rulings; hence, the circuit

[2] Rule 803(3) provides, in pertinent part, as follows:

court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *See id.* However, the fact that a piece of evidence falls within an exception to the rule against hearsay does not equate to automatic admissibility. *Id.*; *Lovell v. Beavers*, 336 Ark. 551, 987 S.W.2d 660 (1999).

We need not decide whether the statement at issue does or does not fall within the exception because it was subject to being excluded as cumulative to other statements made by K.S. that Sparrow did not abuse her. Sparrow wanted to test K.S.'s credibility by exploring other instances where she had denied that he had abused her. It is not error to exclude additional, merely cumulative, evidence with regard to the fact that K.S. had made earlier statements that Sparrow had not abused her. *McMillan v. State*, 229 Ark. 249, 314 S.W.2d 483 (1958); *Edwards v. State*, 40 Ark. App. 114, 842 S.W.2d 459 (1992). That was the predicate question leading to the testimony Sparrow sought to introduce through his mother's testimony — that K.S. had made statements denying that Sparrow had abused her. Therefore, the statement at issue was cumulative to those other statements and could be excluded under Ark. R. Evid. 403.

Affirmed.

PITTMAN, C.J., and BAKER, J., agree.

Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health. . . .

William Ike SEATON, Jr. *v.* STATE of Arkansas

CA CR 07-432 272 S.W.3d 854

Court of Appeals of Arkansas
Opinion delivered January 30, 2008

Jessica Steel Gunter, for appellant.

Dustin McDaniel, Att'y Gen., by: *Laura Shue*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant William Ike Seaton, Jr., appeals his conviction for the second-degree murder of Gene Woodall, who was shot to death on April 11, 2005, at his rural

residence in Story, Arkansas. Appellant was tried before a jury in Montgomery County Circuit Court. Appellant undeniably shot Woodall, but appellant claimed it was in self-defense. Thus, the trial centered on appellant's intent on the night of the shooting. Appellant argues that the trial court abused its discretion in admitting into evidence two written statements, one from his sister and one given from him. Appellant contends that these two evidentiary rulings were in error and warrant the reversal of his conviction and remand for retrial. We reverse the trial court's ruling on the admission of his sister's written statement, but we affirm the admission of appellant's statement.

To give context to this discussion, we set out the undisputed evidence presented to the jury. On the night in question, appellant drove to his sister's house and had an unpleasant encounter with his sister, Debbie Pope, and his girlfriend, Carolyn Dunn. Then, appellant drove away in his truck along the dirt road. Appellant said he was flagged down by his sister's neighbor, Woodall, as he drove by Woodall's trailer. The two men engaged in a verbal confrontation, both men had shotguns, and at least one shot was fired. Woodall died from a spray of shot, which struck Woodall in the back and shoulder. Woodall succumbed on his front porch. Woodall's twelve-year-old son was inside the trailer and heard the commotion, but he did not witness the shooting. Woodall's son told police he observed what appeared to be a red truck driving away.

The next day, appellant was arrested for public intoxication and ended up in a jail in Morrilton. The officers investigating the murder located appellant in that jail two days after the shooting. After being provided verbal and written *Miranda* warnings, appellant was told that the officers were there to talk about Woodall being shot. Appellant admitted that he shot at Woodall, in response to Woodall shooting at him, but he was surprised to learn that Woodall died. This statement was admitted into evidence over appellant's objection.

Appellant's sister was interviewed twice by a law enforcement officer. Pope gave a more damaging statement the second time, implicating her brother. Though the State issued a subpoena for her, which was attempted to be served in the weeks and days before trial, Pope did not appear when called as a witness during trial. The State proceeded with other witnesses that day, and at the conclusion of that day's presentation, a hearing was conducted to determine the State's efforts to procure Pope's attendance, as

described above. The trial court directed that a warrant issue for contempt against Pope, in the hopes that this would compel Pope's attendance the next day. The sheriff's office attempted to serve Pope twice that night, and once before trial resumed the next morning, but Pope did not appear. The judge found that despite "considerable efforts" and "extreme measures" in trying to procure Pope's attendance, she was unavailable. Her statement was admitted over objections based upon hearsay rules and the Confrontation Clause.

At trial, appellant testified that he was angry with his girlfriend and his sister that day, that they all argued and he left, and that Woodall had flagged him down with a flashlight. Appellant testified that Woodall cursed him and told him not to come back to Pope's house. Appellant said he began to drive away when Woodall shot his truck, whereupon appellant exited his truck with a .20 gauge shotgun, hid behind a tree, and came out to shoot toward Woodall to scare Woodall. Appellant believed he had created an opportunity to leave after he shot, so he re-entered his truck and drove away, throwing away the shotgun while crossing a bridge. Appellant did not think he actually hit Woodall, but expected he would be in trouble for shooting at Woodall, even if it was self-defense. Appellant said he told the officers that he "shot *at* the son of a bitch."

On this evidence, the jury found appellant guilty of second-degree murder. A person commits second-degree murder in either of two ways. The first is when a person, "[k]nowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. § 5-10-103(a)(1) (Repl. 2006). A person also commits second-degree murder if "[w]ith the purpose of causing serious physical injury to another person, . . . [he] causes the death of any person." Ark. Code Ann. § 5-10-103(a) (Repl. 2006).

A person's intent or state of mind at the time of the offense is seldom apparent. *Harshaw v. State*, 348 Ark. 62, 71 S.W.3d 548 (2002). However, a person is presumed to intend the natural and probable consequences of his actions. *Coggin v. State*, 356 Ark. 424, 156 S.W.3d 712 (2004). Intent also can be inferred from the type of weapon used, the manner of use, and the nature, extent, and location of the trauma suffered by the victim. *Harshaw v. State, supra*. Here, the State had to prove that appellant acted knowingly or purposefully, as described above.

Appellant first contends that the trial court erred by permitting the State to introduce into evidence the second written statement Pope gave to law enforcement officers. This ruling was first decided on the basis of whether it met with hearsay exceptions outlined in our Rules of Evidence, and then decided on the basis of constitutional rights to confront witnesses. The trial judge rejected all of appellant's arguments to exclude Pope's statement. Pope's statement was very similar to what appellant admitted happened that night, with the exception that Pope said her brother called her that night, both before and after the shooting, initially threatening to kill Woodall, and then later confirming that Woodall was dead.

Appellant's first argument on appeal concerns the hearsay exceptions under Arkansas Rules of Evidence and the constitutional principle of the right to confront witnesses. We move directly to the constitutional argument, because regardless of the ruling regarding admissibility under the Rules of Evidence, appellant's constitutional rights were violated, mandating reversal. Moreover, at the conclusion of the arguments about Pope's statement, defense counsel affirmatively stated to the trial court that "for purposes of the record, my only objection is that I've been denied the right of confrontation."

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), 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). 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 v. Washington*, 546 U.S. 1213 (2006). It is the testimonial character of the statement that separates it from other hearsay which, while subject to traditional limitations on hearsay evidence, is not subject to the Confrontation Clause. *Id.*

There can be no dispute that Pope's statement was testimonial in that it was given at the behest of law enforcement officers in their attempt to solve a murder case, and it caused Pope to bear witness against her brother. Thus, the query is distilled to whether Pope was unavailable and whether appellant had a prior opportunity to cross-examine Pope.

The party offering the testimony has the burden of proving the witness unavailable. *Vick v. State*, 314 Ark. 618, 863 S.W.2d 820 (1993); *Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993); *Bussard v. State*, 300 Ark. 174, 778 S.W.2d 213 (1989). Also, the party seeking to introduce the prior testimony of an unavailable witness must show that a good-faith effort has been made to procure the attendance of the missing witness. *Vick*, *supra*; *Register*, *supra*; *Meine v. State*, 309 Ark. 124, 827 S.W.2d 151 (1992). Here, the State made good-faith efforts to procure Pope's attendance, but even if that were not enough, the trial court directed the issuance of a warrant in an unsuccessful effort to compel attendance. Accordingly, Pope was unavailable.

However, appellant did not have a prior opportunity to cross-examine his sister. The State appears to realize this difficulty because it offers alternative reasons to affirm the trial court on this constitutional ruling. First, the State asserts that Pope's statement was offered for a non-hearsay purpose, or alternatively that the admission of Pope's statement was harmless beyond a reasonable doubt. Neither are persuasive, and we are compelled to agree with appellant and reverse on this issue.

The State wanted to have Pope's statement admitted because it provided the single most devastating piece of evidence in this trial, which was appellant's state of mind via his words to his sister. In Pope's statement, she recounted that:

> [Appellant] called me and told me about Gene [Woodall] pointing a gun at him. He, Ike said, "I'll kill that son of a bitch." After all the calls he called back and said, "Debbie your buddy is dead."

The State in its own brief asserts, in a different argument section, that it used Pope's statement "to show the events and timing surrounding the shooting, the circumstances of which showed Appellant's motive and state of mind." State's Brief at page 11. The State further avers that

Pope's statement "was more probative on the point than any other that the State could procure through reasonable means. Appellant called Pope and told her what he did; therefore, there was no other witness able to give this testimony." State's Brief at page 9. This statement was offered for the truth of the matter it asserted and cannot be deemed harmless beyond a reasonable doubt. On this point, we must reverse and remand for a new trial. However, because the second point raised on appeal is likely to recur on remand, we address it as follows.

Appellant contends that the trial court erred in denying his motion to suppress the statement appellant gave to police because it was the product of a false promise of help, rendering appellant's statement involuntary. A statement induced by a false promise of reward or leniency is not a voluntary statement. *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005). When an interrogating law enforcement officer makes a false promise that misleads, and a confession is given because of that false promise, then the confession has not been made voluntarily, knowingly, and intelligently. *Id.* However, for the statement to be involuntary, the promise must have induced or influenced the confession. *Id.*

When we review a trial court's ruling on the voluntariness of a confession, we make an independent determination based on the totality of the circumstances including the age, experience, education, background, and intelligence of the defendant. *Dickerson v. State*, 363 Ark. 437, 214 S.W.3d 811 (2005). We defer to the superior position of the trial judge to evaluate the credibility of witnesses who testify at a suppression hearing. *Id.* We will reverse a trial court's ruling on this issue only if it is clearly against the preponderance of the evidence. *Id.*

In this case, appellant was interviewed two days after the shooting in the Morrilton jail facility, where he was being held on an unrelated charge. The written statement set forth the undisputed factual scenario outlined above, but affirmatively stated that appellant knew he shot Woodall, but that he only intended to scare Woodall and was unaware Woodall had died.

Sheriff Spivey was in that meeting, along with two other officers. The sheriff had known appellant for twenty years. Appellant was given Miranda warnings, which he signed, waiving those rights. The written waiver included the following:

> I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

All three law-enforcement officers testified at the suppression hearing that appellant appeared to be coherent, and that they did not threaten or offer him anything to give the statement. Appellant was in his late fifties at the time, and he had earned his GED.

Right after the form was completed, one of the officers told appellant they were there to talk about the death of Woodall. The sheriff admitted that he probably said to appellant that he should tell the interviewer what happened, "and I'll help you any way I can." Appellant immediately said, "yeah, I shot the son-of-a-bitch." The whole interview took about thirty minutes, during which appellant did not assert any rights or express any remorse. Appellant did not testify at the suppression hearing. After the judge entertained argument of counsel, the judge denied the motion to suppress finding that the statement was not involuntary. We find no error and affirm.

For the statement to be involuntary, the promise must have induced or influenced the confession. *Bisbee v. State*, 341 Ark. 508, 17 S.W.3d 477 (2000), overruled on other grounds in *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). In determining whether there has been a misleading promise of reward or leniency, this court views the totality of the circumstances and examines, first, the officer's statement and, second, the vulnerability of the defendant. *Id.* There are articulated factors we look to in our determination of whether the defendant was vulnerable, which include: 1) the age, education, and intelligence of the accused; 2) how long it took to obtain the statement; 3) the defendant's experience, if any, with the criminal-justice system; and 4) the delay between the Miranda warnings and the confession. *Conner v. State*, 334 Ark. 457, 982 S.W.2d 655 (1998).

In this instance, there was no evidence that appellant was vulnerable. Appellant was an adult with a high-school equivalency education. He appeared to be coherent and in fair physical condition. He was being detained for unrelated criminal charges and was interviewed by law enforcement officials, one of whom he had known personally for twenty years. There is no indication that the general statement, "I'll help you any way I can," induced this confession. The whole process took just over thirty minutes.

Considering the totality of the circumstances, and giving due deference to credibility determinations to be decided by the trial court, we affirm this point.

Reversed and remanded for retrial.

GRIFFEN and MARSHALL, JJ., agree.

SWIFTON PUBLIC SCHOOLS and Risk Management Resources
v. Edith SHIELDS

CA 07-514 272 S.W.3d 851

Court of Appeals of Arkansas
Opinion delivered January 30, 2008

Worley, Wood & Parrish, P.A., by: *Melissa Wood* and *Carol Lockard Worley*, for appellants.

John Bartlett, for appellee.

SARAH HEFFLEY, Judge. Appellants, Swifton Public Schools and Risk Management Insurance, appeal from a decision by the Workers' Compensation Commission (Commission) that affirmed the Administrative Law Judge's (ALJ) finding that appellee, Edith Shields, sustained a compensable injury on August 14, 2003, and was entitled to temporary total disability benefits from January 27, 2004 through August 2004. Appellants also appeal the Commission's finding that appellee provided adequate notice of her injury to her employer. We affirm the decision of the Commission.

Appellee is a public school teacher who was injured on August 14, 2003, while preparing her classroom for the new school year. According to appellee, who had been previously diagnosed with osteoarthritis in both knees, she slipped on a piece of cardboard, fell forward, and landed on her right knee. Appellee was able to get up after a few minutes with the assistance of the custodian, who was in the room at the time of the fall. Appellee reported the injury to the principal of the school, Larry Lee, approximately an hour and a half later, but at that time she thought her knee was just badly bruised and that it would get better.

After several weeks with continued pain and swelling, however, appellee sought medical treatment with her own physician and eventually was diagnosed with synovitis in her right knee. An MRI performed on November 2, 2003, showed joint effusion in her right knee, and appellee underwent arthroscopic surgery on November 21, 2003. Appellee received no benefit from this surgery, and on February 2, 2004, she underwent a total right knee arthroplasty. Appellee was cleared to return to work in August 2004, and she is now employed with the Leachville School District.

On July 27, 2004, appellee signed a Form AR-N, Employee's Notice of Injury. Appellee contended that she had sustained a compensable injury and was entitled to medical care and temporary total disability. In response, appellants asserted that appellee had not suffered a compensable injury, that appellee's medical

treatment was associated with her pre-existing condition, and that they were not liable for benefits and expenses incurred before the receipt of actual notice of the injury, which was not given until July 27, 2004. A hearing was held on March 3, 2006, and the ALJ held that appellee had sustained a compensable injury, specifically an aggravation to her pre-existing osteoarthritis; she was temporarily totally disabled from January 27, 2004, through August 2004; and appellants were responsible for all reasonable hospital and medical expenses. The ALJ also found that appellee had informed her supervisor, Larry Lee, of the injury on the date of the occurrence, thus satisfying the notice requirement under Ark. Code Ann. § 11-9-701 (Repl. 2002).

Appellants appealed to the Commission, which affirmed the ALJ's decision. In its decision, the Commission specifically noted that although appellee suffered from a pre-existing arthritic condition in her knees, the medical evidence established post-injury findings of synovitis and effusion, which were objective medical findings that were not present before appellee's workplace injury. The Commission also reiterated that appellee's employer had knowledge of appellee's injury on August 14, 2003, and appellee was therefore not barred from receiving workers' compensation before the time she signed the July 27, 2004 Form AR-N. Appellants now bring their appeal of the Commission's decision before this court.

In determining the sufficiency of the evidence to support the findings of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* It is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Searcy Indus. Laundry v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). The issue is not whether this court might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. *Smith v. County Market/Southeast Foods*, 73 Ark. App. 333, 44 S.W.3d 737 (2001). 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. *Id.* After reviewing

the Commission's findings of fact, conclusions of law, and opinion, we hold that there is substantial evidence to support the Commission's decision that appellee sustained a compensable injury on August 14, 2003.

We also agree with the Commission's determination that because appellee's employer was informed of the injury on the date it occurred, the notice requirement under Ark. Code Ann. § 11-9-701 was fulfilled, regardless of when the Form AR-N was filed. Section 11-9-701 provides, in pertinent part:

> (a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.
>
> (2) All reporting procedures specified by the employer must be reasonable and shall afford each employee reasonable notice of the reporting requirements.
>
> . . . .
>
> (b)(1) Failure to give the notice shall not bar any claim:
>
> (A) If the employer had knowledge of the injury or death;
>
> (B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or
>
> (C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

Appellee's testimony at the hearing, which the Commission found credible, established that, not only did she inform her employer of the injury on the date it occurred, but also that her employer was aware she was undergoing medical treatment for her injury because she missed work for doctor's appointments and the two surgeries, and she informed her employer of her reason for missing work. Accordingly, we affirm the Commission's decision.

Affirmed.

HART and MILLER, JJ., agree.

John O'HARA *v.* J. CHRISTY CONSTRUCTION CO., INC., AETNA Life & Casualty Insurance & Second Injury Fund

CA 07-631 272 S.W.3d 842

Court of Appeals of Arkansas
Opinion delivered January 30, 2008

[Rehearing denied April 16, 2008.]

Compton, Prewitt, Thomas & Hickey, LLP, by: *Floyd M. Thomas, Jr.*, for appellant.

Friday, Eldredge & Clark, LLP, by: *Betty J. Hardy*, for appellees.

KAREN R. BAKER, Judge. In this case we are asked to address when the accrual of permanent total disability benefits should commence after the modification of a previous award of wage loss based upon permanent partial disability benefits. A majority of the Workers' Compensation Commission found that the date for beginning the award of permanent total disability benefits was May 10, 2006, the date of the Commission's opinion and order after remand finding that appellant had proved under the odd-lot doctrine

that he was permanently and totally disabled. Appellant asserts two points of error: (1) The Workers' Compensation Commission erred by fixing the commencement of appellant's permanent total disability benefits as the date of its order finding appellant totally and permanently disabled as opposed to an earlier date such as the filing of the claim or the date of the last hearing; (2) The Workers' Compensation Commission erred by not awarding appellant a 20% penalty for late payment, plus interest and attorney's fees on the permanent and total disability payments that accrued before the Full Commission's opinion of May 10, 2006. For the reasons discussed herein, we affirm as modified.

This is not the first appeal of this matter. In our most recent disposition of an appeal of this case, we remanded the matter for the Commission to determine whether appellant fell within the odd-lot doctrine. Section 24 of Act 796 of 1993, now codified at Ark. Code Ann. § 11-9-522(e) (Repl. 1999) abolished the odd-lot doctrine for permanent disability claims based on injuries that occurred after July 1, 1993; however, the doctrine was applicable to appellant's claim stemming from his March 1993 injury.On remand, the Full Commission found that appellant was permanently and totally disabled pursuant to the odd-lot doctrine; however, the order failed to identify the starting date for the benefits of total permanent disability. Upon petition by appellant for the identification of the date from which appellant was deemed to be permanently and totally disabled, the Full Commission issued an opinion filed May 2, 2007, wherein the Full Commission adopted the May 10, 2006, opinion date as the date from which benefits for total permanent disability would begin. Appellees argue that there was no language in the May 10, 2006, opinion stating the award dated back to a date prior to May 10, 2006, and there was nothing in the opinion directing appellees to pay accrued benefits in lump sum. Appellant argues that the evidence was complete at the initial hearing.

A history of appellant's injury and the continued degeneration of his condition may assist in understanding the parties' arguments. Appellant John O'Hara suffered from a compensable work-related hernia on March 13, 1993, which was accepted by his employer, appellee J. Christy Construction Company. This case is controlled by the statutes and case law in effect prior to the workers' compensation law enacted in 1993. After appellant underwent surgery and convalescence, he suffered a compensable complication, that being neuropathy due to femoral nerve impingement. The impingement caused his right leg to have a

burning, prickling sensation. Another surgery was performed to release the nerve, which improved his condition but did not eradicate the symptoms. His healing period ended in July 1994, whereupon he was given a twenty-percent permanent partial impairment rating to the body. All related benefits were accepted and paid by the employer up to this point. In 1996, appellant filed a claim for additional benefits in wage loss or permanent total disability, at which point the appellee controverted the claim.

The testimony taken at the hearing in March 1997 included appellant explaining his high school education and noting his disability in reading, his work history in the Air Force and then in construction, and his present physical condition. Appellant was forty-nine years old at that time. He testified that he could not work because his nerve injury prevented him from walking, standing, or exerting himself for any extended period of time. Nevertheless, appellant continued to work his cattle and farm acreage as best he could with constant pain and side effects from his medications. Video surveillance of appellant during that time showed that appellant smoked cigarettes, drove a truck, and walked with a limp. Appellee put on evidence of possible jobs that appellant could do, outside his ability and training. Appellant admitted that he had not sought any other employment because he did not think he was capable of a full day's work. After reviewing the medical records and the other testimony and evidence, the administrative law judge issued an opinion in July 1997 that appellant was entitled to thirty-percent wage loss. Appellee appealed, and the Commission concluded that appellant was poorly motivated to return to work and somewhat exaggerating his symptoms, but also that he suffered a significant complication from his work injury that affected his earning capacity. It noted his inability to return to heavy manual labor, his age, limited education, and work experience. The Commission concluded in an opinion issued in February 1998 that appellant was entitled to twenty-percent wage loss over his twenty-percent impairment rating, a forty-percent total rating. On appeal, our court affirmed the Commission's decision in an unpublished opinion. *O'Hara v. J. Christy Constr.*, CA98-599, 1999 WL 116280 (Mar. 3, 1999).

Appellant filed another claim for additional wage loss or disability, which was the subject of a hearing in April 2003, six years after the last hearing. Appellant testified that his leg pain is worse than it was back in 1997, that he now wears a brace on his right leg because he suffered from a club foot, that he could not

raise or lower his big toe, that he had continued falling spells, and that this was a progression of his nerve neuropathy. These worsened complications necessitated that he now use a TENS unit to ease the pain down his leg into his foot, and that he take more medication for pain and sleep. Appellant stated that he is less able to walk, that he is tired and weak all the time, and that he had sold cattle and timber because he could not do the family farm work as he had before. He rated his pain in 1997 as a six, whereas it was now between a seven and eight. At the time of this hearing, appellant was fifty-five years old. In an opinion filed on August 15, 2003, the administrative law judge found appellant to be entitled to an additional thirty-percent wage loss. Appellee appealed, and the Commission reversed in a January 13, 2005 opinion, which this court reversed and remanded on appeal. *See O'Hara v. J. Christy Constr. Co.*, 94 Ark. App. 143, 227 S.W.3d 443 (2006).

Our court held that the Commission erred when it stated that appellant's claim for increased permanent disability benefits in 2003 was barred by res judicata, because his claim was based upon changes in his condition *post-1997*. *O'Hara*, 94 Ark. App. at 145, 227 S.W.3d at 445. This court also held that the Commission erred by inaccurately analyzing the issue of wage-loss disability. We remanded for the Commission to reconsider whether appellant demonstrated a change in physical condition that would support his claim for additional wage-loss disability, and to consider, if appellant did not qualify for additional wage-loss disability under the proper analysis, whether appellant fell within the odd-lot doctrine. Appellant's injury occurred prior to the Arkansas Assembly's abolition of the doctrine by Act 796 of 1993. Although the doctrine was applicable to the analysis of this case, the Commission failed to render a finding on that issue.

In an opinion dated May 10, 2006, after remand, the Commission found that appellant had made a prima facie showing that he was in the "odd-lot" category, and that the employer did not meet its burden of showing that some kind of suitable work was regularly and continuously available to appellant. Accordingly, the Commission awarded benefits for permanent and total disability benefits; however, the May 10 opinion did not specify the date from which appellant's entitlement to benefits began. The Commission subsequently entered an opinion and order filed May 2, 2007, finding that benefits began on May 10, 2006, the date that the subsequent order awarding permanent and total disability benefits was filed.

We agree with appellant's observations that the evidence was complete upon the conclusion of the hearing held on April 17 of 2003. However, pursuant to the statute, our focus must be on the review and subsequent award of benefits. The benefits in this case arise out of appellant's permanent disability and the concurrent obligation to pay for a permanent disability that has deteriorated in nature from a partial to total disability status. Arkansas Code Annotated section 11-9-713 provides that former awards may be modified by the Commission upon a "change in physical condition." Ark. Code Ann. § 11-9-713(a)(2) (Repl. 2002 & Supp. 2007). However, "[n]o review shall affect any compensation paid pursuant to a prior order or award." Ark. Code Ann. § 11-9-713(c) (Repl. 2002 & Supp. 2007).

The Commission's erroneous denial of benefits in its January 13, 2005, opinion raises the question of whether the legislature intended to limit the prospective application of the modification to orders that are correctly entered in accordance with the law regardless of how many times erroneous orders rejecting the modification may have been entered. We are guided by our legislature's specific declaration that "the purpose of the workers' compensation code is to provide for disability benefits for injured workers, to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment." Ark. Code Ann. § 11-9-1001 (Repl. 2002). Therefore, any action which operates to divest an employee of rights under Arkansas workers' compensation law should be viewed with extra scrutiny. *Williams v. Johnson Custom Homes*, 100 Ark. App. 60, 264 S.W.3d 569 (2007). To hold that the accrual of benefits to a modification accrues only after a series of appeals and remands finally results in a correct disposition of the injured workers' claim would divest an employee of his rights to timely payments of benefits. Accordingly, we hold that the accrual of benefits began at the time the first order in the case addressing the modification was entered, August 15, 2003, which was the order entered by the Administrative Law Judge. We affirm the Commission's decision with the entry of this modification.

We find no error in the Commission's decision that pursuant to Ark. Code Ann. § 11-9-802(c), no penalty was due because the order entered on May 10, 2006 was the award contemplated by that statute. Accordingly, we affirm on that point.

Affirmed as modified.

GLOVER and HEFFLEY, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
APRIL 16, 2008

KAREN R. BAKER, Judge. TheAppellant John O'Hara petitioned this court for rehearing asserting that the opinion in *O'Hara v. J. Christy Constr. Co.*, 101 Ark. App. 212, 272 S.W.3d 842 (2008) failed to address the issue of Mr. O'Hara's entitlement to interest on the installments of compensation that the court found were due but not paid between August 15, 2003, and May 10, 2006. Arkansas Code Annotated section 11-9-809 (Repl. 2002) specifically entitles Mr. O'Hara to interest on all accrued and unpaid compensation. Our decision specifically held that the accrual of benefits began on August 15, 2003. By operation of law, Mr. O'Hara is entitled to interest on benefits accrued and unpaid from that date. Accordingly, the petition for rehearing is denied.

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

Shannon L. (Hampton) BROWN *v.* Kevin Gene ASHCRAFT

CA 07-782 272 S.W.3d 859

Court of Appeals of Arkansas
Opinion delivered January 30, 2008

Benjamin D. Hooten, for appellant.

Paul Petty, for appellee.

KAREN R. BAKER, Judge. Appellant Shannon L. (Hampton) Brown challenges the trial court's removal of a condition in a previous visitation order requiring that appellee Kevin Gene Ashcraft be present during his visitation with the parties' minor child and not absent for extended periods of time or overnight. For the reasons stated herein, we find no error and affirm.

The initial visitation order in this case was entered as a result of appellant's petition to establish paternity for the minor child. The child was born December 11, 2001, and the order establishing paternity and setting visitation was filed of record on September 22, 2003. This order contained the following provision: "That defendant shall be present with the minor child during visitation and shall not be away from the minor child for any extended period of time or overnight." This original order was subsequently modified in an agreed order for modification filed on May 11, 2005. This order modified provisions addressing mid-week visitation, Christmas vacation, and transportation for visitation. The restriction requiring appellee's presence during visitation was not modified and the trial court admonished that "all previous orders of the Court not specifically modified herein shall remain in full force and effect."

On March 9, 2007, appellee filed a petition for contempt against appellant alleging that appellant had failed and refused to allow appellee visitation with the parties' minor child. In defending against the charge of contempt, appellant relied upon the provision in the order requiring appellee's presence for visitation and his extended absences while fulfilling his responsibilities as a

truck driver. In denying appellee's petition from the bench, the trial court found that appellant had "done nothing wrong. She's followed the order as it was written ...." However, the trial court removed the provision restricting appellee's visitation to times when he would be physically present. In removing the restriction, the trial court stated the following from the bench:

> It's always been this Court's position that a non-custodial parent's time is his time or her time, whatever the case may be, to spend with the child and to acquaint that child with their side of the family. That's a very short period of time. I don't view that as grandparent visitation, that's just his family's time to visit. As long as he has the child in an appropriate environment with appropriate people to supervise then I don't have a problem with that, other than, Mr. Ashcraft, if it's your weekend and if you're working, Ms. Brown has every right to know where the child is — and be able to contact the child and know who is supervising the child. That's how I handle these type of cases, I always have, and I don't see any reason to deviate from that today.

Although appellee did not file a petition to modify visitation, appellant never objected at trial or on appeal that the modification was entered without petition nor that consideration of the modification was improper. From our review of the record, it is clear that the issue was tried by consent. Rule 15(b) of the Arkansas Rules of Civil Procedure allows for issues not raised by the pleadings to be tried by consent:

> **(b) Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

Ark. R. Civ. P. 15(b) (2007).

Accordingly, the issue of modification was tried by consent of the parties. Furthermore, appellant has neither objected to the modification by challenging the trial court's finding that there was

a change of circumstances nor by asserting that the change was not in the child's best interest. On appeal, appellant asks this court to reinstate the restriction that appellee must be present during visitation and not gone for extended periods of time or overnight because our case law and statutes clearly prohibit awarding visitation rights to other family members absent certain safeguards that were not present here. She argues that the trial court erred when it stated that, as long as the child is with an appropriate person, then other family members should be allowed to exercise visitation absent the non-custodial parent. In asserting error, appellant focuses on the effect of the removal as providing visitation with parties who are not subject to the court's order by virtue of their failure to intervene.

We do not agree with appellant's characterization that the removal of the restriction was in essence an award of grandparent visitation. As appellant acknowledges, the visitation period primarily affected is the Christmas and summer vacation times when appellee's work schedule requires that he be gone for days at a time. Nothing in the order awards visitation to the grandparents or other family members, nor does it prohibit appellant from seeking a future modification of the existing visitation provisions, if appellee's work schedule causes difficulties in the future.

The trial court's removal of the restriction was consistent with the court's continuing responsibility in visitation matters. The trial court maintains continuing jurisdiction over visitation and may modify or vacate those orders at any time when it becomes aware of a change in circumstances or of facts not known to it at the time of the initial order. *Meins v. Meins*, 93 Ark. App. 292, 218 S.W.3d 366 (2005). Determining whether there has been a change of circumstances that materially affects the child's best interest requires a full consideration of the circumstances that existed when the last order was entered in comparison to the circumstances at the time the change is considered. *See Blair v. Blair*, 95 Ark. App. 242, 235 S.W.3d 916 (2006). Furthermore, the party seeking the modification has the burden below to show a material change in circumstances warranting the change in visitation. *See Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998). The party seeking the change also has the burden to show that the modification is in the best interest of the child. *See Bennett v. Hollowell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990).

Important factors to be considered in determining reasonable visitation are the wishes of the child, the capacity of the party

desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. *Marler v. Binkley*, 29 Ark. App. 73, 776 S.W.2d 839 (1989). The establishment of visitation rights is a matter that lies within the sound discretion of the trial court. *Davis v. Davis*, 248 Ark. 195, 451 S.W.2d 214 (1970).

In this case, the parties were in conflict over the restriction and its application to the present facts and circumstances. The trial court's discussion of the appropriateness of the individuals to whom appellee delegated his supervisory duties, the environment in which that supervision was performed, and the desirability of strong relationships with the extended family demonstrates the trial court's proper evaluation of the factors to be considered in its decision. Accordingly, we find no error in the trial court's decision and affirm.

Affirmed.

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

Wade Kevin CROOMS *v.* Keith CAPPS
d/b/a Total Lawn & Garden

CA 07-755 274 S.W.3d 364

Court of Appeals of Arkansas
Opinion delivered February 6, 2008

Schmidt Law Firm, PLC, by: *Heath Ramsey*, for appellant.

Lightle, Raney & Bell, LLP, by: *A. Watson Bell*, for appellee.

JOSEPHINE LINKER HART, Judge. The circuit court granted the motion to dismiss of appellee, Keith Capps, which appellee made at the close of the evidence offered by appellant, Wade Kevin Crooms, in his suit alleging that appellee damaged his truck. Appellant contends that this was error. Specifically, appellant argues that the court erred in finding that he failed to make a prima facie case of his measure of damages in accordance with Ark. Code Ann. § 27-53-401 (Repl. 1994), which provides in part that "[i]n all cases involving damage to motor vehicles, the measure of damages shall be the difference between the value of the vehicle immediately before the damage occurred and the value after the damage occurred . . . ." He asserts that he made his prima facie case by presenting an estimate of the cost of repairs to the truck. We agree with appellant and reverse and remand.

The proper motion to challenge the sufficiency of an opponent's evidence in a non-jury case is a motion to dismiss. *Rymor Builders, Inc. v. Tanglewood Plumbing Co.*, 100 Ark. App. 141, 265 S.W.3d 151 (2007). The court must decide whether, if it were a jury trial, the evidence would be sufficient to present to the jury, and 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. *Id.* In evaluating whether the evidence is substantial enough to make a question for the fact-finder, the circuit court may not assess the witnesses' credibility. *Id.*

In presenting his case to the circuit court, appellant testified that on May 4, 2005, he drove his 1997 S-10 Chevrolet pickup truck to the appellee's place of business to purchase a load of soil. An employee of appellee used a small bucket loader to load the truck, but during loading, a sixty- to seventy-pound clod of wet, hard dirt fell from the bucket and damaged the bed panel of the truck.

Appellant testified that at the time of the damage, he had owned the truck for almost a year; that he had purchased it from the original owner for $6500; and that it was in excellent condition, with very low mileage and no scratches or dents. He further testified that he traded the truck during the summer of 2005 and "took a loss on it when I traded it because of the damage," and as a trade-in, he "got about $2500." He further testified that he would not have objected to repairing, as opposed to replacing, the panel, but that repairing the panel was not what was recommended to him at the time he obtained an estimate of the damage. He testified that Suzette Thomas, who prepared the estimate, recommended that the panel be replaced instead of repaired because the panel was "bowed out."

Suzette Thomas, whose various duties in her employment included writing estimates for automobile repair, testified that on May 11, 2005, she prepared an estimate for replacing and painting the passenger-side bed panel of appellant's truck. The total was $2105.78, which included $1072.30 for parts and material; $868.00 for labor; $9.50 for "sublet repairs"; and $155.98 in tax. An itemized list of the work to be performed was introduced into evidence. Thomas testified that the decision to replace or repair the bed panel was "really a judgment call."

On cross-examination, however, Thomas admitted that she had no independent recollection of making the estimate. She agreed that the only way to know whether the estimate was correct was to actually perform the repairs. She also agreed that she based her estimate on what she saw and what she was told by appellant. Further, she agreed that it was possible that appellant could have asked her to replace the panel. Counsel for appellee then presented her with photographs of the truck, and she concluded that the

damage to the panel could have been repaired, as opposed to replacing the panel. When counsel asked how repairing the panel rather than replacing it would reduce the estimate, Thomas testified that, "[j]ust guessing, approximately the cost of the bed panel, which is $842.00, plus would not need to do the blending; approximately $1,000.00." She further testified that she had no independent recollection of why she indicated that the panel should be replaced, that her business did not perform any repairs to the truck, and that she did not know the value of the truck either before the damage or after the damage.

At the conclusion of appellant's case, appellee moved to dismiss, arguing that appellant failed to make a prima facie showing of damages in accordance with Ark. Code Ann. § 27-53-401, as there was no testimony about the value of the truck immediately before and after the damage. Appellant argued that the estimate established the difference in the value of the truck before and after the damage, and further noted that appellant also testified about the purchase price and the trade-in value of the truck. The circuit court granted appellee's motion to dismiss, and in its written order stated that appellant "failed to present proper evidence of the difference between the value of the vehicle immediately before the occurrence, and the value of the vehicle immediately after the occurrence . . . ." Appellant again argues on appeal that evidence of the cost of repairs was sufficient to establish a prima facie case of his measure of damages.

■ We reverse and remand the circuit court's decision. In *Zhan v. Sherman*, 323 Ark. 172, 913 S.W.2d 776 (1996), the Arkansas Supreme Court stated that, in accordance with Ark. Code Ann. § 27-53-401, the measure of damages to a motor vehicle is the difference between the value of the vehicle immediately before the damage occurred and the value after the damage occurred. However, the court further stated that when proving damages for property that was not a total loss, the difference in fair market value may be established by the reasonable cost of repairing the damaged property.

This proposition was aptly demonstrated in a case predating passage of the statute. In *Slaughter v. Barrett*, 239 Ark. 957, 395 S.W.2d 552 (1965), the trial court directed a verdict for the defendant on the ground that the plaintiff's proof failed to show the difference in the value of his car before and after the collision. There, the plaintiff, who was an automobile mechanic, described the specific replacements and repair work that were necessitated by

the collision, and the repair bill introduced into evidence reflected the labor and materials that went into the job. The Arkansas Supreme Court noted that it had frequently held that the difference in the market value of a vehicle before and after an accident may be established by proof of the amount paid in good faith for repairs made necessary by the collision. The court concluded that the plaintiff's testimony and the repair bill itself were sufficient to justify the trial court in submitting the question of damages to the jury, as the plaintiff's evidence made a prima facie case for the jury. The court noted further that the defendant was at liberty to go forward with rebutting proof if he thought that the cost of the repairs exceeded the difference in market value.

Similarly, in the case before us, appellant's testimony regarding the damage to his truck and Thomas's testimony regarding the cost of repairs, along with the repair estimate, presented a prima facie case of appellant's measure of damages. Appellee counters, asserting that this evidence was too speculative to establish a prima facie case. Appellee notes that Thomas did not remember making the estimate or why she indicated that the panel should be replaced, testified that it was judgment call, stated that she would not know whether the estimate was correct unless the repairs were made, testified that she based her estimate on what she was told by appellant and that he may have asked her to replace the panel, testified that the panel could be repaired rather than replaced, and testified that she did not know the value of the truck and guessed that the damages were approximately $1000 less if the panel was repaired.

We, however, disagree with appellee's assertion. Our cases give the factfinder some latitude in its decision in awarding damages when arriving at a fair-market-value figure and have not required exactness on the proof of damages. *Zhan, supra.* If it is reasonably certain that some loss has occurred, it is enough that the loss be stated only proximately. *Id.* The evidence presented by appellant did that, and accordingly, appellant made a prima facie case of the measure of damages.

Reversed and remanded.

HEFFLEY and MILLER, JJ., agree.

Michelle Logan JONES *v.* STATE of Arkansas

CA CR 07-352 274 S.W.3d 361

Court of Appeals of Arkansas
Opinion delivered February 6, 2008

William R. Simpson, Jr., Public Defender, *Don Thompson*, Deputy Public Defender, by: *Clint Miller*, for appellant.

Dustin McDaniel, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Michelle Logan Jones was convicted in a bench trial of possession of marijuana with intent to deliver and possession of drug paraphernalia with intent to use while in the course of and in furtherance of a felony drug offense. The court fined appellant $300, ordered her to pay court costs, ordered her to perform thirty hours of community service within six months, suspended her driver's license for six months, and placed her on probation for five years. Appellant's sole point on appeal is that the circuit court erred in denying her motion to suppress. We affirm.

On November 21, 2005, appellant was charged with felony possession of marijuana with intent to deliver and felony possession of drug paraphernalia with intent to use while in the course of and in furtherance of a felony drug offense. On June 2, 2006, appellant filed a motion to suppress her statement and physical evidence. On September 11, 2006, the circuit court simultaneously held a bench trial on the felony charges against appellant and a hearing on appellant's motion to suppress.

At the hearing, Michael Blevins, a North Little Rock police officer, testified that on the night of October 1, 2005, he was dispatched to investigate an anonymous call regarding loud music at the 2500 block of North Berkley. He said that he arrived at the location in his police car and saw two cars parked on the side of the street. He made contact with the occupants of the rear car and then made contact with those in the second car. Appellant was in the driver's seat of the second car with the windows down; there was also a passenger in the front seat. Officer Blevins testified that he asked appellant if she was playing loud music, to which she responded, "No." Officer Blevins testified that he then asked both appellant and her passenger if they "had anything illegal inside the car." Appellant responded, "Yes, sir, I have marijuana in my car." Officer Blevins asked them to step out of the car. He then asked appellant where the marijuana was, and she said it was in the passenger-side door. Officer Blevins testified that appellant then told him to look in the glove compartment, where he found another bag of marijuana. At that point appellant told Officer Blevins that there was more marijuana under the driver's seat. When he found a plastic baggie with marijuana, appellant said, "That's not all. Look in the brown paper bag." Officer Blevins found the majority of the marijuana with some scales and a marijuana pipe in a paper bag under the driver's seat. He arrested appellant and took her to the Levy substation where Detective John Nannen took her statement. In her statement, appellant admitted purchasing marijuana and possessing it with the intent to deliver.

Appellant argued in her motion to dismiss, after the State's presentation of its case, and at the close of all of the evidence that the marijuana and drug parapernalia seized from appellant's car as well as appellant's statement to Detective Nannen should be suppressed because Officer Blevins's question regarding whether she had "anything illegal" was impermissible under the Arkansas Rules of Criminal Procedure and the U.S. Constitution. The

circuit court denied appellant's motions to suppress, finding that appellant was not being detained when Officer Blevins was questioning her and that his questions were permissible under Rule 2.2(a) of the Arkansas Rules of Criminal Procedure because he was investigating a call about loud music. Appellant filed this appeal, arguing that the circuit court's holding regarding Rule 2.2(a) was erroneous.

In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court and proper deference to the circuit court's findings. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007). We reverse only if the circuit court's ruling is clearly against the preponderance of the evidence. *Id.*

The supreme court has explained that there are three types of encounters between police and private citizens.

> The first and least intrusive category is when an officer merely approaches an individual on a street and asks if he is willing to answer some questions. Because the encounter is in a public place and is consensual, it does not constitute a "seizure" within the meaning of the fourth amendment. The second police encounter is when the officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime. The initially consensual encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. The final category is the full-scale arrest, which must be based on probable cause.

Stewart v. State, 332 Ark. 138, 144, 964 S.W.2d 793, 797 (1998)(citing *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998)). The State does not argue that the encounter in this case was justified by either articulable suspicion or probable cause. Moreover, appellant does not dispute that the initial encounter between her and Officer Blevins to investigate the loud music was permissible under Rule 2.2. The dispute is whether Officer Blevins's additional question, concerning whether appellant "had anything illegal," was permissible under Rule 2.2. Appellant argues that an encounter under Rule 2.2 is limited by the purpose for which the encounter is permitted — in this

case, a report of loud music — and that further questioning about unrelated potential criminal activity is not permissible absent reasonable suspicion. *See* Ark. R. Crim. P. 3.1. The State contends that an encounter under Rule 2.2 is not so limited and that Officer Blevins's general inquiry did not present an additional intrusion upon appellant and was therefore permissible under Rule 2.2, which authorizes the officer "to request any person to furnish information."

Rule 2.2(a) provides that "[a] law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request." Ark. R. Crim. P. 2.2(a). The supreme court has clarified that an encounter under this rule is permissible "only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime." *Stewart v. State*, 332 Ark. 138, 146, 964 S.W.2d 793, 797 (1998); *see also Stevens v. State*, 91 Ark. App. 114, 208 S.W.3d 843 (2005), and *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000).

In determining the extent of permissible interruption that a citizen must bear to accommodate a law enforcement officer who is investigating a crime under Rule 2.2, the supreme court has stated that the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. *Baxter v. State*, 274 Ark. 539, 543, 626 S.W.2d 935, 937 (1982). To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. *Id.* Our case law has consistently held that Rule 2.2 authorizes an officer to request information or cooperation from citizens where the approach of the citizen does not rise to the level of being a seizure and where the information or cooperation sought is in aid of an investigation or the prevention of crime. *Wilson v. State*, 364 Ark. 550, 559, 222 S.W.3d 171, 179 (2006).

Here, Officer Blevins had authority under Rule 2.2 to approach appellant's car to investigate a particular crime, a complaint of loud music. After approaching her car, he asked her if she was playing loud music to which she responded, "No," and then asked her and her passenger if they "had anything illegal inside the

car." There is no evidence that Officer Blevins was any more overbearing or intimidating when he asked this particular question than when he asked his first question about the music. Indeed, he testified that it was merely a routine question that he always asked. Accordingly, we do not find Officer Blevins's additional inquiry to be outside the scope of Rule 2.2 or to have caused the encounter to rise to the level of a seizure. Therefore, we hold that the circuit court's ruling denying appellant's motion to suppress is not clearly against the preponderance of the evidence, and we affirm.

GLOVER and VAUGHT, JJ., agree.

Angela FLOYD *v.* A. Samuel KOENIG III, M.D., Albert S. Koenig III, P.A. d/b/a Family Medical Center

CA 07-728 274 S.W.3d 339

Court of Appeals of Arkansas
Opinion delivered February 6, 2008

Keith, Miller, Butler & Webb, PLLC, by: *Kristin L. Pawlik*, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *J. Michael Cogbill* and *Farrah L. Fielder.*

SAM BIRD, Judge. Appellant Angela Floyd appeals from the circuit court's order dismissing her complaint against Dr. Samuel Koenig III for failure to file her complaint within the applicable statute of limitations. Although appellant responded to Dr. Koenig's statute-of-limitations defense by claiming that the statute of limitations was tolled by the doctrine of fraudulent concealment, the circuit court rejected this argument, holding that appellant did not set out allegations of fraud in her complaint. Appellant argues on appeal that the circuit court erred in holding that Rule 9(b) of the Arkansas Rules of Civil Procedure, which requires that fraud be pleaded with particularity, applies to the doctrine of fraudulent concealment. Moreover, she claims that she pleaded sufficient facts in her complaint to establish fraudulent concealment and, therefore, that the statute of limitations in this case was tolled. We reverse the circuit court's order dismissing appellant's complaint and remand for further proceedings.

In cases where the appellant claims that the trial court erred in granting a motion to dismiss, appellate courts review the trial court's ruling using a de novo standard of review. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004). We will not reverse a finding of fact unless it is clearly erroneous. *Sanford v. Sanford*, 355 Ark. 274, 137 S.W.3d 391 (2003). We treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *Biedenharn v. Thicksten*, 361 Ark. 438, 441, 206 S.W.3d 837, 840 (2005). In viewing the facts in the light most favorable to the plaintiff, the facts should be liberally construed in plaintiff's favor. *Id.*

According to appellant's complaint, in the late summer of 1987, appellant, then twenty-three years old and unmarried, became pregnant with her second child. Dr. Koenig, who was her

family physician and the primary-care provider for her one-year-old son, provided prenatal care. During one of appellant's prenatal visits, Dr. Koenig suggested that appellant consider giving up her second child for adoption, said that he knew a family who would like to adopt, and told her that he could take care of all of the arrangements for the adoption. She agreed to the adoption, which was to be done anonymously. Appellant moved from Fort Smith to Tulsa, Oklahoma, in January 1988 in order to keep her pregnancy a secret from all but her parents and her aunt. Appellant gave birth to a baby girl on April 12, 1988, and executed the consent to adoption on April 13, 1988.

When appellant returned to Fort Smith after the birth, Dr. Koenig continued to treat appellant and her son. Appellant got married on September 28, 2003, and gave birth to her third child, a daughter, on February 20, 2004. Dr. Koenig assisted in the birth of this child. At this time, neither appellant's husband nor first-born child knew that appellant had given up the second child for adoption.

On March 27, 2006, appellant was contacted by Greg Whitsett, who, along with his wife Donna, had adopted appellant's daughter, named Rainy, in 1988. Appellant learned that, sometime in 1997, Dr. Koenig had released appellant's medical records, family history, and other identifying information, including her married name, address, date of birth, and social security number to Mr. Whitsett. The information released included medical records available at the time of Rainy's birth as well as information regarding appellant's and her son's care through 2006. Mr. Whitsett instructed appellant to tell Rainy that she did not want a relationship with her. When appellant hesitated to follow Mr. Whitsett's instructions, Mr. Whitsett threatened to reveal the facts of the adoption to appellant's husband and son. Thereafter, appellant told her husband and son the facts of the adoption.

Appellant filed a complaint against Dr. Koenig and Albert S. Koenig III, P.A., d/b/a Family Medical Center (hereinafter sometimes referred to together as "Dr. Koenig") on September 25, 2006, alleging invasion of privacy, public disclosure of private facts, negligence, and breach of fiduciary duty. Dr. Koenig moved to dismiss on the grounds that appellant's claims were barred by the three-year statute of limitations. Appellant responded, asserting that the statute of limitations was tolled because Dr. Koenig's failure to reveal his wrongful disclosure and the manner in which this disclosure was made amounted to fraudulent concealment. She

argued that the statute was tolled until she discovered that Dr. Koenig had revealed this confidential information to Mr. Whitsett without her permission. The court granted the motion and entered an order dismissing the case for failure to file the complaint within the applicable statute of limitations. The court stated in a letter that appellant's complaint did not set out allegations of fraud or facts that would support an allegation of fraudulent conduct on the part of the defendants.

Appellant's first point on appeal is that the circuit court erred in holding that she was required to plead fraud with particularity under Ark. R. Civ. P. 9(b). She argues that the doctrine of fraudulent concealment is not a cause of action but merely a response to the affirmative defense of statute of limitations. She asserts that, as a general rule, plaintiffs have no duty to anticipate affirmative defenses. While appellant is correct as a general matter and appellant was not required to allege fraud or fraudulent concealment in her complaint, Arkansas law does require appellant's complaint to contain facts sufficient to support the application of fraudulent concealment to toll the statute of limitations. *See Jones v. Central Ark. Radiation Therapy Inst., Inc.*, 270 Ark. 988, 607 S.W.2d 334 (1980); *see also Federal Deposit Ins. Corp. v. Deloitte & Touche*, 834 F. Supp. 1129 (E.D. Ark. 1992).

For her second point on appeal, appellant contends that she did plead facts sufficient to support the application of fraudulent concealment and that the statute of limitations was tolled in this case. The parties agree that the statute of limitations for appellant's causes of action is three years. *See O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997) (noting the longstanding Arkansas caselaw that a three-year statute of limitations applies to all tort actions not otherwise limited by law). The statute of limitations generally begins to run when the allegedly wrongful acts occurred — in this case, in 1997 when Dr. Koenig allegedly informed Mr. Whitsett about appellant's identity and medical history. *Courtney v. First Nat'l Bank*, 300 Ark. 498, 501, 780 S.W.2d 536, 538 (1989). However, fraud suspends the running of the statute of limitations until the party having the cause of action discovers the fraud, or should have discovered it by the exercise of reasonable diligence. *Delanno, Inc. v. Peace*, 366 Ark. 542, 545, 237 S.W.3d 81, 84 (2006). In order to toll the statute of limitations, the fraud perpetrated must be concealed. *Id.* The general rule of fraudulent concealment requires "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 conceals itself." *Id.* (quoting *Sheton v. Fiser*, 340 Ark. 89, 96, 8 S.W.3d 557, 562 (2000)).

However, in some situations, the law imposes upon a party a duty to speak rather than to remain silent in respect of certain facts within his knowledge, and the failure to speak is the *equivalent of fraudulent concealment* and amounts to fraud just as much as an affirmative falsehood. *Camp v. First Fed. Savings & Loan*, 12 Ark. App. 150, 154, 671 S.W.2d 213, 215 (1984); *see also Tech. Partners, Inc. v. Regions Bank*, 97 Ark. App. 229, 245 S.W.3d 687 (2006). The Arkansas Supreme Court has held that this rule is applicable under "special circumstances . . . such as a confidential relationship." *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 397, 653 S.W.2d 128, 134 (1983). It is this theory of fraudulent concealment that appellant argues applies in this case.

Appellant contends that her complaint alleges that she and Dr. Koenig had a special, confidential relationship; that Dr. Koenig wrongfully disclosed her medical records, her son's medical records, and her personal, identifying information to the adoptive parents in 1997; and that he had a duty to tell her that he had disclosed this information. She argues that Dr. Koenig's failure to speak is the equivalent of fraudulent concealment and tolled the statute of limitations until March 27, 2006, when Mr. Whitsett contacted her.

The question before us is whether a duty to speak arose in this case. A duty to speak arises only when under "special circumstances . . . where there is a confidential relationship." *Id.* Whether a duty to speak exists is determinable "by reference to all the circumstances of the case, and by comparing the facts not disclosed with the object and end sought by the contracting parties. The difficulty is not so much in stating the general principles of law, which are fairly well understood, as in applying the law to particular groups of facts." *Camp*, 12 Ark. App. at 155, 671 S.W.2d at 216.

In *Camp*, the appellant purchased a newly constructed house from a builder who had borrowed construction money from First Federal Savings and Loan. Unbeknownst to the appellant, the house was in a flood plain. The appellant argued that First Federal owed her a duty to disclose that the property she was purchasing was in a flood area. The bank argued that it had no confidential relationship with the appellant because it had merely loaned

construction money to the builder. We reversed the directed verdict on behalf of the bank and held that a jury should have had the opportunity to consider whether a confidential or other similar relationship existed between appellant and First Federal, thereby imposing upon First Federal a duty to speak.

In *Howard v. Northwest Arkansas Surgical Clinic, P.A.*, 324 Ark. 375, 921 S.W.2d 596 (1996), the supreme court reversed a summary judgment in a medical-malpractice case in which a needle was left by the defendant doctor in the plaintiff's breast during a biopsy, holding that there was a genuine issue of material fact as to whether the presence of the needle was fraudulently concealed from her and thus the statute of limitations tolled. The court noted that "[w]e have a defendant who had an obvious professional, positive duty to speak if he knew he had negligently left a foreign object in his patient, we have evidence that he was informed that the foreign object remained in the patient, and we have a plaintiff who could not, if the facts were as stated, have detected the fraud." 324 Ark. at 383, 596 S.W.2d at 600.

In *Roberts v. Francis*, 128 F.3d 647 (8th Cir. 1997), the court held that the statute of limitations was tolled where the doctor did not disclose to the plaintiff that, during bladder-removal surgery, he had also removed her only remaining ovary even though the plaintiff was not informed, either before or after the surgery, that removal of her ovary might be necessary. The court recognized that, under Arkansas law, a party may have an obligation to speak rather than remain silent, when a failure to speak is the equivalent of fraudulent concealment. The court noted the special nature of the doctor-patient relationship and held that the doctor was under a duty to inform the plaintiff that he removed her ovary, reasoning that "where the physician maintains primary control over the relevant information and the plaintiff is unaware of the alleged wrong, the physician has an affirmative duty of disclosure." *Id.* at 650.

In this case, viewing the facts asserted in the complaint in the light most favorable to appellant, Dr. Koenig was appellant's primary-care physician when she got pregnant with Rainy; he was also the primary-care provider for her one-year-old son; he provided prenatal care during appellant's pregnancy; he advised her to give the child up for adoption; and he arranged for an anonymous adoption after Rainy's birth. Moreover, Dr. Koenig continued to provide medical care for appellant and her son for over fifteen years after the adoption. In reviewing these allega-

tions, we recognize that the issue of fraudulent concealment is normally a question of fact that is not suited for dismissal by summary judgment or, as here, by a motion to dismiss. *See, e.g.*, *Tech. Partners, Inc.*, 97 Ark. App. at 237, 245 S.W.3d at 694. Our review of these allegations and the relevant law convinces us that appellant has alleged facts sufficient to support the application of fraudulent concealment. Therefore, the circuit court erred in granting the motion to dismiss in favor of Dr. Koenig.

Reversed and remanded.

GLOVER and VAUGHT, JJ., agree.

S.F. and D.F. *v.* ARKANSAS DEPARTMENT of HEALTH and HUMAN SERVICES

CA 07-735 274 S.W.3d 334

Court of Appeals of Arkansas
Opinion delivered February 6, 2008

Jeff Rosenzweig, for appellants.

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

Chrestman Group, PLLC, by: *Keith L. Chrestman*, attorney ad litem for the minor child.

DAVID M. GLOVER, Judge. S.F. and D.F. have appealed from a juvenile court's adjudication order finding their adopted son to be dependent-neglected. They raise a novel legal argument on appeal — that they were not at fault because they followed an attorney's advice before they placed the child in harm's way. We affirm the circuit court's decision.

Appellants are the biological grandparents of G.A., born on May 14, 2005, to their daughter, K.A., and her husband, T.A. The court found G.A. to be dependent-neglected on October 3, 2005, as a result of life-threatening abuse that he suffered while in his biological parents' care. He suffered multiple retinal hemorrhages, multiple brain hemorrhages (resulting in permanent damage), an injury to his clavicle, and a fracture of his tibia. With the biological parents' consent, appellants adopted G.A. on August 1, 2006, and the juvenile case was closed.

In February 2007, DHS opened another investigation because appellants had returned the child to his biological parents' home. DHS filed a dependency-neglect petition on March 8, 2007. Appellants responded that they had relied on the advice of counsel and stated that the court's earlier findings that the child had been abused were erroneous.

A hearing was held on May 11, 2007. Appellants stipulated that the child had been in K.A.'s care for a period of time and in the presence of T.A., who was in the military and in Iraq at the time of trial. They argued that they had relied upon the advice of the biological parents' attorney in returning the child to his biological

mother. The attorney testified that he had represented K.A. and T.A. in the juvenile case and that he had advised them, after the adoption, that they could legally have contact with the child if appellants agreed. He could not remember whether appellants were present during those conversations. He admitted that his legal advice was erroneous. *See* Arkansas Code Annotated section 9-27-353 (Supp. 2007), which provides in relevant part:

> (e)(1) It shall be the duty of every person granted custody, guardianship, or adoption of any juvenile in a proceeding pursuant to or arising out of a dependency-neglect action under this subchapter to ensure that the juvenile is not returned to the care or supervision of any person from whom the child was removed or any person the court has specifically ordered not to have care, supervision, or custody of the juvenile.
>
> (2) This section shall not be construed to prohibit these placements if the person who has been granted custody, guardianship, or adoption obtains a court order to that effect from the juvenile court that made the award of custody, guardianship, or adoption.
>
> (3) Failure to abide by subdivision (e)(1) of this section is punishable as a criminal offense pursuant to § 5-26-502(a)(3).

K.A. testified that her parents had returned the child to her in August 2006 and that T.A. had stayed at their home while he was on temporary leave. She said that her attorney had advised her, "after the adoption was final, that we were through with him and that T. could basically walk up to the DHHS with G. and wave him around." She said that her parents were present on some of the occasions when her attorney gave her legal advice.

S.F. stated that she had not known she was doing anything wrong by permitting K.A. to take care of G.A. because she had relied on the attorney's advice. She also said that, although she would abide by the court's orders, she did not believe that K.A. or T.A. had actually harmed the child.

Emily Hudkins, an investigator with DHS, testified that, when she first talked to appellants in February 2007 about the child's location, they were dishonest and would not admit that he was with K.A.; eventually, they admitted that they had given him to her. She stated that she was involved in the previous juvenile-court case, during which she advised appellants that they could not return the child to T.A. or K.A.

Kay Higginbotham, a caseworker with DHS, testified that, at a "staffing" on June 23, 2006, she discussed appellants' decision to adopt the child and made it clear that K.A. could only have supervised visitation with G.A.; that he could never be returned to her; and that T.A. could have no contact with him. She said that appellants knew that the child could not go back to his biological parents and that they did not indicate that they planned to return him.

Appellants' attorney urged the court to interpret the juvenile code as permitting a child to be adjudicated dependent-neglected without anyone's being "at fault" and asked the court not to make a finding of fault. He argued that the "advice-of-counsel" defense, which has been raised in malicious-prosecution and criminal cases, should apply here. In response, appellee's attorney argued that there was no excuse for not following the law; that the attorney giving the erroneous advice was not appellants' attorney; and that appellants had apparently planned from the beginning to return the child to his biological parents, even though they represented otherwise in the adoption proceeding.

From the bench, the court stated that appellants had neglected G.A. and had left him in a risky situation:

> The F.s, in the opinion of this Court, made a decision to disregard the fact that their daughter and son-in-law had been parents of a child who was removed pursuant to a finding of dependency/neglect. They chose to disregard the fact that there was no certainty as to which parent had inflicted the physical abuse, that either or both parents were still potentially the perpetrator of the physical abuse. I've heard no testimony today that eliminates K. as a potential perpetrator. The Court made it clear back in 2005 that both parents were considered as potential perpetrators. The grandparents chose to rely on second hand legal advice, potentially some direct legal advice, from somebody who was not their attorney, to assume that because a DHS case was closed and because an adoption decree had become final, that they were no longer required to comply with the conditions that had been in place, clearly by their own admission, during the interlocutory period, which included no unsupervised contact with K.; nor any contact with the father. And to suddenly believe that well, because the adoption is final, that those conditions were no longer valid. That assumption ignores the provisions of Arkansas Code 9-27-353, which provides:

> It should be the duty of every person granted custody, guardianship, or adoption of any juvenile in a proceeding pursuant to or arising out of a dependency neglect action, under this subchapter to insure that the juvenile is not returned to the care or supervision of any person from whom the child was removed.

> The F.s are not attorneys, but they are deemed to be bound by the law of the State of Arkansas. The Court believes that the decision by the F.s to allow G. to, basically, be returned to the custody and supervision of his mother, and thereby at times to his father, does under the Arkansas Juvenile Code, under the sections previously cited, constitute neglect, and I find that G is a dependent/neglected juvenile for those reasons.

In the adjudication order entered on May 22, 2007, the court found the child to be dependent-neglected because appellants had placed him back in the home of K.A., where T.A. had contact with him. The court stated that, although appellants claimed that they had relied on the advice of an attorney that, once the adoption was finalized, they could do whatever they wished, they disregarded the previous findings of the court that the biological parents had committed dependency-neglect and that the abuse could have been caused by either or both parents. The court found that appellants had violated Ark. Code Ann. §§ 9-27-303(36)(A)(vi), 9-27-303(36)(A)(vii), and 9-27-353(e)(1) (Supp. 2007). The court stated that the goal would be continued placement of the child in appellants' home and that K.A. would have supervised visitation for no more than two three-hour visits per week. The court stated that T.A. could have no contact with G.A. but could, when he returned from Iraq, ask the court to modify the visitation order. The court directed appellants to attend counseling and instructed DHS to submit a case plan. Appellants filed this appeal.

Appellants argue on appeal that the trial court erred in refusing to accept their advice-of-counsel defense and ask us to reverse that decision and to modify the circuit court's order accordingly. They cite no cases in the context of juvenile proceedings to support this argument but contend that the advice-of-counsel defense, as applied in malicious-prosecution and criminal cases, should apply here. In malicious-prosecution cases, the advice-of-counsel defense applies if the parties have made a full disclosure of all relevant facts to competent counsel and have acted

in bona fide reliance thereon. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). In criminal cases, the defense may apply if the person has fully disclosed all material facts to his attorney before seeking advice and has actually relied on his counsel's advice in the good-faith belief that his conduct was legal. *Covey v. U.S.*, 377 F.3d 903 (8th Cir. 2004).

We decline to apply the defense in this case. First, appellants did not have an attorney-client relationship with the attorney representing the biological parents. Further, the trial court's order made no finding as to any level of intent on appellants' part, which was appropriate given that a finding of dependency-neglect does not require a showing of mens rea. An advice-of-counsel defense is not recognized in juvenile proceedings, in which the touchstone is the juvenile's best interest, not the defendant's intention. *See* Ark. Code Ann. § 9-27-302 (Supp. 2007). Because the juvenile code focuses on the effect of the parents' actions on the child, an attorney's advice to the parents is not relevant to whether the child is dependent-neglected. Even the most well-intentioned behavior, if it threatens the child's well-being, can result in an adjudication of dependency-neglect.

The only possible effect of a ruling in appellants' favor would be to perhaps reduce the stigma of the dependency-neglect finding. We refused to take such a step in *Richardson v. Arkansas Department of Human Services*, 86 Ark. App. 142, 143-44, 165 S.W.3d 127, 128 (2004):

> We first address Richardson's argument that this case is not moot because the relief she seeks is the erasure of the judicial finding of parental unfitness. While we might agree, as does DHS, that such a finding might be "stigmatizing," we believe that this argument reflects a fundamental misunderstanding of the purpose of our appellate jurisdiction. It is not enough that Richardson disagrees with a finding of the trial court; for us to review it, there must exist a justiciable controversy that our decision will settle. *See Mastin v. Mastin*, 316 Ark. 327, 329, 871 S.W.2d 585, 586 (1994). To put it another way, a case is moot when any decision rendered by this court will have no practical *legal* effect on an existing legal controversy. *K.S. v. State*, 343 Ark. 59, 31 S.W.3d 849 (2000). (Emphasis added.) Here, Richardson has already regained custody of A.C., so a decision on the merits, either affirming or reversing the trial court, will have absolutely no legal effect on the issue of A.C.'s custody.

> We are aware that there are exceptions to the rule that the appellate courts of Arkansas do not decide cases that are moot, render advisory opinions, or answer academic questions. *Campbell v. State*, 300 Ark. 570, 781 S.W.2d 14 (1989). The most notable exceptions are cases that involve the public interest or tend to become moot before litigation can run its course, or situations where a decision might avert future litigation. *Id.* However, given the fact that this case turns not on a principle of law, but rather on the adequacy of the evidence to support a trial judge's findings of fact, we hold that the instant case does not embrace an issue of public interest. Furthermore, we do not believe that adjudications of dependent neglect are necessarily of such short duration that they will evade appellate review. Finally, we do not believe that our decision today could help avert future litigation in this case. If DHS indeed does again become involved in A.C.'s life, which we certainly cannot foresee, it will be because of facts and circumstances that are not presently before us. We are not unsympathetic to the terrible tragedy that has befallen Ms. Richardson and A.C. Nor are we unmindful that a finding of parental unfitness is an especially stinging blow to a person who already has suffered so much. However, decisions of an appellate court can do nothing to assuage the personal pain of all those involved, nor serve as an imprimatur of Ms. Richardson's parenting abilities.

The same reasoning applies here.

[redacted] We also hold that the trial court did not clearly err in finding that appellants violated Ark. Code Ann. § 9-27-303(36)(a)(vi) and (vii). The burden of proof in a dependency-neglect proceeding is a preponderance of the evidence. *Donahue v. Ark. Dep't of Health & Human Servs.*, 99 Ark. App. 330, 260 S.W.3d 334 (2007). Although our review is de novo, we will not reverse the circuit court's findings unless they are clearly erroneous. *Id.* The definition of "neglect" in Ark. Code Ann. § 9-27-303(36) includes:

> (vi) Failure, although able, to assume responsibility for the care and custody of the juvenile or to participate in a plan to assume the responsibility; or
>
> (vii) Failure to appropriately supervise the juvenile that results in the juvenile's being left alone at an inappropriate age or in inappropriate circumstances, creating a dangerous situation or a situation that puts the juvenile at risk of harm.

On this record, we cannot say that the trial court's finding that appellants neglected the child is clearly erroneous.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Tana Rachelle DOWNUM *v.* Brad Don DOWNUM

CA 07-533 274 S.W.3d 349

Court of Appeals of Arkansas
Opinion delivered February 6, 2008

Cullen & Co., PLLC, by: *Tim Cullen* and *Kami S. Wentz*, for appellant.

Woodard Law Firm, PLC, by: *Ernie Woodard*, for appellee.

D.P. MARSHALL JR., Judge. This divorce case is about custody and relocation. The dispositive question presented is whether the circuit court erred in concluding that Ms.

Downum committed a constructive fraud — an innocent misrepresentation by silence that justified the court vacating the custody provision of the Downums' agreed divorce decree. Convinced that the record contains insufficient evidence of a constructive fraud, we reverse and remand.

I.

This is a case where the calendar is important. The Downums were married for almost four years. Their son, K.D., was born in 2002. They separated in May 2005. Ms. Downum hired counsel and filed for divorce; Mr. Downum filed an answer pro se. In early November 2005, Ms. Downum came to Mr. Downum with a proposed divorce decree. The proposal gave Ms. Downum custody of K.D. and included the circuit court's standard visitation for Mr. Downum: every other weekend, one day midweek from after school to bedtime, alternating holidays, and time during the summer. Mr. Downum also had a right of first refusal to be K.D.'s babysitter whenever Ms. Downum needed one.

When Ms. Downum proposed the decree, which was a settlement of all the parties' disputes in the divorce, Mr. Downum knew that his estranged wife wanted to find a new job. Her boss at Tyson Foods was Mr. Downum's long-time friend, and this circumstance created an uncomfortable situation. Mr. Downum did not ask Ms. Downum whether she was considering looking for a job outside northwest Arkansas, where the parties lived. Ms. Downun did not tell Mr. Downum that she might consider potential jobs outside northwest Arkansas. Based on the proposed visitation schedule, Mr. Downum believed that relocation was not a possibility. In early November, Mr. Downum signed and approved the terms of the decree. He also waived the right to appear at the hearing on the decree.

Ms. Downum worked in accounting. About ten days after Mr. Downum approved the decree, Ms. Downum was actively looking for a new job. She looked for jobs in northwest Arkansas, including at Coca-Cola, Frito Lay, and other Wal-Mart vendors, as well as with various hospitals. She also used careerbuilder.com to investigate other job prospects. She sent out e-mails to employers who had open accounting positions. These potential employers included some in northwest Arkansas, Louisiana, and Tennessee. Ms. Downum did not tell Mr. Downum about the details of her job search. On December 1st, Ms. Downum and her counsel

appeared before the circuit court, which approved and entered the decree. We have no record of what was said at the hearing. Mr. Downum did not appear.

The next day, December 2nd, Fresenius Medical Care in Belle Chase, Louisiana, responded to one of Ms. Downum's November e-mails. During the next few weeks, Ms. Downum and Fresenius exchanged information about the position and her qualifications. She interviewed with the company. In late December, Ms. Downum accepted the job. It paid $6000 a year more than her former job and required less hours at work. She moved with K.D. to Louisiana in January 2006.

Mr. Downum hired counsel and immediately moved the circuit court to vacate the custody provision of the parties' divorce decree based on Ms. Downum's alleged fraud about her job plans. Mr. Downum also asked the court to consider what was in K.D.'s best interest and then award custody of their son to him. Ms. Downum responded, denying any legal basis to vacate the decree or change custody. K.D. was not yet in school, and so while the parties waited several months for a hearing, by agreement the child spent time with his mother in Louisiana and father in Arkansas.

The circuit court heard Mr. Downum's Rule 60(c)(4) motion first. The following additional important facts emerged at the hearing. Ms. Downum acknowledged that, had the parties' positions been reversed, she would have wanted to know that Mr. Downum was contemplating possible new jobs that would require relocation. Mr. Downum testified that, if he had known Ms. Downum was considering any jobs outside northwest Arkansas, then he never would have agreed for her to have custody of K.D.

After receiving all the evidence, the circuit court ruled from the bench and vacated the custody provision of the decree. The court stated:

> In considering the defendant's motion to vacate the Court's decree as to custody of the parties' minor child, I considered the undisputed, uncontroverted facts that the defendant signed a waiver on November 9th, 2005, which the plaintiff submitted to him, and that on that date he also signed the parties' divorce decree; on November 19th, 2005, the plaintiff sent an e-mail to what became her current employer, Defendant's 3; this Court entered its decree, approved by the parties, on December 1st, 2005; and on December 2nd, 2005, the plaintiff had telephone contact with her current

> employer, which resulted in an interview with that employer on December 9th, 2005; given that the plaintiff and defendant both acknowledge that the defendant signed the waiver, admitted as Defendant's Exhibit 1, based on their conversations and the proposed arrangement regarding custody and visitation.
>
> As to the law applied in this case, I reviewed the decision of the Arkansas Supreme Court in the case of *Dickson v.* [*Fletcher*]. Counsel, that citation is 206 S.W.3d 229. In that opinion the court said that 'This court has held that constructive fraud for the breach of a legal or equitable duty to another warrants setting aside or modifying a judgment.'
>
> It is the ruling of this Court that given the facts outlined the plaintiff had an equitable duty to notify the defendant of any material change regarding the custody of their child prior to the entry of this Court's decree and that that was not done. Therefore, the defendant's petition to set aside the decree as to custody is granted.

After a break, the court heard testimony about what custody arrangement would be in K.D.'s best interest. The court concluded that, in light of its Rule 60 decision, it had to make an initial custody decision. The court then ruled that it was in K.D.'s best interest to be in his father's custody. The court filed orders on all these points in due course. Ms. Downum's timely appeal brings the matter before us.

II.

Our standard of appellate review has several layers. We review the circuit court's Rule 60 decision to vacate part of the decree for an abuse of discretion. *Grubbs v. Hall*, 67 Ark. App. 329, 332, 999 S.W.2d 693, 694 (1999). A circuit court abuses its discretion when it makes an error of law. *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 20-21, 894 S.W.2d 897, 900 (1995). We evaluate the circuit court's factual findings about the elements of constructive fraud for clear error. Ark. R. Civ. P. 52; *Knight v. Day*, 343 Ark. 402, 405, 36 S.W.3d 300, 302 (2001). If the circuit court clearly erred about Ms. Downum's alleged pre-decree intention to move, then no constructive fraud occurred, and the court's grant of relief under Rule 60 was an abuse of discretion.

III.

To establish fraud in Arkansas, a plaintiff must prove that the defendant intentionally misrepresented a material fact and that the

plaintiff was damaged by justifiably relying on that misrepresentation. *Roach v. Concord Boat Corp.*, 317 Ark. 474, 476, 880 S.W.2d 305, 306-07 (1994). In some fraud cases, however, the plaintiff need not prove the defendant's intent to deceive — constructive fraud, sometimes called fraud in the law, may exist in the complete absence of dishonesty of purpose, evil intent, or moral guilt. *Ibid.* Unlike actual fraud, constructive fraud is based on a breach of a legal or equitable duty that the law declares to be fraudulent because of its tendency to deceive others. *Ibid.* Mr. Downum had to prove each factual element of fraud except intent by a preponderance of the evidence. *Ibid.*

Here, the circuit court concluded that Ms. Downum committed constructive fraud by misrepresenting her intention to continue living in northwest Arkansas. In its order vacating the divorce decree, the circuit court found that she "had an equitable duty to notify [Mr. Downum] of any material change regarding the custody of the parties' minor child (her intent to move to Belle Chase, Louisiana) prior to the entry of this Court's decree, and she failed to do so." Considering the entire record we hold that the circuit court clearly erred by concluding that Ms. Downum intended to move to Louisiana before the decree was entered. Considering the governing law, this factual error undermines the circuit court's legal conclusion that constructive fraud occurred. *Roach*, 317 Ark. at 477, 880 S.W.2d at 307.

The circuit court relied on *Dickson v. Fletcher*, 361 Ark. 244, 250-51, 206 S.W.3d 229, 333 (2005). In that divorce case, the husband failed to disclose that he owned Exxon stock in his sworn answers to discovery or in his affidavit of financial means. He also omitted any reference to the stock in his trial testimony. The circuit court found that the husband had committed a constructive fraud and modified the parties' divorce decree. Dr. Dickson had a legal duty to answer discovery requests, and testify, truthfully and completely.

As in *Dickson*, Ms. Downum's alleged constructive fraud was based on a nondisclosure, rather than an affirmative misrepresentation. Silence can be the basis of a constructive fraud. *Ward v. Worthen Bank & Trust Co., N.A.*, 284 Ark. 355, 359-60, 681 S.W.2d 365, 368 (1984). Generally, however, liability for a nondisclosure may be found only in special circumstances. *Ibid.* Thus Mr. Downum had to prove more than Ms. Downum's

silence. He had to prove that she concealed a material fact known to her and that she had a duty to communicate that fact to him. *Ibid.*

Unlike the husband in *Dickson*, Ms. Downum did not give incomplete answers to discovery requests before the decree. She did not omit facts from any pre-decree pleading or court document. She did not lie under oath before the court entered the divorce decree. Ms. Downum did not tell Mr. Downum that she had applied for in-state and out-of-state jobs in mid-November. Nor did she tell him that she might move out of the area if she was offered a better job in a different state. The possibility she might relocate, however, was not a "fact" that Ms. Downum had a duty to disclose to Mr. Downum before the divorce decree was entered.

In general, fraud actions must be based on misrepresentations related to a past event or a present circumstance, not on an intention or a prediction about a future event. *P.A.M. Transport, Inc. v. Arkansas Blue Cross and Blue Shield*, 315 Ark. 234, 240, 868 S.W.2d 33, 36 (1993). If Ms. Downum had decided to move away from northwest Arkansas in November, then her silence about that decision in the face of the proposed visitation schedule could be a basis for fraud. *Ibid.* If, however, Ms. Downum honestly represented her then-existing intention to remain in northwest Arkansas when she presented the proposed decree to Mr. Downum and when she presented it to the circuit court, then her nondisclosure cannot be the basis of fraud simply because she later decided to move. *Undem v. First Nat'l Bank*, 46 Ark. App. 158, 165, 879 S.W.2d 451, 454 (1994); *Starling v. Valmac Industries, Inc.*, 589 F.2d 382, 386-87 (8th Cir. 1979). Put another way, this would be a different case if Ms. Downum had decided to relocate before the circuit court entered the decree.

Contrary to the circuit court's ruling, Mr. Downum did not prove by a preponderance of the evidence that Ms. Downum intended to move to Louisiana at any point before the decree was entered. Ms. Downum testified that, as of December 1st, her only contact with Fresenius or any other potential employer — including several in northwest Arkansas — was a bunch of e-mail job applications. There was no evidence that any potential employer had responded to her e-mail inquiries before December 2nd. She did not quit her former job at Tyson until late December 2005. And there was no evidence that she had any definite plan to move to Louisiana until about three weeks after the divorce was final. At most, Mr. Downum proved that Ms.

Downum had not foreclosed the possibility of moving somewhere out of state if offered a better job there. Such an uncertain notion cannot be the basis of fraud. *Delta School of Commerce, Inc. v. Wood*, 298 Ark. 195, 199-200, 766 S.W.2d 424, 426-27 (1989). A possibility is not a material fact.

Divorce proceedings usually mean that the status quo is undesirable to one or both spouses. Each divorcing party is contemplating changes in their lives at the time of the decree. Requiring each party to disclose *sua sponte* every possibility that might lead to a change of circumstances in the future would impose a burden both too heavy and unworkable. Granted, Ms. Downum acknowledged at the hearing that, if the tables were turned, she would have liked for Mr. Downum to have told her that he had sent an e-mail to a potential out-of-state employer. A litigant's preference for complete information, however, does not create a legal or equitable duty.

Mr. Downum did not prove constructive fraud, moreover, because he did not show that he justifiably relied on Ms. Downum's nondisclosure. In cases of nondisclosure, especially when the parties are in an adversarial position, each has a duty to investigate the circumstances and protect his own interests. *Kinkead v. Union Nat'l Bank*, 51 Ark. App. 4, 14-15, 907 S.W.2d 154, 160 (1995). Here, Mr. Downum knew that Ms. Downum was looking for a new job because she worked for his long-time friend at Tyson. Visitation, babysitting, and the normal considerations of custody were certainly issues in the divorce proceeding. Yet Mr. Downum did not ask Ms. Downum informally if she planned to move. Unlike in the *Dickson* case, he propounded no pre-decree discovery. The law does not allow Mr. Downum to omit all inquiry and then complain that Ms. Downum did not volunteer information. *Kinkead, supra.*

Finally, in considering whether Ms. Downum violated any legal or equitable duty, we are mindful that the issue here is relocation. Our supreme court has made it clear that Arkansas law now presumes that a custodial parent's decision to move is in the minor's best interest and that a move is not a material change in circumstances. *Hollandsworth v. Knyzewski*, 353 Ark. 470, 476-85, 109 S.W.3d 653, 657-63 (2003). Ms. Downum urges us to reverse because, she argues, the circuit court's decision circumvents *Hollandsworth.* Ms. Downum had no duty to advise Mr. Downum that Arkansas law presumes that she could relocate after the divorce

without affecting custody. We decline to hold, however, that *Hollandsworth* means that a parent's pre-divorce plans about relocation are beyond the reach of our general law of fraud. The circuit court clearly erred in finding that Ms. Downum had a pre-decree intention to move. Mr. Downum, moreover, made no inquiry about relocation. In these circumstances, Ms. Downum had neither a legal nor an equitable duty to disclose mere possibilities about her future. We therefore need not decide this case on the broader ground urged.

IV.

The confluence of important dates made it appear in hindsight that Ms. Downum planned to relocate before the circuit court approved the decree. But the record did not sustain that appearance. The preponderance of the evidence does not demonstrate a pre-decree plan to move. It demonstrates a possibility of relocation. Ms. Downum's nondisclosure of a possibility that Mr. Downum never inquired about was not constructive fraud. The circuit court erred in concluding otherwise, and therefore abused its discretion by granting Rule 60(b) relief. We reverse and remand with instructions to return custody of K.D. to Ms. Downum and provide reasonable visitation to Mr. Downum considering all the material circumstances.

Reversed and remanded with instructions.

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

HART, J., concurs without opinion.

BIRD, J., concurs.

ROBBINS, GRIFFEN, and MILLER, JJ., dissent.

SAM BIRD, Judge, concurring. I agree with the decision to reverse the trial court's change-of-custody order. I also agree that the trial court clearly erred in finding that Ms. Downum had an equitable duty to notify Mr. Downum of her intent to move to Louisiana prior to the entry of the decree. But I write separately to express my concern that the trial court's decision circumvented the law of *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), and that today's decision by this court impermissibly expands the *Hollandsworth* factors to be considered in relocation cases.

The non-custodial parent moving for a modification of custody has the burden of showing a material change of circumstances sufficient to warrant a change in custody, *Middleton v.*

Middleton, 83 Ark. App. 7, 113 S.W.3d 625 (2003), and the relocation of a primary custodian and children alone is not such a material change in circumstances. *Hollandsworth*, *supra*. Under *Hollandsworth*, there is a presumption in favor of relocation for custodial parents with primary custody, and the noncustodial parent has the burden to rebut the presumption. *Id*. The polestar in making a relocation determination is the best interest of the child, and the court should take into consideration the following matters:

> (1) the reason for the relocation; (2) the educational, health, and leisure opportunities available in the location in which 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 487, 109 S.W.3d at 663-64.

In his petition to vacate the divorce decree and award of custody, Mr. Downum alleged that Ms. Downum had fraudulently induced him into not contesting the divorce and custody award by not informing him that she would move, had a desire to move, or was entertaining employment options that would require relocation. He prayed that the divorce decree be vacated and that he be awarded custody. Alternatively, he asked that the decree be modified to award him custody based upon a material change in circumstances and the child's best interests. Ms. Downum denied the allegations regarding fraudulent inducement, and she asserted that there was no legal or factual basis for vacating the divorce decree. She affirmatively stated that there had been no material change in circumstances that would justify a change in custody, citing the *Hollandsworth* holding that relocation alone does not constitute a material change in circumstances.

I agree with Ms. Downum's argument on appeal that the allegation of constructive fraud as a basis for vacating the previous decree and making an initial determination of custody was merely a means of circumventing the law of *Hollandsworth*. This is a simple relocation case in which Ms. Downum, the custodial parent, was entitled to a presumption in favor of relocation with the child. Mr. Downum failed to rebut that presumption because he presented no material change of circumstance to justify a change of custody.

I strongly disagree with the majority's implication that, had Ms. Downum decided to relocate before the circuit court entered its decree, the trial court would have been justified in vacating the agreed decree and award of custody to Ms. Downum. To hold that a divorcing spouse, who may subsequently become the custodial parent, has a duty to disclose his or her relocation plans to the other spouse before the entry of a divorce decree will open a Pandora's box in future cases, requiring the relocating party to prove, as a condition of relocating, the wholly irrelevant factor of when he or she made the decision to relocate. This is not the law under *Hollandsworth* and we should not make it the law in this case.

The record of this case contains absolutely no evidence that rebuts the *Hollandsworth* presumption in favor of Ms. Downum's right to relocate with her child to Louisiana, and I would reverse the trial court's decision on that basis alone, without regard for when she made the decision to do so.

WENDELL GRIFFEN, Judge, dissenting. This appeal presents three related issues. First, did the trial court err when it found that Ms. Downum committed constructive fraud? Second, if the constructive-fraud finding was not clearly erroneous, did the trial court abuse its discretion by vacating a previous order that awarded custody of the parties' son to Ms. Downum? Finally, did the trial court err by awarding custody of the child to Mr. Downum?

I dissent from the decision announced by the majority opinion because the trial court did not clearly err in determining that Ms. Downum committed constructive fraud. The trial court's decision to vacate the previous custody award was not an abuse of discretion. And, the trial court's decision to award custody to Mr. Downum was not clearly erroneous.

Background Facts

Ms. Downum filed for divorce against Mr. Downum on August 19, 2005. After Mr. Downum filed a *pro se* answer, Ms. Downum proposed and Mr. Downum signed a waiver of appearance and an agreed divorce decree on November 9, 2005, giving primary custody of Koel, their son who was born in August of 2002, to Ms. Downum. Mr. Downum testified that he was not sure whether to sign the waiver of appearance but did so, in part, because Ms. Downum told him that she would work with him regarding visitation. Pursuant to the precedent that Ms. Downum

prepared and presented to the trial judge, Mr. Downum was to have standard visitation, including weekly mid-week visitation. In addition, the parties agreed that Ms. Downum was to check with Mr. Downum first if she needed a babysitter. A hearing was set for December 1, 2005.

Ms. Downum claims that she sent a "flurry of blind" e-mails on or around November 20, 2005, to various employers in northwest Arkansas; Memphis, Tennessee; and Belle Chase, Louisiana (where her cousin and friends live). As the trial court observed, documentary evidence of only the Belle Chase e-mail was submitted as evidence (which was secured by Mr. Downum).

When Ms. Downum presented the precedent to the trial judge, she did not inform Mr. Downum or the trial judge that she was seeking a job outside of Arkansas. On December 1, the trial judge approved the parties' agreement and entered the divorce decree. Ms. Downum claims that the next day, December 2, she received her first response from Fresenius Medical Care, in Belle Chase, with whom she ultimately accepted employment. Ms. Downum moved to Belle Chase in January 2006 and has since lived there with her cousin.

Ms. Downum testified that the November 20 e-mail was of no consequence and that it was not important to inform Mr. Downum of the e-mail, even though he had previously signed the waiver and even though she admitted that she told Mr. Downum that she would work with him regarding visitation. Ms. Downum denied that she knew, prior to the divorce, that she would be moving. She admitted that she did not tell Mr. Downum before the divorce that she was seeking employment out of state or that she intended to move out of state, essentially because she did not know whether she would actually get a job out of state. However, she admitted that she knew it was a possibility that she might move out of state. She also admitted that if the situation had been reversed she would have expected to be informed that Mr. Downum had e-mailed a job inquiry to a prospective out-of-state employer.

Further, Ms. Downum admitted that she did not tell the trial judge on December 1 that she was actively seeking employment out of state because she "wasn't seriously thinking about moving at that time" and did not seriously think about moving until she received a formal offer of employment. According to Ms. Downum, she did not decide until December 22 to move.

The majority opinion does not mention, but it is certainly relevant to our review, that prior to the custody hearing, Mr. Downum submitted requests for interrogatories, asking Ms. Downum in numerous and very explicit ways to specify the first date that she considered leaving the state and the first contact she had with Fresenius, regardless of who initiated the contact. *Ms. Downum listed December 2 as her first contact date (the day after the divorce hearing), not the November 20 e-mail.* She gave various explanations for this omission: that she did not know the date she sent her first e-mails; that, she thought the word "contact" meant "a two-way conversation"; and that she thought the question asked about when she actually spoke to Fresenius. Ms. Downum asserted that she thought the interrogatory that asked when she first had "any inclination whatsoever to leave" Arkansas "for any reason whatsoever" meant the date "there was a verifiable chance that there's a possibility I could have a job with another company."

Additionally, Ms. Downum admitted that she answered "Not applicable" and that she failed to list CareerBuilder in her response to an interrogatory that requested that she provide information on any employment agency or services that she had contacted within the past two years. She could not remember why she answered the interrogatory in that manner, but she believed that everything was "above board" and that she would not have felt deceived if she had been Mr. Downum.

Constructive Fraud

Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt or the valid reason, the law declares fraudulent because of its tendency to deceive others; neither actual dishonesty or purpose nor intent to deceive is an essential element of constructive fraud. *See South County, Inc. v. First Western Loan Co.*, 315 Ark. 722, 871 S.W.2d 325 (1994). Here, the trial court weighed the credibility of the witnesses, applied the correct law concerning constructive fraud, and objectively determined that Ms. Downum committed constructive fraud because she had an equitable duty to inform Mr. Downum of any material change regarding the custody of Koel prior to entry of the divorce decree — specifically, her efforts to obtain employment outside Arkansas — and she failed to do so. *See, e.g., Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005) (holding that an ex-husband had a legal and an equitable duty to disclose, at the

time of the divorce, the fact that he owned stock, and setting aside the marital property provision of the divorce decree because he failed to do so).

The trial court here had ample evidence to support the conclusion that Ms. Downum breached an equitable duty to notify Mr. Downum and the court that she was seeking employment outside the area that was reasonably accessible for Mr. Downum insofar as the visitation and related baby-sitting care aspects of the divorce decree were concerned. It was undisputed that Ms. Downum presented Mr. Downum with a waiver of appearance and proposed divorce decree on November 9, 2005. The proposed decree called for Ms. Downum to have primary custody, and specified that Mr. Downum would have mid-week visitation on one evening each week. The proposed decree also stated that "Should Plaintiff [Ms. Downum] have the need for baby sitting *at any time*, she shall first check with Defendant to see if he is willing to watch after the child, prior to make (sic) alternative baby-sitting arrangements." (Emphasis added.) Thus, the trial court's constructive fraud finding raises a fundamental issue: whether preparation and tender of the proposed divorce decree, with its custody and visitation provisions, created an equitable duty on the part of Ms. Downum to disclose her intention and efforts to locate and obtain employment in places where the visitation and baby-sitting provisions of the proposed decree would be materially affected, if not altogether frustrated.

Before today's decision, most attorneys and trial judges would consider this question easy to answer with a resounding affirmative. After all, Rule 11 of the Arkansas Rules of Civil Procedure states that:

> The signature of an attorney *or party* constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . , and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." (Emphasis added.)

Furthermore, it is common knowledge throughout the Arkansas bench and bar that judges and attorneys rely on the good faith and accuracy of matters related in pleadings in uncontested matters. Therefore, the view that Ms. Downum somehow owed no duty to

disclose her efforts to find employment in Belle Chase, Louisiana — a locale removed from Northwest Arkansas by a ten- hour drive — runs counter to established law and common knowledge within the legal community. It is remarkable, to put it mildly, that the majority opinion appears to disregard a duty that, until now, has been a hallmark of our litigation process.

That said, the trial court was obliged to determine whether the facts preponderated in favor of a finding that Ms. Downum contemplated employment away from the area where Mr. Downum could exercise the visitation and baby-sitting provisions of the decree that she represented to him that she would present to the trial court, and that she would honor if the trial court entered it. Ms. Downum's evasive and inconsistent responses to Mr. Downum's discovery requests about her employment efforts certainly qualified as competent proof about whether she was forthright. The trial judge was able to observe her demeanor while hearing her testimony. Regardless of whether one agrees with the trial judge's conclusion, he had a far superior opportunity to assess Ms. Downum's demeanor and weigh her credibility than does any member of this or any other court. In fact, our supreme court and this court have often declared that we accord deference to the superior position of trial judges in determining the credibility of witnesses and the weight to be given their testimony. *See Hunt v. Perry*, 357 Ark. 224, 162 S.W.3d 891 (2004); *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001).

It must necessarily follow, therefore, that the majority has concluded that the trial court erred *as a matter of law* in finding that Ms. Downum committed constructive fraud. I cannot subscribe to that conclusion, nor do I find any basis in the record for it. Ms. Downum's failure to mention the November 20 e-mail, her misleading and evasive answers to the interrogatories, and her failure to inform Mr. Downum or the trial court before the December 1 hearing that she was seeking employment out of state constitute relevant and probative evidence that supports the trial judge's conclusion, as does the fact that Ms. Downum sought a job in a city in another state where she had existing ties *after* she persuaded Mr. Downum not to contest custody, but *before* the divorce decree was entered. Moreover, Ms. Downum knew that Mr. Downum signed the waiver of appearance and agreed to custody in the expectation that Koel would live at least close enough that Mr. Downum could exercise mid-week visitation and could serve as Koel's first babysitter.

The majority labels Ms. Downum's withholding of information relevant to the custody determination "an innocent misrepresentation by silence" and concludes that the evidence merely demonstrated the "possibility" that she might relocate, which was not a material fact or present circumstance that she was obliged to disclose. In so doing, the majority improperly assumed the role of a factfinder and overturned the trial court's credibility determination regarding the nature of Ms. Downum's intent and when it was formed. No member of our court heard the evidence or otherwise is qualified to reach a reliable conclusion about whether Ms. Downum's silence was innocent or intentional. We certainly are not more likely to reach a reliable — let alone accurate — conclusion about her intent. Yet, the majority now overturns the credibility assessment made by the only judge who both heard the evidence and personally observed Ms. Downum when she testified about why she did not inform Mr. Downum or the Court about her intention to seek out-of-state employment.

The majority also misapplies the law concerning constructive fraud, and presumes that because this case did not involve actual fraud, it is unaffirmable. However, constructive fraud does not require actual dishonesty or purpose or the intent to deceive, but focuses on the conduct's *tendency* to deceive others. *See South County, Inc., supra.* The tendency to deceive is undeniable where Ms. Downum secured a waiver of appearance from Mr. Downum by assuring him that she would work with him on visitation (which she did not do), and thereafter presented the precedent providing Mr. Downum mid-week visitation and the right to be Koel's first babysitter, while actively exploring and soliciting employment opportunities in locations that made the mid-week visitation and baby-sitting provisions useless.

Simply put, Ms. Downum's conduct in concealing from Mr. Downum that she was seeking a job out of state, while inducing him to agree to the custody provision in the initial divorce decree, deceived Mr. Downum and the trial judge. Both believed that Ms. Downum would live close enough so that Mr. Downum could exercise mid-week visitation and serve as Koel's first babysitter. Thus, solely *due to Ms. Downum's concealment,* the trial judge entered the divorce decree and original custody order without knowing relevant facts relating to Koel's best interests — the terms of the divorce decree implied to the trial judge that he was sanctioning a custody arrangement that did not require Koel to commute

twenty-hours round-trip to visit his father.[1] If we do not affirm on these facts, no trial judge will ever be able to grant a motion to vacate in similar situations except where actual fraud is shown.

The majority emphasizes that Mr. Downum did not propound discovery or make inquiries as to Ms. Downum's living arrangements before the divorce hearing. But there is an obvious reason why he did not do so — Ms. Downum induced him into entering a waiver of appearance. She agreed to visitation terms — including mid-week visitation — that favored him. Nothing about the visitation proposal implied that Mr. Downum and Koel would have to negotiate a twenty-hour round trip. Mr. Downum was not required to ask Ms. Downum if she intended to move out of Arkansas where she clearly represented to him that she would not behave in a manner that would frustrate the express visitation terms that she proposed. The very essence of fraud is that the party committing the fraud acts in a manner that precludes a reasonable person from making inquiry or otherwise discovering the fraud. In the simplest terms, given Ms. Downum's conduct, Mr. Downum had no reason to propound discovery or inquire where Ms. Downum would live.

The Order Vacating the Custody Decree

The majority does not deny that a trial court has the authority to vacate an order or decree procured by fraud, be the fraud actual or constructive. Obviously, fraudulently procured relief is voidable, and one would hope that courts would not hesitate to vacate orders that are procured through fraud. The decision announced today will do nothing to strengthen the resolve of trial judges to invalidate orders procured through constructive fraud, however, and can be expected to invite disin-

[1] It should not be overlooked that the presumption favoring a custodial parent's relocation did not apply *prior to* the divorce hearing, because Ms. Downum had not yet been named the custodial parent. Notwithstanding the majority and concurring opinions' suggestion to the contrary, I do not seek to circumvent or alter the law established in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). I would simply point out that the law according to *Hollandsworth* is what causes Ms. Downum's failure to disclose her plans to move out of state to be so egregious. Ms. Downum knew, or at least is charged with knowing, the law. The law pursuant to *Hollandsworth* is that, upon becoming the custodial parent, Ms. Downum gained the very significant presumption that her move to southern Louisiana was in the best interest of her child. Consequently, it was to her strategical benefit for the decree of divorce to be entered before she sought leave to remove the child out of state.

genuous conduct by more litigants who are willing to gamble that their disingenuity will either go undiscovered or produce no adverse consequences.

The Custody Award to Mr. Downum

Finally, I would affirm the trial court's grant of custody to Mr. Downum. Once the trial court vacated the prior custody award, it properly treated the issue as an initial custody determination. Koel was approximately four-and-a-half years old at the time of the hearing. For most of his life, he either lived in the home with both parents or split his time between them in two-week increments. The trial court found that both Mr. and Ms. Downum were good parents, but concluded that it was in Koel's best interest to be placed with Mr. Downum because Koel's extended maternal and paternal family reside in northwest Arkansas, which is approximately ten hours (one way) from Belle Chase. The record supports that Koel spent a lot of time with Mr. Downum's mother, in particular. On these facts, the trial court did not err in awarding Mr. Downum custody.

I respectfully dissent, and am authorized to announce that Judges Robbins and Miller join this opinion.

Lance CLOUSE, D.C. *v.* Ngau Van TU

CA 07-586 274 S.W.3d 344

Court of Appeals of Arkansas
Opinion delivered February 6, 2008

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark* and *Sidney P. Davis, Jr.,* for appellant.

Carr & Carr Attorneys, by: *Phillip L. Votaw*, for appellee.

D.P. MARSHALL JR., Judge. This case arises at the three-way intersection of a service problem, the statute of limitations, and the terms of the dismissal. The question presented is whether the circuit court should have dismissed Ngau Van Tu's lawsuit against his former chiropractor, Dr. Lance Clouse, with prejudice or without prejudice. As Dr. Clouse contends, our review is *de novo* because this case turns on court rules and precedents about commencement, an issue of law. We conclude that Tu commenced his case by completing timely but defective service of his complaint and summons. As the circuit court ruled, this defect entitled Dr. Clouse to have this case dismissed, but without prejudice to it being refiled by Tu.

I.

One week before the statute of limitations (as extended by a tolling agreement) expired, Tu sued Dr. Clouse. Tu alleged negligent treatment. About two weeks after filing suit, Tu served the complaint and summons but did so imperfectly.

The personal service was defective under Rule of Civil Procedure 4(d)(1). Dr. Clouse was with a patient when the process server came to his office with the suit papers. The server gave the complaint and summons to Dr. Clouse's wife, who was working there as his office manager. Mrs. Clouse was not her husband's registered agent to receive process. The process server testified by affidavit, however, that she told him that she was Dr. Clouse's agent; Mrs. Clouse's affidavit did not discuss this alleged representation. And the service did not occur at Dr. Clouse's "dwelling house or usual place of abode," where we presume that he and Mrs. Clouse live. Ark. R. Civ. P. 4(d)(1).

In due course, Dr. Clouse timely answered the complaint and asserted his defenses including that service was defective. Tu did not attempt to cure this problem by serving the lawsuit again.

Several months later Dr. Clouse moved to dismiss. By then, the statute of limitations had expired. Dr. Clouse — relying on precedents exemplified by *Green v. Wiggins*, 304 Ark. 484, 803 S.W.2d 536 (1991) — sought a dismissal with prejudice. Because, Dr. Clouse argued, Tu did not complete good service on him within 120 days of filing his complaint, Tu never commenced his case before the statute ran, and his claims were now barred.

The circuit court granted Dr. Clouse's motion in part. It dismissed the case, but did so without prejudice. This decision triggered our saving statute, Ark. Code Ann. § 16-56-126(a)(1) (Repl. 2005), and began a one-year period in which Tu may refile his case. *Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 621-22, 954 S.W.2d 939, 940 (1997). In a salutary step that aids our appellate review, the circuit court explained why it refused to dismiss with prejudice. "The rationale in *Forrest City Machine Works, Inc. v. Lyons*[,] 315 Ark. 173, 866 S.W.2d 372 (1993) is the reason that I find the case should be dismissed without prejudice."

Dr. Clouse appeals. He argues that *Lyons II*[1] and like cases do not control because their rule is triggered only by completed service. Here, Dr. Clouse continues, Tu did not complete personal service on him because Tu served only Mrs. Clouse. Therefore, he argues, the *Green* line of precedents applies; Tu never commenced his lawsuit and his claims are now barred by limitations. Tu defends the decision below by arguing that *Lyons II* governs.

II.

The circuit court decided this issue correctly. The *Green* line of precedents does not apply. In those cases, the plaintiff made no completed service at all within the time prescribed by Rule 4. *E.g.*, *Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 162, 226 S.W.3d 757, 763 (2006) (plaintiffs "admitted on the record that they never attempted to serve [defendant] with the amended complaint"); *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 215, 979 S.W.2d 885, 888 (1998) (no service completed until after the 120-day period expired); *Bodiford v. Bess*, 330 Ark. 713, 715, 956 S.W.2d 861, 862 (1997) ("service on [defendant] was not obtained"); *Sublett v. Hipps*, 330 Ark. 58, 62, 952 S.W.2d 140, 142 (1997) (plaintiff

[1] There were two appeals in the *Lyons* case, *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990) (*Lyons I*), and the decision cited by the circuit court, *Lyons II*.

"concedes that service was not accomplished on [co-defendant] within 120 days because counsel was under the false impression that [the co-defendant] had died without insurance coverage"); *Hicks v. Clark*, 316 Ark. 148, 150, 870 S.W.2d 750, 752 (1994) (plaintiff "waited over ten months before completing any service on [defendant]"); *Green*, 304 Ark. at 485, 488-89, 803 S.W.2d at 537-39 (plaintiff "made no attempt to serve [three defendants]").

This principle — no completed timely service means no commencement under Rule of Civil Procedure 3 or the saving statute — is the common denominator in each of Dr. Clouse's authorities, and in all the authorities that this court has examined, on this issue. The leading commentators put the matter this way: "[I]f no service whatsoever is made within the 120-day period or the extended time period set by the court, the action was never commenced and the statute of limitation continues to run. After expiration of the statute, a dismissal on defendant's motion is with prejudice." David Newbern & John J. Watkins: 2 Arkansas Practice Series: Civil Practice and Procedure, § 12:2, at 280 (4th ed. 2006 and Supp. 2007) (footnotes collecting cases omitted).

Timely but defective service is not no service. As the circuit court ruled, *Lyons II* is directly in point. Here is the supreme court's holding, which governs this case:

> In sum, to toll the limitations period and invoke the saving statute, a plaintiff need only file his or her complaint within the statute of limitations and complete timely service on a defendant. A court's later ruling finding that completed service invalid does not disinherit the plaintiff from the benefit of the saving statute.

315 Ark. at 177, 866 S.W.2d at 374.

Consider the facts of the *Lyons* cases. The deputy sheriff took the complaint and summons to the manager of Forrest City Machine Works. The deputy filed a return stating that he had served the company. The manager, however, later testified by affidavit that the deputy did not leave the suit papers with him. In *Lyons I*, the supreme court affirmed the circuit court's decision dismissing the first case for improper service. 301 Ark. at 562-63, 785 S.W.2d at 222. In *Lyons II*, the supreme court rejected the company's argument that the improper service did not commence the case and entitle Mr. Lyons to refile it under the saving statute. 315 Ark. at 175-77, 866 S.W.2d at 373-74. The supreme court held that the facts established completed, but improper, service.

Lyons II, 315 Ark. at 176, 866 S.W.2d at 374. As Dr. Clouse points out, the supreme court's decision in *Lyons II* that service was completed does not square exactly with the facts as recited by *Lyons I*. But to highlight that looseness does not undermine this settled precedent or the governing rule: timely and completed service later invalidated commences the case.

Tu filed his complaint within the limitations period and completed timely — albeit defective — service of it. Dr. Clouse timely answered, preserved his objection about the defective service, and then moved to dismiss. The circuit court agreed with Dr. Clouse and concluded that the completed service was invalid. That conclusion, however, does not mean that Tu failed to commence his case in a timely fashion under Rule 3 and the saving statute. *Lyons II* and similar cases hold that he did so.

Lyons II is not a stray precedent. The supreme court, and this court, have recognized and applied it repeatedly. *E.g.*, *McCoy v. Montgomery*, 370 Ark. 333, 337-39, 259 S.W.3d 430, 433-35 (2007); *Posey*, 365 Ark. at 165-66, 226 S.W.3d at 765; *Long v. Bonds*, 89 Ark. App. 111, 113, 200 S.W.3d 922, 923-24 (2005); *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 710-11, 120 S.W.3d 525, 530-31 (2003). In each of these cases and others, the appellate court reaffirmed the holding of *Lyons II* on which the circuit court decided this case.

Dr. Clouse argues that, given the bad service in this case, applying *Lyons II* here changes the commencement standard from completed service to attempted service. He points out that the *Keener* case explicitly rejected attempted service as the standard. We acknowledge that some of the precedents speak about attempted service. *E.g.*, *Lyons II*, 315 Ark. at 177-78, 866 S.W.2d at 375 (Brown, J., concurring); *Posey*, *supra*; *McCoy*, *supra*. If any attempted service suffices, however, then Tu commenced his case by serving the complaint and summons on Mrs. Clouse. Articulating the legal standard in this way therefore does not help Dr. Clouse end this case now. Attempted service, moreover, is not the standard. Notwithstanding the mention of attempted service in some of the cases, the governing legal principles are clear.

For several reasons, we are not persuaded that this case works any change in the settled law about commencement. The key ingredient is timely completed service that turns out to be defective. First, *Keener* did reject an attempted-service argument, but *Keener* is really a no-service case. The plaintiff made no completed

service during the 120-day period. She attempted service on the defendant corporation during that period by certified mail, but the letter was returned as "undeliverable." It was only after the 120-day period expired that she completed service on the Secretary of State. 335 Ark. at 211, 215, 979 S.W.2d at 886, 888. Second, the supreme court's most recent precedents on point — *McCoy* and *Posey* — speak of attempted service as the outer boundary in these cases. This formulation is really just another way of expressing the rule of timely and completed but defective service exemplified by *Lyons II.* This understanding explains why Justice Brown joined the court's opinion in *Lyons II* but also spoke about a timely attempt at service in his concurrence.

Posey, for example, is a no-service case: the plaintiffs never served the co-defendant/appellee Dr. Bolt at all, 365 Ark. at 161-62, 226 S.W.3d at 762-63, and thus the case falls squarely in the *Green* line. *McCoy* is almost exactly like *Lyons II,* but there was one twist: the circuit court upheld the timely but defective service. The plaintiffs nonetheless grew concerned about the adequacy of that service, and nonsuited and refiled their case out of an abundance of caution. On appeal after a judgment in the refiled case, relying on *Lyons II* the supreme court rejected Dr. McCoy's limitations argument. 370 Ark. at 337-39, 259 S.W.3d at 433-35. We do not believe that *McCoy* conflicts with *Keener* or changed the governing law to an attempted-service rule. Again, service in *McCoy* was timely completed but defective. *Ibid.*

The supreme court has never held that any attempt at service, whether completed or not, commences a case. Indeed *Keener* rejected that standard. And we do not adopt or apply this standard today. Instead, the cases fall in two lines: those in which no timely service was completed, and those in which timely service was completed but done imperfectly. Tu's case, as the circuit court correctly concluded, is in the second line.

We note one new decision that appears to break this pattern. The parties do not address *Brennan v. Wadlow*, 372 Ark. 50, 270 S.W.3d 831 (2008) because the supreme court decided it after they filed all their briefs in this case. The Brennans completed timely service of their complaint against Wadlow (a teenaged driver) by serving Wadlow's father at the father's place of business — because Wadlow used that address as his residence on his driver's license. After the statute of limitations ran, the circuit court granted Wadlow's motion to dismiss. The supreme court affirmed. It rejected all the Brennans's arguments for reversal, which turned on

whether the business was young Wadlow's usual place of abode and whether the teenager committed fraud and misrepresentations about his residence.

Brennan is thus a completed-but-defective service case where commencement should have been found. The decision, however, does not mention or address *Lyons II*. To be sure that the Brennans made no argument from *Lyons II* or similar cases, we have reviewed the record and the briefs in *Brennan*. *Compare United States v. Sithithongtham*, 192 F.3d 1119, 1123 (8th Cir. 1999) (Arnold, J.). The Brennan plaintiffs never relied on *Lyons II* or argued that their timely but defective service commenced the case and tolled the limitations period. The Brennans's waiver of an argument that would have preserved their lawsuit does not alter the well-established legal landscape that we have explored in this opinion.

III.

As in *Lyons II*, Tu made timely service of his lawsuit. As in *Lyons II*, the circuit court here correctly held that his completed service was defective — because Dr. Clouse's office was not his residence and Mrs. Clouse was not his agent for service. However these circumstances are characterized — attempted service or timely completed service later ruled invalid — should not, and we hold does not, affect the commencement inquiry. It serves no useful purpose to ponder whether service that is made incorrectly is really "completed" when measured against some Platonic form of ideal service. Here the law must be practical and clear. It is: when the plaintiff completes timely service of the summons and complaint, he commences his case even if time reveals that the service was defective in some particular. This standard, settled by *Lyons II* and counter-balanced by *Green's* no-service rule, will answer the mine run of cases.

As Dr. Clouse points out, we strictly construe our service rules. Those rules insure personal jurisdiction by protecting defendants' Due Process rights and in particular the right to notice of the lawsuit. *Posey*, 365 Ark. at 161-62, 226 S.W.3d at 763. Dr. Clouse prevailed on this issue because service was imperfect. The commencement inquiry under Rule 3 and the saving statute, however, preserves equally important rights. When a plaintiff files his case during the limitations period, and serves it promptly but imperfectly under Rule 4, if the limitations period has expired then he deserves the grace period provided by our saving statute to refile

his case and serve it properly. *Cole v. First National Bank of Fort Smith*, 304 Ark. 26, 30-31, 800 S.W.2d 412, 415 (1990). If the law were otherwise, the beneficent purpose of our saving statute would be thwarted. Tu timely commenced his case pursuant to Rule 3, and thus he was entitled to a dismissal without prejudice and the shelter of the saving statute.

Affirmed.

VAUGHT and MILLER, JJ., agree.

Eugene E. BILO, Jr. *v.*
EL DORADO BROADCASTING CO.

CA 07-507 275 S.W.3d 660

Court of Appeals of Arkansas
Opinion delivered February 13, 2008

[Rehearing denied March 19, 2008.*]

* GLADWIN and GRIFFIN, JJ., would grant rehearing.

Compton, Prewett, Thomas & Hickey, LLP, by: *Floyd M. Thomas, Jr.*, for appellant.

Vickery & Carroll, P.A., by: *Ian W. Vickery*, for appellee.

JOSEPHINE LINKER HART, Judge. Eugene Bilo appeals the trial court's finding that he diverted a natural watercourse from his property onto the land of El Dorado Broadcasting Company (EDB). Bilo argues that he diverted surface water, which the common-enemy doctrine allowed him to do without incurring liability. He also argues that the trial court did not provide objective criteria to enforce the judgment. We affirm.

Bilo's property is a rectangular tract located at the corner of Timberlane Drive on the east and Hillsborough Road on the south in El Dorado. EDB owns the land to Bilo's west. The area is primarily commercial with some residential use to the north. The topography is such that the land slopes downward from the north and west toward the parties' tracts and the intersection. Water has historically flowed from these upland areas onto Bilo's tract,

continuing south through a culvert under Hillsborough Road, then back to the east through culverts under Timberlane Drive. Before Timberlane was constructed, the water ran through a broad valley south of Hillsborough. According to EDB's owner, Ross Partridge, Bilo placed land fill on his (Bilo's) tract and diverted this water onto EDB's land, endangering EDB's broadcast tower and guy anchor. EDB sued Bilo on May 10, 2005, to restore the natural water flow.

The evidence at trial showed that, when Bilo began developing his property in 2004 or 2005, he placed land fill on virtually his entire tract, including along his border with EDB. Photographs show that the fill was made up of large mounds of dirt and shards of concrete and that it elevated Bilo's tract considerably higher than EDB's. Before the fill was placed, Bilo's tract was a swampy lowland, containing willow trees, mud, and beaver dams. Ross Partridge testified that, prior to Bilo's fill activities, small rainfalls did not cause water to flow onto EDB's land, and only twenty to twenty-five percent of water from heavy rainfalls did so. But, he said, after Bilo's placement of the land fill, one hundred percent of the upland water flowed onto EDB's property. Partridge feared that the increased water flow would weaken the foundation of EDB's tower. He told the court that he was not asking Bilo to remove the land fill but to put in a ditch or culverts. He referred, as an example, to a large ditch constructed by First Financial Bank, located south across Hillsborough. This ditch controlled the flow of water as it made its way southward.

Robert Edmonds, the city of El Dorado's public works director, testified that this locale was a significant drainage area with enough flow to entice beavers to "do their work" building dams. He testified that the city removed beaver dams from the Bilo tract in approximately 2003 because "through that creek bottom there is a flood plain" and "when the creek is obstructed . . . the base flood [level] then rises." The water flow was restored after the dams were eradicated. But, Edmonds said, about a year later, Bilo "started hauling fill in there and filling up the whole bottom." Edmonds received several calls asking "why this marsh land was being filled in." He contacted Bilo and told him the property should be "culverted." Bilo thought the city should take care of the culverts, and he continued to fill the land. Edmonds said that water did not percolate through the fill. Rather, the fill operated like a dam or levee, and water now flowed between the Bilo tract and the EDB tract at an elevation lower than the fill. The drainage situation was worse, he stated, than when the beaver dams were

there, but culverts or ditches could be used on Bilo's land to address the problem. Edmonds said, "you just can't put fill in the water way."[1]

Bilo testified that the area in question was in a flood plain, was a significant drainage area, and was, at least in part, a "wetland." He sought a permit from the Corps of Engineers to do the fill work after the Corps informed him that it was investigating "a discharge of fill material into a wetland associated with an unnamed tributary of Bayou de Loutre." Bilo's application listed the Bayou de Loutre as the body of water connected with the project. Thereafter, the Corps issued the permit authorizing Bilo to discharge fill material "into waters of the United States associated with the construction of a commercial development." The permit expressly stated that it did not authorize work that could adversely affect adjacent property. Bilo testified that he was merely filling in his property as a former owner had done to prevent erosion, though he said that he did "elevate" the fill by a few additional feet. He also said that he intended for the fill to slope toward Timberlane on the east so that the water would flow onto the curb of the street. He denied any damage to EDB's land. Yet, he agreed that he was in no position to dispute Partridge's testimony that more water now flowed onto EDB's property.

The court found that the drainage across Bilo's land was part of a natural watercourse and that Bilo's diversion of water onto EDB's property was unreasonable. Bilo was enjoined "from further fill activities" on the west side of his property and was ordered to construct, at his own expense, "drainage facilities to prevent no more than 20% of the flow of water" onto EDB's land. If Bilo chose to construct the drainage ditch on the west side of his tract, EDB was to contribute twenty percent of the land required. Bilo appeals from that ruling.

This is a case in equity involving the issuance of an injunction, and our review is therefore de novo. *See generally Ark. Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001); *Clark v. Casebier*, 92 Ark. App. 472, 215 S.W.3d 684 (2005). We review the trial court's decision to award injunctive relief for an abuse of discretion, *see United Food & Comm. Workers Int'l Union v.*

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[1] Bilo argues for the first time in his reply brief that the trial court erred in allowing Edmonds to testify as an expert. We do not address arguments raised for the first time in a reply brief. *See Abdin v. Abdin*, 94 Ark. App. 12, 223 S.W.3d 60 (2006).

Wal-Mart Stores, Inc., 353 Ark. 902, 120 S.W.3d 89 (2003), and we review the court's factual findings leading to the issuance of the injunction under the clearly-erroneous standard. *See So. College of Naturopathy v. State*, 360 Ark. 543, 203 S.W.3d 111 (2005); *City Slickers v. Douglas*, 73 Ark. App. 64, 40 S.W.3d 805 (2001). A finding is clearly erroneous when, although there is evidence to support it, the appellate court, upon viewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *See Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Bilo argues that the trial court erred in finding that he diverted a natural watercourse and, consequently, that the court erred in judging his conduct under a reasonableness standard. He contends that the court should have found that he diverted mere surface water, which would entitle him to the benefit of the standard set forth by the common-enemy doctrine, to wit:

> Where no watercourse exists . . . a landowner is justified in defending against surface runoff without incurring liability for damages unless injury is unnecessarily inflicted upon another which, by reasonable effort and expense, could be avoided.

See Boyd v. Greene County, 7 Ark. App. 110, 112, 644 S.W.2d 615, 616-17 (1983). Bilo also argues that, under our supreme court's holding in *Levy v. Nash*, 87 Ark. 41, 112 S.W. 173 (1908), his status as an urban landowner gave him even more freedom to fend off surface water without incurring liability.

Our law defines a watercourse as:

> [A] running stream of water; a natural stream, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed and banks, and usually discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of the tract of land occasioned by unusual freshets or other extraordinary causes.

Boyd, 7 Ark. App. at 112, 644 S.W.2d at 617 (1983) (quoting *Boone v. Wilson*, 125 Ark. 364, 188 S.W. 1160 (1916)). We see no clear error in the trial court's finding that the water diverted by Bilo was a watercourse. Accordingly, we need not address his arguments concerning diversion of surface water.

The evidence showed that the water moved through Bilo's tract with such flow and direction that beavers built dams, thus indicating a flow through a definite channel. The large drainage ditch constructed by First Financial Bank, the parties' neighbor to the south, is further indication of the water's force, volume, and constant flow along this path. Additionally, the water was referred to by public works director Robert Edmonds as a "creek" and a "water way." Corps of Engineers documents stated that Bilo had discharged fill material into a "wetland associated with an unnamed tributary of Bayou de Loutre," and Bilo's application listed the Bayou de Loutre as the body of water connected with the project. And, the court found that the water ultimately drained south and east "into Loutre Creek." These factors demonstrate that more than mere surface water flowed across Bilo's tract.

We therefore have no definite and firm conviction that the trial court was mistaken when it characterized the diverted water as a watercourse.[2] We are not dissuaded by the trial court's lack of findings regarding the presence of well-defined bed and banks. Their absence may be explained by the fact that the water had been diverted away from this course at least once in the past and that the water had begun to coalesce along this course once again after Timberlane Drive was constructed. We also distinguish *Boyd, supra*, on which Bilo relies. There, the evidence was "virtually undisputed" that the water in question was "mere surface drainage." *Boyd*, 7 Ark. App. at 113, 644 S.W.2d at 617. That matter is in great dispute here.

Bilo argues next that the trial court should have provided a legal description of that part of his land that he was enjoined from filling. A trial court's order must provide a legal description when locating boundary lines or easements. *See Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998); *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997). Bilo cites no persuasive authority that these holdings should be applied in a case that does not involve a dispute over property lines or ownership.

Affirmed.

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

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[2] Bilo does not challenge the trial court's finding that his conduct was unreasonable.

GLADWIN and GRIFFEN, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. I believe that the trial court was clearly erroneous in finding that the drainage across appellant's land was a natural watercourse, and therefore I would reverse. A natural watercourse is defined as:

> [A] running stream of water; a natural stream, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed and banks, and usually discharges itself into some other stream or body of water. It must be something more than mere drainage over the entire face of the tract of land occasioned by unusual freshets or other extra ordinary causes.

Boyd v. Greene County, 7 Ark. App. 110, 644 S.W.2d 615 (1983) (quoting *Boone v. Wilson*, 25 Ark. 364, 188 S.W. 1160 (1916)).

The trial court listed the following reasons for finding the drainage a natural watercourse:

> a. The watershed which produces the drainage is large in area. The exact dimensions are not in evidence, but the area includes a number of streets and houses to the north and northwest, businesses to the west along the north side of Highway 82B and undeveloped land to the north owned by Bilo's company.
>
> b. Beavers used to inhabit the area.
>
> c. The property of E.D. Broadcasting constitutes minuscule amount of the watershed area. Likewise only a minuscule amount of the water draining across Bilo's land came from the land of E.D. Broadcasting. Conversely, the vast majority of the water comes from the property of other owners, including Bilo's company.
>
> d. Bilo's land has long been a drainage area while E.D. Broadcasting's land has been used for radio stations for about thirty years.
>
> e. The land of Bilo was identified as wetlands by the U.S. Corp. of Engineers and a permit for the fill was required.

None of these factors fit the definition of a watercourse and in fact confirm that this is surface water. The court describes no definite channel with bed and banks. In fact it seems to state that

water runs from the homes and business to the north and northwest, from the business to the west and from the contiguous land to the north. Apparently this watercourse runs both to the south and the east and contains streets and houses, but no actual banks or bed.

The fact that beavers once inhabited the area is of no import. There is no evidence in this record that beavers will only inhabit a natural watercourse as defined by Arkansas case law.

That E.D. Broadcasting constitutes a minuscule amount of the watershed only reinforces that the water is flowing from several directions and is not a part of a defined channel. Further, that appellant's land has long been a drainage area proves that this may be a collection area for surface water but not a natural watercourse that must usually discharge itself into some other stream or body of water, as required by our definition of a natural watercourse. Finally, the Army Corps. of Engineers map that was introduced along with its letter of June 13, 2005, does not show any unnamed tributary of Bayou de Loutre, and does not show where the parties' properties are located.

This land is a developed urban area in El Dorado, with a car lot, residential area, and other businesses located at or near this intersection. The pictures that were introduced clearly show that if there had ever been a "tributary" or "creek," it has been obliterated by the development of the area. This is now an urban intersection with roads and man-made culverts. I simply believe the trial court's finding that this drainage is a natural watercourse is not supported by the evidence and is clearly erroneous.

Because I would find the drainage to be surface water, I believe that *Levy v. Nash*, 87 Ark. 41, 112 S.W. 173 (1908), controls. In *Levy* the Arkansas Supreme Court stated:

> The lot of the defendant is in the midst of a populous city. The rule which governs the right to dispose of surface water in agricultural districts does not apply to such property. It is set apart, held and owned for building purposes. To make it useful for this purpose the owner has the right to fill it up, elevate it, to ditch it, to construct building on it in such a manner as to protect it against the surface water of an adjoining lot. If in so doing he presents the flow of surface water upon his lot, the owner of the higher lot has no cause of action against him. This is necessary incident to the ownership of

> such property. A contrary rule would operate against the advancement and progress of cities and towns and to their injury, and would be against public policy.

87 Ark. at 44, 112 S.W. at 174.

Under the rule set out in *Levy*, "The owner has the right to fill it up, elevate it, to ditch it, to construct buildings on it in such a manner as to protect it against the surface water of an adjoining lot." 87 Ark. at 44, 112 S.W. at 174. Here the appellant filled it up as provided in *Levy*. Therefore appellant could divert the water as he did.

As I believe that a natural watercourse as defined by our cases does not flow through this paved intersection in El Dorado, I would reverse.

GRIFFEN, J., joins.

Allen L. LAMPKIN *v.* STATE of Arkansas

CA CR 07-568 275 S.W.3d 679

Court of Appeals of Arkansas
Opinion delivered February 13, 2008

William R. Simpson, Jr., Public Defender, *Mac Carder*, Deputy Public Defender, by: *Clint Miller*, for appellant.

Dustin McDaniel, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Allen Lampkin was found guilty in district court of driving while intoxicated. He appealed to the circuit court. The issue before this court is whether the circuit court abused its discretion in dismissing Lampkin's appeal and remanding the case back to the district court because it determined that Lampkin failed to appear without good cause on the date of his trial. We hold that the circuit court erred in determining that Lampkin failed to appear without good cause, as it recalled the case after Lampkin initially failed to appear, asked Lampkin what he wanted to do, and indicated that "we're having a trial today." Accordingly, we reverse and remand the case to circuit court.

Lampkin waived his right to a jury trial, and a bench trial was set for 10:00 a.m. on August 28, 2006. When Lampkin's case was first called, he was not in the courtroom. The deputy prosecuting attorney informed the court that John May, Lampkin's counsel, was in the hallway, and further stated that "I think he's probably negotiating. They may be out in the hall." Thereafter, when neither Lampkin or his attorney answered the bailiff's call, the circuit court announced, "Remand to district court."

Nonetheless, the court recalled Lampkin's case later the same day. The State indicated that it had no objection to Lampkin entering a negotiated guilty plea. May informed the court that "[Lampkin's] case was called up while we were out in the hall and you initially remanded it." May then reiterated that he and the State had negotiated a guilty plea. When the court asked Lampkin what he wanted, Lampkin said he wanted to go to trial but that the State had not provided the name of one of the officers at the scene.[1]

The following exchange then took place:

[1] Lampkin raised this argument during a prior proceeding; the State obtained a continuance but apparently never provided the information.

COURT: Do you want me to remand this to district court?

DEFENDANT: No, sir. I would like to get the officers to give us the trooper's name and go forward with trial.

COURT: Okay, that's — you're here for trial today.

DEFENDANT: I know.

COURT: We're having a trial today.

Lampkin again indicated his willingness to proceed to trial but again requested that the unidentified officer be called as a witness. The court informed Lampkin that,"It doesn't work that way," and then the following exchange occurred:

COURT: Okay, I'm going to remand this to district court.

DEFENDANT: Well, then, I want to do the plea deal, Your Honor.

COURT: I've already remanded it to district court because you didn't come in when I called your name.

The relevant statute provides that

> [i]f the appellant shall fail to appear in the circuit court when the case is set for trial or the judge . . . then the circuit court may, *unless good cause is shown to the contrary*, affirm the judgment and enter judgment against the appellant for the same fine or penalty that was imposed in the court of limited jurisdiction, with costs.

Ark. Code Ann. § 16-96-508 (Repl. 2006) (emphasis added). We review questions of statutory interpretation *de novo* and construe criminal statutes strictly, resolving any doubts in favor of the defendant. *See Stivers v. State*, 354 Ark. 140, 118 S.W.3d 558 (2003). We also adhere to the basic rule of statutory construction, which is to give effect to the intent of the legislature. *Id.*[2]

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[2] For example, § 16-96-508 has been strictly interpreted to prohibit a circuit judge from dismissing an appeal based on a defendant's failure to appear at a *pre-trial* conference. *See Ayala, infra.*

In essence, the circuit court's "remand" functioned as a dismissal of Lampkin's appeal, which is permissible even though § 16-96-508 only authorizes a circuit court to *affirm* the district court's judgment. *See Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006). Nonetheless, we reverse because it was an abuse of discretion for the circuit court to dismiss Lampkin's case based on his initial "failure to appear" when the case was thereafter recalled the same day, Lampkin was present when the case was recalled, and the court indicated that "we're having a trial today."

As Lampkin argues, the purpose of § 16-96-508 is to facilitate the court's power to control its own trial docket. *See* Ark. R. Crim. P. 27.2 (stating that the court shall control the trial calendar and the scheduling of cases on the calendar). It is apparent from the record that Lampkin's initial failure to appear did not disrupt the court's trial docket. This was a bench trial. No jury was seated and then dismissed when Lampkin failed to initially appear.

Rather, the circuit court purported to dismiss the appeal, yet recalled the case the same day. Lampkin appeared when the case was recalled. The court asked Lampkin what he wanted to do and then stated that "we're having a trial today." It subsequently remanded the case based on Lampkin's *initial* failure to appear *only after* Lampkin voiced his complaints about the discovery regarding a specific witness. In so doing, the court also ignored the plea agreement that had been reached by the parties.

Certainly, a circuit court may change a ruling during the course of a proceeding. Here, however, the court did not merely change a ruling. Rather, it initially purported to dismiss the appeal but then, by its further statements, *acted as though no final ruling had been made or as though any interim ruling had been reversed.* Given that, it was an abuse of discretion for the court to thereafter dismiss the appeal pursuant to § 16-96-508 based on Lampkin's *initial* failure to appear.

Reversed and remanded.

ROBBINS and MARSHALL, JJ., agree.

Robin TAYLOR *v.* E. John LANDHERR, M.D.;
Sparks Medical Foundation; Sparks Regional Medical Center;
and John Doe Nos. 1-5

CA 07-602 275 S.W.3d 656

Court of Appeals of Arkansas
Opinion delivered February 13, 2008

Law Offices of Charles Karr. P.A., by: *Charles Karr*, for appellant.

Cox, Cox & Estes, PLLC, by: *Walter B. Cox* and *James R. Estes*, for appellee E. John Landherr, M.D.

Warner, Smith & Harris, PLC, by: *Wayne Harris* and *Stephanie Harper Easterling*, for appellees Sparks Medical Foundation and Sparks Regional Medical Center.

D.P. MARSHALL JR., Judge. Dr. E. John Landherr operated on Robin Taylor's back at Sparks Regional Medical Center. Problems developed with the surgical wound, including a staph infection. Taylor eventually sued Dr. Landherr, the Medical Center, the Sparks Medical Foundation, and five John Does. The circuit court granted a nonsuit of all Taylor's claims against the John Does. After discovery, the court granted summary judgment to all the named defendants. The court ruled that Taylor's claims against Dr. Landherr, the Medical Center, and the Foundation failed as a matter of law because Taylor had no expert testimony establishing a deviation from the standard of care or proximate cause. In addition, the court found that the Foundation did not exist as a separate entity when the malpractice allegedly occurred and therefore was not a proper party to the action. Taylor appeals.

I.

We must resolve an unusual procedural issue at the threshold. On the day before this case was submitted for decision by our court, Taylor filed a motion suggesting that Dr. Landherr died in November 2007. This was months after the parties had filed all their appellate briefs. Taylor has moved this court to appoint Dr. Landherr's widow, Patsi Landherr, as Special Administratrix of The Estate of E. John Landherr, M.D., revive the appeal as to Dr. Landherr, and substitute the Special Administratrix in his place. Dr. Landherr's lawyers have no objection to these steps.

The cluster of issues raised by Taylor's motion rarely arises on appeal. If Dr. Landherr had died after this case had been submitted but before we handed down our decision, then precedent would allow us to dodge the revivor and substitution questions by making our opinion *nunc pro tunc* to a date before he died. *Pool v. Loomis*, 5 Ark. 110, 115 (1843) (supplemental opinion upon motion). But this is not what has happened. Dr. Landherr died more than two months ago, and his death was suggested to us before submission. So we must answer the resulting procedural questions.

The first question is whether Taylor's claims against Dr. Landherr may be revived at all. They may indeed. Actions for

"wrongs done to the person or property of another" survive the alleged tortfeasor's death. Ark. Code Ann. § 16-62-101(a)(1) (Repl. 2005). Taylor's personal-injury claims against her former doctor therefore have not been lost.

The second question is whether this court or the circuit court should act on Taylor's request to appoint the Special Administratrix. Taylor asks this court to do so, and cites Rule of Civil Procedure 25 and Ark. Code Ann. §§ 16-62-106 and 107 (Repl. 2005) as authority for us to act. In support of her motion, she attaches an order from the Franklin County Circuit Court in another pending case against Dr. Landherr. This order finds that Ms. Landherr consents to serve as Special Administratrix of her husband's estate to defend that case and appoints her to do so.

Rule 25, however, does not authorize this court to grant the motion. This rule applies only to circuit courts, and we may not act pursuant to it. *Constitution State Ins. Co. v. Passmore*, 18 Ark. App. 247, 247-48, 713 S.W.2d 255, 255 (1986) (*per curiam*). But the statutes and precedent support the relief Taylor seeks from this court.

The special-administrator statute authorizes appointment by "the court before which the suit or suits are pending, on the motion of any party interested, to appoint a special administrator, in whose name the cause shall be revived." Ark. Code Ann. § 16-62-106(a). Taylor's suit is pending in this court. Thus the plain words of the statute give us authority to act. *Dunklin v. Ramsay*, 328 Ark. 263, 267, 944 S.W.2d 76, 78 (1997). Two venerable precedents, moreover, deal with this situation and approve appointment of a special administrator by the appellate court in these circumstances. *Sneed v. Sneed*, 172 Ark. 1135, 1137, 291 S.W. 999, 1000 (1927); *Anglin v. Cravens*, 76 Ark. 122, 123-24, 88 S.W. 833, 834 (1905) (construing a statutory ancestor of Ark. Code Ann. § 16-62-106).

Another code provision not cited by the parties, Ark. Code Ann. § 16-67-322 (Repl. 2005), has given us some pause. This statute allows substitution on appeal in situations where *all* the appellants have died and allows compelled substitution where *all* the appellees have died. This obscure provision is among the statutes about appellate procedure, many of which have been superceded by court rules. Though this provision has been cited in at least one case, we find no cases analyzing or applying it. *Compare Passmore, supra*. It has been in the books since 1837 and was the law

when both *Anglin* and *Sneed* were decided. Those cases do not mention it. And both of those cases were multi-party appeals where only one among the several appellants and appellees died.

For several reasons, we choose to follow *Anglin* and *Sneed* and hold that § 16-67-322 does not apply. First, this statute is limited by its terms to those situations where all the parties on one side of the *v.* have passed away while the case is pending in the appellate court. Those are not our facts. Second, the statute does not purport to limit party substitutions to only those situations. The authority conferred by the special-administrator statute, Ark. Code Ann. § 16-62-106(a), is broader than the authority of this section. And we must harmonize the two statutes if possible to avoid a conflict. *Jester v. State*, 367 Ark. 249, 256, 239 S.W.3d 484, 490 (2006). Third, in appellee-death situations § 16-67-322 authorizes "compell[ing]" the decedent's executors or administrators to become parties to the appeal. We need not invoke any such authority. Ms. Landherr has consented to stand in place of Dr. Landherr.

We therefore grant Taylor's motion. We hereby appoint Patsi Landherr as the Special Administratrix of the Estate of E. John Landherr, M.D., for purposes of defending this case only, revive this case, and substitute the Special Administratrix in Dr. Landherr's stead as one of the appellees. Now we proceed to the merits of this appeal.

II.

Under the statute, Taylor had to support her medical-malpractice claims against Dr. Landherr with expert testimony unless his alleged negligence was a matter within the common knowledge of the jurors. Ark. Code Ann. § 16-114-206 (Repl. 1987); *Haase v. Starnes*, 323 Ark. 263, 268-69, 915 S.W.2d 675, 677-78 (1996). Unlike claims that a doctor failed to sterilize an instrument or left a foreign object inside the patient, Taylor's allegations against her doctor were not matters of common knowledge. *Skaggs v. Johnson*, 323 Ark. 320, 325-26, 915 S.W.2d 253, 256 (1996); *Lanier v. Trammell*, 207 Ark. 372, 377-86, 180 S.W.2d 818, 821-25 (1944). She alleged that Dr. Landherr failed to give her the information that she needed to make an informed decision to undergo the surgery; failed to get her informed consent; discharged her prematurely and then failed to provide adequate

follow-up care; failed to properly diagnose and treat her infection and request an infectious disease consult; and failed to dictate timely reports.

A jury would need expert testimony to evaluate all of Taylor's claims. *Brumley v. Naples*, 320 Ark. 310, 318, 896 S.W.2d 860, 865 (1995); *Skaggs, supra.* Absent this kind of testimony supporting her allegations, she had no proof of the standard of care, deviation, or proximate cause — all essential elements of her claims. Faced with these evidentiary gaps, the circuit court correctly granted Dr. Landherr judgment as a matter of law. *Hamilton v. Allen*, 100 Ark. App. 240, 245-49, 267 S.W.3d 627, 631-34 (2007); *Short v. Little Rock Dodge, Inc.*, 297 Ark. 104, 106, 759 S.W.2d 553, 554 (1988).

Taylor's allegations against Sparks Medical Center also had to be supported by expert testimony. In her complaint, Taylor alleged that Sparks Medical Center failed to use ordinary care to determine her physical condition and to furnish her with the care and attention reasonably required by it. Further, she alleged that the hospital failed to monitor and supervise Dr. Landherr as he prepared his operative and discharge summaries. The jury would need to hear from a witness with specialized knowledge before it could determine the level of record-keeping oversight required in a hospital setting. The care reasonably required by her staph infection and wound complications are not within the common knowledge of most jurors either. *Skaggs, supra.* Taylor thus needed an expert to support her claims against the hospital, and it too was entitled to judgment as a matter of law because she offered no such proof. *Hamilton, supra.*

Taylor bases her negligence claims against the Foundation on a *respondeat superior* theory. She made no specific allegations against the Foundation, but asserted that Dr. Landherr and the other doctors were at all times acting in the scope of their authority as agents of the Foundation.

The Foundation was likewise entitled to summary judgment. It was undisputed that the Foundation was not incorporated until after the alleged malpractice occurred. Contrary to the circuit court's ruling, this fact is not dispositive. Taylor could have sued the Foundation as an unincorporated nonprofit association under Ark. Code Ann. § 4-28-506 (Repl. 2001). But she presented no evidence that the Foundation existed as an entity at

all when her surgery occurred in 1999. Moreover, the Foundation's liability was based solely on Landherr's and the other employees' acts and omissions. Because Taylor's claims against those defendants failed as a matter of law, her claims against the Foundation did too. *National Bank of Commerce v. HCA Health Services of Midwest, Inc.*, 304 Ark. 55, 58-59, 800 S.W.2d 694, 697 (1990).

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.

Joe Leslie SMITH *v.* STATE of Arkansas

CA CR 07-673 275 S.W.3d 686

Court of Appeals of Arkansas
Opinion delivered February 13, 2008

Witt Law Firm, P.C., by: *Ernest W. Witt,* for appellant.

Dustin McDaniel, Att'y Gen., by: *Valerie Glover Fortner,* Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant Joe Leslie Smith was convicted by a Crawford County jury of failing to register as a sex offender and sentenced to six years in prison. Smith argues on appeal that the trial court erred in failing to grant his motions for directed verdict. We affirm.

In 1999, Smith was convicted of first-degree sexual abuse. In the case at bar, the parties stipulated to the 1999 conviction and that as a result of that conviction Smith was required by law to register as a sex offender. On April 30, 2004, Smith appeared at the Crawford County Sheriff's Office to register as a sex offender. Smith, who was assisted by Deputies Aaron Beshears and Pattie Bonewell, advised that he was residing at 4510 Alma Highway, Lot 61, in Van Buren, Arkansas. Deputy Bonewell, who testified that she helped Smith fill out the sex-registration form, confirmed that Smith told her he was living at 4510 Alma.

Deputies Beshears and Bonewell both testified that in 2004 they, along with other sheriff's employees, made numerous attempts (over a one-year period) to locate Smith at 4510 Alma and were unsuccessful. On August 26, 2005, Deputy Bonewell met with Smith's sister, Judy Ketten, who advised that she resided at 4510 Alma and that her brother did not live there with her. Ketten corroborated Deputy Bonewell's testimony. Ketten testified that she lives at 4510 Alma in her mobile home. She further testified that her brother has never lived with her at that address. She agreed that he may have stayed there a night or two in the past, but that the utilities were not in his name and he had no personal belongings there. Ketten also testified that she did not know that her brother listed her address on the sex-offender registration form until she received a visit from a sheriff's deputy.

Both deputies concluded that Smith did not reside at that address, and the sheriff's office issued a warrant for Smith's arrest based on his failure to register as a sex offender. On March 20, 2006, Smith was arrested, pursuant to that warrant, in Russellville, Pope County.

Smith testified that he drives a tractor-trailer rig for a living. Before registering in Crawford County, he asked his sister if he could use her address because he was living in his truck, had no address to list on the form, and had to have an address where he could receive mail. He testified that she agreed. On at least two occasions, Smith testified that he did not actually live at 4510 Alma, rather, he only stayed there on occasion. But, primarily, he

lived in his truck. He testified, "last year, I had 348 days in my truck." He testified that his sister lied when she said that she had never agreed to let him use her address. Smith twice moved for directed verdict, arguing that the proof was insufficient. The trial court denied the motions. The jury found Smith guilty of failing to register as a sex offender.

On appeal, Smith again challenges the sufficiency of the evidence. When a defendant challenges the 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 will be considered. *Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997).

Smith does not contest his duty to register as a sex offender; rather, he contends he complied with the statute. He argues that he lived at 4510 Alma (when he was not living in his truck), and that his sister was aware that he used her address when he registered. He also argues that because he lived in his truck most of the year, law-enforcement officers were not able to locate him at 4510 Alma. Finally, he argues that the State failed to prove that he lived in Russellville or any other address.

The information filed by the State charged Smith with a violation of Arkansas Code Annotated section 12-12-904(a)(1) (Repl. 2003).[1] This statute provides that:

> A person who fails to register or who fails to report changes of address, employment, education, or training, or who refuses to cooperate with the assessment process as required under this subchapter shall be guilty of a Class D felony.

Substantial evidence supports the trial court's denial of Smith's motions for directed verdict. Smith did not provide a change of address verifying his residence when he registered with the Crawford County Sheriff's Office. "Residency" is defined in the Sex Offender Registration Act of 1997 as "the place where a person lives . . . ." Ark. Code

[1] This statute has since been amended to change the offense to a Class C felony. *See* Ark. Code Ann. § 12-12-904(a)(1) (Supp. 2007).

Ann. § 12-12-903 (10)(A) (Repl. 2003). Smith gave "an" address, but the evidence shows that Smith did not reside at that address. Numerous attempts, over the course of a year, were made by the sheriff's department to locate Smith at that address, and all were unsuccessful. Smith's sister testified that her brother did not live with her. Moreover, Smith admitted at trial that he did not live with his sister — he only stayed there occasionally — and that he lived in his truck.

Not only did Smith fail to give an accurate address, he failed to report the change in his employment, which is also required under Arkansas Code Annotated section 12-12-904(a)(1).

Q: And had, in fact, [you] even changed employment in 2005, correct?

A: Yes, sir.

Q: And never told anybody about that change, either: did you?

A: No, sir.

Finally, Deputy Bonewell testified that sex offenders are required to submit residence verification every six months.[2] The evidence demonstrated that Smith failed to comply with this requirement as well.

Therefore, we hold that the evidence is substantial that Smith refused to comply with section 12-12-904(a)(1) — he failed to report a change of address or change of employment, and he failed to cooperate with the assessment process.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

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[2] *See* Ark. Code Ann. § 12-12-909(a)(1)(A) (Repl. 2003), which provides that every six months the Arkansas Crime Information Center shall mail a verification form to the last known address of the offender. The offender has ten days to return the verification form to the local law-enforcement agency.

Clifford APPLEGATE *v.* Kimberly APPLEGATE

CA 07-657 275 S.W.3d 682

Court of Appeals of Arkansas
Opinion delivered February 13, 2008

Woodworth Law Firm, PLC, by: *Linda Woodworth,* for appellant.

James E. Goldie, for appellee.

LARRY D. VAUGHT, Judge. Appellant Clifford Applegate was found to be in "contempt" of court and ordered to pay a $500 attorney's fee to his former wife, appellee Kimberly Applegate, who filed the initial contempt petition. On appeal, Clifford argues that the trial court erroneously held him in criminal contempt. His wife responds that the trial court properly held him in civil contempt. Because there was neither a valid criminal-contempt finding nor a valid civil-contempt finding, we reverse the fee award and the trial court's "contempt" designation.

The facts of this case are not in dispute. Following a contested divorce between the Applegates, a decree of divorce was filed on October 20, 2006. In the decree the trial court ordered Clifford to pay certain judgments and marital bills, but the court did not set a time or date in its decree by which these debts had to be satisfied. Despite the indefinite terms of the decree, on December 5, 2006, Kimberly filed a verified petition for contempt alleging that Clifford had willfully disobeyed the decree. Clifford was ordered to appear before the trial court on February 28, 2007, and show cause why he should not be held in contempt and punished for willful disobedience of a court order.

At the February hearing, the trial court rejected Kimberly's assertion that Clifford had failed to pay her thousands of dollars owed. The trial court recognized that Kimberly had valid judgments against Clifford for the large majority of the amount due her and that she had rested on her rights of execution in relation to the judgments. Specifically, the trial court noted that the judgments previously entered in Kimberly's favor had vested her with the right to compel payment and that she could have filed an order of garnishment to ensure that she would receive payment.

The evidence also showed that Clifford had satisfied many of the debts he had been ordered to pay and, despite changing jobs and taking a pay cut, he continued to make payments toward his obligations each month. However, the trial court was troubled by the fact that Clifford had failed to pay anything whatsoever on at least two of the marital debts outlined in the decree — the $199 debt owed to Western Grove Deli and the $780 debt owed to Mountain Crest Rehabilitation. During the trial court's examination of Clifford, this exchange took place:

> THE COURT: Have you paid anything to the Western Grove Deli?
>
> MR. APPLEGATE: No, I haven't.

THE COURT: North Arkansas Medical Regional Medical Center?

MR. APPLEGATE: Yes, I think I paid that off.

THE COURT: $88.85 you've paid that?

MR. APPLEGATE: Yes. Yes, I did.

COURT: Dr. Patterson?

MR. APPLEGATE: I don't know if I've paid Dr. Patterson or not?

THE COURT: Dr. Keener, how much did you pay on that?

MR. APPLEGATE: I paid $30.00 on that so far on the checks that I've found.

THE COURT: What about Mountain Crest Rehab?

APPELLANT: I've not paid anything on that yet.

THE COURT: Not to the extent that [Kimberly] alleged, [she] could have garnished wages but the Court did order that [Clifford] pay certain bills[,] which he has not, therefore, he is in Contempt of Court. The Court holds him in Contempt and orders payment of a $500.00 attorney's feel [sic]. That is the ruling of the order of the Court. Comply with the orders of the Court and get this behind you.

In response to this ruling, Clifford's counsel argued that there could not be a contempt finding without a corresponding finding that his client had "willfully disobey[ed] the Court orders." The following colloquy took place:

THE COURT: Look. Just hold on a second. Look. They claimed he's thousands [sic] dollars behind. I intentionally didn't order him to pay those thousands of dollars because I knew he probably [could] not do that, you know. I gave him judgments and if they want to garnishing wages, that would put him in a position

where reasonable people would try to work out an agreement. He's not a bad person but he's in contempt of court.

Ms. WOODWORTH [COUNSEL FOR APPELLANT]: Your Honor, I still disagree. I don't see how he could be in contempt of court if he's making payments every month when he gets his paycheck. He's taking out a little bit for groceries and a little bit for his rent and everything else is going to his obligations. If he had nothing left and he can't borrow money, what else would [you] ask him to do?

THE COURT: I tell you what. You've got 30 days to file an appeal. If you think I'm wrong, file an appeal. It's been done before. Sometimes the Court of Appeals tells me I'm wrong.

As the trial judge suggested, Clifford filed a timely appeal and now argues that the trial court erred in its finding that he committed contempt because he did not willfully disobey a definite order of the court. He also asserts that, because he was ordered to pay a fee, he was held in de facto criminal contempt and was denied certain Due Process rights that attach with a finding of criminal contempt. In response, Kimberly first alleges that Clifford has confused criminal contempt with civil contempt. She then concludes that the trial court properly found Clifford in civil contempt because he failed to pay certain debts set out in the divorce decree.

We begin by setting out the two contempt standards. Contempt is divided into criminal contempt and civil contempt. *Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 156 S.W.3d 228 (2004). Criminal contempt preserves the power of the court, vindicates its dignity, and punishes those who disobey its orders. *Id.* Civil contempt protects the rights of private parties by compelling compliance with orders of the court made for the benefit of private parties. *Id.* Appellate courts have often noted that the line between civil and criminal contempt may blur at times. *Id.* However, we have given a concise description of the difference between civil and criminal contempt. *See Baggett v. State*, 15 Ark. App. 113, 116, 690 S.W.2d 362, 364 (1985) (noting that criminal contempt *punishes* while civil contempt *coerces*) (emphasis in original).

Thus, in determining whether a particular action by a trial court constitutes criminal or civil contempt, the focus is on the character of relief rather than the nature of the proceeding. *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). Because civil contempt is designed to coerce compliance with the court's order, the civil contemnor may free himself or herself by complying with the order. *Id.* This is the source of the familiar refrain that civil contemnors "carry the keys of their prison in their own pockets." *Id.* at 140, 752 S.W.2d at 277 (quoting *Penfield Co. v. S.E.C.*, 330 U.S. 585, 593 (1947), which quoted *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)). Criminal contempt, by contrast, carries an unconditional penalty, and the contempt cannot be purged. *Fitzhugh*, 296 Ark. at 139, 752 S.W.2d at 276-77.

In *Feiock v. Feiock*, 485 U.S. 624 (1988), which was adopted by our supreme court in *Fitzhugh*, the Supreme Court explained the contempt distinctions this way:

> [T]he critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. The character of the relief imposed is thus ascertainable by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order, and is punitive if the sentence is limited to imprisonment for a definite period. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt.

485 U.S. at 631-32 (internal quotations and citations omitted).

Based on this language, our supreme court has set a bright-line rule that aids our resolution of the first question before us — whether the $500 attorney fee was in essence a "punitive fine" for

criminal contempt. A contempt fine for willful disobedience that is payable to the complainant is remedial, and therefore constitutes a fine for civil contempt, but if the fine is payable to the court, it is punitive and constitutes a fine for criminal contempt. *See Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 454, 156 S.W.3d 228, 238 (2004) ("Here, the fine is to be paid to the complainant, and we conclude that it is for civil contempt."); *Fitzhugh, supra.*

■ Therefore, we know (based on the fact that Clifford was ordered to pay Kimberly, not the court), if there was any contempt at all, it was civil contempt. So we now review the trial court's finding of civil contempt. Our standard of review for civil contempt is whether the finding of the circuit court is clearly against the preponderance of the evidence. *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991). In order to establish civil contempt, there must be willful disobedience of a valid order of a court. *See Ivy v. Keith*, 351 Ark. 269, 92 S.W.3d 671 (2002). However, before one can be held in contempt for violating the court's order, the order must be definite in its terms and clear as to what duties it imposes. *Id.*

■ In this case there are two distinct problems with the trial court's finding of contempt. First, there is no valid civil-contempt finding. As discussed earlier, it is the remedy that distinguishes the type of contempt, and here the court failed to grant any remedy whatsoever. In order for the trial court to have found Clifford in civil contempt, the court must have empowered him with a path to purge the contempt. Clifford was not in civil contempt because the sentence was not contingent on certain terms being satisfied — in other words, he was not "handed the keys to the jailhouse door." However, he also was not in criminal contempt because he was not required to pay a fine to the court, or ordered to jail for a set period of time. In sum, the record demonstrates neither civil contempt nor criminal contempt.

■ Additionally, there is no factual basis for contempt. The decree did not set out a time frame or definitive terms by which Clifford was required to satisfy all debts assigned to him, and (presumably due to this lack of specificity) the trial court made no finding that Clifford had willfully disobeyed a court order. Therefore, we must conclude that a finding of contempt is clearly against

the preponderance of the evidence. As such, we reverse the trial court's order of contempt and the award of attorney's fees associated with it.

Reversed.

GRIFFEN and BAKER, JJ., agree.

Jason J. POWELL *v.* Wendell Ray LANE & Davelynn Felkel Lane

CA 06-1355 275 S.W.3d 666

Court of Appeals of Arkansas
Opinion delivered February 13, 2008

[Rehearing denied on March 19, 2008.*]

Mary M. Rawlins, for appellant.

Bob Keeter, P.A., by: *Bob Keeter*, for appellees.

* PITTMAN, C.J., and VAUGHT, HEFFLEY, and BAKER, JJ., would grant rehearing.

BRIAN S. MILLER, Judge. This is an appeal of an adoption decree granted to the petitioners, Wendell Ray Lane and Davelynn Felkel Lane, permitting Wendell to adopt Davelynn's minor son whom she conceived with Jason Powell. Powell argues on appeal that the trial court erred in granting the Lanes' petition for adoption because: (1) Powell and Davelynn are not only the minor's biological parents, but he and Davelynn are also married and their marriage has not been dissolved; (2) he was not given an opportunity to cure any failure to support or failure to have meaningful contact with the minor; (3) there was not clear and convincing evidence that he failed significantly, and without justifiable cause, to communicate with the minor; and (4) there was not clear and convincing evidence that he failed significantly, and without justifiable cause, to support the minor.

We agree with Powell that he and Davelynn were validly married and that the trial court erred in finding otherwise. In that the trial court's finding that Powell and Davelynn were never married was the determinating factor regarding the remaining issues, we reverse and remand all issues presented.

Background

It is undisputed that, on December 31, 1996, Davelynn and Powell went to the First Baptist Church in Pencil Bluff where they were married by Reverend Bruce Tidwell. The ceremony was traditional in that Powell stood at the head of the church and Davelynn walked down the aisle in a creme-colored dress. When Davelynn reached the front of the church, she and Powell exchanged marriage vows while family and friends witnessed the ceremony. Davelynn's mother was among those present. Davelynn was pregnant by Powell at the time of the ceremony and later gave birth to a son (the minor) on June 9, 1997. She and Powell lived together as husband and wife from the date of ceremony until their separation in the Spring of 2004, almost eight years.

It is also undisputed that Davelynn and Powell obtained a marriage license before the ceremony. The marriage license, however, was not signed by Reverend Tidwell and was never returned to the county clerk for filing. Finally, Davelynn and Powell have never obtained a divorce.

In case number DR-2004-51, Davelynn petitioned the Montgomery County Circuit Court in June 2004 to establish paternity. Powell failed to answer and a default judgment was entered on July 23, 2004. The default judgment found that Powell was the minor's natural father; set a visitation schedule; required

Powell to pay child support in the amount of seventy-five dollars per week; and required Powell to pay one-half of the minor's medical expenses. Powell moved to set aside the default judgment, but that motion was denied.

Davelynn married Wendell on September 4, 2004. On March 28, 2006, they petitioned the Polk County Circuit Court for a decree allowing Wendell to adopt the minor without the consent of Powell. The case was assigned case number PR-2006-33. Davelynn consented to the adoption and alleged that Powell had failed significantly to communicate with or support the minor for at least one year. Powell denied the allegations and refused to consent to the adoption.

On May 12, 2006, Powell filed a petition for divorce against Davelynn, and Davelynn moved to dismiss the petition. Powell also moved, again, to set aside the default judgment. The cases were consolidated in the Polk County Circuit Court and heard on July 5, 2006.

At the trial, Davelynn testified that she was pregnant at the time of the wedding and that the marriage to Powell was a bad decision that she regretted. She further stated that she and Powell never intended to file the marriage license or to become legally married. In addition to providing testimony regarding the marriage ceremony with Powell, Davelynn testified that she and Wendell were married in September 2004, in Branson, Missouri. She further stated that Powell had not paid child support since December 2004 and he had not paid any part of the minor's medical bills.

Powell testified that he was his son's primary shot-giver and the primary medication-giver during the first eight years of the minor's life. He admitted that he stopped paying support to Davelynn through the Child Support Clearinghouse; however, he denied that he quit paying support because he continued to deposit the payments into a fund that he was maintaining for the minor. He claimed that he stopped paying money to the clearinghouse because he knew that doing so would prod the Child Support Enforcement Office to bring him into court. At that time, he could resolve all of the other issues with Davelynn.

Powell's sister-in-law, Melissa Powell, testified that she witnessed the marriage ceremony in which Powell and Davelynn were married. She said that there was no question that Powell and Davelynn were married because "[w]e had a wedding, they kissed,

they went down the aisle, they said, I do. That's what I seen." She testified further that Powell and Davelynn appeared to be happy on their wedding day.

Wendell Lane testified that he and Davelynn were married on September 4, 2004, and have one child together. He further stated that he wished to adopt the minor, who was the biological child of Powell and Davelynn; that the minor had resided with him since his marriage to Davelynn; and that he and Davelynn have received no financial support from Powell since their marriage.

The trial court dismissed Powell's divorce petition. In doing so, the court ruled that Davelynn and Powell were never married because they failed to have the preacher, who performed their marriage ceremony, sign the marriage license and they also failed to file it with the county clerk.

The court then granted the adoption petition of Davelynn and Wendell. In doing so, the court held that Powell's consent to the adoption was not required because, in excess of one year, he failed significantly, and without justifiable cause, to support the minor. Powell's motion for reconsideration was denied and he filed a timely appeal.

The Marriage of Davelynn and Powell

We will accept the trial court's interpretation of a statute when no error is shown; however, we are not bound by the trial court's interpretation of the law. *Fryar v. Roberts*, 346 Ark. 432, 57 S.W.3d 727 (2001). Here, the circuit court erred in concluding that Powell and Davelynn never entered into a valid marriage. In so ruling, the court misinterpreted Ark. Code Ann. § 9-11-218 (Repl. 2002), which provides that a person obtaining a marriage license is required to return the license to the county clerk within sixty days from the date the license is issued. The statute also provides that the license must be duly executed by a person authorized to solemnize marriage in this state. *Id.*

The key to a valid marriage is solemnization, not licensing. Solemnization is defined as "[t]he performance of a formal ceremony (such as a marriage ceremony) before witnesses, as distinguished from a clandestine ceremony." *Black's Law Dictionary* 1427 (8th ed. 2004). The solemnization statute provides that a marriage is invalid unless there is solemnization, performed by some person authorized by statute to do so. See *Fryar, supra* (citing *Furth v. Furth*, 97 Ark. 272, 133 S.W. 1037 (1911)).

The marriage licensing statute, however, is merely directory and is neither mandatory nor vital to the validity of a marriage. *Fryar, supra.* The only remedy provided in the marriage licensing statute for noncompliance is that the one-hundred-dollar bond required by the statute shall remain in effect. *Id.* There is "no statute providing that a marriage is void where no license is obtained." *Id.* (quoting *DePotty v. DePotty*, 226 Ark. 881, 882, 295 S.W.2d 330, 331 (1956)). Moreover, the failure to return a marriage license does not void the marriage. *Id.* (citing *Thomas v. Thomas*, 150 Ark. 43, 53, 233 S.W. 808 (1921)).

A validly executed marriage license, that is filed in the county clerk's office, is presumptive proof of marriage. *Thomas, supra.* When this does not occur, the party wishing to prove a marriage must do so by introducing evidence of the couple's reputation as a married couple, their declarations and conduct, and other circumstances accompanying their relationship. *Id.*

This case is similar to the cases of *Fryar, supra,* and *Thomas, supra,* in which our supreme court held that the failure to file a marriage license does not void an otherwise valid marriage. In those cases, the supreme court held that valid marriages existed because they were solemnized by wedding ceremonies, although marriage licenses were not filed in either case. *Id.* In *Thomas, supra,* the supreme court noted that the couple also lived together for eight years after the ceremony and held themselves out as married. *Id.*

Powell and Davelynn were married on December 31, 1996, in a church ceremony performed by a preacher. They publicly said their marriage vows in a solemn ceremony that was conducted with all appropriate ritual. Not only was the ceremony witnessed by family and friends, but Powell and Davelynn also conducted themselves as a married couple and lived together as husband and wife for seven years after the ceremony. Their failure to file the marriage license does not void their marriage.

The dissent asserts, *sua sponte,* that Powell failed to rebut the presumption that the marriage between Davelynn and Wendell was valid. This assertion, however, was neither argued by the parties nor addressed by the trial court below. Moreover, it does not hold up under scrutiny because the marriage of Powell and Davelynn clearly rebuts any presumption of validity that may have attended Davelynn and Wendell's marriage.

The dissent further asserts, *sua sponte,* that Powell failed to prove his marriage to Davelynn because he introduced no evi-

dence regarding the licensing of the preacher who performed the ceremony. This assertion was neither argued by the parties nor addressed by the trial court below. Further, this argument contradicts the holding in *Thomas v. Thomas*, 150 Ark. 43, 233 S.W. 808 (1921). In *Thomas*, the supreme court held that the parties were validly married, although there was no testimony as to the credentials of the preacher who performed the wedding ceremony. *Id.*

Indeed, the credentials of the preacher in *Thomas* were less known than those of the preacher in the present case. In *Thomas*, Jas. Thomas and Alsie Thomas were residents of Ashley county before Alsie moved to Ft. Smith. *Id.* Jas. later traveled to Ft. Smith with a marriage license issued by the Ashley County Clerk and met Alsie at the train station. *Id.* The Arkansas Supreme Court set forth the circumstances surrounding their marriage ceremony as follows:

> [A]s they walked along the street from the train they met an old negro preacher named Mooney, who used to live in Ashley county, and Jas. Thomas procured him to marry them. Jas. Thomas turned over the marriage license to the old preacher, and they never saw it afterwards. The marriage license was never returned to the clerk by the preacher . . .

Id. at 52, 233 S.W. at 811. At the trial, it was shown that the "old colored preacher" whom Alsie claimed had performed the marriage ceremony had died before the date of the ceremony. In holding that the marriage between Jas. and Alsie was valid, the court held that:

> [i]t may be that [Alsie] was mistaken in the preacher who married them, but this did not overcome her testimony to the effect that they were married by a minister of the Gospel, after Jas. Thomas procured a license therefore provided by the statute.

Id. The court further noted that "marriage may be proved in civil cases by reputation, the declarations and conduct of the parties, and other circumstances usually accompanying that relation." *Id.* at 53, 233 S.W. at 811.

There is no question but that Powell and Davelynn obtained a marriage license and were married in a Baptist church by a "minister of the Gospel," whose credentials were never questioned. *See Thomas, supra.* Moreover, they lived together as husband and wife, with their son, for more than seven years after the

marriage ceremony. *See id.* These factors, along with all of the other undisputed evidence set forth above, show that Powell and Davelynn were validly married on December 31, 1996.

Finally, the dissent asserts, *sua sponte*, that Davelynn was seventeen at the time of the marriage ceremony and that there is no evidence in the record that her parents consented to the marriage. This assertion, however, was neither argued by the parties nor addressed by the trial court below. In fact, it was specifically waived by Davelynn at trial when, discussing her age at the time of the marriage, she testified that "I don't claim that I didn't have capacity to marry." Therefore, relying on this assertion is inappropriate.

For the reasons set forth above, we hold that Powell and Davelynn were validly married, and we reverse the contrary ruling of the trial court. A review of the court's order shows that all of the court's remaining rulings were based on its erroneous conclusion that Powell and Davelynn were never married. Therefore, we will not address the remaining issues but remand this case to permit the trial court to make further findings in accordance with this opinion.

Reversed and remanded.

GLADWIN, ROBBINS, GLOVER and MARSHALL, JJ., agree.

PITTMAN, C.J., VAUGHT, HEFFLEY and BAKER, JJ., dissent.

LARRY D. VAUGHT, Judge, dissenting. I agree with the majority that the determining issue in this case is whether the marriage of Jason Powell and Davelynn Lane was valid. However, I disagree with the majority's conclusion that it was. Recognizing our court's ability to affirm the trial court even if we disagree with its reasoning, *Wedin v. Wedin*, 57 Ark. App. 203, 944 S.W.2d 847 (1997), I would hold that the trial court's finding — that the Powell–Davelynn marriage was not valid — was not clearly erroneous and would affirm. Therefore, I dissent.

While the trial court erred in relying on the failure to register the marriage license with the county clerk as a basis for finding the marriage of Powell and Davelynn invalid, our analysis does not end there. Reviewing the case de novo, I note that there was evidence introduced that supports the trial court's conclusion that the Powell–Davelynn Lane marriage was not valid.

All parties agree that on December 31, 1996, a wedding ceremony was performed between Powell and Davelynn. Several witnesses described the ceremony right down to the cream-colored dress worn by Davelynn. Family and friends were present. However, that is not enough, on its face, to support a conclusion that the parties were lawfully married on that date. In order for the marriage to be valid it must be properly solemnized. Ark. Code Ann. § 9-11-213 (Supp. 2007). There was no evidence that the preacher who performed the ceremony on December 31, 1996, was licensed, with his license recorded, as required by Arkansas Code Annotated section 9-11-214 (Repl. 2002).

In addition to the requirement that a competent officiator solemnize the ceremony, competent parties, who consent to being married, are also required. Ark. Code Ann. § 9-11-101 (Repl. 2002). Section 9-11-101 defines marriage as a civil contract "to which the consent of the parties capable in law of contracting is necessary." Ark. Code Ann. § 9-11-101. The evidence reflects that Davelynn was under age at the time of the wedding. Moreover, there is nothing in the record to suggest that parental consent was obtained, and by law, it was required. Ark. Code Ann. § 9-11-102 (Supp. 2007). While Davelynn testified that she did not claim a lack of capacity to marry, that is not her determination to make.

In any event, Davelynn's testimony was that there was never any intent for a valid marriage; that she and Powell were "play acting" and never intended to file the marriage license; that "the preacher never even saw the license"; and that it was a bad decision that she regretted. She eventually filed a paternity action against Powell alleging that the child was born out of wedlock. Powell did not answer, and a default was entered.

Considering all of the evidence, I cannot say that the trial court's finding that there was no valid marriage between Powell and Davelynn was clearly erroneous. With this conclusion, it is easy to hold that the marriage between Davelynn and Wendell Lane is valid and that Wendell Lane is a step-parent. Since Powell has not contributed to the support of the child for over a year, his consent to the adoption is not necessary. Therefore, I would also affirm the other issues in this case.

PITTMAN, C.J., and HEFFLEY, J., join in this dissent.

KAREN R. BAKER, Judge, dissenting. Nine judges agree that the appeal before us is a challenge to the trial court's entry

of an adoption decree. Beginning with that premise, we must first look at the order of adoption and appellant's assertions of error. Three of appellant's four points allege that the trial court erred in finding that the consent of appellant, as the natural father, was not required. The majority refuses to address these three assertions that the adoption was in error. Instead, it concludes as follows:

> For the reasons set forth above, we hold that Powell and Davelynn were validly married and we reverse the contrary ruling of the trial court. A review of the court's order shows that all of the court's remaining rulings were based on its erroneous conclusion that Powell and Davelynn were never married. Therefore, we will not address the remaining issues but remand for this case to permit the trial court to make further findings in accordance with this opinion.

The majority's reasoning fails to identify the means by which the trial court's determination that there was no valid marriage between Ms. Lane and Mr. Powell invalidated the court's remaining rulings regarding the adoption. This omission is particularly perplexing given the trial court's following admonition to the parties in a letter dated July 31, 2006, denying Mr. Powell's motion for reconsideration or a new trial: "I remind the parties that even if the marriage was valid, the defendant has failed to meet the basic requirements of A.C.A. § 9-9-207(ii) so as to require consent to an adoption. This requirement overrides consent as otherwise required by A.C.A. § 9-9-206(a)(2)." Section 9-9-206(a)(2) requires consent if the parties were married either before or after the conception of the child. The trial court correctly reasoned that even if Mr. Powell had been married to Ms. Lane, the marriage would not excuse his abandonment of his child. Mr. Powell abandoned his son. That abandonment, by his own failure to support without justifiable cause, is the reason his consent was not required.

Perhaps the majority ignores the remaining issues because our standard of review would require that we affirm the trial court's decision that appellant had failed to support his minor child in excess of one year. It would certainly be awkward to affirm the trial court's ruling that appellant's consent was not required for the adoption, but nevertheless reverse the adoption based upon the objections of the party who had no statutory right to object. Thus the majority does not address the only ruling that is truly at issue in this case; whether or not appellant's consent to the adoption was required.

We review probate proceedings de novo, but we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *See Thomas v. Avant,* 370 Ark. 377, 260 S.W.3d 266 (2007); *Freeman v. Rushton,* 360 Ark. 445, 202 S.W.3d 485 (2005). 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. *See Artman v. Hoy,* 370 Ark. 131, 257 S.W.3d 864 (2007). 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. *See Devine v. Martens,* 371 Ark. 60, 263 S.W.3d 515 (2007).

The order of adoption contained the judge's conclusion that the father's consent was not required under Arkansas Code Annotated § 9-9-207(a)(2) "due to his failure to provide support under the judgment in Montgomery County DR-2004-51." This judgment was the default judgment entered on July 23, 2004, that established Mr. Powell as the natural father of the child born out-of-wedlock, set a visitation schedule, required Mr. Powell to pay child support in the amount of seventy-five dollars per week, and required him to pay one-half of the minor's medical expenses. The trial court found that it was undisputed that the last child support paid pursuant to that decree was in December 2004. This finding is supported by appellant's statement that he made no payments after December 2004, nor paid any medicals bills, and Mr. Lane's testimony that he and Ms. Lane had received no support from Mr. Powell since the couple's marriage in September 2004. As the majority notes, appellant admitted that he stopped paying support to Ms. Lane pursuant to the judgment, and, instead, deposited the readily available funds into a savings account.

Although appellant asserts that he was not given the opportunity to cure his failure to support, he also argues on appeal that "even if Mr. Powell paid a substantial amount of the past due payments, unless he **also** reestablished a relationship with the child, the adoption and termination could still go forward." (Emphasis in appellant's brief.) He claims he had a statutory right to have the opportunity to cure because the child support order entered in 2004 failed to include the notification clause that his failure to support or visit the child for at least one year would provide Ms. Lane with the right to initiate proceedings to terminate his parental rights. The statutory provision upon which he bases his argument provides as follows:

(c) In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued under this subchapter on any ground provided by other law for termination of the relationship, or on the following grounds:

(1) Abandonment.

(A) A child support order shall provide notice to the non-custodial parent that failure to pay child support or to visit the child for at least one (1) year shall provide the custodial parent with the right to initiate proceedings to terminate the parental rights of the non-custodial parent.

(B) If the notification clause required by subdivision (c)(1)(A) of this section is not in the child support order, the custodial parent, prior to termination of parental rights, shall notify the non-custodial parent that he or she intends to petition the court to terminate parental rights.

(C)(i) The non-custodial parent shall have three (3) months from the filing of the petition to pay a substantial amount of past due payments owed and to establish a relationship with his or her child or children.

(ii) Once the requirements under subdivision (c)(1)(C)(i) of this section are met, the custodial parent shall not be permitted to proceed with the adoption nor the termination of parental rights of the non-custodial parent.

(iii) The court may terminate parental rights of the non-custodial parent upon a showing that:

(a) Child support payments have not been made for one (1) year or the non-custodial parent has not visited the child in the preceding year and the non-custodial parent has not fulfilled the requirements of subdivision (c)(1)(C)(i) of this section; and

(b) It would be in the best interest of the child to terminate the parental relationship.

Ark. Code Ann. § 9-9-220 (Repl. 2002 & Supp. 2007).

Mr. Powell argues that, according to this statute, he had three months to cure his nonpayment of support. The petition for adoption was filed in March 2006. The order of adoption was

entered on July 24, 2006. More than three months had passed from the time that Ms. and Mr. Lane filed the petition until the entry of the adoption order. As discussed above, Mr. Powell had money in an account but still chose to withhold the support obligation. Mr. Powell was afforded the statutory opportunity to cure his nonsupport. He merely refused to cure his failure.

All of this evidence supports the trial court's finding that Mr. Powell's consent was not required. Appellant admitted that he chose to place the support required by the July 2004 court order into a savings account rather than provide the support pursuant to the judgment. It was undisputed that no payment was made after December 2004 resulting in more than a year of nonsupport. Mr. Powell had more than three months to cure his failure to support, but he chose not to do so.

Accordingly, the trial court was correct in permitting Wendell Lane to adopt the minor without Mr. Powell's consent because Mr. Powell failed significantly, and without justifiable cause, to support the minor. A person wishing to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence. *In re Adoption of Lybrand*, 329 Ark. 163, 946 S.W.2d 946 (1997). A circuit court's finding that consent is unnecessary due to a failure to support the child will not be reversed unless clearly erroneous. *In re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993). 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. *Gregg v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997). We defer to the trial court to determine credibility because it is in the best position to do so. *Hurtt v. Hurtt*, 93 Ark. App. 37, 216 S.W.3d 604 (2005).

Arkansas Code Annotated section 9-9-207(a)(2) (Repl. 2002) provides that "consent to an adoption is not required of . . . [a] parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause . . . to provide for the care and support of the child as required by law or judicial decree." "Significantly and without justifiable cause" does not mean that the parent totally failed to make payments. *Manuel v. McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988). It only means that the failure is "meaningful, important, and willful." *Id.*

As the majority acknowledges, Mr. Powell asserts that he stopped paying the court ordered child support because visitation between him and his son was being withheld and he wanted to come back to court. This is not legally justifiable because the duty to support cannot be excused based on another person's conduct unless such conduct prevents the payment of support. *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979). Nothing prevented Powell from tendering his child support payments to the clearinghouse rather than a savings account.

Accordingly, it was not error for the court to find that Mr. Powell failed significantly, and without justifiable cause, to support the minor, rendering his consent to the adoption unnecessary. The majority's failure to address the issue of whether the trial court erred in finding that Mr. Powell's consent was required is further complicated by its faulty analysis and reversal of the adoption order, based upon its conclusion that Mr. Powell and Ms. Lane were married.

Contrary to the majority's position, the question is not whether a valid marriage existed between Ms. Lane and Mr. Powell, but whether Mr. Powell had overcome the presumption that the marriage between Davelynn and Wendell Lane is valid.[1] In the case before us, there is no question that the Lanes' marriage was properly solemnized. Appellant challenges the validity of the Lanes' marriage by claiming that it is bigamous.

While Mr. Powell's argument focuses upon the facts and circumstances surrounding the ceremonial acts on December 31,

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[1] Contrary to the trial court's finding, a failure to file the marriage license does not void a marriage. *See Fryar v. Roberts*, 346 Ark. 432, 57 S.W.3d 727 (2001). Therefore, the trial court erred in finding that, because the marriage license was not filed, Mr. Powell and Ms. Lane were never married. However, the trial court's error in finding the marriage between Mr. Powell and Ms. Lane invalid due to failure to comply with the marriage licensing statutes does not end our inquiry. Instead, on appeal our review must determine whether the trial court was correct in granting the decree of adoption, and if the trial court reached the correct result, albeit for the wrong reason, we affirm. *See, First Sec. Bank v. Estate of Leonard*, 369 Ark. 213, 253 S.W.3d 434 (2007); *Office of Child Support Enforcement v. Pyron*, 363 Ark. 521, 215 S.W.3d 637 (2005). This is true even where the argument was not raised below. *Simmons First Nat'l Bank v. Wells*, 279 Ark. 204, 650 S.W.2d 236 (1983). While the majority appears to find an impropriety with this approach, evident from its "*sua sponte*" references, our standard of review requires our de novo review of this probate proceeding. The majority's complete disregard of this standard results in its erroneous decision and the inevitable hardship the disposition imposes upon this child.

1996, between him and Ms. Lane, our review must focus on the trial court's determination that the marriage between the Lanes was valid. This is particularly so in view of the long-standing presumption against deliberate bigamy, *Bruno v. Bruno*, 221 Ark. 759, 256 S.W.2d 341 (1953), and the common law presumption of the validity of the second marriage, *Cole v. Cole*, 249 Ark. 824, 462 S.W.2d 213 (1971).

Because there is a longstanding presumption of law that a marriage entered in due form is valid, the burden of proving a marriage invalid is upon the party attacking its validity. *See Clark v. Clark*, 19 Ark. App. 280, 719 S.W.2d 712 (1986). This presumption is so strong, it has been referred to as one of the strongest presumptions in the law. *Martin v. Martin*, 212 Ark. 204, 205 S.W.2d 189 (1947).

The burden, therefore, is upon appellant to overcome the presumption of the validity of the marriage between Wendell and Davelynn Lane. Mr. Powell cannot meet this burden by relying solely on the fact that a ceremony was conducted between him and Ms. Lane and his claim that the ceremony resulted in a marriage that is also presumed to be valid. Our supreme court has addressed the issue of the conflict between the presumption of the validity of a first marriage and the presumption of the validity of a second marriage many times and consistently held the presumption of the validity of the first marriage is not sufficient to overcome the presumption of the validity of a second marriage. In one such case, handed down in December 1928, the supreme court stated:

> Among other things, the court there said, quoting from another authority: "There was also a presumption that appellant's marriage with Jane Honeycutt was lawful, innocent, and not criminal. It is supposed that a man will not incur the guilt of felony and danger which attends it by marrying another woman during the life of one to whom he has previously been lawfully married."

This court, in the same case, also quoted with approval the following:

> "So strong is the presumption, and the law is so positive in requiring the party who asserts the illegality of a marriage to take the burden of proving it, that such requirement obtains, even though it involves the proving of a negative, and although it is shown that one of the parties had contracted a previous marriage, and the existence

> of the wife or husband of the former marriage at the time of the second marriage is established by proof, it is not sufficient to overcome the presumption of the validity of the second marriage. . . .

Spears v. Spears, 178 Ark. 720, 731, 12 S.W.2d 875, 878-79 (1928).

In a case, cited with approval in *Spears, id.,* handed down the preceding January of that same year the supreme court stated this principle even more directly, holding:

> From these authorities we feel justified in again stating the law to be that, where a second marriage is established in form according to law, a presumption arises in favor of its validity as against a former marriage, even though the husband or wife of the former marriage is living at the time, and that this presumption is not overcome by the presumption of law in favor of the continuance of the first marital relation . . . .

Lathan v. Lathan, 175 Ark. 1037, 1044, 1 S.W.2d 67, 70 (1928).

More recently this court explained our role in evaluating a claim of deliberate bigamy emphasizing the strong presumptions in the validity of the second marriage:

> While it is true that a bigamous marriage is void from its inception, [I]t is a longstanding presumption of law that a marriage entered in due form is valid, and the burden of proving a marriage is invalid is upon the party attacking its validity.

Jessie v. Jessie, 53 Ark. App. 188, 193-94, 920 S.W.2d 874, 877 (1996).

In the case before us, the trial court in August 2006, consolidated the paternity case and the adoption case in an order that states that the cases involve common questions of law and fact and should be consolidated. In its letter to the parties, the court states, "I conclude that the parties never entered into a valid marriage at any time thereafter" the conception of the child.

The trial court in this case was called upon to render void a marriage that unquestionably comported with the solemnization statute and was presumed valid as against the former marriage. The evidence before him included a petition filed by Ms. Lane alleging that she and Mr. Powell were not married at the time of the

conception and birth of the child and asking the court to establish paternity for her out-of-wedlock child. The subsequent court order found that the child in this case was born out-of-wedlock.

Despite appellant's contention in this case that he and the mother were married at the time the order establishing paternity and child support was entered, appellant never questioned that court order and paid child support pursuant to that order until he abandoned his child support obligations altogether. Although appellant relies heavily upon the evidence regarding the performance of a ceremony between him and Ms. Lane by a preacher, and emphasizes that the marriage vows and ceremony were conducted with all appropriate ritual, the record contains no reference to this minister's credentials nor registration filed pursuant to § 9-11-214(a), which provides:

> No minister of the gospel or priest of any religious sect or denomination shall be authorized to solemnize the rites of matrimony in this state until the minister or priest has caused to be recorded his or her license or credentials of his or her clerical character in the office of the county clerk of some county in this state. The minister or priest must also have obtained from the clerk a certificate, under his or her hand and seal, that the credentials are duly recorded in his or her office.

This statute, as part of the solemnization requirements, is mandatory, unlike the licensing statutes which are merely directory. *Fryar v. Roberts*, *supra*; *see Brooks v. State,* 74 Ark. 58, 84 SW 1033 (1905) (holding an alleged first marriage was not proved and that when this fact is sought to be established by the evidence of persons present at the marriage, such testimony must show, not only the fact of the solemnization of the marriage, but the official character of the person performing it).

Furthermore, although the majority claims that Ms. Lane testified that "the marriage to Powell was a bad decision that she regretted," Ms. Lane actually testified that the ceremony was play acting, that she and Mr. Powell never intended to file the license, that they never presented the license to the celebrant, and that they believed that just going through the ceremony would not result in a legally binding marriage. She explained to the judge that she was overwhelmed as a pregnant teenager facing Mr. Powell's complaints that he had been trapped and simultaneously experiencing her grandfather's failing health and anticipated passing. The deci-

sion she regretted was going through the sham ceremony. Mr. Powell's testimony is devoid of any attempt to dispute her direct testimony that neither party wanted nor intended to marry.

While the majority accurately states that Ms. Lane asserted at trial that "I don't claim that I didn't have capacity to marry," it mischaracterizes her statement as a waiver of an affirmative defense. In her testimony, that statement is immediately followed with her explanation that "I claim . . . that we were never married." Her statements were designed to clarify her position, consistent with her petition for, and resultant order of, paternity that she and Mr. Powell were never married. She did not claim that the marriage was voidable because of her lack of capacity to enter the marriage but that there was never any marriage to find voidable or to dissolve.

However, the fact that she was only seventeen at the time of the ceremony requires us to examine the issue of capacity in our analysis of whether Mr. Powell overcame the presumption of the validity of the Lanes' marriage. At the time the ceremony was performed, Ms. Lane was seventeen and Mr. Powell was twenty-two. The statute addressing the minimum age for marriage contracts and parental consent in effect on the date of the ceremony required the consent of both of Ms. Lane's parents unless the parents had been divorced and an award of exclusive jurisdiction or custody had been surrendered by one of the parents through abandonment or desertion. *See* Ark. Code Ann. § 9-11-102 (Repl. 2002 & Supp. 2007). Ms. Lane testified that neither of her parents signed the application for the marriage license. Ms. Lane's mother testified at trial. She stated that she was present at the ceremony but made no reference to her consent. Other testimony established that Ms. Lane's mother married Adam Strothers in June 2005, but no evidence explains the absence of Ms. Lane's father nor compliance with the statutory mandate of consent. Capacity to marry is one aspect we must consider in evaluating whether Mr. Powell met his burden.

Therefore, we should hold that the proof presented by Mr. Powell was not sufficient to overcome the strong presumption in favor of the validity of the second marriage between Wendell and Davelynn Lane and affirm the trial court's entry of adoption.

The majority's error in reasoning leads it to the wrong conclusion. Sadly, its decision imposes a great burden on the child whose interests we are bound to protect. The effect of the decision

is to render his mother and the only man he has known as his father these four years subject to prosecution for bigamy. His sibling is rendered illegitimate under the laws of Arkansas. Issues such as insurance coverage, filing status and deductions and rates for tax purposes, contractual obligations, ownership of assets are all affected by the majority's decision and all affect the stability and resources available to this child. The harm to the child's interests by this decision is palpable, and Mr. Powell never even challenged the trial court's finding that the adoption was in the child's best interest.

The disposition of this matter creates additional burdens regarding the procedural aftermath of the appeal. With no guidance from the majority as to what action the trial court should take, it leaves Mr. and Ms. Lane in a legal morass to sort through at additional cost — monetary and emotional in nature. Ordinarily, we would treat a default judgment as binding. For collateral estoppel purposes, a "judgment by default is just as binding and enforceable as judgment entered after a trial on the merits." *Reyes v. Jackson*, 43 Ark. App. 142, 861 S.W.2d 554 (1993). *Accord Arnold & Arnold v. Williams*, 315 Ark. 632, 870 S.W.2d 365 (applying *res judicata* to default judgment), *cert. denied*, 513 U.S. 990 (1994); *Davidson v. Hartsfield*, 250 Ark. 1072, 468 S.W.2d 774, 779 (1971); *Murry v. Mason*, 42 Ark. App. 48, 852 S.W.2d 830 (1993); *Williams v. Connecticut General Life Ins. Co.*, 26 Ark. App. 59, 759 S.W.2d 815 (1988)(applying *res judicata* to default judgment); *Meisch v. Brady*, 270 Ark. 652, 657, 606 S.W.2d 112, 114 (Ark. App. 1980). While the order of adoption incorporates a finding that the trial court refused to set aside the default judgment of paternity, the refusal itself is not challenged on appeal nor is the original motion to set aside even included in the briefs.

The legal questions raised by the decision are painfully contorted. Does the majority's directive somehow confer jurisdiction on the trial court to set aside the default judgment? Is the majority actually ordering the trial judge to set aside the default judgment, finding that it had abused its discretion? Are due process rights violated by the majority in reversing an order not appealed by appellant?

The stress imposed upon this child's family by this decision would be difficult to bear under the best of circumstances, but the testimony of Mr. Powell indicates that the circumstances this child faces are less than optimal. In describing his son's medical condition and the effect that stress had on him, Mr. Powell said that even

a buzzer at a basketball game can trigger a chemical reaction leading to violent vomiting followed by a lethargic, comatose-like state. Yet the adoption decree so clearly in this child's best interest, is reversed by the majority solely due to the objections of a man whose consent to the adoption was not required because of his abject failure to support this child.

The trial court in this case correctly found that Mr. Powell's consent to this adoption was not required. The trial court's decision to grant Mr. Lane's adoption petition was correct; was clearly in the best interest of the child; and should be affirmed by this court.

Accordingly, I dissent.

James DELAMAR *v.* STATE of Arkansas

CA CR 07-769 276 S.W.3d 746

Court of Appeals of Arkansas
Opinion delivered February 20, 2008

Alvin Schay, for appellant.

Dustin McDaniel, Att'y Gen., by: *Farhan Khan*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellant in this criminal case was tried by a jury and convicted of committing second-degree domestic battery by stabbing a family or household member on December 7, 2006, and was sentenced as a habitual offender to twelve years' imprisonment. On appeal, he argues that the trial court erred in denying his motion for a directed verdict on the ground that there was no substantial evidence that the victim was a family or household member. We affirm.

Arkansas Code Annotated § 5-26-304(a)(2) (Repl. 2006) provides that a person commits domestic battery in the second degree if, with the purpose of causing physical injury to a family or household member, he causes physical injury to such a person by means of a deadly weapon. The term "family or household member" is defined, *inter alia*, as persons who presently or in the past have resided or cohabited together. Ark. Code Ann. § 5-26-302(2)(F) (Repl. 2006).

Appellant's argument is based on the fact that the victim in this case denied that she had cohabited with him. Appellant cites *Wrenn v. State*, 92 Ark. App. 167, 211 S.W.3d 582 (2005), for the proposition that there can be no substantial evidence of cohabitation where the fact of cohabitation is denied by the victim. It is absurd to read *Wrenn* so broadly. The testimony of the victim in a criminal case is not inviolable but, like the testimony of any other witness, is subject to the jury's scrutiny. The supreme court has repeatedly held that, in reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in a light most favorable to the State, *i.e.*, must consider only the evidence that supports the verdict. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005). The jury is free to believe all or part of *any* witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.* A conviction must be affirmed if it is supported by substantial evidence, *i.e.*, evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resort to speculation or conjecture. *Id.*

Here, appellant himself took the stand at trial. He testified that, up until the date of the altercation that resulted in his arrest, he shared a residence with the victim, that he gave the

victim money for some utility bills, that the cable service installed in the residence was in his name, that he received the cable bill and his bank statement at that address, and that he kept ninety percent of his clothing there. He also stated that he recognized the knife with which the victim was stabbed because he "lived there" and "used it, cooked with it, every day." Finally, appellant testified that, while incarcerated, he authorized the release of money to the victim because he "knew that she needed it for bills . . . because" he "lived there and . . . knew when the bills were due and what was due." Appellant's testimony is unquestionably substantial evidence that he cohabited with the victim, and we therefore affirm.

Affirmed.

GLOVER and MILLER, JJ., agree.

John M. FARR *v.* Jackye R. FARR

CA 07-369 276 S.W.3d 734

Court of Appeals of Arkansas
Opinion delivered February 20, 2008

Orvin W. Foster, for appellant.

J. David Maddox, for appellee.

JOSEPHINE LINKER HART, Judge. John M. Farr, Jr., appeals from an order of the Polk County Circuit Court denying his motion to set aside an order on the mandate and granting Jackye R. Farr's petition to find him in contempt. On appeal, he argues that both of these rulings were error. We affirm the denial of his motion to set aside the order on the mandate, and we reverse and dismiss the contempt finding.

On January 19, 2005, this court remanded the property division in the parties' divorce, holding that the trial court erred in failing to divide as a marital asset a $92,000 "receivable" that was engendered by a loan of marital funds to John's sons from a

previous marriage. The $92,000 was a debt that remained from the sons' failed business venture, and the trial court had concluded the debt was uncollectible.

On November 30, 2005, the trial court entered an order styled "Order on Mandate" that purported to divide the marital property in accordance with our January 19, 2005 opinion. The order, however, not only evenly divided the $92,000 receivable between the parties, but also ordered that Jackye would receive her portion directly from the proceeds of the sale of the marital residence. John did not challenge the order until September 1, 2006, when he petitioned to set the order aside. Jackye answered the petition and moved to dismiss, asserting that the trial court had lost jurisdiction to modify or set aside the order because more than ninety days had elapsed since its entry. By order entered January 9, 2007, the circuit court denied John's petition. It specifically found that John "was represented by counsel at the time of the entry of the order, and was aware that the order was entered and when it was entered and had actual knowledge of the order." The trial court also found that John "did not request a hearing concerning the order prior to its entry, nor properly object to same being entered, nor take an appeal from the entry."

Meanwhile, the marital residence went to a Commissioner's sale on August 2, 2006. The notice of the sale specified that the home was to be sold on three months' credit with a ten-percent bond. John made the high bid of $231,000. On August 30, 2006, he requested the trial court to confirm the sale. John was given fifteen days to tender the purchase price and Jackye, who had been occupying the marital residence, was given fifteen days to vacate.

John failed to complete the sale and Jackye petitioned to have him found in contempt. The grounds asserted in Jackye's petition were that John had failed to complete the purchase of the marital residence and that he had made duplicate keys to the home and other buildings on the property and placed furniture in the residence "without the knowledge and consent of the Clerk of the Court." In the same order in which the trial court denied John's petition to set aside the order on the mandate, the trial court found John in contempt. The trial court adopted Jackye's allegations regarding making the keys, moving personal property into the residence, and failing to close on the property within the time frame specified as the basis for finding John in contempt. It awarded Jackye $1,000 in damages for having to move from the residence and $2,933.33 in attorney's fees.

On appeal, John first argues that the trial court erred in entering its order on the mandate because it deviated from the directions that we gave it in our opinion and failed to resolve disputed questions of fact and law. We note, however, that John's petition to vacate was filed approximately nine months after the entry of the order. This time is well beyond the ten days that Rule 59 of the Arkansas Rules of Civil Procedure allows for requesting a new trial and the ninety days specified under Rule 60(a) of the Arkansas Rules of Civil Procedure during which a trial court may modify or vacate a judgment to "correct errors or mistakes or to prevent miscarriage of justice." While there are exceptions to the ninety-day limitation specified in Rule 60(c), John does not argue, nor do we find, that any of the enumerated grounds in that subsection apply. It is settled law that a trial court loses jurisdiction to modify a judgment or order after ninety days. *Jordan v. Circuit Court of Lee County*, 366 Ark. 326, 235 S.W.3d 487 (2006). Accordingly, we hold that the trial court did not err in refusing to set aside its order because it lacked the jurisdiction to modify or vacate the order.

John next argues that the trial court erred in finding him in contempt and awarding Jackye damages and attorney's fees. He asserts that no specific order was produced prohibiting him from engaging in the alleged contemptuous conduct and there was no evidence presented at the hearing that established willful disobedience of any valid order of the court. We agree.

We note first that because the finding of contempt appears to be directed at vindicating the dignity of the court and punishing disobedience to its orders rather than compelling compliance with an order, the sanctions imposed in this case were criminal in nature. *See Omni Holding & Dev. Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 156 S.W.3d 228 (2004). When we review a case of criminal contempt, we view the record in a light most favorable to the trial judge's decision and will sustain the decision if supported by substantial evidence. *Hodges v. Gray*, 321 Ark. 7, 11, 901 S.W.2d 1, 3 (1995). However, before one can be held in contempt for violating a court order, the order must be definite in its terms and clear as to what duties it imposes. *Conlee v. Conlee*, 370 Ark. 89, 257 S.W.3d 543 (2007).

Here, by defaulting on the purchase of the marital residence, John did not violate an order of the court, but merely failed to fulfill a sales contract. While it is true that Jackye testified

at the contempt hearing that he outbid her for the residence, we find this fact to be of no moment. The trial court never prohibited John from bidding on the residence, and when he did so, his actions were not those of a party to this action, but that of any member of the public at large who chose to enter a bid. We note further that his bid was secured by a ten-percent bond which John — or any other high bidder — would stand to forfeit if he or she failed to complete the sale. We acknowledge that the power to punish for contempt is inherent in the courts, but that power should only be exercised when it is necessary to insure that the authority of the court is continued. *Nutt v. Delta Trust & Bank*, 79 Ark. App. 257, 85 S.W.3d 927 (2002). John's conduct in this regard was covered by a contractual remedy and was therefore outside the scope of the trial court's contempt power.

Regarding the other asserted grounds for finding John in contempt, we have scanned the record, and we found no order that prohibited John from making duplicate keys or placing furnishings in the erstwhile marital residence. Indeed, Jackye's petition merely alleged that this conduct was contemptuous because it was undertaken "without the knowledge and consent of the Clerk of this Court" or her. Before a person may be held in contempt for violation of a judge's order, the order alleged to be violated must be definite in its terms as to the duties imposed and the command must be express rather than implied. *Sims v. First State Bank of Plainview*, 73 Ark. App. 325, 43 S.W.3d 175 (2001). Because there was not an express court order prohibiting such conduct, we hold that it was error for the trial court to find John in contempt.

Finally, Jackye asserted that John caused her to have to leave the marital residence. Her departure from the marital residence was occasioned by the Commissioner's sale, however, not by any contemptuous conduct on John's part. We therefore reverse and dismiss the contempt finding and vacate the judgment for damages and attorney's fees.

Affirmed in part; reversed and dismissed in part.

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

GRIFFEN and GLADWIN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. Although I agree that the circuit court properly refused to set aside the

order on mandate due to appellant's failure to comply with Rule 60 of the Arkansas Rules of Civil Procedure, I would hold that the contempt finding in this case was supported by substantial evidence. The majority opinion asserts that this is a simple case of a party who "merely failed to fulfill a sales contract." However, appellant's behavior goes much deeper. For these reasons, I respectfully dissent.

While the majority opinion properly states the procedural background of this case, it omits the evidence presented at the hearing on the contempt petition. At that hearing, appellant acknowledged that he offered to pay $231,000 for the marital residence, but that he was unable to complete the transaction because no bank would lend him the bond money. He stated that he bid that amount thinking that he was going to pay half, as he already owned half the home. Appellant also noted that the house was not insured and that, when he paid an insurance premium, he was told that the home had to be occupied before insurance coverage would apply. He testified that he tried to comply by placing his belongings inside the house; however, he was told by the clerk of the court that he was in the home illegally. On cross-examination, he acknowledged that he had purchased five houses since moving away from the marital residence.

Appellee testified that it cost her $1600 to construct a storage building and that she could move the building for $250 to $300. She claimed $600 in damages for having to move out of the marital residence plus construction of the storage building. She also noted that she was at the auction of the marital residence and that she submitted a bid of $230,000, thinking that the bid represented the value of the home.

At the conclusion of the hearing, the circuit court noted as follows:

> Now, the other one is, on your motion for contempt. I don't know how many calls I got from the clerk's office and I just don't know, the poor circuit clerk here is just — I'm surprised she's got any hair left on her head because every time I visited her, she was pulling it out. And, that was caused by you, Mr. Farr. Ms. Farr bid it up to $230,000 and you bid her one more and you said you would proceed on it. Now, I required you to put up at least the amount of the bond of one-half plus half the debt, did I now, isn't that correct?
>
> . . . .

And, the fact that the testimony has been from Mr. Farr today is that he's — he's bought a new house in Fort Smith, I believe he said he paid $120,000 for that one. He's getting ready to buy one in Oklahoma for $80,000. He bought another one for $162,000, so, the fact that he indicates he can't proceed with the sale or put up a bond doesn't carry much water in my opinion.... It looks like to me he's doing quite well. So, I don't find that's a viable argument that he couldn't follow through on the sale or put up whatever bond he needed to put up. I believe that Mr. Farr is trying to pull a little bit of wool over the Court's eyes. And, even though he bid on the property, he had keys made. There's a dispute in the facts as to whether or not the locks were drilled or whatever, but the truth of the matter is and I think it's pretty well uncontroverted is that he went out there and tried to move stuff in before he had authorization to do so, he had a key made in direct defiance of the order of the Clerk and then attempted to move stuff and so forth in and out and as far as I'm concerned, you're in contempt for those particular reasons.

Now, here's what I'm concerned about. If this were a third party ... who'd bid on this property and put up $23,000 and that party didn't follow through on the sale, I've always understood that that was earnest money and earnest money like any other real estate deal would be — that's the value or that's the damage that you have incurred and the right to keep that money because you have taken that property off the market during that period of time because you failed, the proposed buyer, failed to follow through and close the transaction and as a result, then that money should be forfeited. That's what I would say on any real estate deal is the way I understand it. I'm going to give you a chance to tell me I'm right or wrong on this issue, but it looks like to me the money ought to be forfeited and that's what I'm thinking. I'm not ordering it, I'm going to give you a chance if you can find me some legal — case law that says I shouldn't do it that way, then I'll be glad to refund the money to Mr. Farr. I don't think that's right and I think he's playing games with the Court and Ms. Farr. I think he's played games with Ms. Farr and that the Court's been drawn in as part of it and the clerk. Those are the two things I don't care for. What you two do to each other is fine, but when you get in front of the Court, then you're going to have to take responsibility for it.

So, here's what I'm going to do. First of all, I don't agree with all of Ms. Farr's request for damages. You built your storage building and I believe from Mr. Foster, he indicated that the most you

> could have would have probably been $1,000 in expenses for moving and you were going to have to move anyway, so I don't have a whole lot of part in that argument because you were going to have to move anyway at some point, you might not have if you'd have been the successful bidder and Mr. Farr hadn't have bumped you up, so I'm going to award you $1,000 on your moving expenses or damages for what — I shouldn't say moving expenses because I don't think that's correct. But damages occurred as a result of your actions, Mr. Farr, in doing all this and bidding it up and then not following through on it and going out there and causing the problems.
>
> Now, on the attorneys fees, Mr. Maddox, you can submit your time sheet from the time of the report of the sale through today. Whatever those are, I'll grant you attorneys fees on that.

Disobedience of any valid order of a court having jurisdiction to enter it may constitute contempt, punishment for which is an inherent power of the court. *Aswell v. Aswell*, 88 Ark. App. 115, 195 S.W.3d 365 (2004). An act is deemed contemptuous if it interferes with the order of the court's business or proceedings or reflects upon the court's integrity. *Ward v. Switzer*, 73 Ark. App. 81, 40 S.W.3d 325 (2001). Before a person may be held in contempt for violating a judge's order, the order alleged to be violated must be definite in its terms as to duties imposed, and the command must be express rather than implied. *Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000).

While the majority opinion states that appellant was held in contempt for failing to close on the sale of the marital residence, the issue here is much deeper. The contemptuous behavior includes the act of increasing the bids on the property to prevent appellee from obtaining the home, then failing to follow through with the purchase despite the ability to do so (as evidenced by the purchase of other residences in that same time period). These actions frustrated the purpose of resolving the property issues in this arduous divorce.[1]

Further, the majority notes that appellant stood to forfeit his bond for his failure to complete the sale of the home. It so states

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[1] According to documents in the record, another auction was held on January 25, 2007, and the marital residence was ultimately sold to a third party for $217,000, $14,000 less than appellant's "successful" bid. Appellant's behavior deprived the marital estate of that money, half of which would have been presumably awarded to appellee.

without any citation to authority and despite the circuit court's reluctance to automatically forfeit the bond at the conclusion of the contempt hearing. Appellant certainly did not believe that his bond payment was subject to forfeiture, as he filed a request to have his bond money refunded. If the circuit court were to grant his remedy, it would leave appellee without a remedy.

The majority sees this case as a simple failure to follow through with the sale of a residence, but the issues go much further than that. Because I would hold that the circuit court did not err in finding appellant in contempt, I dissent.

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

Paul Lewis DOTTLEY *v.* Melanie Dottley MILLER

CA 07-426 276 S.W.3d 729

Court of Appeals of Arkansas
Opinion delivered February 20, 2008

Haddock & Tisdale, P.A., by: *James W. Haddock*, for appellant.

R. Victor Harper, for appellee.

SAM BIRD, Judge. The issue in this case is whether the trial court erred in ruling on a petition for modification of child support without hearing any testimony or receiving any evidence. We hold that the trial court did err, and we reverse and remand for a hearing on the petition.

Appellant Paul Lewis Dottley, Jr., and appellee Melanie Beth (Dottley) Miller were divorced on October 2, 2000. On January 15, 2006, appellant filed a petition for modification of child support, alleging a change in circumstances justifying a decrease in child support. Appellee answered, requested an increase in child support, and filed a counterclaim for contempt. The trial court set the case for a hearing on December 21, 2006.

The record reflects that on December 21, 2006, the trial court requested the attorneys to identify themselves and the parties they represented. The court then explained that there were two matters before the court: a petition to modify support and a motion for contempt. The following includes the remainder of the proceedings:[1]

> THE COURT: ... I visited with the attorneys in the back and received some indication of what the anticipated

[1] Appellant is referred to as the Defendant; appellee is referred to as the Plaintiff.

testimony might be. And from that I reached a decision. Mr. Harper, would you announce it?

MR. HARPER: Yes, sir, Your Honor. Mr. Dottley owes to my client the sum of $800.00 in back child support. In addition he owes the sum of $185.00 for school fees, which he has not paid. That total is $985. That amount will be paid within ninety days of today's date.

In addition, my client will be awarded attorney's fees of $500.00 for Defendant's failure to follow the previous orders of the court. That fee will be paid within ninety days.

The Plaintiff's petition for increase is denied. The Defendant's petition for a decrease is denied. The tax deduction will continue to be carried by my client.

During the summer months when the Defendant has the child for at least fourteen days he will be entitled to a reduction of one-half of his child support obligation. The child support will continue to be $400.00 per month.

The parties previously in a property settlement agreement provided that they would each be responsible for one-half of private school tuition and expenses. That agreement was entered into during the divorce and the Court finds it shall continue to be enforced. Therefore, they will both continue to be responsible for half of the tuition and fees for the private school the child is attending.

THE COURT: Okay. Very well. And this is the ruling of the court. Is there anything further, Mr Haddock?

MR. HADDOCK: Excuse me, Your Honor?

THE COURT: I said that's the ruling of the Court.

MR. HADDOCK: Just note our objection, Your Honor, that the Court ruled without taking any evidence, any testimony, looking at none of the evidence to be pre-

sented in this case. That he ruled basically on all the representations of Ms. Dottley's attorney and to that we object.

I've tried about a thousand of these cases and this is the first time I've ever had a ruling without any evidence. To that we object and to that we're going to appeal.

THE COURT: Well, you know, while we're here you can —

MR. HADDOCK: The Court's announced [its] ruling. If we're going to have a hearing I'm going to ask the Court to recuse, because the Court's already decided what he's going to do without the first witness taking the stand.

THE COURT: Okay. Well, yeah, that's my ruling based upon the proposed facts as I appreciate them to be if this matter was presented to the Court.

The trial court entered an order on January 31, 2007, denying appellant's request for a decrease in child support and essentially incorporating the rulings set forth above in its oral pronouncement. Appellant filed a timely appeal from the order.

Appellant's argument on appeal is that the trial court erred by, in essence, granting a summary judgment when it ruled without allowing testimony or receiving any evidence. Appellant claims that summary judgment is an extreme remedy; that this case is fact intensive; and that summary judgment was therefore inappropriate. Appellee responds, arguing that this court's review is limited to the record, and that appellant's failure to proffer evidence or testimony precludes our review on appeal, citing *Duque v. Oshman's Sporting Goods*, 327 Ark. 224, 937 S.W.2d 179 (1997), and other cases standing for this proposition. Appellee claims that it is apparent that the trial court was attempting to offer appellant an opportunity for a hearing when it said, "Well, you know, while we're here you can —" and that appellant's counsel declined the offer. Appellee also argues that the record does not contain any evidence or testimony upon which a request to reduce child support could be granted, that the appellant offered nothing to meet his burden of showing that a change in circumstances had occurred, and that evidence and testimony not proffered will not be considered on appeal.

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). In determining whether there has been a change in circumstances warranting adjustment in support, the supreme court has held that the trial court should consider remarriage of the parties, a minor 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. *Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005).

On appeal, we review child-support awards de novo on the record. *Martin v. Scharbor*, 95 Ark. App. 52, 54, 233 S.W.3d 689, 692 (2006). A trial court's determination regarding whether there are sufficient changed circumstances to warrant a modification in child support is a question of fact that we will not reverse unless it is clearly erroneous. *Woodson v. Johnson*, 63 Ark. App. 192, 975 S.W.2d 880 (1998). 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. *Martin*, 95 Ark. App. at 54, 233 S.W.3d at 692.

In order for the trial court to make the factual determination of whether there have been sufficient changed circumstances to warrant a modification of child support, the trial court must consider evidence. Evidence is "any species of proof legally presented at trial through the medium of witnesses, records, documents, exhibits, and concrete objects for the purpose of inducing belief in the minds of the court or jury. The word 'evidence' thus includes all the means by which any fact in dispute at a judicial trial is established or disproved." 29 Am. Jur. 2d *Evidence* § 1 (1994). Then, in order for this court to review the trial court's determination, we must review the entire evidence. In this case, there was no evidence to review: no testimony, no financial records, nothing. Appellant has effectively been denied any review of the trial court's ruling because the court did not allow any evidence to be presented.

Appellant asserts that the trial court, in essence, granted a summary judgment. We disagree. Summary judgment is governed by Ark. R. Civ. P. 56. It provides for the filing of motions specifying the issues upon which the motion is being filed,

responses, and supporting materials. No motion for summary judgment was filed by either party; no affidavits, financial records, or other documents were provided; and no determination was made by the trial court that there were "no genuine issues of material fact to be litigated, and that [appellee] is entitled to judgment as a matter of law." *Mitchell v. Lincoln*, 366 Ark. 592, 237 S.W.3d 455 (2006). The trial court did not grant a motion for summary judgment. The court made a determination regarding appellant's petition for modification without considering, in any legally recognizable way, any evidence.

Appellee excuses the court's actions by claiming that the court attempted to offer appellant an opportunity for a hearing, that appellant's counsel understood it to be an offer, but that appellant declined the offer. Therefore, appellee claims, appellant essentially "waived" his hearing. Appellee relies upon cases requiring a party to proffer excluded testimony or evidence in order to have the issue considered on appeal.

First, we do not find the trial court's statement as determinative as does appellee. While it is certainly possible that the trial judge intended to offer appellant a hearing when he was interrupted by appellant's counsel, the fact is that he did not offer appellant a hearing. We are unwilling to assume that the trial court, after twice announcing "that is the ruling of the court" without hearing the testimony of any witnesses, was then attempting to reverse itself and conduct a hearing. If so, the court had an opportunity to do so after the interruption before its third pronouncement: "That's my ruling based upon the proposed facts as I appreciate them to be if this matter were presented to the Court."

Second, the cases upon which appellee relies requiring a party to proffer the excluded evidence in order to challenge the exclusion on appeal are inapposite. Those cases involve trials in which evidence was excluded. *See, e.g.*, *Cadillac Cowboy, Inc. v. Jackson*, 347 Ark. 963, 69 S.W.3d 383 (2002); *Duque, supra.* In order to predicate error on a ruling that excludes evidence, Arkansas Rule of Evidence 103(b) states that "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." There was no ruling excluding evidence in this case. The court never conducted a hearing in which evidence was being offered. The cases cited by appellee simply are not relevant to the issue before us.

We hold that the trial court erred in making findings and in denying appellant's petition without allowing the parties to present testimony and other evidence. Accordingly, we reverse and remand to the trial court for a hearing.

ROBBINS, GLOVER, HEFFLEY, and BAKER, JJ., agree.

PITTMAN, C.J., dissents.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. The appellant filed a petition seeking a reduction in his child-support payments. Appellee counterclaimed for an increase in child support and for contempt. The trial court entered an order denying both parties' request for modification of child support, finding appellant in contempt, and ordering him to pay $985 in past-due child support. On appeal, appellant argues that the trial court erred in ruling on the basis of representations made in chambers, without taking any testimony or other evidence.

The following is the entire abstract of the proceedings:

> THE COURT: I visited with the attorneys in the back and received some indication of what the anticipated testimony might be. And from that I reached a decision. Mr. Harper, would you announce it?
>
> MR. HARPER: Mr. Dottley owes my client $800.00 in back child support. He owes $185.00 for school fees. The total is $985. This will be paid within ninety days of today's date.
>
> My client will be awarded attorney's fees of $500.00 for defendant's failure to follow previous orders of the Court. This will be paid within ninety days.
>
> Plaintiff's petition for increase is denied. Defendant's petition for decrease is denied. The tax deduction for the child will continue with my client.
>
> When defendant has the child at least fourteen days, he is entitled to a reduction of one-half of his child support. Child support will continue to be $400 per month.
>
> The parties in a property settlement agreement provided that they would each be responsible for one-half

> of private school tuition and expenses. It shall continue to be enforced. Both will continue to be responsible for one-half of tuition and fees for the private school the child is attending.

THE COURT: That is the ruling of the Court.

MR. HADDOCK: Excuse me, Your Honor?

THE COURT: I said that's the ruling of the Court.

MR. HADDOCK: Just our objection, that the Court ruled without taking any evidence, any testimony, or looking at the evidence; that he ruled on all the representations of Ms. Dottley's attorney and to that we object. This is the first time I've ever had a ruling without any evidence. We object and we're going to appeal.

THE COURT: Well, you know, while you're here you can —

MR. HADDOCK: The Court's announced its ruling. If we're going to have a hearing I'm going to ask the Court to recuse, because the Court's already decided what he's going to do without the first witness taking the stand.

THE COURT: That's my ruling based upon the proposed facts as I appreciate them to be if this matter were presented to the Court.

The following statements were not abstracted but appear in the record immediately afterward:

MR. HADDOCK: That's good, Your Honor.

THE COURT: Very well. Thank you.

I agree that the trial judge erred in ruling before evidence was had. Nevertheless, I disagree with the conclusion that this error warrants reversal. When he made his objection, appellant's attorney requested no relief, but instead declared immediately that he intended to appeal. When the court attempted to respond to address his objection, appellant's attorney interrupted the trial judge in mid-sentence and refused the very relief he now seeks, a hearing on the merits.

An appellant must obtain a ruling on his objection to preserve it for appeal, *Arkansas Contractors Licensing Board v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001). The reason

for this rule is to ensure that the trial court has an opportunity to correct its own error before resort is had to appeal. Here, the appellant's attorney not only failed to obtain a clear ruling, but is himself directly responsible for preventing the trial judge from correcting his error by conducting a proper hearing. It is quite possible that the trial judge made a simple and honest mistake. Perhaps he believed that the parties had stipulated to the facts in chambers and that all that was required at this point was for him to issue a ruling. The majority does not consider this possibility, but instead apparently believes it more likely that an Arkansas trial judge might be so misguided as to intentionally issue a ruling without having heard either evidence or stipulation. I vehemently disagree. In my view, it would have been beneath the dignity of the court to continue to offer relief after he had been silenced by appellant's attorney and after relief had been refused. I would affirm because appellant's attorney prevented the court from ruling on the objection.

I respectfully dissent.

Emilia DUKE *v.* Joseph Edward SHINPAUGH
and Rebekah Shinpaugh Ogle, Administrators of the Estate of
Calvin Leeroy Shinpaugh, Deceased

CA 07-229 276 S.W.3d 713

Court of Appeals of Arkansas
Opinion delivered February 20, 2008

[Rehearing denied April 2, 2008.*]

* PITTMAN, C.J., and GLADWIN, ROBBINS, and BAKER, JJ., would grant rehearing.

Legal Aid of Arkansas, by: *W. Marshall Prettyman*, for appellant.

Penix and Taylor, by: *Stephen L. Taylor*, for appellees.

WENDELL L. GRIFFEN, Judge. Emilia Duke appeals from an order setting aside a deed granting her one acre of property belonging to her late stepfather, Calvin Leeroy Shinpaugh (Mr. Shinpaugh). We hold that the trial court did not err in applying the presumption of undue influence because appellant and Mr. Shinpaugh were in a confidential relationship. Nonetheless, we hold that the trial court erred in 1) excluding a neighbor's testimony that Mr. Shinpaugh intended to give one acre of land to appellant before he died, 2) finding the power of attorney by which appellant conveyed the land to herself by a quitclaim deed was the product of undue influence, and 3) finding that, in making the quitclaim conveyance to herself, appellant overreached the powers granted to her as Mr. Shinpaugh's power of attorney. Accordingly, we affirm in part, but we reverse the trial court's order setting aside the deed, reverse the order ejecting appellant from the entire parcel of land, and remand for a new trial.

I. Facts

Mr. Shinpaugh and appellant's mother, Frances Shinpaugh, owned 2.9 acres of property in Fayetteville, Arkansas, as tenants by the entirety; their home is located on the northernmost acre. Pursuant to a written agreement and a power-of-attorney form executed by Mr. Shinpaugh in her favor, appellant conveyed the middle acre of this property to herself shortly before Mr. Shinpaugh died. Appellees are Joseph Shinpaugh and Rebekah Ogle, Mr. Shinpaugh's children. Acting as administrators of his estate, appellees filed suit to have the deed set aside and to have appellant removed from the property.

Appellant began living with the Shinpaughs in 1997 due to her mother's poor health. It is undisputed that appellant took care of Mrs. Shinpaugh from that point, and also took care of Mr.

Shinpaugh after his health declined. Additionally, she performed household chores and property maintenance.

Mrs. Shinpaugh died intestate on May 15, 2005. Appellant testified that before her mother died, Mr. Shinpaugh agreed that appellant would be given one acre of their property. Ogle admitted that she spoke with Mr. Shinpaugh about giving property to appellant both before and just after Mrs. Shinpaugh's funeral, but she maintained that her father could not decide which acre to give to appellant.

Appellant continued to live with and care for Mr. Shinpaugh after her mother's death. A few hours after Mrs. Shinpaugh's funeral, after Mr. Shinpaugh met privately with appellees, appellant approached him to discuss "legitimizing" her situation. Within the next few days, she and Mr. Shinpaugh drafted a document entitled "Agreement," which purported to give her one acre of Mr. Shinpaugh's property in recognition of her long-time assistance to the Shinpaughs. This document was typed by appellant's nephew, Calvin Duke, on a computer belonging to John Holmberg, Mr. Shinpaugh's long-time neighbor.

Mr. Shinpaugh was hospitalized on May 23, 2005, due to congestive heart failure. He signed the agreement the next day, on May 24, 2005, while he was still hospitalized. Ogle did not dispute that her father signed the agreement; appellant did not sign the document.

The following day, May 25, 2005, while Mr. Shinpaugh remained hospitalized, he signed a durable power of attorney in favor of appellant, that was prepared by his attorney. Appellees conceded at the hearing that Mr. Shinpaugh signed this form and further conceded that the power of attorney was valid.

After Mr. Shinpaugh's release, appellant continued to live with and care for him. On December 14, 2005, Mr. Shinpaugh suffered a stroke; he was again hospitalized until January 27, 2006. He was thereafter taken to a rehabilitation center, where he died on March 5, 2006.[1] Ogle admitted that her father retained his faculty to understand what was being said to him and to respond appropriately to the end of his life.

On February 8, 2006, approximately one month before Mr. Shinpaugh died, appellant deeded one acre of Mr. Shinpaugh's

[1] Appellees initiated a guardianship proceeding shortly before Mr. Shinpaugh died. However, he died before a guardian was appointed.

property to herself, pursuant to the power of attorney. After Mr. Shinpaugh died, appellant continued to live in the Shinpaugh home but never notified appellees that she deeded the property to herself. Appellees found the deed while searching property records to discover the name of the mortgage company holding a reverse mortgage on their father's property. They filed suit in the instant case, alleging, *inter alia,* that Mr. Shinpaugh was incapacitated from December 14, 2005, onward, due to his health conditions, and that appellant breached her fiduciary duty in conveying part of his property to herself. They also filed a detainer action and were granted immediate possession of the entire 2.9 acres of property.

In its written order, the trial court found that a confidential relationship existed between appellant and Mr. Shinpaugh and that the agreement was testamentary in nature, though it did not qualify as a will. However, the court made no finding that appellant procured the agreement. Further, even though appellees never challenged the validity of the power of attorney executed by Mr. Shinpaugh and conceded that the form was valid, the trial court determined that appellant failed to overcome the presumption that the agreement and power of attorney were the product of her undue influence. Finally, the court found that appellant breached her fiduciary duty and that, if the power of attorney was valid, appellant exceeded her power granted under it. Accordingly, the trial court ordered that the deed be set aside and entered a final judgment of possession in appellees' favor of the entire 2.9 acres of property.

II. Presumption of Undue Influence

We first affirm the trial court's determination that the presumption of undue influence arose, which appellant was required to rebut. Appellant argues that the trial court erred in finding that the agreement was not a will but yet determined that the presumption of undue influence arose.

The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *See First Nat'l Bank v. Garner,* 86 Ark. App. 213, 167 S.W.3d 664 (2004). 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. *See id.* In reviewing a trial court's findings of fact, we give due deference to the trial judge's superior position to determine

the credibility of witnesses and the weight to be accorded to their testimony. *See Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996).

To be valid as a will, an instrument must be executed with testamentary intent, which is the intention to dispose of one's property upon one's death. *See Edmundson v. Estate of Fountain*, 358 Ark. 302, 189 S.W.3d 427 (2004). We affirm on this point because the agreement contained contradictory terms indicating both that it was a will and that it was not; thus, the trial court could have determined that the agreement was not a will. Moreover, regardless of the nature of the agreement, the undue influence presumption arose because the trial court determined that appellant and Mr. Shinpaugh were in a confidential relationship — a finding that appellant does not challenge on appeal. *See Wesley v. Estate of Bosley*, 81 Ark. App. 468, 105 S.W.3d 389 (2003).[2]

III. Mr. Holmberg's Testimony

Although we agree that the presumption of undue influence arose, we reverse, first, because the trial court erred in finding that the agreement was the product of undue influence without allowing Mr. Shinpaugh's neighbor, John Holmberg, to testify that Mr. Shinpaugh told him before he died that he wanted to give appellant one acre of land. Appellees raised a hearsay objection when Mr. Holmberg testified that he was aware of the agreement and that he and Mr. Shinpaugh had discussions about it. The trial court assumed that Holmberg would testify that "He [Mr. Shinpaugh] told me he wanted to give Emilia Duke an acre." The trial court ruled that any such testimony would be inadmissible hearsay.[3] Appellant argued that the testimony was admissible pursuant to Ark. R. Evid. 804(b)(3) as a statement against Mr. Shinpaugh's interest. We will not reverse a trial court's ruling on the admission of evidence unless the trial court abused its discretion. *See O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000).

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[2] Appellees inconsistently assert that the agreement cannot be regarded as making an *inter vivos* transfer of the property to appellant because no delivery of the property was actually made, and that the law concerning gifts raises the presumption of undue influence if the agreement was not testamentary in nature. We note that the intent of the donor can negate the fact that actual title was not transferred. *See O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000).

[3] While no proffer was made, no proffer was necessary because the substance of the testimony was apparent from the context. *See* Ark. R. Evid. 103(2).

The trial court's exclusion of Holmberg's testimony was an abuse of discretion because Mr. Shinpaugh's statement, prior to his death, that he intended to give the property to appellant, was a statement against the pecuniary interest of his estate. *See id.* Pursuant to Rule 804(b)(3), a statement against interest is admissible if the declarant is unavailable as a witness. A statement against interest is

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true.

In *O'Fallon*, the trial court found that the decedent made an *inter vivos* gift to his son, after the court admitted testimony that the decedent stated that he "was buying" or "had bought" the vehicle for his son. The *O'Fallon* court affirmed the admission of this testimony under Rule 804(b)(3), as an admission against the pecuniary interest of the decedent's estate. Similarly, here, Mr. Shinpaugh's statement would constitute a statement against the pecuniary interest of his estate because a successful property transfer, whether testamentary or *inter vivos,* would reduce the body of what would be included in Mr. Shinpaugh's estate.

Appellees unpersuasively attempt to distinguish *O'Fallon* on two grounds. First, they argue that any statement Mr. Shinpaugh made would be made while under appellant's undue influence. However, whether Mr. Shinpaugh made any statement under the undue influence of appellant would go to the weight of the statement, not its admissibility. Second, they argue that the issue in *O'Fallon* was whether the decedent had divested himself of the title to his vehicle and that "there can be no question that Leeroy Shinpaugh did not alienate or divest himself of title to the acre of his property while under appellant's undue influence." To the contrary, whether Mr. Shinpaugh divested himself of title to the property when he signed the agreement is the *precise* issue.[4]

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[4] Appellees further assert that even if Mr. Holmberg's testimony was admissible, it would have only strengthened the trial court's conclusion that a confidential relationship existed between appellant and Mr. Shinpaugh because Mr. Holmberg would have testified

More convincing is appellant's argument that she was prejudiced by the trial court's exclusion of Holmberg's testimony because he was a disinterested, third-party witness whose testimony was critical to prove that Mr. Shinpaugh acted of his own accord and did not agree to convey the property to appellant due to her undue influence. *See Estate of Garrett*, 81 Ark. App. 212, 100 S.W.3d 72 (2003) (citing as evidence supporting a finding of no undue influence the fact that two disinterested witnesses testified that the decedent was of sound mind when he executed his will).

Here, due to the trial court's exclusion of Mr. Holmberg's testimony, it erroneously concluded that the agreement was the product of appellant's undue influence without considering all of the relevant, admissible evidence that Mr. Shinpaugh agreed to give appellant the property before he died. Appellant was prejudiced by the ruling to exclude Holmberg's testimony, as she had the burden of proving donative intent and the absence of undue influence. Because appellant was prejudiced by this evidentiary ruling, we reverse and remand for a new hearing.

III. Power of Attorney

We further reverse the trial court's finding that the power of attorney was obtained as the result of undue influence because appellees never developed that argument below. To the contrary, appellees conceded below that the power of attorney was valid. Appellees did not assert in their complaint that the power-of-attorney form was the result of appellant's undue influence. Rather, they simply asserted that she breached her fiduciary duty in deeding the property to herself because Mr. Shinpaugh never agreed to convey any of his property to her.

Nor was the issue tried by the implied consent of the parties. Rather, appellees expressly conceded during the hearing that the document was valid. When Ogle testified that Mr. Shinpaugh revoked the power of attorney, appellees' attorney halted this line of cross-examination and conceded that the power of attorney was valid as written. Because this is so, even though evidence was

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that the agreement was due to Mr. Shinpaugh's "complete reliance on appellant for care 24 hours a day." This assertion is speculative, at best, as it assumes how the trial court would interpret the evidence, as well as the weight the court would assign to it.

submitted concerning the events surrounding the drafting of the document, the trial court had no basis for determining that the power of attorney was the product of undue influence.

The trial court further erred in alternatively finding that if the power of attorney was valid, appellant exceeded her authority and powers granted under the terms thereof and breached her fiduciary duty. Contrary to the trial court's oral finding, the power-of-attorney form authorized appellant to deed the property to herself.

The form is entitled, "General Durable Power of Attorney." It states that Mr. Shinpaugh designates appellant to act in his name and for his benefit as follows:

> 1. GENERAL GRANT OF POWER. To exercise or perform any act, power, duty, right, or obligation whatsoever that I now have or may hereinafter acquire, relating to any person, matter, transaction or property, real or personal, tangible or intangible, now owned or hereinafter acquired by me, including, without limitation, the following specifically enumerated powers. I grant to my agent full power and authority to do everything necessary in exercising any of the powers herein granted as fully as I might or could do if personally present[.]
>
> . . .
>
> (b) POWER TO ACQUIRE AND SELL. To acquire, purchase, exchange, grant options to sell, and sell and *convey real* or personal *property*, tangible or intangible, or interest therein, *on such terms and conditions as my agent shall deem proper*[.]

(Emphasis added.)[5]

Thus, the plain terms of the power of attorney authorized appellant to convey Mr. Shinpaugh's real property on such terms and conditions as she deemed proper. Obviously, she would deem it proper to convey property to herself that Mr. Shinpaugh

[5] Appellant does not specifically challenge the trial court's finding that she exceeded the scope of her authority under the power of attorney. However, we cannot affirm this finding as an alternative, independent ground that appellant failed to challenge because this finding is not *independent* from the remainder of the trial court's findings. The court's decision is related to the fact that it found the agreement to be invalid.

had previously agreed to convey to her. In the simplest terms, consensual self-dealing is permitted. *See Cole v. Laws*, 349 Ark. 177, 76 S.W.3d 878 (2002) (stating the guiding principle of the fiduciary relationship is that self-dealing is strictly proscribed *unless* the other party to the relationship consents). Because the valid power of attorney authorized appellant to convey Mr. Shinpaugh's property, if he, in fact, agreed to convey the instant property to her, then appellant's self-dealing would be permitted. Hence, on remand the trial court should consider the effect of the power of attorney in light of our reversal on this point as well as its new findings regarding the agreement.

V. Conclusion

We affirm the trial court's finding that the presumption of undue influence arose because appellant and Mr. Shinpaugh were in a confidential relationship. We reverse and remand because the trial court erroneously determined that the agreement was the product of undue influence without considering the relevant, admissible testimony that, before he died, Mr. Shinpaugh intended to give appellant one acre of his property. We also reverse because the trial court erroneously determined that the power of attorney was the product of undue influence even though appellees conceded that the document was valid, and because the court erroneously determined that appellant exceeded her powers granted under that document.

This, in turn, requires us to reverse and remand the order of judgment and possession ejecting appellant from the *entire* 2.9 acres of land. If the trial court determines on remand that appellant is entitled to receive one acre of Mr. Shinpaugh's land, it should enter an appropriate order based on that finding.

Affirmed in part; reversed and remanded in part.

BIRD, VAUGHT and HEFFLEY, JJ., agree.

MARSHALL, J., concurs.

PITTMAN, C.J., GLADWIN, ROBBINS and BAKER, JJ., dissent.

D.P. MARSHALL JR., Judge, concurring. I concur in the court's judgment. This case should be retried, as the court holds, because the circuit court erred by excluding testimony from Mr. Holmberg about Mr. Shinpaugh's stated intentions to give Ms.

Duke some real property. I also agree that the circuit court erred by invalidating the durable power of attorney. It was prepared for Mr. Shinpaugh at his request by his lawyer, and executed while the lawyer was present and Ms. Duke was not. The appellees conceded the validity of the power at trial. The circuit court therefore erred as a matter of law by reaching out and voiding it in spite of the parties' contrary agreement.

I disagree with the court, however, about procurement. As the court correctly holds, Ms. Duke and Mr. Shinpaugh had a confidential relationship in which she was the dominant party because of his dependence on her. A presumption of undue influence arose from the circumstances surrounding the agreement. *Medlock v. Mitchell*, 95 Ark. App. 132, 136, 234 S.W.3d 901, 905 (2006). The burden shifted to Ms. Duke to overcome that presumption. And the question that the parties and lower court need answered for retrial is: what evidentiary burden must Ms. Duke carry to demonstrate that no undue influence occurred?

If procurement occurred, then she must prove beyond a reasonable doubt that Mr. Shinpaugh decided to give her the acre without improper pressure from her. *Smith v. Welch*, 268 Ark. 510, 513, 597 S.W.2d 593, 595 (1980). If no procurement occurred, then she must prove this point by a preponderance of the evidence. *Ibid.* The weight of Ms. Duke's evidentiary burden may well determine the outcome of this case, and we should be clear about that burden.

The circuit court implicitly found that Ms. Duke procured the agreement because it shifted the burden to her to prove — beyond a reasonable doubt — that she did not unduly influence Mr. Shinpaugh. This is the standard in procurement cases. *Smith, supra*; *Looney v. Estate of Wade*, 310 Ark. 708, 710, 839 S.W.2d 531, 533 (1992). I would hold that the circuit court did not err on this important embedded issue. The agreement was Ms. Duke's idea. She and Mr. Shinpaugh drafted it together, and she wrote it down. Then her nephew typed it at her request. Ms. Duke waited outside Mr. Shinpaugh's hospital room while he signed it, and then he handed it to her. This is a quintessential procurement situation. *Looney*, 310 Ark. at 710-12, 839 S.W.2d at 533-34.

I part company with the court on one other point. Mr. Shinpaugh's durable power of attorney does not expressly authorize Ms. Duke to make gifts of real property to herself. The "POWER TO ACQUIRE AND SELL" term is just that: an

express power to "sell and convey" real property on whatever terms Ms. Duke decided were best for Mr. Shinpaugh. This conveyance, however, was no sale. It was a gift prompted by Ms. Duke's caregiving.

Now of course Mr. Shinpaugh could give his property away if he wanted to do so, and the "GENERAL GRANT OF POWER" in the power of attorney is broad enough to confer the authority to make gifts on Ms. Duke. But the sticking point is that this gift of land was self dealing. As the court notes, our law forbids a fiduciary from acting in her own interest vis-a-vis her principal unless the principal freely and knowingly consents to the transaction without any undue influence from the fiduciary. *Cole v. Laws*, 349 Ark. 177, 185-86, 76 S.W.3d 878, 883 (2002). This line must not be crossed. As then-judge Cardozo famously wrote, the law holds a fiduciary like Ms. Duke to "the punctilio of an honor the most sensitive." *Litvinko v. Downing*, 260 Ark. 868, 870, 545 S.W.2d 616, 617 (1977) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)).

This case, then, rests on the agreement coupled with the power of attorney. If Ms. Duke proves beyond a reasonable doubt that Mr. Shinpaugh wanted to give her an acre of land and signed the agreement embodying this desire without undue influence, then the durable power of attorney authorized her to implement Mr. Shinpaugh's wishes. But the power of attorney standing alone did not authorize her to make this gift of land to herself.

With these explanations and limitations, I concur in the court's judgment reversing and remanding for a new trial.

JOHN MAUZY PITTMAN, Chief Judge, dissenting. This is a clear case involving only two issues: first, did the trial court commit reversible error by not permitting a neighbor to testify that the decedent intended to give an acre of land to appellant; and second, did the trial court erroneously conclude that the quitclaim deed given by appellant to herself was invalid due to overreaching? In a remarkable opinion, the majority holds that the trial court did err on both counts. I would affirm.

A more detailed exposition of the facts is necessary to fully understand the issues. Appellant Emilia Duke is the stepdaughter of the decedent, Calvin Leeroy Shinpaugh. Appellant had spent the previous eight years living in the home shared by her mother and decedent in order to save money on rent. During that time she

cared for her mother and, later, her stepfather, as their health deteriorated. By the time appellant's mother died in May 2005, Mr. Shinpaugh was wheelchair-bound and in great pain. Physically helpless, he had by this time become completely dependent on appellant for all the necessities of life. By her own admission, appellant was very worried because her mother had died intestate and she did not know whether she would be allowed to remain in the Shinpaugh residence. Her anxiety was exacerbated when, following her mother's funeral, Mr. Shinpaugh spent four hours with his children outside her presence, and Mr. Shinpaugh's attorney told her that she "was nothing after he died."

So, a few days after the death of a wife to whom Mr. Shinpaugh was utterly devoted, appellant, after querying an attorney acquaintance concerning the best method of doing so, "sought to legitimize [her] presence in the house through . . . the agreement." The "agreement" was obtained by appellant while Mr. Shinpaugh was hospitalized for congestive heart failure. It was composed at appellant's behest, with her active assistance with respect to the contents, and was typed by appellant's nephew. It read as follows:

AGREEMENT

I, Calvin Leroy [sic] *Shinpaugh, residing at 3275 N. Wagner Road, Fayetteville, AR 72704, Being of sound mind and competent this 24th day of May 2005 date* [sic]*; I give to Emilia Duke one acre of land adjacent to the north of the one acre at the corner of Wagner Road and Weir Road. I also bequeath the household objects belonging to her mother and her father, James Duke, which consists* [sic] *of; two rocking chairs, a Black gum desk, a Morraçan* [sic] *tray, and various other objects of furniture and plants. Not included is an Acrosonic piano. I also give to her the contents of the bank box located in the Bank of Elkins, Elkins, AR, which belonged to Francis Shinpaugh, her mother. In the box are items such as; a seventeen hundreds* [sic] *coin, an ivory Buddha, a diamond ring and other items.*

Emilia has lived at 3275 N. Wagner Road for eight years. We invited her to live here. In the duration she was a caregiver for my wife Francis for four to six years at six to eight hours a day with no holidays. She has cleaned, maintained three acres, did [sic] *landscaping and gardening and various othetr* [sic] *tasks.*

Emilia, at the time of this will, was a twenty-four hour caregiver to Francis, an eighty-five year old stroke patient. Emilia changed her diaper, spoon-fed

her, lifted her, changed her clothes, gave her sponge baths and all personal hygiene. She is also doing the yard work, running errands, cooking, washing dishes and at the time of this writing, taking us to doctors appointments.

In the duration of the time that Emilia has been living with us, she has supported herself by building furniture and selling it to local businesses. Supplementary to this, she helped support Calvin Duke, our grandson and parented him. Calvin Duke was present part-time for eighteen years.

This is my only will to date. This document is not revocable. I, Calvin Leroy[sic] Shinpaugh, am a primary beneficiary.

This document under contest will not be my will as is made clear and concise what I wanted at signing.

[Signature] *Calvin Leroy* [sic] *Shinpaugh*

_____ *Witness*

_____ *Witness*

[Signature] *Notary*

What are we to make of this document? Clearly, it fails to meet the requirements of a will or a deed. It is not a contract, because it contains no mutual obligations and because past consideration will not support a current promise,[1] and it is not an *inter vivos* gift, because there was no delivery of a deed to the property before Mr. Shinpaugh's demise.[2] In sum, this document is precisely what it appears to be—an unschooled attempt to secure Mr.

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[1] *See, e.g.*, *Simmons v. Simmons*, 98 Ark. App. 12, 249 S.W.3d 843 (2007), and cases cited therein.

[2] The majority opinion cites *O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000), for the proposition that "the intent of the donor can negate the fact that actual title was not transferred." This is specious, because in that case the donee of the auto was too young to hold title, and it was undisputed that there was actual delivery of the automobile. Actual delivery is an indispensable requisite without which a gift fails, and mere intention cannot supply it regardless of the consequences. *Irvin v. Jones*, 310 Ark. 114, 832 S.W.2d 827 (1992); *Jamison v. Estate of Goodlett*, 56 Ark. App. 71, 938 S.W.2d 865 (1997). In the case of realty, the requirement of actual delivery must, at a minimum, include delivery of a deed to the property. *See Smith v. Van Dusen*, 235 Ark. 79, 357 S.W.2d 22 (1962).

Shinpaugh's property that nevertheless failed to transfer any legal right to the property to appellant. Could Mr. Shinpaugh have procured the assistance of an attorney in this matter? Of course he could have, just as he did the very next day when, still hospitalized, he executed the power of attorney under the authority of which appellant deeded the property to herself. It is crystal-clear that the "agreement" is ineffective because the drafter lacked the legal knowledge necessary to make a will, deed, contract, or gift *inter vivos*, and that the reason no attorney was involved was because appellant did not want her helpless stepfather to have the independent advice that an attorney would provide him.

It would be difficult to imagine a more clear-cut case of undue influence and overreaching, yet the majority reverses the trial court's finding to this effect because of an asserted error in refusing to admit the testimony of Mr. Shinpaugh's neighbor that he believed Mr. Shinpaugh intended to give an acre of land to appellant before his death. What possible prejudice could appellant have suffered because the neighbor's opinion regarding Mr. Shinpaugh's intent was excluded? This point was not contested. Appellee Ogle herself admitted that her father intended to give one acre of land to appellant. His neighbor's opinion regarding this intent is of no relevance. The question, instead, is what Mr. Shinpaugh *did* do: did he effectively complete an *inter vivos* transfer of land by the document titled "agreement"? Clearly, in the absence of delivery, he did not, and I cannot agree that a failed *inter vivos* gift of land can be completed by the intended beneficiary pursuant to a general power of attorney.

The crux of this case is the validity and legal effect of the "agreement." Not only does it fail as a will, deed, contract, or *inter vivos* gift, it was quite clearly procured by appellant's overreaching. Regardless of whether the power of attorney was otherwise legitimate, it gave appellant no authority to grant herself a deed based on the strength of a document of no legal effect procured by undue influence from a bereaved and hospitalized elderly stepparent. The majority's opinion to the contrary leaves me frankly astonished.

I respectfully dissent.

GLADWIN, ROBBINS, and BAKER, JJ., join in this dissent.

Ronald E. GROVER *v.* Valarie K. GROVER

CA 07-553 276 S.W.3d 740

Court of Appeals of Arkansas
Opinion delivered February 20, 2008

Laws & Murdoch, P.A., by: *Allen Laws*, for appellant.

Peel Law Firm, P.A., by: *Jennifer L. Modersohn*, for appellee.

WENDELL L. GRIFFEN, Judge. This is the second time these parties are before us. In *Grover v. Grover*, CA

06-118 (Ark. App. Sept. 27, 2006) (not designated for publication) (*Grover I*), we reversed and remanded for reconsideration of the validity of a reconciliation agreement reached by the parties after they agreed to no longer pursue a divorce. On remand, the circuit court set aside the reconciliation agreement, finding it to be unreasonable and not entered into voluntarily by appellee Valarie Grover.[1] Appellant Ronald Grover appeals again, contending that the circuit court misapplied Florida law when it set aside the reconciliation agreement or, alternatively, that appellee freely entered into the agreement. We affirm, holding that the circuit court did not err in setting aside the agreement when the evidence showed that appellee entered into the agreement under circumstances constituting duress.

As the circuit court took no additional evidence on remand, most of the facts recounted herein are adopted from *Grover I*. The parties were married on December 26, 1990. They met while appellant was stationed at Little Rock Air Force Base in December 1987 or January 1988. Appellant was later transferred to Germany, and appellee followed in May 1989 while pregnant with their son. The parties later moved to Florida. The parties separated in July 1993, and appellant filed for divorce. However, the parties decided not to pursue the divorce. On March 28, 1994, they signed the following agreement:

> WHEREAS, the parties, [Appellant and appellee], have reconciled their marital differences and no longer desire to proceed with the dissolution of marriage action.
>
> NOW, THEREFORE, it is agreed and stipulated as follows:
>
> 1. [Appellee] hereby waives any right, title or interest she may have to [appellant's] military retirement, *now or in the future*.[2]
>
> 2. [Appellee] hereby agrees to quit-claim her interest in the parties' marital home . . . to [appellant].
>
> 3. [Appellant] hereby agrees to hold [appellee] harmless for any and all debts and liabilities associated with the marital home.

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[1] Like last time, some of the documents in this case refer to appellee as "Valarie Grover," while others refer to her as "Valerie Grover." As we did in *Grover I*, we refer to her as "Valarie Grover." *See Grover I*, slip op. at 1 n.1.

[2] The emphasized portion was handwritten and initialed by appellee.

4. This Agreement constitutes the entire agreement between [appellee and appellant] and supersedes any prior understandings or written or oral agreements or representations between the parties respecting the within subject matter. It shall not be amended, altered, or changed except by a written agreement signed by the parties hereto.

The parties dispute the circumstances under which the agreement was entered. Appellee testified that she moved back to Arkansas when appellant filed for the first divorce. However, the couple decided to reconcile, and she moved to Florida to be with him. According to appellee's testimony, the couple went to appellant's attorney's office, where she was presented with the reconciliation agreement. She testified that appellant conditioned the reconciliation upon her signing the agreement and that, had she not signed the agreement, she would have had to return to Arkansas. Appellee also testified that she agreed to sign the reconciliation agreement only after appellant agreed to get counseling and move back to Arkansas. She stated that her attorney never saw the agreement and that appellant did not give her a list of his assets or tell her the approximate value of his military retirement.

Appellant testified that appellee had not moved from Arkansas when she signed the agreement. He stated that appellee had been in Florida for one day prior to signing the agreement and that her belongings were still in Arkansas at the time. Regarding the reconciliation agreement, he testified that the agreement was a safeguard that he and appellee put together in his attorney's office and that appellee's attorney was involved in the meeting through telephone contact. He noted that there is nothing written in the agreement regarding counseling or moving away from Fort Walton.

The parties followed through with a second divorce filed in Johnson County. In a letter opinion dated June 15, 2005, the circuit court set aside the reconciliation agreement, finding that the agreement was "so unfair as to be shocking." It opined that the agreement was executed more in contemplation of divorce rather than in encouragement of reconciliation and that the agreement was so one-sided as to be patently unfair. Accordingly, the court awarded appellee an undivided one-half interest in the marital home in Florida and one-half of a 12/22 interest in appellant's military account. The court's findings were incorporated into an order entered August 10, 2005. Appellant pursued an appeal, and

we reversed and remanded, holding that the circuit court misapplied Florida law when it set aside the agreement. *See Grover I, supra.*

On remand, the circuit court considered briefs submitted by the parties and issued an order on February 9, 2007, again setting aside the reconciliation agreement and dividing the military account and marital home. After recounting the law as stated by our previous opinion, the court applied *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987), and again found the agreement to be unreasonable, which according to the circuit court raised a rebuttable presumption that appellee did not freely enter into the agreement. In finding that appellant did not rebut that presumption, the court stated:

> First, the court explores the issue of whether or not [appellant] made a full and frank disclosure to [appellee] of all the marital property and the income of the parties. This court finds, based upon the evidence submitted, that full and complete disclosure was not made to [appellee] concerning [appellant's] future military benefits. This court agrees with the argument advanced in [appellee's] brief that [appellant] had no means of obtaining the value of his future military retirement benefits because this would have been unknown at the time the reconciliation agreement was entered into. It is also interesting to note that the phrase "NOW OR IN THE FUTURE" contained on page one of the reconciliation agreement was handwritten and initialed by the parties as an apparent last minute addition. Also, there does not appear anywhere on the reconciliation agreement a signature line for attorneys who may have been representing either of the parties.
>
> This court further finds that at the time that [appellee] signed the reconciliation agreement that she was not represented or advised by an attorney regarding the matter. This court further finds that the parties had already agreed to reconcile and that [appellee] had returned to Florida on the basis of this reconciliation and resumption of their fiduciary relationship as husband and wife.
>
> This court further finds that after [appellee] and the parties' minor child had moved back to Florida based upon the reconciliation that she was then presented with the reconciliation agreement and advised that if she didn't sign the same that [appellant] would divorce her and that she would have to return to Arkansas. Under this duress, she then signed the reconciliation agreement which did

> not make full and fair complete disclosure of the value of any future military benefits which [appellant] might acquire during their marriage a share of which she would be entitled to receive. Furthermore, she did not have the advice or representation of legal counsel at the time.
>
> In short, this court finds that this case is very much similar to the case of . . . Hjortass v. McCabe, 656 So. 2d. 168 (Fla. Ct. App. 1995) cited in the mandate from the Arkansas Court of Appeals. [Appellee] was placed under duress having been presented with this agreement upon her arrival back in Florida, threatened by her husband with divorce and not having the advice of legal counsel in regard to this matter. More importantly, the agreement itself cannot begin to represent full and complete disclosure of the value of all the marital assets. Regardless of any discovery done in the Florida divorce proceeding which both parties had agreed not to pursue, the reconciliation agreement should have met the minimum requirement of full and complete disclosure of all marital assets and their respective values and it simply did not do so.

We review traditional cases of equity, such as domestic relations proceedings, de novo. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). We review the lower court's findings of fact and affirm unless those findings are clearly erroneous or clearly against the preponderance of the evidence. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003); *Powell v. Powell*, 82 Ark. App. 17, 110 S.W.3d 290 (2003). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Cole*, *supra*. In reviewing the lower court's findings, this court gives due deference to the circuit judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000).

In *Grover I*, we explained Florida law regarding a motion to set aside a postnuptial agreement:

> A correct statement of Florida law regarding setting aside postnuptial agreements is found in *Casto v. Casto*, 508 So. 2d 330 (Fla. 1987). Under Florida law, a spouse may set aside or modify a postnuptial agreement by establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching. *Id.* Overreaching is defined as "that which results from an inequality of bargaining power or other circumstances in which there is an

absence of meaningful choice on the part of one of the parties." *Schreiber v. Schreiber*, 795 So. 2d 1054, 1057 n.3 (Fla. Ct. App. 2001) (citing *Black's Law Dictionary* 1104 (6th ed. 1990)). Even though an agreement is one-sided and unfair, that alone does not make it the result of overreaching absent a showing that the agreement resulted from an inequality of bargaining power or other circumstances such that there was no meaningful choice on the part of the disadvantaged party. *Id.* "[O]verreaching involves the situation where one party, having the ability to force the other into an unfair agreement, does so." *Id.* at 1057.

In the alternative, the spouse may seek to set aside a postnuptial agreement on the basis that the agreement is unfair or unreasonable, given the circumstances of the parties. *Casto v. Casto, supra.* To establish unreasonableness, the party seeking to set aside the agreement must show that the agreement does not adequately provide for the challenging spouse and, consequently, is unreasonable. *Id.* However, this does not end the court's inquiry. Once the challenging spouse establishes that the agreement is unreasonable, a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached. *Id.* This presumption may be rebutted by the defending spouse by showing that (a) a full, frank disclosure to the challenging spouse by the defending spouse before the signing of the agreement relative to the value of all the marital property and the income of the parties, or (b) a general and approximate knowledge by the challenging spouse of the character and extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties. *Id.* The *Casto* court recognized that parties to a marriage are not dealing at arm's length and that they may enter into bad fiscal agreements for any reason; however, "[i]f an agreement that is unreasonable is freely entered into, it is enforceable." *Id.* at 334; *see also Waton v. Waton*, 887 So. 2d 419 (Fla. Ct. App. 2004).

Further, in *Macar v. Macar*, 803 So. 2d 707 (Fla. 2001), the Florida Supreme Court announced that, when challenging a settlement agreement entered into after the commencement of litigation and the utilization of discovery procedures, a party seeking to set aside a settlement agreement must challenge the settlement under Fla. R. Civ. P. 1.540 (similar to Fed. R. Civ. P. 60), which would only

> allow for the agreement to be set aside in light of evidence of fraud or in light of newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial or rehearing. If *Macar* governs, the *Casto* framework is inapplicable.

Grover I, slip op. at 8-10.

In this appeal, appellant contends that the circuit court erred in applying *Casto*. He argues that the agreement in this case was entered into after the parties had instigated litigation, making *Macar*, rather than *Casto*, applicable. In the alternative, he argues that the court erred in its application of *Casto*, contending that the circuit court erred in finding that the agreement was unreasonable and that appellee had full knowledge of his assets.

First, the circuit court did not err in applying *Casto*. Appellant argues that *Macar* is applicable because the parties had instituted litigation prior to signing the reconciliation agreement. However, the *Macar* rule does not automatically apply simply because the parties are engaged in litigation. The Florida Supreme Court explained:

> Our conclusion that *Casto* is inapplicable in these types of cases is based on the premise that *Casto*'s rationale assumes that the specific dissolution case has not proceeded to the procedural posture reached in *Macar*. That is, in deciding whether *Casto* or rule 1.540 should apply, our focus is on the fact that the challenging party here was afforded an opportunity to engage extensively in the discovery process. In cases where the agreement is reached after the initiation of litigation and the completion of discovery, parties challenging final judgments should not be permitted to claim lack of knowledge, because through due diligence, they could have unearthed all relevant facts.

Macar, 803 So. 2d at 712-13.

In other words, the *Macar* analysis applies when the party seeking to set aside a postnuptial agreement has had a full and fair opportunity to unearth all of the facts relevant to the other's financial position. Absent that opportunity, *Macar* does not apply. *See also Robinson v. Kalmanson*, 882 So. 2d 1086 (Fla. Ct. App. 2004) (rejecting application of *Macar* in an action to set aside a divorce and settlement agreement when the lower court placed a monetary restriction on discovery in the divorce action, and

holding that there existed a genuine issue of material fact regarding whether the former wife had a full opportunity to explore specific omissions in disclosures from the former husband).

In the present case, the circuit court explicitly found that appellant had not fully disclosed the nature of his military benefits, that the parties had ended the divorce litigation and resumed their fiduciary relationship, and that appellee signed the agreement without the benefit of legal counsel.[3] The rule in *Macar* is premised on the fact that the parties, being in full litigation, are no longer fiduciaries, but are dealing at arm's length. In other words, the primary justification for requiring the higher standard of Fla. R. Civ. P. 1.540 is absent here. Under the facts of this case, an analysis under *Casto* was proper.

In arguing that the circuit court erroneously applied *Casto*, appellant argues that the circuit court did not take into consideration the parties' relative situations when determining whether the reconciliation agreement was unfair or unreasonable. However, such an analysis was not necessary here. *Casto* provides two separate grounds under which a party can set aside a reconciliation agreement. The first is to show that the agreement was the product of fraud, deceit, duress, coercion, misrepresentation, or overreaching. If the court so finds, then it need not go further to set aside the agreement. Here, the court found that the reconciliation agreement was the product of duress. It compared the instant case to *Hjortass, supra* (cited in *Grover I*), where the Florida appellate court set aside a prenuptial agreement on the grounds of duress when the wife was presented with the agreement for the first time two days before the wedding, the actual terms of the agreement were previously unknown to her, and the agreement contained no information about the husband's finances. Appellant argues that appellee could have simply opted to not sign the agreement, returned to Arkansas with the parties' minor child, and pursued the divorce. However, this would be analogous to arguing in *Hjortass* that the wife-to-be could have refused to sign the agreement and

[3] While appellant notes his testimony that appellee's attorney participated in the drafting of the agreement via telephone, the circuit court credited appellee's testimony that she did not have the opportunity to obtain legal advice prior to signing the agreement. Our standard of review requires us to defer to the circuit court regarding this credibility determination. *Hunt, supra.*

call off the wedding.[4] Appellee's testimony shows that she had returned to Florida with the parties' minor child to begin reconciliation efforts.

The circuit court's finding that appellee signed the reconciliation agreement under duress, which is grounds for setting aside the agreement under Florida law, is not clearly erroneous. Accordingly, we affirm the circuit court's decision to set aside the agreement.

Affirmed.

VAUGHT and BAKER, JJ., agree.

FARM BUREAU MUTUAL INSURANCE CO. of ARKANSAS *v.* Gary NOWLIN

CA 06-1053 276 S.W.3d 723

Court of Appeals of Arkansas
Opinion delivered February 20, 2008

[4] To the extent that appellant argues that appellee had the option of following through with the divorce, that argument would evidence intent not to follow through with reconciliation efforts, which would be tantamount to fraud. Such an argument may also confirm the circuit court's opinion in the original divorce decree "that the agreement was executed more in contemplation of divorce rather than in encouragement of reconciliation." *Grover I*, slip op. at 6.

Wright, Berry, Hughes & Moore, by: *Eric G. Hughes*, for appellant.

R. Theodor Stricker, for appellee.

DAVID M. GLOVER, Judge. In June 2002, appellee, Gary Nowlin, purchased an insurance policy from appellant, Farm Bureau Mutual Insurance Company, for a house that he owned in Chidester, Arkansas. The house was subsequently destroyed by fire, and appellee filed his claim with appellant. When the claim was denied, appellee filed his complaint against the insurance company. The case was submitted to a jury upon two interrogatories. As a result of the jury's responses to those interrogatories, judgment was entered against appellant. As its sole point of appeal, appellant contends that the verdict is not supported by substantial evidence. We agree and, therefore, reverse and remand.

In determining whether there was substantial evidence to support a jury verdict, we examine the evidence in the light most favorable to the party on whose behalf the judgment was entered and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Northport Health Servs., Inc. v. Owens*, 82 Ark. App. 355, 107 S.W.3d 889 (2003). In reviewing the evidence, the weight and value to be given the testimony of the witnesses is a matter within the exclusive province of the jury. *Id.* Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture. *Id.*

Here, appellee, Gary Nowlin, testified that after his mother died in August 2002, he had the Chidester house "boarded up," and that no one lived there afterward. He stated that while there was still gas and electrical service to the house, that he "turned off the breaker" at that time. He explained that the fire occurred in May 2003. Nowlin also testified that there was furniture in the house throughout this period of time.

George Bosvenor, appellee's uncle, testified that he "watched out for" the property; that he went out there almost every day and made sure everything was all right; and that he mowed the property every week. He stated that, as far as he knew, no one lived in the house after appellee's mother died, and that it burned almost a year after she died. He said that the house was "basically vacant."

The case was submitted to the jury with two interrogatories: 1) Do you find from a preponderance of the evidence that the home was unoccupied for a period of sixty consecutive days? and 2) Do you find from a preponderance of the evidence that the home was vacant for a period of sixty days? In addition, the jury was instructed in pertinent part:

> It is contended by Farm Bureau that the dwelling was vacant or unoccupied for a period of sixty days. This is a defense to coverage under the policy, and if proven, Gary Nowlin is not entitled to recover any proceeds of the policy. Farm Bureau has the burden of proving by a preponderance of the evidence that the dwelling was vacant or unoccupied for a period of sixty consecutive days.
>
> In that regard, the home of Gary Nowlin was unoccupied if it was without human inhabitants, but contained enough furnishings or other personal property to show an intent to return and occupy it.
>
> The home was vacant if it was without human inhabitants, and without enough furnishings or other personal property to show an intent to return or occupy the home.

Following its deliberations, the jury answered "no" to each interrogatory. From our review of the evidence presented to the jury we find that there was substantial evidence to support the jury's answer to the question regarding whether the house was vacant because there was testimony that there was furniture in the house. However, both appellee and his uncle testified that no one lived in the house after appellee's mother died in August 2002. The fire occurred in May 2003, which would have been more than sixty consecutive days following the mother's death. Even examining the evidence in the light most favorable to appellee, we can find no substantial evidence to support the jury's negative response to the interrogatory regarding whether the house was unoccupied. In addition, we dispense with appellee's effort to support the jury's verdict based upon an estoppel theory because the jury was not provided with interrogatories or instructions regarding estoppel. We conclude, therefore, that the jury's verdict in favor of appellee was not supported by substantial evidence and that we must reverse and remand for a new trial.

Reversed and remanded.

VAUGHT, HEFFLEY, and MILLER, JJ., agree.

GRIFFEN and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. When a party is given an opportunity to supplement the addendum, and the party fails to do so within the prescribed time limits, we should affirm the circuit court's judgment. *See Heard v. Regions Bank*, 370 Ark. 117, 257 S.W.3d 543 (2007) (affirming trial court's judgment after a review of the clerk's docket sheet showed that Heard failed to supplement the addendum as previously ordered within the prescribed time limits). On May 2, 2007, in an unpublished opinion in *Farm Bureau v. Nowlin*, 2007 WL 1277902 (2007), this court issued an opinion ordering rebriefing and instructing Farm Bureau to cure the deficiencies in the brief by providing a copy of the documents relied upon at trial that were omitted from appellant's abstract and addendum. Included in the documents listed by this court was a copy of the insurance policy (upon which this entire case is based). In response, Farm Bureau filed a motion with this court stating "the language of the insurance policy is abstracted beginning on page 25 of the abstract *through the testimony of Forrest Fletcher*. . . ." (Emphasis added.) "The addendum, on page 34, contains the *letter from Farm Bureau to Nowlin denying his claim*, which includes the relevant language from the insurance policy." (Emphasis added.) In its motion, Farm Bureau acknowledged that the policy was exhibit two at trial; however, it refused to attach the policy. Instead of complying with this court's rebriefing order, Farm Bureau added only two pages of the policy to its addendum. Without a complete record, this court should summarily affirm. *See Larry v. Grady Sch. Dist.*, 82 Ark. App. 185, 119 S.W.3d 528 (2003) (in the absence of a complete record on appeal, we are compelled to summarily affirm the trial court's order).

In the absence of the entire insurance policy this court cannot conduct an effective review. Our supreme court has "consistently adhered" to the notion that the entire contract should be before it, in order to construe any part of the contract. *See First Nat'l Bank v. Griffin*, 310 Ark. 164, 170, 832 S.W.2d 816, 819 (1992). This court adhered to the requirement that we review the entire contract in *Hartford Ins. Co. v. Brewer*, 54 Ark. App. 1, 922 S.W.2d 360 (1996). In *Hartford*, this court stated:

> It is axiomatic that, to determine the rights and duties under a contract, we must determine the intent of the parties. . . . It is well

> settled that the intent of the parties is to be determined *from the whole context of the agreement*; the court must consider the instrument in its entirety. Clearly, it is an appellant's burden to bring up a record sufficient to demonstrate error. Without the contract in question, which may have spoken in any number of ways to the issue of the person or persons entitled to the policy proceeds, we cannot determine whether the trial court erred.

Id. at 3, 922 S.W.2d at 362 (citations omitted) (emphasis added). In *Hartford, supra*, the insurance contract did not appear in the abstract or the record, and this court affirmed, concluding that appellant had failed in its burden to produce a record sufficient to demonstrate error. *Id.* In the case at hand, Farm Bureau provided this court with only *two* pages of a contract that is at least *ten* pages in length. *See Gibbs v. Hensley*, 345 Ark. 179, 44 S.W.3d 334 (2001) (summarily affirming where an initial review of the record revealed there were at least fourteen missing documents).

We have repeatedly emphasized that the appellant bears the burden of bringing forth an adequate record on appeal. *See Cannon Remodeling v. The Marketing Co.*, 79 Ark. App. 432, 90 S.W.3d 5 (2002); *see also Rothbaum v. Arkansas Local Police*, 346 Ark. 171, 55 S.W.3d 760 (2001). In the absence of a complete record on appeal, we cannot determine whether substantial evidence supports the jury's verdict, and we are compelled to summarily affirm. *See Hankins v. Dep't of Fin. & Admin.*, 330 Ark. 492, 954 S.W.2d 259 (1997).

GRIFFEN, J., joins.

James Harold BROOKS *v.*
FARMERS BANK and TRUST CO.

CA 07-694 276 S.W.3d 727

Court of Appeals of Arkansas
Opinion delivered February 20, 2008

Danny R. Williams, for appellant.

Reid, Burge, Prevallet & Coleman, by: *Richard A. Reid* and *Jeremy M. Thomas*, for appellee.

BRIAN S. MILLER, Judge. Appellant James Brooks appeals from a default judgment entered against him in an action filed by appellee Farmers Bank and Trust Company (the Bank). On appeal, Brooks argues that the trial court abused its discretion when it granted the Bank's motion for default judgment. We agree and reverse and remand for a new hearing.

The Bank filed a complaint against Brooks on September 28, 2006, alleging that Brooks was in default on a loan provided by the Bank. The complaint alleged that Brooks owed the Bank $20,863.69. A lis pendens notice was filed and a summons was issued the same day. The complaint and summons were served on Brooks on October 4, 2006. Brooks, however, failed to respond to the complaint.

Brooks appeared at a hearing on the Bank's complaint, which was held on March 30, 2007. Before offering testimony, the Bank orally moved for a default judgment against Brooks, alleging that he failed to answer the complaint. In response, Brooks moved for a continuance. The trial court denied Brooks's motion and found him in default. The trial court did not permit Brooks to offer a defense as to the Bank's damages, and awarded the Bank $22,990.41 in damages, plus interest of $4.19 per diem.

A trial court's decision to grant a motion for default judgment will not be reversed absent an abuse of discretion. *See Nationwide Ins. v. Ibanez*, 368 Ark. 432, 246 S.W.3d 883 (2007); *Fields v. Byrd*, 96 Ark. App. 174, 239 S.W.3d 543 (2006). When a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend, the trial court may enter a default judgment. Ark. R. Civ. P. 55(a). Default judgments are not favorites of the law and should be avoided when possible. *Volunteer Transp., Inc. v. House*, 357 Ark. 95, 162 S.W.3d 456 (2004). A default judgment should only be granted when strictly authorized and when the party affected should clearly know he is subject to default if he does not act in a required manner. *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998).

Brooks argues two points on appeal in support of his contention that the trial court abused its discretion when it granted the Bank's motion for a default judgment. He argues that the trial court erred in granting a default judgment because the complaint failed to show a specific basis for relief and because the court was required to provide him three days' notice before hearing the Bank's motion for a default judgment. We will not address Brooks's first point because we find merit in his second point, and we reverse and remand based on that point.

The trial court abused its discretion by granting the Bank's motion for a default judgment without first allowing Brooks's three days' notice to prepare a defense to the motion. Arkansas Rule of Civil Procedure 55(b) provides that if the party against whom judgment by default is sought has appeared in the action, he shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. Rule 55(b) does not require that notice of a hearing be given to a defaulting defendant who has not appeared. *McGraw v. Jones*, 367 Ark. 138, 238 S.W.3d 15 (2006). The word "appearance" designates some overt act by which a party against whom a suit has

been commenced submits himself to the jurisdiction of the court. *Divelbliss v. Suchor*, 311 Ark. 8, 841 S.W.2d 600 (1992).

In this case, Brooks personally appeared at the March 30 hearing, which is an overt act submitting himself to the court's jurisdiction. His appearance was made before the Bank orally moved for a default judgment. Consequently, the court was required by Rule 55(b) to give him three days notice before hearing the Bank's default motion. Further, the court also erred in failing to permit Brooks to defend against the Bank's damages evidence. For these reasons, the trial court abused its discretion when it granted the Bank's motion for default judgment and we reverse and remand. The trial court is instructed to proceed according to this opinion should it conduct a second default-judgment hearing.

Reversed and remanded.

PITTMAN, C.J., and GLOVER, J., agree.

Wesley R. McMURRAY *v.* STATE of Arkansas

CA CR 07-190 278 S.W.3d 122

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

The Blagg Law Firm, by: *Ralph J. Blagg*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Nicana C. Sherman*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellant, Wesley R. McMurray, was charged with committing second-degree battery by causing serious physical injury to a person over sixty years of age in concert with two or more other persons. After a jury trial, he was convicted of that offense and sentenced to four years' imprisonment. On appeal, he argues that he was denied due process by the trial judge's allowing the jury to ask a question concerning accomplice liability, and that the trial court abused its discretion by giving accomplice-liability instructions in response to the jury's question. We affirm.

At trial, there was evidence that the victim was beaten by a group of men. Appellant was not specifically charged as an accomplice. After deliberating some time, however, the jury sent a note to the judge, stating that they believed that appellant was in fact present when the beating occurred and asking to be instructed on accomplice liability. Over appellant's objection, the trial judge instructed the jury with Arkansas Model Jury Instruction – Criminal (AMCI) 2d 401, defining accomplice liability; and AMCI 2d 404, stating that mere presence, silence, or knowledge of a crime is not, in the absence of a legal duty to act, sufficient to establish accomplice status.

Appellant's objection at trial was based on lack of notice and his assertions that (1) accomplice liability must be specifically charged; and (2) there was no evidence that he acted in concert with others because the evidence that indisputably shows

that he did so was admitted only for the purpose of the enhancement statute, not to show accomplice liability. These arguments are without merit. Appellant was expressly charged with committing battery in concert with two or more other persons. This is sufficient to put appellant on notice that accomplice liability may be an issue, *see Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991), and there is no need to expressly charge a defendant as an accomplice to obtain a conviction based on accomplice liability. *Id.*

Nor do we agree with appellant's argument that the evidence of concerted action could not properly be considered to find accomplice liability because it was introduced as proof of enhancement. Because appellant, by virtue of the facts alleged in the charging instrument, should have known that accomplice liability was at issue, *see Purifoy v. State*, *supra*, he was required under Ark. R. Evid. 105 to request a limiting instruction if he wished to restrict the jury's consideration of the evidence to enhancement alone. Having failed to do so, he cannot complain on appeal that the evidence should be restricted to the purpose for which he alleges it was admitted. *Jackson v. State*, 259 Ark. 780, 536 S.W.2d 716 (1976); *see Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001); *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996).

Appellant's remaining arguments are not properly before us. At trial, appellant made no argument, or mention, of Ark. R. Crim. P. 33.7, which *requires* instructions to be given upon the jury's request unless certain factors are present. Nevertheless, Rule 33.7 is central to several of his arguments on appeal and, because the Rule was not raised at trial, those arguments are not preserved for appeal.

We note that the circumstances of the present case are markedly different from those of *Rush v. State*, 239 Ark. 878, 395 S.W.2d 3 (1965), which held that the trial court erred in instructing the jury on lesser-included offenses after the jury had been deliberating for over twenty-four hours. First, *Rush* involved the giving of an instruction permitting the jury to find the defendant guilty of entirely different crimes; here, the instruction concerned the identical offense with which appellant was charged — the law draws no distinction between the criminal liability of a principal and an accomplice. *Tillman v. State*, 364 Ark. 143, 217 S.W.3d 773 (2005). Second, the trial judge in *Rush* gave the lesser-included

instructions on his own initiative, whereas the trial judge's instructions in the present case were given in response to a request from the jury which, under Rule 33.7, *must* be answered unless certain factors are present. Finally, if we are to resort to the common law, there is much better precedent available than *Rush*. In *Slim and Shorty v. State*, 123 Ark. 583, 186 S.W. 308 (1916), the supreme court squarely held that it was within the trial court's discretion, at the jury's request after deliberations had begun, to give an instruction on the issue of accessories. *Id.* at 593. So, even had this argument been preserved — and it has not — it would be unavailing.

Affirmed.

BIRD, VAUGHT, HEFFLEY, and MILLER, JJ., agree.

GLADWIN, ROBBINS, GLOVER, and MARSHALL, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. The majority correctly asserts that a defendant may be convicted on a theory of accomplice liability even if he was not charged as such. In *Purifoy v. State*, 307 Ark. 482, 822 S.W.2d 374 (1991), the supreme court affirmed the appellant's murder and battery convictions on an accomplice liability theory, even though the information did not charge the appellant as an accomplice. However, in that case the proof at trial showed that the victims' wounds were inflicted by the gunshots fired by the appellant's accomplice, and thus the proof varied from the charging instrument. Moreover, consistent with the proof, the jury was instructed on accomplice liability, apparently before the jury retired to deliberate. The circumstances of the present case are distinguishable, and I would hold that the trial court erred in giving the belated accomplice liability instruction over Mr. McMurray's objection.

The following events occurred after the jury had retired to deliberate during the guilty phase. Three hours passed, and the trial court called the jury back into the courtroom to check on their progress toward a verdict. The foreman stated that the jury was still discussing whether the State had made its case, and that the current vote was 7 to 5. When asked whether with more deliberation they would be able to reach a verdict, the foreman replied, "I think it is going to be hard sir." After a short recess, the trial court advised the jury to resume deliberations.

Sometime later, the jury handed the trial court a handwritten note saying:

> 1. We believe McMurray was at the scene of the beating
>
> 2. We believe the beating occurred while McMurray was there
>
> 3. We have some credible witnesses
>
> Question: Can we convict of battery 2nd by circumstantial evidence when none of the credible witness(es) observed the actual beating? If our question is out of order, can we have complicity (or being an accomplice) explained to help us make a decision?

The prosecutor then proposed that the jury be given an instruction on accomplice liability, but Mr. McMurray objected on the basis that he was not charged as an accomplice, but rather as a principal actor in a gang. The prosecutor acknowledged that Mr. McMurray was not tried as an accomplice under the State's theory, stating, "Not that he was an accomplice, but that he had accomplices." Mr. McMurray argued that he was never put on notice that he was going to be tried as an accomplice, but only that there was going to be enhancement if he were to be found guilty of second-degree battery. Mr. McMurray complained that such an instruction would be prejudicial and violate due process. Appellant contended, "There was never a State theory that he actually was an accomplice. He was charged as actually doing the beating." Appellant argued that not only does the information not say anything about accomplice liability, but the theory was also not supported by the evidence. Appellant further stated, "I am objecting to all these jury instructions all of a sudden. After three and a half hours of the jury deliberation, the State has been sitting back, having already given their instructions, [and] now after they get some notes from the jury they want to add new instructions." In my view, appellant's objections were of sufficient specificity to preserve his argument on appeal that submission of the jury instruction at that late time in the proceedings was erroneous.

This case is similar to our supreme court's decision in *Rush v. State*, 239 Ark. 878, 395 S.W.2d 3 (1965). In that case the appellant was tried for first-degree murder and the jury was instructed to convict him of that crime or acquit him altogether. After many hours of being unable to convict him of that crime, over the defendant's objection, the jury was given a lesser-included instruction on second-degree murder. The defendant's counsel said:

> I am going to object to the giving of such instructions at this time; to the Court's instruction on second degree murder, on the ground that this lawsuit has been tried solely upon the theory that it was murder in the first degree, or that the man was innocent; and at this late stage, after the evidence has been adduced, instructions given, arguments made, and the jury has been out better than 26 hours and deliberated a great deal of time . . . .

239 Ark. at 884, 395 S.W.2d at 7. The jury convicted the appellant of second-degree murder, and the supreme court held that that was error. The supreme court reasoned:

> We cannot put the stamp of approval on the action of the Court in first ascertaining that the jury was hopelessly deadlocked on first degree murder. It was almost the same as "bargaining" with the jury. It is not a question of whether the Court should have given the instruction on second degree murder at the time the other instructions were given: the question, here, is the challenge to the Court's action, in waiting 28 hours and ascertaining that the jury was deadlocked, and then charging the jury on a lesser degree of the offense.

Id.

In the present case the jury was hung 7-5 after three hours, and the foreman stated it would be "hard" to come to a unanimous conclusion on whether McMurray was guilty of second-degree battery. Then, after inquiring about and receiving an instruction on accomplice liability, the jury convicted McMurray of that crime. This is similar to *Rush* in that the jury appeared unable to convict on the theory advanced by the State, and was thereafter erroneously permitted to convict on some other basis. The jury indicated in its note that there were no credible witnesses who actually saw Mr. McMurray beat the victim, and thus the jury asked if it could proceed on a theory not advanced by the State — that Mr. McMurray was there and aided in the crime but was not himself a principal. I would hold that the trial court violated Mr. McMurray's rights in giving the instruction where it was evident that the jury was unable to reach a verdict from the instructions given. *See Rush, supra.* This would have been error whether the instruction was requested by the jury, the prosecution, or given on the trial court's own accord.

For the foregoing reasons, I respectfully dissent from the majority's decision and would reverse and remand this case for a new trial.

GLADWIN, GLOVER, and MARSHALL, JJ., join in this dissent.

Dena BASS *v.* Jennifer WEAVER and Tyson Weaver

CA 07-874 278 S.W.3d 127

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

Schmidt Law Firm, PLC, by: *Paul A. Schmidt*, for appellant.

Keesa M. Smith, Center for Arkansas Legal Services, for appellee.

JOHN MAUZY PITTMAN, Chief Judge. The appellant, Dena Bass, is the paternal grandmother of O.W., a three-year-old child. Appellant, who had continuous custody of the child for one year prior to the parents' divorce, intervened in the divorce action seeking custody on the grounds of parental unfitness. After a hearing, the trial court found that both parents were unfit and awarded custody of the child to appellant. These findings are not contested. Instead, appellant argues that the trial court erred in failing to order the parents to pay child support and in awarding extensive visitation to the mother. We agree with both arguments, and therefore we reverse and remand.

We review cases sounding in equity de novo on the record, but we do not reverse unless we determine that the trial court's findings were clearly erroneous. *Oliver v. Oliver*, 70 Ark. App. 403, 19 S.W.3d 630 (2000). We defer to the trial court's superior position to determine the credibility of the witnesses. As a rule, when the amount of child support is at issue, the appellate court will not reverse the trial judge absent an abuse of discretion. *Johnson v. Cotton-Johnson*, 88 Ark. App. 67, 194 S.W.3d 806 (2004).

We hold that the trial court abused its discretion by failing to order payment of child support at the time that the divorce was granted and the custody decree was issued. Arkansas Code Annotated section 9-12-312(a)(1) (Repl. 2002) requires the trial court to make all orders that are reasonable concerning the care of children at the time the divorce decree is entered. An order requiring payment of a reasonable amount of support by noncustodial parents is such an order. The statute further provides that:

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.

Ark. Code Ann. § 9-12-312(a)(2) (Repl. 2002).

Here, the trial court had before it ample evidence of the mother's recent income. It also had before it evidence that the father was an Army National Guard E-5 currently on active duty. Pursuant to Section III(c) of Arkansas Supreme Court Administrative Order Number 10, the trial court was required to reference the current military pay allocation chart and benefits in calculating the amount of support for which the father was liable. Although the proof was not extensive, it was sufficient to permit calculation of the minimum amount of support for which the father would be liable. We direct the court on remand to determine the parents' income based on available evidence and enter an order of support based on the family support chart, impute income pursuant to Administrative Order Number 10, section III(d), or explain why application of the chart would be unjust or inappropriate.

We also hold that the trial court erred in the duration and extent of visitation ordered to the mother. The order provided that the mother would have weekly visitation from Friday evening until Sunday evening and, on alternating weeks, would have visitation from Thursday evening until the following Monday morning. She was also granted six weeks' visitation every summer and one week every Christmas. We cannot, from this distance, reconcile the grant of such extensive unsupervised visitation with the trial court's specific finding that the mother was unfit because of serious delinquencies in character, judgment, and obligation, including living with and permitting the child to be cared for by a self-professed vampire who actually drinks blood. We are also concerned by the evidence that the child has severe developmental problems that have improved substantially by virtue of therapy obtained by appellant, especially in light of the mother's testimony that she did not believe that the child had any such problems.

Consequently, we also direct the trial court on remand to appoint an attorney ad litem to represent the best interests of the child and to reconsider the question of visitation.

Reversed and remanded.

GLOVER and MILLER, JJ., agree.

Misty RHINE *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 06-137 278 S.W.3d 118

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

[Rehearing denied March 19, 2008.]

Glen Hoggard, for appellant.

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

Diane Warren, attorney *ad litem*, for the minor child.

JOSEPHINE LINKER HART, Judge. Misty Rhine's parental rights to her son A.I. were terminated by a Washington County Circuit Court order entered on October 27, 2005. In this appeal, she asserts that the circuit court abused its discretion in denying a continuance to allow her to execute a consent and waiver so that her mother could adopt A.I. We agree that, under the circumstances of this case, such a refusal amounted to an abuse of discretion. Therefore, we reverse and remand.

The facts leading to the termination of Rhine's parental rights are set forth in our opinion in *Ivers v. Arkansas Department of Human Services*, 98 Ark. App. 57, 250 S.W.3d 279 (2007), where we addressed the termination of the parental rights of both of A.I.'s parents.[1]

At the outset of the termination hearing, Rhine sought a continuance so that she could execute a consent so that her mother, Helen King, could adopt A.I. The following colloquy took place.

> THE COURT: So, we're here today on the [A.I.] Case set for a Dependent-Neglect Termination. Call your first, Ms. McIlroy.
>
> Ms. SEGERS [attorney for Rhine]: Your Honor, may I ask for everyone to approach?
>
> THE COURT: Yes.
>
> Ms. SEGERS: Your Honor, my client has informed me this morning that she is willing to sign a consent of adoption, and I did not have one drawn up because I did not know that. And I understand Mr. Ivers is, too. They would like to have the baby placed with Ms. King, the grandmother who has the step-child — I mean the —

[1] In *Ivers*, we denied Rhine's counsel's motion to withdraw and ordered rebriefing on the merits. On September 5, 2007, we again denied Rhine's counsel's motion to withdraw and again ordered rebriefing on the merits. *Rhine v. Arkansas Dep't of Human Servs.*, No. CA06-137 (Ark. App. Sept. 5, 2007). Counsel has now filed a brief complying with our earlier orders.

MR. CASTO [attorney for Ivers]: Sibling.

MS. SEGERS: — the sibling. And I believe Ms. King is in agreement with that, so if we — I just thought I would bring it to the Court's attention that they will sign a consent, and it could occur ten days from now if we can get the consent, and the termination would be automatic at that point in time and have the baby, if possible, placed with its sibling with Ms. King, who is in agreement.

THE COURT: All right, so you're asking for a continuance, then, today, on the Termination Hearing?

MS. SEGERS: Yes.

THE COURT: Okay, and, Ms. Warren, do you have any objection?

MS. WARREN [attorney ad litem]: I think we need to have the Termination by October 12th unless — the Petition, I believe, was filed on July 12th.

THE COURT: Okay, Ms. McIlroy?

MS. MCILROY [attorney for DHS]: As long as we can do it within that time frame.

THE COURT: Well, you're going to be out for training.

MS. MCILROY: I know. Not until the 19th.

THE COURT: So, I think we're just going to press on today because — did you say the 17th is when?

MS. MCILROY: The 12th.

MR. CASTO: 12th, Your Honor.

MS. WARREN: July 12th.

THE COURT: You're not going to be here next week, is that correct?

Ms. McIlroy: I'll be on vacation.

The Court: Right.

Ms. McIlroy: Susan will be here, yeah.

The Court: No Melinda McIlroy all week, and it's a Termination, so I'm not going to put that on Ms. Hall. And then the next week —

Ms. Warren: We're at October 12th.We can go one day past for as —

The Court: Well, it's not any better than today, so we're going to just press on today. I deny the —

Ms. McIlroy: You can go anytime for good cause.

Ms. Warren: That's true.

The Court: We're going to press on today. I'll deny the motion for a continuance. Call your first, Ms. McIlroy.

Arkansas Code Annotated section 9-27-341(d) requires that termination hearings shall be completed within ninety days of the date of the petition unless continued for good cause. In addressing the continuance, the court did not consider the effect a continuance would have on obtaining permanency for A.I., who was in his third foster home. A continuance to allow for the adoption of A.I. by King would have accomplished permanency for A.I. quicker than could be available if the court and DHS proceeded with an ordinary termination case because the rights of the father would still have had to be terminated. According to the colloquy, the father was willing to consent to the adoption. Further, the adoption would have allowed A.I. to be placed with his sibling whom King has already adopted, a factor sanctioned by our supreme court. *See In re Adoption of Perkins/Pollnow*, 300 Ark. 390, 779 S.W.2d 531 (1989) (upholding a finding that it was in the child's best interest to grant adoption to parents who had previously adopted child's two siblings). In *Ivers*, we noted our disagreement with the idea that the termination of parental rights would lead to greater stability for A.I., especially where placement with King was

the primary option under consideration at that time. 98 Ark. App. at 68, 250 S.W.3d at 286. We also noted that this would be a less extreme remedy than would the termination of Rhine's parental rights. *Id.* at 69, 250 S.W.3d at 287.

The consideration of factors such as the attorney for DHS being on vacation and that there was an upcoming training event created a false dilemma because the circuit court clearly had the discretion to go beyond the ninety-day limit in section 9-27-341(d) upon a finding of good cause. It cannot be said that providing permanency for A.I. in a more timely manner and the keeping of the siblings together is not good cause for exceeding the ninety-day period in section 9-27-341(d) by only a few days at most. Although concern with accommodating the attorney for DHS and her vacation are important, those considerations pale in comparison to the serious consequences at stake for Rhine and A.I. Further, the court did not exercise its discretion under the statute, even after the attorney ad litem and DHS attorney pointed it out to the court. Under these circumstances, we hold that the circuit court abused its discretion in denying Rhine's motion for a continuance. We reverse and remand for further orders consistent with this opinion.

Reversed and remanded.

BIRD and MARSHALL, JJ., agree.

Maria NEAL *v.* Dr. Paul E. FARRIS

CA 07-839 278 S.W.3d 129

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

Law Offices of Charles Karr, P.A., by: *Charles Karr*, for appellant.

Warner, Smith & Harris, PLC, by: *C. Wayne Harris*, *G. Alan Wooten* and *Jason T. Browning*, for appellee.

ROBERT J. GLADWIN, Judge. Appellant Maria Neal appeals from the May 2, 2007 order granting summary judgment in favor of appellee Dr. Paul Farris, as well as the May 23, 2007 order denying her motion for reconsideration and to set aside the previous order. On appeal, she argues that the circuit court erred in granting appellee's motion for summary judgment before the time for submitting supplemental supporting materials had expired and in denying her motion for reconsideration and to set aside the May 2, 2007 order. We affirm.

This appeal arises from a medical-malpractice action, which accrued, at the latest, on August 9, 2002, the last day appellee provided treatment to appellant. The original complaint was filed by appellant on March 9, 2004, alleging, among other things, that appellee violated the standard of care as a physician and was negligent in the treatment of appellant. The complaint was filed

within the applicable two-year statute of limitations for medical-malpractice claims pursuant to Ark. Code Ann. § 16-114-203 (Repl. 2006). Appellant took a voluntary non-suit on August 8, 2005, and refiled the present matter on August 8, 2006, pursuant to the saving statute, Ark. Code Ann. § 16-56-126 (Repl. 2005).

Appellee propounded written discovery on appellant pursuant to both the original and re-filed complaint, and appellant responded on September 1, 2004, and January 30, 2007, respectively. On February 6, 2007, appellee filed a motion for summary judgment asserting that appellant had failed to identify an expert witness as required by Ark. Code Ann. § 16-114-206 (Repl. 2006). Attached to the motion for summary judgment was an affidavit from Dr. Scott J. Stern, which asserted that appellee's treatment of appellant was in every way consistent with the appropriate standard of care. Appellee also incorporated all the pleadings on file as well as appellant's answers to interrogatories and responses to requests for production of documents.

Had there been no request for extensions, the original date to respond to appellee's motion for summary judgment would have been February 27, 2007. However, appellant did move for extensions on two separate occasions. On February 28, 2007, the circuit court entered an order granting appellant's motion and extending her time to respond for an additional three weeks, until March 22, 2007. Subsequently, on March 27, 2007, the circuit court entered an additional order extending appellant's time to respond an additional thirty days, until April 22, 2007. Appellant filed her response to appellee's motion for summary judgment on April 23, 2007, but failed to attach an affidavit of an expert witness.

Appellee filed a reply to appellant's response to the motion for summary judgment three days later on April 26, 2007, and on May 2, 2007, the circuit court entered its order granting appellee's motion for summary judgment. In the order, the circuit court acknowledged the respective briefs filed by the parties and made a specific finding that the "Arkansas Supreme Court has held that in a malpractice case, a defendant is entitled to Summary Judgment when it is shown that the plaintiff has no qualified expert to testify as to the explicable standard of care." The circuit court stated that upon review of the pleadings filed and evidence presented, plaintiff had failed to meet the burden regarding a qualified medical expert.

Five days after the order was entered, appellant filed a supplemental response to appellee's motion for summary judgment, this time including an attached affidavit from Dr. Dale H.

Rice. She also filed a motion for reconsideration and to set aside the May 2, 2007 order granting summary judgment. The circuit court denied both motions in its order filed on May 23, 2007, and appellant filed a timely notice of appeal on May 25, 2007, regarding both the May 2, 2007 and May 23, 2007 orders. This appeal followed.

Summary judgment is to be granted by a circuit 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. *See Wagner v. General Motors Corp.*, 370 Ark. 268, 258 S.W.3d 749 (2007). 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. *See Pakay v. Davis*, 367 Ark. 421, 241 S.W.3d 257 (2006). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *See id.* Appellate courts 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. *See id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *See id.*

Appellant acknowledges that, as the moving party, appellee had fourteen days after her response to his motion for summary judgment was served within which to serve a reply. Appellee waited only three days, filing his reply on April 26, 2007, and the circuit court did not hold a hearing on the motion but granted appellee's motion for summary judgment just nine days later on May 2, 2007. Five days after that, on May 7, 2007, which was only fourteen days after appellant had filed her response, she filed a supplemental response to the motion for summary judgment for the purpose of submitting an affidavit from Dr. Dale H. Rice. Appellant asserts that she, as the non-moving party in the summary judgment proceeding, was entitled to submit supplemental supporting materials at any time within those fourteen days after her response was served.

Rule 56 of the Arkansas Rules of Civil Procedure provides in pertinent part:

> (b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary

judgment in his favor as to all or any part thereof. Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.

(c) *Motion and Proceedings Thereon.*

(1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits. The adverse party shall serve a response and supporting materials, if any, within 21 days after the motion is served. The moving party may serve a reply and supporting materials within 14 days after the response is served. For good cause shown, the court may by order reduce or enlarge the foregoing time periods.[1] *No party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise.* The court, on its own motion or at the request of a party, may hold a hearing on the motion not less than 7 days after the time for serving a reply. For good cause shown, the court may by order reduce the foregoing time period.

(2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion. A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability.

(f) *When Affidavits Are Unavailable.* 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 refuse the application for judgment or 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.

(Emphasis added.) As Rule 56 states, a defending party may move with or without supporting affidavits for a summary judgment in his favor. In the instant case, appellee did submit an affidavit with his

[1] Appellee highlights this sentence in the current form of Rule 56(c)(1), from 2007, and points out that the Addition to Reporter's Notes, 2006 Amendment, subdivision (c)(1) was amended to allow a circuit court to *reduce* the time periods for responses and replies rather than to only allow the *enlargement* of the time period.

motion. Appellant was then required to serve a response and supporting materials, if any, within twenty-one days from the date the motion was served. Rule 56 specifically allows the time period to respond to be lengthened by the circuit court for good cause, and in this case, the time period was lengthened on two separate occasions. Once her response was served on April 23, 2007, appellee had fourteen days in which to file a reply, but he filed it only three days later on April 26, 2007.

As highlighted above, Rule 56(c)(1) states that "[n]o party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise." Appellant asserts that the rule gives the moving party *and* the non-moving party a full fourteen days after the non-moving party's response is served within which to submit supplemental supporting materials. Appellant argues that is precisely what occurred when she filed her supplemental materials on the fourteenth day after filing her response to appellee's motion. Appellant points out that the rule does not indicate that the non-moving party must request or obtain leave from the court in order to submit the supplemental supporting materials. Accordingly, she argues that it was reversible error for the circuit court to grant appellee's motion for summary judgment before the fourteen-day time period for submitting supplemental supporting materials had expired. *See First Nat'l Bank, Gdn. v. Newport Hosp. & Clinic*, 281 Ark. 332, 663 S.W.2d 742 (1984) (where the supreme court held that it was error for the trial court to grant summary judgment in a medical-malpractice case before the plaintiff's interrogatories and requests for production of documents had been answered).

Appellant also refers to the language of Rule 56(c)(1) that states that the circuit court, on its own motion, or at the request of a party, may hold a hearing on the motion not less than seven days after the time for serving a reply. She acknowledges that the circuit court may, by order, reduce this time period, but she reiterates that in the instant case no order reducing that time period was entered.

Finally, appellant asserts that the affidavit of Dr. Dale H. Rice that was attached to her supplemental response to the motion for summary judgment clearly shows that there are genuine issues of material fact and that appellee is not entitled to judgment as a matter of law. She claims that her supplemental supporting materials, specifically Dr. Rice's affidavit, was timely submitted pursuant to Rule 56. Accordingly, she reasserts that the circuit court committed reversible error in prematurely granting appellee's

motion for summary judgment and thereafter by denying her motion for reconsideration and to set aside motion for summary judgment.

Appellee concisely explains the time line of all the pleadings filed in this matter, and additionally points out that appellant failed to file a pleading that could have easily resolved this entire situation. Appellee cites *Jenkins v. International Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994), where our supreme court upheld a grant of summary judgment where the non-moving party failed to file an affidavit substantiating the fact that they were having problems gathering facts to support their opposition to summary judgment, as was their right under Ark. R. Civ. P. 56(f). The supreme court stated that had they done so, the circuit court might well have foregone a decision on summary judgment for an additional period of time pursuant to Rule 56(f) so that other discovery could be pursued. In the instant case, appellant had a significant amount of time, arguably from as early as August 2002, to identify a medical expert to support her claims as required by Ark. Code Ann. § 16-114-206. *See also Spring Creek Living Ctr. v. Sarrett*, 319 Ark. 259, 890 S.W.2d 598 (1995) (reiterating that it is incumbent upon a plaintiff to identify an expert and attach an affidavit or deposition testimony or a physician to respond to a defendant's motion for summary judgment). She failed to do so and further failed to notify the circuit court of the circumstances surrounding her inability to identify a medical expert.

While *Jenkins* dealt with the party's diligence, or lack thereof, in completing discovery, as opposed to obtaining medical expert testimony to refute the moving party's motion for summary judgment, the analysis is analogous. In *Jenkins*, the circuit court acknowledged that the non-moving party failed to exercise due diligence in completing discovery and exacerbated the problem by failing to file an affidavit substantiating the allegation that they were having difficulty gathering the facts to support their opposition to summary judgment as contemplated by Rule 56(f). Appellant likewise never sought this relief, and never afforded the circuit court a basis from which to forego ruling on the motion for summary judgment.

Regarding appellant's argument that she should have been given fourteen days after her response was filed to supplement that response, appellee cites *Southeastern Distributing Co. v. Miller Brewing Co.*, 366 Ark. 560, 237 S.W.3d 63 (2006), where our supreme court looked at a similar issue and reviewed the procedural history

of the case and the pleadings filed therein. The appellee in that case filed a motion for summary judgment, and the appellant obtained a thirty-day extension to file its response. The appellant filed its response on the thirtieth and final day of the extension, and the appellee filed a reply seven days later. The circuit court held a hearing on the motion five days later and subsequently entered an order of summary judgment in favor of the appellee. The appellant then argued that, pursuant to Rule 56, both parties should have been allowed to file supplemental supporting materials for at least fourteen days after it filed its response, which would have been two days after the hearing was held, and that the circuit court was not authorized to hold a hearing until that entire time period had elapsed.

The supreme court clarified that the moving party *may* serve a reply and supporting materials within fourteen days of the service of the non-moving response, and that the circuit court *may* hold a hearing on the motion not less than fourteen days after the time for serving a reply, but that neither is mandatory. *Southeastern Distributing Co., supra.* The supreme court acknowledged that the appellant had received additional time to file its response, and seemed to give the additional thirty days great weight in determining that both parties were provided adequate time to present evidence and argument.

In the instant case, appellant was granted two separate extensions that spanned nearly two months from when the response was originally due; however, nothing in the record reflects that appellant ever gave a reason for her need for the continuances. She failed to request additional time for the specific purpose of trying to obtain a medical expert's opinion. Then after two months of extensions, she finally filed a response, still without supporting materials and with no request for additional time or an explanation of the lack of medical expert testimony. Appellee responded quickly, filing a reply in only three days, and the circuit court entered its ruling a week later. It was not until five days after the entry of the order that appellant finally submitted the requisite affidavit attached to a supplemental response to the motion for summary judgment.

Appellee characterizes appellant's filing as an "impermissible last-minute submission." Appellant failed to timely meet her burden of proof by providing the necessary medical expert testimony to rebut the evidence presented by appellee in support of his motion for summary judgment. There was ample time for her to do so, as well as time to seek additional relief from the circuit

court pursuant to Rule 56(f); she simply did not do so. We hold that no abuse of discretion occurred when the circuit court granted the motion for summary judgment and denied appellant's motion for reconsideration and to set aside the summary judgment.

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.

Patricia Gail (Rascoe) ROARK *v.*
OFFICE of CHILD SUPPORT ENFORCEMENT
and Anthony Dwayne Rascoe

CA 07-515 278 S.W.3d 114

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

Chaney Taylor, Jr., for appellant.

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

SARAH HEFFLEY, Judge. Appellant, Patricia (Rascoe) Roark, appeals the January 19, 2007, order of the Faulkner County Circuit Court, in which the court refused to enforce an agreement between the parties, which had previously been approved by the court, and established appellant's child support obligation at $74 per week. The order also found appellant in arrears and granted appellee, the Office of Child Support Enforcement (OCSE), a judgment against appellant in the amount of $6,989.20. On appeal, appellant contends that the agreement entered into by the parties and approved by the court should be upheld and enforced, or, in the alternative, that her child support obligation should be set at $34.50 per week. We disagree with appellant's contentions and affirm.

Appellant and Anthony Rascoe were divorced by decree filed December 14, 1992, and appellant was given custody of the parties' son, J.R., born 1/26/1987, and daughter, B.R., born 1/21/1990. Mr. Rascoe was ordered to pay child support in the amount of $40 per week. In February 1998, this obligation was increased to $90 per week. In June 1998, the parties' son, J.R., was removed from his mother's care by the Department of Human Services and placed with his father.[1] An agreed temporary order,

[1] The exact circumstances surrounding this removal are not clear, although the transcript of a hearing held January 21, 2000, indicates the situation involved anger management issues and J.R.'s acting out toward both his sister and his mother.

entered May 21, 1999, established that J.R. would remain with his father while B.R. would remain with her mother. The order also abated Mr. Rascoe's child support obligation and stated that the issue of child support would be addressed at a later hearing, including the abatement of Mr. Rascoe's child support obligation from the time J.R. was placed in his custody up until the entry of the May 21 order. After the hearing held January 21, 2000, the court ordered that "[n]either party shall pay child support" but did not specifically address the abatement of support from June 1998 until May 21, 1999. The order memorializing this decision was filed February 9, 2000.

On November 10, 2003, Mr. Rascoe filed a petition to change custody of B.R. from appellant to himself, which was granted on March 16, 2004. Appellant was ordered to pay child support in the amount of $69 per week. On January 26, 2005, J.R. reached the age of 18, and under Ark. Code Ann. § 9-14-237(a)(1)(A)(i) (Supp. 2005), an obligor's duty to pay child support automatically terminates by operation of law when the child reaches 18 unless the child is still in high school. J.R. completed high school in December 2004; thus, appellant's child support obligation was terminated when J.R. turned 18.

On February 4, 2005, OCSE filed a motion to intervene and a motion for citation for appellant's failure to pay child support, alleging that she was in arrears in the amount of $3105. OCSE's motion to intervene was granted, and another motion for citation was filed on May 16, 2005, alleging that appellant was $4278 in arrears. Appellant filed an answer to the motions in which she denied all allegations, asked for a reduction in her current child support obligation, and counterclaimed for an offset of any arrearages against arrearages owed by Mr. Rascoe.

According to the briefs, appellant and the attorney for OCSE appeared before the court on July 29, 2005, and announced that the matter had been resolved by agreement. No transcript of this hearing appears in the record, although there is a proposed order resulting from that hearing in OSCE's supplemental addendum. This proposed agreement stated that appellant owed an arrearage of $3720, and Mr. Rascoe owed an arrearage of $6170, giving appellant a credit of $2450 against future support obligations. The proposed agreement also stated that appellant's child support obligation would be reduced to $34.50 per week. The parties were apparently unable to agree on a final order, however, and the matter was again set for a hearing on January 20, 2006.

At that hearing, the attorney for OCSE announced that it was willing to "basically call it even . . . based on payments that have been made in the past, the amount of payments will resolve themselves to settle out any future support payments owed by [appellant]." OCSE suggested that it prepare an order dismissing the citations against appellant, zeroing out any balance owed by either party, and cancelling the wage-withholding order currently in effect. The court agreed; however, no written order was ever entered memorializing the agreement.

On May 4, 2006, OCSE filed a motion asking the court to find the agreed resolution to be of no effect and to find appellant in arrears in her child support obligation. OCSE contended that the agreement ignored the court's May 21, 1999 order that abated Mr. Rascoe's support obligation and the February 9, 2000 order that stated Mr. Rascoe owed no child support arrearage. OCSE argued that the effect of the agreement was to bargain away B.R's right to future support to her detriment, and the court had held no hearing to determine whether this agreement was in the best interest of B.R. To support its argument, OCSE cited *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995), in which our supreme court stated:

> It has long been the law in Arkansas that the interests of a minor cannot be compromised by a guardian without approval by the court. It is not sufficient that a court be made aware of a compromise agreement and that it is agreeable to the guardian; rather, the court must make a judicial act of investigation into the merits of the compromise and into its benefits to the minor. Any judgment by a court that compromises a minor's interest without the requisite investigation is void on its face.
>
> The foregoing rules of public policy protecting minors have been applied to a child's right to support from his parents. Moreover, this court has stated that the duty of support is a continuing one and one that cannot be permanently bargained away by a parent to the child's detriment. Consequently, the parents' inability to permanently bargain away the child's right to support preserves the court's power to modify an order to meet subsequent conditions.

Id. at 355-56, 908 S.W.2d at 651-52 (citations omitted).

A hearing on the motion was held on October 31, 2006. After hearing counsels' arguments, as well as testimony from appellant, Mr. Rascoe, and Judy Kree, a regional manager for

OCSE who had calculated appellant's alleged arrearages, the court took the matter under advisement. In a letter opinion dated December 19, 2006, the court found that the earlier agreement of the parties could not be upheld under the authority of *Davis, supra,* noting that "the evidence does not support a determination that the agreement recited by [OCSE's attorney] is in the best interest of the child" because it would have resulted in the relinquishment of several thousands dollars of child support owed by appellant. The court asked OCSE to prepare an order setting the agreement aside and making a finding of arrearage in conformity with OCSE's calculations. An order to that effect was filed on January 19, 2007. Appellant now appeals to this court.

Our standard of review for an appeal from a child support order is de novo on the record, and we will not reverse a finding of fact by the circuit court unless it is clearly erroneous. *Hill v. Kelly,* 368 Ark. 200, 243 S.W.3d 886 (2006). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. *Matthews v. Matthews,* 368 Ark. 252, 244 S.W.3d 660 (2006). 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. *Id.* 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. *Hill, supra.* However, a trial court's conclusions of law are given no deference on appeal. *Id.*

For her argument on appeal, appellant asserts that litigants should be able to rely on agreements, particularly those that are approved by the court, and that OCSE should be required to honor the agreement it had previously reached with appellant. Appellant contends that it would be "impossibly time-consuming for the Court to conduct a 'best-interests hearing' on each and every child support case that comes before it"; that the court depends on the parties, and particularly the OCSE and all its available resources, to properly reach an agreement; and that once an agreement has been reached and announced to the court, the matter should be settled.

We disagree with appellant's assertion that the trial court was bound by the parties' earlier agreement. Our case law has made clear that independent agreements concerning child support are not binding on the trial court, and the court always retains jurisdiction over child support as a matter of public policy. *Alfano*

v. Alfano, 77 Ark. App. 62, 72 S.W.3d 104 (2002). In addition, no matter what an independent agreement states, either party has the right to request modification of a child support award. *Id.* And, pursuant to *Davis, supra*, the trial court was required to investigate the merits of the compromise and to determine its benefits to the minor, and without doing so, any order entered by the court would have been void on its face.

Accordingly, we find no error in the trial court's refusal to follow the parties' agreement. And while appellant also offers an alternative argument, that her child support obligation should be set at $34.50 per week, she bases this number on the agreement allegedly reached by the parties in July 2005, and does not develop any argument showing how the calculations used by OCSE were in error. We have already clarified that the trial court was not bound by any prior agreement made by the parties, and we have repeatedly held that we will not address an argument on appeal when the appellant has not sufficiently developed the argument and it is not apparent without further research that the appellant's point is well taken. *Holt Bonding Co. v. First Federal Bank of Arkansas*, 82 Ark. App. 8, 110 S.W.3d 298 (2003). Therefore, we also affirm the trial court's order establishing appellant's current child support obligation and amount of arrearage.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Susan Ellen TOM *v.* Kandi COX

CA 07-650 278 S.W.3d 110

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

Jim Hamilton, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *M. Samuel Jones, III*, for appellees.

KAREN R. BAKER, Judge. Appellant, Susan Tom, appeals from a decision by the Pulaski County Circuit Court denying her petition for adoption of the minor child, A.M.G. Ms. Tom's sole argument on appeal is that the trial court erred in finding that appellee Cox had not unreasonably withheld her consent to the adoption and should have granted appellant's petition for adoption. We disagree and affirm.

On April 18, 2005, A.M.G. was born to Geneva Griffith in Ft. Smith, Arkansas. Immediately following her birth, A.M.G. was taken to Arkansas Children's Hospital for treatment for epidermolysis bullosa, junctional non herlitz (an incurable condition in which the upper layer of the skin does not properly bond to the sublayer, resulting in serious injury from even the slightest pulling

or twisting of the upper layer of the skin).[1] Also on that day, Ms. Griffith relinquished her parental rights to A.M.G. On May 6, 2005, the Saline County Circuit Court ordered that Kandi Cox, President of ABBA Adoption, LLC, serve as temporary guardian of the minor child in order to facilitate an adoption.

Susan Tom of Fairfield, California, is the mother of eleven adopted children with disabilities, one of which suffers from recessive dystrophic epidermolysis bullosa, a disease similar to the disease from which A.M.G. suffers. Ms. Tom learned about A.M.G. through an internet-based support group for children with epidermolysis bullosa. Ms. Tom began communicating with Ms. Cox about A.M.G. and offering Ms. Cox her support.

On July 11, 2005, after an unsuccessful adoption attempt, Ms. Cox asked if Ms. Tom would be interested in adopting A.M.G. Ms. Tom responded that she would be interested in adopting the child; however, the placement would need to be postponed until October because her family was going to be featured on the television show Extreme Makeover Home Edition. Because of her spotlight on the show, the Tom family received a new home that was specially designed for children with disabilities. The home had seven bedrooms, six bathrooms, and an elevator. The family also received a $300,000 trust to be used for the children's special needs or for their education.[2]

On August 17, 2005, the Saline County Circuit Court modified its previous order, appointing Ms. Cox as guardian of the child and transferring the case to Pulaski County. As planned, on October 19, 2005, Ms. Tom arrived in Arkansas to meet with Ms. Cox and sign a placement agreement, an at-risk placement notice, and an agreement for adoption services with ABBA. Ms. Tom paid ABBA $4900 for adoption services and took custody of the child. Ms. Tom and A.M.G. traveled to California to be with the remainder of the family, and A.M.G. remained in California with her new family for ten months.

In the meantime, the requirements for the adoption were being completed. Ms. Tom had contacted the appropriate agency

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[1] The child also later began to suffer from seizures and episodes of holding her breath and passing out.

[2] In addition to the $300,000 trust from Extreme Makeover Home Edition, a trust by Ms. Tom had previously been established (worth approximately $117,000) to be used for the children's education.

to conduct the home study, and the home study had been completed. As a result of the home study, Ms. Tom was recommended as an adoptive parent; however, there was testimony that the post-placement visits were not completed. Also during this time, Ms. Tom was attempting to obtain financial assistance to which A.M.G. was entitled, through social security or the American Adoption Program.

The testimony showed that in April 2006, the birth mother, Ms. Griffith, began residing in the home of Kandi and Chris Cox. Ms. Griffith testified that she began living with the Cox family because she was in need of a new living arrangement. She also testified that she still lived with the Cox family and that she did not know how long she would reside there.

Also in April 2006, Ms. Cox called Ms. Tom and requested that Ms. Tom bring A.M.G. to Arkansas for a visit. Because it was customary for her family to make a long motor home trip in the summer, Ms. Tom agreed to stop in Arkansas for a visit. Ms. Tom and her family arrived in Little Rock on August 2, 2006. While visiting, she and her children enjoyed meals and various other activities with the Cox family. Ms. Cox testified that her overall observation of the relationship and interaction between Ms. Tom and the child was appropriate.

On August 4, 2006, the Cox family, the Tom family, and Ms. Griffith dined together at the Olive Garden restaurant. At the time, A.M.G. was seventeen months old. While sitting in a highchair, A.M.G. injured her knee and began crying. Because the child was inconsolable, Ms. Tom took the child out of the restaurant to the family's motor home. Ms. Tom was able to calm the child, and she moved the motor home near the restaurant's entrance into a handicap parking place. She attempted to call her children on their cell phone, but got no answer. She did not attempt to call Ms. Cox's cell phone. She then exited the motor home and returned to the restaurant.

Ms. Tom testified that she informed the restaurant employees near the entrance that she needed to pay her bill and that she would return shortly to move the motor home. She then went to the table hoping to pay the bill. When she discovered that the bill had not yet been delivered to the table, she requested it from the wait staff. She sat down while she waited for the check. Ms. Tom allowed her teen-aged daughter Chloe to go out to the motor home while she waited. She estimated that only three and a half

minutes passed between the time she returned to the table until Chloe got out to the motor home. She testified that while she waited on the bill, there was no discussion of the child or her condition.

On the other hand, Ms. Cox testified that after Ms. Tom was in the motor home with A.M.G., she returned to the table and began to finish her meal. Ms. Cox testified that although there was some mention of the check as Ms. Tom was trying to console A.M.G. (specifically, Mr. Cox and Ms. Cox told Ms. Tom not to worry about the bill for the dinner), Ms. Tom did not mention the check after she returned from the motor home. As Ms. Tom finished her meal, Ms. Cox asked about the child, and Ms. Tom responded that she had fallen asleep in the motor home. Ms. Cox testified that the air conditioning was on and the doors were locked. Ms. Tom then reluctantly granted Chloe's request to go out to the motor home. Ms. Cox estimated that approximately five minutes passed from the time Ms. Tom returned to the table until Chloe went out to the motor home. After another ten minutes passed, Ms. Cox went out to check on the two children. She found A.M.G. awake and playing. In her opinion, it was not in A.M.G.'s best interest to be left alone in the motor home because of her various medical conditions.[3]

After the incident, the parties left the restaurant and had no contact until the next morning. At six o'clock in the morning on August 5, 2006, Ms. Cox and two North Little Rock police officers arrived at the campground where Ms. Tom and her family were staying. Ms. Cox claimed that Ms. Tom had neglected and improperly abandoned the child in the motor home the night before. Officer Richard Beaston testified that he accompanied Ms. Cox only to investigate a possible child abuse situation. To his knowledge, there was no plan to assist with an exchange of the child or to make an arrest. The investigation revealed no signs of abuse or neglect. Nonetheless the child was given to Ms. Cox. Ms. Tom testified that she willingly handed the child over because of the officers' presence and in order to avoid a confrontation in front of her other children. Following the exchange, Ms. Cox sent a

[3] Mr. Cox testified that approximately fifteen to twenty minutes passed before anyone went to the motor home to check on the child. Ms. Griffith also testified that approximately thirty minutes passed before anyone checked on the child, but in her deposition, Ms. Griffith estimated that the time period was only twenty minutes. Nonetheless, the trial court found that Mr. Cox's and Ms. Griffith's "accounts of the elapsed time seemed exaggerated."

letter to Ms. Tom informing her that Ms. Cox would no longer recommend that she adopt the child.[4]

On September 6, 2006, Ms. Tom filed her petition to adopt A.M.G. Ms. Tom also filed a motion to consolidate the petition for adoption and the petition for guardianship (filed by Ms. Cox and previously transferred to Pulaski County Circuit Court). Ms. Cox and ABBA responded to both pleadings. After the hearing, the trial court entered an order consolidating the petition for adoption and the petition for guardianship, and denying the petition for adoption on the basis that Ms. Tom failed to prove that Ms. Cox unreasonably withheld her consent for the adoption of A.M.G. In the order, the trial court also concluded that Ms. Cox was the lawful guardian of the child and that there was no testimony offered to show that she had violated her fiduciary responsibilities with regard to the guardianship. This appeal followed.

In *Luebker v. Arkansas Department of Human Services*, 93 Ark. App. 173, 217 S.W.3d 172 (2005), this court set forth our standard of review in adoption cases:

> A trial court may grant a petition for adoption if it determines at the conclusion of a hearing that the required consents have been obtained or excused and that the adoption is in the best interest of the child. *Bemis v. Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986) (emphasis added). However, even where the trial court has determined that parental consent to an adoption is not required, the trial court still must find from clear and convincing evidence that the adoption is in the best interest of the child. *Waldrip v. Davis*, 40 Ark. App. 25, 842 S.W.2d 49 (1992). The burden rests on the one seeking adoption to prove by clear and convincing evidence that adoption is in the child's best interest. *Manuel v. McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988). The ultimate determination of best interest is the primary objective of the trial court in custody matters. *Manuel, supra.* We defer to the trial court's personal observations when the welfare of a young child is involved because we know of no other case in which the superior position, ability, and opportunity of the trial court to observe the parties carries as great a weight as one involving minor children. *King v. Lybrand (In re Lybrand)*, 329 Ark. 163, 946 S.W.2d 946 (1997). On appeal, we review the evidence de novo, but we will not reverse a trial court's

[4] Ms. Cox retained custody of the child after August 5, 2006.

> findings unless it is shown that they are clearly contrary to the preponderance of the evidence. *Mason v. Mason*, 82 Ark. App. 133, 111 S.W.3d 855 (2003).

Luebker, 93 Ark. App. at 176-77, 217 S.W.3d at 174-75.

Arkansas Code Annotated section 9-9-206(a)(3) (Supp. 2007) states that "a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by any person lawfully entitled to custody of the minor or empowered to consent." One exception to this requirement is that the consent of a legal guardian is not necessary if the guardian "has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his or her written reasons for withholding consent, is found by the court to be withholding his or her consent unreasonably." Ark. Code Ann. § 9-9-207(a)(8) (Supp. 2007).

The issue at hand in this case is whether the circuit court's finding that Ms. Cox reasonably withheld her consent to the adoption is clearly erroneous. We find that it is not. This case centers around an incident at a local restaurant when Ms. Tom left the child alone in a motor home parked near the door of the building for a short period of time. While both Ms. Cox and Ms. Tom had somewhat different versions of the incident, the trial court focused on the special medical needs of the child — including her epidermolysis bullosa condition, seizures, and episodes of holding her breath and passing out. Considering the events of the evening where the child injured herself while simply wiggling in her high chair, it was clear that the child could have suffered additional injury while in the motor home unattended by an adult, even for a short period of time. Even though it appeared as if the Cox family wanted to clear the way to adopt A.M.G. themselves, Ms. Cox testified that she withheld her consent based on Ms. Tom's decision to leave A.M.G. alone in the motor vehicle without adult supervision. Under such facts where Ms. Tom left the child in the motor home alone, we cannot say that the circuit court erred in finding that Ms. Cox was not unreasonably withholding her consent to the adoption of A.M.G. Accordingly, we affirm.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.

Jeffery Lynn DAILEY *v.* STATE of Arkansas

CA CR 07-756 278 S.W.3d 120

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

Jeff Rosenzweig, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

BRIAN S. MILLER, Judge. A Ouachita County jury convicted appellant Jeffery Lynn Dailey of manslaughter, abuse of a corpse, and a firearm enhancement. Dailey was sentenced to eighteen years' imprisonment. Daily appeals only the abuse of a corpse conviction, arguing that there was insufficient evidence to sustain it. We disagree and affirm.

The trial evidence showed that Dailey shot Sheila Dillard in his living room on March 25, 2006. Dillard's decomposing body was recovered four days later in an unheated and locked "junk room." She had been placed in fifty-five-gallon garbage bags, secured by duct tape, and covered with a tarp. Other items were stored in the same room and a pair of coveralls were jammed under the door.

At the close of the State's case, Dailey moved for a directed verdict on the charge of abuse of a corpse, arguing that he took no

action which was damaging to Dillard's corpse. The motion was denied. In Dailey's case in chief, his mother testified that it was neither uncommon for the "junk room" to be closed, nor was it uncommon for something to be placed under the door. Dailey then rested and renewed his directed-verdict motion. His motion was again denied and he was found guilty of manslaughter, abuse of a corpse, and a firearm enhancement.

Dailey now appeals, arguing that the trial court erred in failing to grant his motion for directed verdict. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Simmons v. State*, 89 Ark. App. 34, 199 S.W.3d 711 (2004). To determine if evidence is sufficient, there must be substantial evidence, direct or circumstantial, to support the verdict. *Id.* Substantial evidence is that which is of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without speculation or conjecture. *Mayo v. State*, 70 Ark. App. 453, 20 S.W.3d 419 (2000). In reviewing a challenge to the sufficiency of the evidence, this court views the evidence in the light most favorable to the State and considers only the evidence that supports the conviction. *Simmons*, *supra.*

The crime of abuse of a corpse is a Class D felony which occurs when someone knowingly "[d]isinters, removes, dissects, or mutilates a corpse"; or "[p]hysically mistreats a corpse in a manner offensive to a person of reasonable sensibilities." Ark. Code Ann. § 5-60-101 (Repl. 2005). The Arkansas Supreme Court has held that one who mishandles or neglects a corpse may also be guilty of the abuse of a corpse. *See Dougan v State*, 322 Ark. 384, 912 S.W.2d 400 (1995). In *Dougan*, the appellant wrapped her stillborn baby in bloody sheets and placed him in a dumpster. *Id.* She was charged with the abuse of a corpse but moved for a directed verdict, asserting that there was insufficient evidence to establish that she physically mistreated the corpse of her stillborn child. *Id.* The State, however, argued that "the placing of a corpse in the dumpster constituted physical mistreatment of a corpse." *Id.* The trial court denied the motion and the appellant was convicted. *Id.* The supreme court affirmed her conviction, holding that there was sufficient proof for the jury to conclude that appellant's conduct amounted "to physical mistreatment of a corpse in a manner offensive to a person of reasonable sensibilities." *Id.*

The question we must answer is whether the trial court clearly erred in finding that Dailey's treatment of Dillard's dead body was physical mistreatment, offensive to a person of reason-

able sensibilities. We hold that this case is similar to *Dougan* in that both charged parties attempted to hide dead bodies. In *Dougan*, the appellant wrapped the corpse in bloody sheets and hid it in a dumpster, while Dailey wrapped the corpse in garbage bags and hid it in a "junk room" where it began decomposing. Both cases involved the mishandling or neglect of a corpse constituting physical mistreatment that would offend a person of reasonable sensibilities. Therefore, we affirm.

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.

Liza TOZER and Nicholas Warden *v.*
Steve WARDEN

CA 07-796 278 S.W.3d 134

Court of Appeals of Arkansas
Opinion delivered February 27, 2008

Brian G. Brooks, Attorney at Law, PLLC, by: *Brian G. Brooks*, for appellants.

Appellee, pro se.

BRIAN S. MILLER, Judge. This appeal, which is a case of first impression for this court, requires us to determine whether the trial court erred in denying the appellants' petition to disinter the remains of their deceased family member. We adopt the analysis of the courts of Ohio and New York and reverse and remand with directions to the trial court to consider and make findings on the following factors: (1) the degree of relationship that the party seeking reinterment bears to the decedent, (2) the degree of relationship that the party seeking to prevent reinterment bears to the decedent, (3) the desire of the decedent, (4) the conduct of the person seeking reinterment, especially as it may relate to the circumstances of the original interment, (5) the conduct of the person seeking to prevent reinterment, (6) the length of time that has elapsed since the original interment, and (7) the strength of the reasons offered both in favor of and in opposition to reinterment.

Tamara Warden died in an automobile accident in July 2000, when she was seventeen years old. Her body was interred in the Oxford Cemetery in Oxford, Fulton County, Arkansas. Appellants, Lisa Tozer and Nicholas Warden, are Tamara's mother and brother, respectively. Appellee Steve Warden is Lisa's former husband and Tamara's adoptive father.

In March 2007, appellants filed a petition seeking to disinter Tamara's remains from the Oxford Cemetery and have them reinterred in the Westbrook Cemetery in Beebe, White County, Arkansas. Appellee opposed the petition. Because there are no

reported Arkansas cases upon which the trial court could rely in making its decision, the trial court relied upon ecclesiastical law and certain other ancient common-law doctrines, and found that there is no property interest in a dead body and that after Tamara's burial, her body became part and parcel of the ground to which it was committed. Based on this analysis, the trial court denied appellants' petition.

The standard of review on appeal from a bench trial is whether the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Pablo v. Crowder*, 95 Ark. App. 268, 236 S.W.3d 559 (2006). 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 an error has been committed. *Pulaski County v. Ark. Democrat-Gazette, Inc.*, 371 Ark. 217, S.W.3d (2007). Facts in dispute and determinations of credibility are within the province of the fact-finder. *Id.*

The Arkansas State Board of Health is vested with the authority to promulgate rules and regulations governing the interment and disinterment of remains. *See Alford v. Hale*, 85 Ark. App. 23, 145 S.W.3d 389 (2004). Pursuant to this authority, the State Board of Health promulgated Regulation 7.4 of the Rules and Regulations pertaining to Vital Records. *See id.* Rule 7.4 provides in pertinent part:

> No dead human body shall be removed from its place of original interment except under the following conditions:
>
> (1) Unless a permit from the State Registrar or his designated representative marked "Disinterment Permit" be secured by a licensed funeral director in charge of the disinterment.
>
> The qualified person making the application shall present to the State Registrar, the correct name, age, date of death of the body to be disinterred, place of disinterment, together with written consent of the next of kin or their authorized representative, by the local law enforcement officer, or by court order.

Although consent of the next of kin is required, the next of kin are not required to offer a compelling reason for disinterment. *See Alford, supra.*

Appellants argue that appellee's permission was not needed and that once a next of kin requests disinterment, the request must be granted. We disagree and hold that either appellee's consent was

necessary or, in cases where there is disagreement, the matter must be submitted for a judicial decision. Appellee was Tamara's adoptive father, and for all intents and purposes, appellee was Tamara's legitimate blood descendent. *See* Ark. Code Ann. § 9-9-215(a) (Supp. 2007). Therefore, the present dispute involves family members who are of the same degree of consanguinity. The fact that Tamara's sibling joins in the petition fails, in and of itself, to tip the scale in favor of disinterment. When determining an issue this important, the trial court cannot simply count the votes on either side and make its decision based upon a majority vote by family members.

Regulation 7.4 permits the family to obtain approval to disinter a family member without court approval when the family is in agreement on the request. When the family is in disagreement, however, the trial court must decide whether to permit disinterment. This leaves open the question of what factors the trial court should consider when deciding whether to permit disinterment. The States of Ohio and New York have determined that the following factors should be considered:

> (1) the degree of relationship that the party seeking reinterment bears to the decedent, (2) the degree of relationship that the party seeking to prevent reinterment bears to the decedent, (3) the desire of the decedent, (4) the conduct of the person seeking reinterment, especially as it may relate to the circumstances of the original interment, (5) the conduct of the person seeking to prevent reinterment, (6) the length of time that has elapsed since the original interment, and (7) the strength of the reasons offered both in favor of and in opposition to reinterment.

In re Disinterment of Frobose, 163 Ohio App. 3d 739, 840 N.E.2d 249 (2005); *Yome v. Gorman*, 242 N.Y. 395, 152 N.E. 126 (1926). We find these factors persuasive and therefore adopt them. Consequently, we reverse and remand this case and direct the trial court to consider and make findings regarding these factors.

Reversed and remanded.

PITTMAN, C.J., and GLOVER, J., agree.

Alton D. SPIGHT *v.* STATE of Arkansas

CA CR 07-855 278 S.W.3d 599

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

Gregory Crain, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. A jury found appellant, Alton D. Spight, guilty of first-degree battery. Raising three issues on appeal, he argues that the evidence was insufficient to support the conviction, that the circuit court erred in refusing to instruct the jury on the crime of second-degree battery, and that during voir dire the State improperly altered the standard of proof. We disagree with all of appellant's contentions and affirm.

We first consider appellant's challenge to the sufficiency of the evidence. The jury was instructed on first-degree battery under Ark. Code Ann. § 5-13-201(a)(8) (Supp. 2007), which provides that a person commits first-degree battery if, "[w]ith the purpose of causing physical injury to another person, the person causes physical injury to any person by means of a firearm." Appellant argues that the State failed to prove that appellant acted purposely. Our criminal statutes provide that "[a] person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result." Ark. Code Ann. § 5-2-202(1) (Repl. 1996).

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Taylor v. State*, 77 Ark. App. 144, 72 S.W.3d 882 (2002). We affirm a conviction if substantial evidence exists to support it, which is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* Furthermore, a

criminal defendant's intent can seldom be proven by direct evidence and must usually be inferred from the circumstances surrounding the crime. *Id.* Because intent can seldom be proven by direct evidence, the jurors are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Id.* And because of the obvious difficulty in ascertaining a defendant's intent, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

At trial, Roy Ray testified that on February 22, 2006, he was driving a red Freightliner Century pulling a trailer down I-30 on his way to Tyler, Texas. With him was his driving partner, Charles McCallister, who was in the passenger seat. As they were approaching the ninety-six mile marker, he moved to the left lane to pass a Marten truck that was in the right lane. He passed the Marten truck, and because a faster truck was coming up behind him, Ray pulled in front of the Marten truck. While the faster truck was trying to pass him, Ray came upon a slower truck in front of him, and Ray had to brake to keep from being too close to the slower truck. After the faster truck passed him, he moved to the left lane to pass the slower truck, but Ray came to a hill and lost speed. The Marten truck, which was in the right lane, then came up beside Ray's truck, and Ray heard three or four gunshots. They later found two bullet holes in the truck, one to the left of the passenger door and one in the passenger-side mirror. Ray backed off and lost more speed, and the Marten truck moved into the left lane. Ray moved to the right lane and called 911 and reported that the gunfire came from the Marten truck. He then realized that McCallister had been shot.

McCallister, who was sitting in the passenger seat at the time of the shooting, testified that he was shot underneath his right arm, and the bullet went through the lower third of his right lung, causing his lung to collapse. When emergency personnel arrived, he was transported to Arkadelphia and then to Little Rock.

Deputy Ken Ashcraft of the Hot Spring County Sheriff's Office testified that on February 22, 2006, he was advised by dispatch that there had been a shooting and to look for a Marten eighteen-wheel truck on the interstate. He observed the Marten truck and stopped it. Ashcraft asked appellant, who was the driver of the truck, if something had happened back up the road. Appellant stated that he had shot a man. Ashcraft asked appellant if he had a gun, and appellant replied that he had one in his front pocket. According to Corporal Dean Palmer of the Arkadelphia

Police Department, who participated in the stop, the gun was a five-shot revolver with three spent and two unspent cartridges.

Appellant testified in his own behalf. In sum, he testified that Ray's truck was in the left lane moving slowly and another truck was in the right lane also moving slowly, and when Ray's truck started to ease over on him, he thought that they may have been trying to rob or kill him. He testified that he then fired three shots at the truck to get away from them. He further testified that he was not shooting at anybody, that he did not look, that he did not aim, that he had never shot a gun from a moving vehicle, and that he shot wildly to try to get out of the trap. On cross-examination, when asked if he purposely pointed the gun and pulled the trigger, appellant agreed and testified that he "took it out the window and shot, h[e]ld it out the window and pulled it three times." He further admitted that he had to roll the window down to shoot.

We conclude that the evidence was sufficient to support the first-degree battery conviction. The jury had before it evidence that appellant purposely fired three times at an occupied truck. While appellant contended that he was not shooting at anybody and he fired wildly without aiming, because a presumption exists that a person intends the natural and probable consequences of his acts, the jury could have reasonably concluded that when he fired at the occupied truck, his purpose was to cause physical injury to the truck's occupants. Moreover, the jury was under no obligation to believe appellant's evidence. *See, e.g.*, *Smith v. State*, 337 Ark. 239, 988 S.W.2d 492 (1999).

For his second point on appeal, appellant argues that the circuit court erred in refusing to give his proffered instruction on second-degree battery as a lesser-included offense of first-degree battery. The proffered instruction provided that appellant, "with the purpose of causing physical injury to Charles McCallister caused serious physical injury to Charles McCallister," and that appellant "recklessly caused serious physical injury to Charles McCallister by means of a deadly weapon." *See* Ark. Code Ann. § 5-13-202(a)(1), (3) (Supp. 2007).

We reject appellant's argument under the analysis provided in *Taylor*. There, and here, the jury was instructed in accordance with Ark. Code Ann. § 5-13-201(a)(8), which defines first-degree battery as purposely causing physical injury to another person by means of a firearm. Both in that case and here, the proposed instruction for second-degree battery did not describe a

lesser-included offense as defined under Ark. Code Ann. § 5-1-110(b) (Supp. 2007).[1] Both alternatives given in the proffered instruction required an additional element, serious physical injury, that was not required in the first-degree battery instruction that was given, which only required physical injury when the injury was caused by a firearm. Further, the proffered instruction was not a lesser-included offense because the offense was not an attempt offense, and the proffered instruction did not differ from the offense charged only in the respect that a less serious injury to the same person sufficed to establish the offense's commission.

For his third point, appellant argues that the circuit court erred in "allowing the prosecution to lower the standard of beyond a reasonable doubt." During voir dire, the State asked the venire members if they knew the State's burden of proof. The State then said that the burden was "beyond a reasonable doubt." The State then asked, "Does that mean beyond a shadow of a doubt?" Appellant objected, arguing that the State was "trying to lower the bar on the standard" in violation of the state and federal constitutions. The court overruled the objection, telling the venire members that the purpose of voir dire was to inquire about their qualifications. The State then asked the question again. Ultimately, the State told the venire members that the burden was beyond a reasonable doubt, paraphrased the instruction defining the term, and stated that the court would instruct as to its meaning. At the close of the case, the circuit court instructed the jury on the proper burden of proof.

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[1] The statute provides in part as follows:

A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:

(1) Is established by proof of the same or less than all of the elements required to establish the commission of the offense charged;

(2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or

(3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

The course and conduct of voir dire examination is within the trial judge's discretion, and on appeal we will not reverse absent an abuse of that discretion. *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993). This case is controlled by *Hall*, and we conclude there was no abuse of discretion. In *Hall*, the prosecutor explained that "shadow of doubt" was not the law and attempted to explain reasonable doubt by examples. The defendant argued on appeal that the State improperly attempted to quantify reasonable doubt. In holding that the trial judge did not abuse its discretion, the Arkansas Supreme Court observed that the jury was instructed on the proper burden of proof and that the jury was presumed to have followed the instruction. Here, the circuit court likewise instructed the jury on the proper burden of proof, and we likewise presume that it followed the court's instruction. Thus, as in *Hall*, we conclude there was no abuse of discretion.

Affirmed.

BIRD and MARSHALL, JJ., agree.

John Edward GRUBBS *v.* Frederick A. HINDES and Pamela M. Cornwell-Hindes

CA 07-239 278 S.W.3d 575

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

[Rehearing denied April 9, 2008.*]

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

Pryor, Robertson Beasley, Smith & Karber, PLLC, by: *C. Brian Meadors*, for appellant.

Nolan, Caddell & Reynolds, P.A., by: *David L. Borland*, for appellees.

ROBERT J. GLADWIN, Judge. Appellant John Edward Grubbs appeals the November 28, 2006 order of the Sebastian County Circuit Court granting appellees Frederick A. Hindes and Pamela M. Cornwell-Hindes a new trial. Appellant contends that appellees failed to properly object to the jury interrogatories and, thus, are not entitled to receive a new trial. Also, he claims that the appellees failed to establish that they did not receive a fair trial. We reverse and remand with instructions to reinstate the judgment consistent with the jury's verdict.

Facts

On March 30, 2003, appellant was traveling in a vehicle behind appellees, who traveled by motorcycle and side-car. In front of appellees was another motorcycle, and in front of that motorcycle was a car, which was driven by Elizabeth Rowlett, a non-party to the lawsuit. The testimony at trial was that Rowlett's car left the roadway near a curve. The first motorcycle slowed down, and appellee's motorcycle slowed down or came to a stop. Appellant's vehicle then hit appellees' motorcycle from behind, knocking them off the motorcycle. Both were taken to the hospital by ambulance.

Appellees filed a complaint against appellant on September 7, 2004, for negligence, seeking damages for their injuries, pain and suffering, medical treatment, and medical expenses. At trial, appellant moved for a directed verdict both at the end of appellees' case and at the conclusion of all testimony. The directed-verdict

motions were based on appellant's argument that there was not substantial evidence before the trial court to indicate his negligence. The motions were denied. The trial court then discussed jury instructions with counsel for both parties. Counsel for appellees objected to the submission to the jury of those interrogatories which contained a provision for a finding of a percentage of fault attributable to Elizabeth Rowlett, a non-party. The trial court overruled this objection and proceeded to instruct the jury. Contained within the instructions to the jury were four interrogatories, each its own document with blank spaces provided for juror signatures, and which stated as follows:

INTERROGATORY NO. 1

Do you find by a preponderance of the evidence that John Edward Grubbs was negligent in the occurrence?

ANSWER: _____ YES _____ NO

. . . .

NOTE: ANSWER INTERROGATORY NO. 2 ONLY IF YOUR ANSWER TO INTERROGATORY NO. 1 WAS YES. OTHERWISE, DO NOT ANSWER INTERROGATORY NO. 2 AND ANY OF THE FOLLOWING INTERROGATORIES.

INTERROGATORY NO. 2

Using 100% to represent the total responsibility for the occurrence and any injuries or damages resulting from it, apportion the responsibility between the parties whom you have found to be responsible.

Frederick A. Hindes	_____ %
John Edward Grubbs	_____ %
Elizabeth Rowlett	_____ %
TOTAL	100 %

. . . .

NOTE: ANSWER INTERROGATORY NO. 3 ONLY IF YOU FIND JOHN EDWARD GRUBBS MORE THAN

50% AT FAULT IN INTERROGATORY NO. 2. OTHERWISE, DO NOT ANSWER INTERROGATORY NO. 3.

INTERROGATORY NO. 3

State the total damages that Frederick A. Hindes is entitled to recover, if any, that you find were approximately caused by the occurrence.

ANSWER: $ _____

. . . .

NOTE: ANSWER INTERROGATORY NO. 4 ONLY IF YOU FIND JOHN EDWARD GRUBBS MORE THAN 50% AT FAULT IN INTERROGATORY NO. 2. OTHERWISE, DO NOT ANSWER INTERROGATORY NO. 4.

INTERROGATORY NO. 4

State the total damages that Pamela M. Cornwell-Hindes is entitled to recover, if any, that you find were approximately caused by the occurrence.

ANSWER: $ _____

The jury returned having answered "yes" to the first interrogatory, finding that appellant was negligent. Nine jurors signed this form. The jurors then found that appellee Frederick A. Hindes and appellant were both twenty-five percent responsible for the occurrence and that Rowlett was fifty-percent responsible. Again, nine jurors signed the second interrogatory. However, not all the nine jurors who signed Interrogatory No. 2 were the same jurors who answered "yes" to Interrogatory No. 1. This discovery was not made before the jurors were excused, even though the jury was polled as to their verdict before their dismissal. After the jury had been dismissed, appellees moved for a judgment notwithstanding the verdict, arguing that, based upon the evidence as presented, the jury could not have found Rowlett fifty percent at fault. The trial court took the motion under advisement, and offered an opportunity for appellees to file a written motion.

At the post-trial hearing on appellees' motion for judgment notwithstanding the verdict and alternative motion for new trial, appellees made two arguments. First, they argued that there was not sufficient evidence presented at trial for the jury to have found by a preponderance of the evidence that Rowlett was fifty-percent responsible, and that there was substantial evidence presented that appellant was negligent. Second, they argued that the jury failed to properly follow instructions in answering the interrogatories. The second argument was not contained in the written motion before the trial court, but was brought to the trial court's attention for the first time during the oral argument at the post-trial hearing.

The trial court found that there was an irregularity in the proceedings that prevented appellees from having a fair trial, and ordered that the judgment be vacated and the matter set for a new trial. This appeal followed.

Law

The standard of review utilized in cases involving a trial court's grant of a new trial is well settled:

> Upon review of a trial court's grant of a new trial, this court must determine whether the trial court abused its discretion. *Sunrise Enters., Inc. v. Mid-South Rd. Builders, Inc.*, 337 Ark. 6, 987 S.W.2d 674 (1999); *Razorback Cab of Ft. Smith, Inc. v. Martin*, 313 Ark. 445, 856 S.W.2d 2 (1993). Where a new trial has been granted, it is more difficult to prove that the trial court abused its discretion, as the party opposing the motion will have another opportunity to prevail. *Id.*; *Worthington v. Roberts*, 304 Ark. 551, 803 S.W.2d 906 (1991). This court has held that a manifest abuse of discretion is one exercised improvidently or thoughtlessly and without due consideration. *Martin*, 313 Ark. 445, 856 S.W.2d 2; *Security Ins. Co. v. Owen*, 255 Ark. 526, 501 S.W.2d 229 (1973).

Jones Rigging & Heavy Hauling, Inc. v. Parker, 347 Ark. 628, 632-33, 66 S.W.3d 599, 602 (2002).

Appellant contends that the resolution of this appeal is entirely governed by *Jones Rigging*. There, injured motorists brought a personal-injury action against a truck driver and trucking corporation as a result of a collision. After a jury verdict for defendants, the trial court granted the injured motorists a new trial. The defendants appealed, and the Arkansas Supreme Court held that the injured motorists were not entitled to a new trial based on

their claim of surprise regarding testimony that the trucking corporation had dissolved. The court held that at no point during the surprise testimony did the injured motorists object. They also did not request a continuance or seek any type of curative relief, such as a cautionary instruction from the court. Moreover, the court held that the injured motorists were also responsible for introducing the offending testimony. The court stated, "It is well settled that a party who invites error may not complain of that error for which he or she is responsible." *Id.*, 347 Ark. at 634, 66 S.W.3d at 603 (citing *McGhee v. State*, 330 Ark. 38, 954 S.W.2d 206 (1997); *Peters v. Pierce*, 308 Ark. 60, 823 S.W.2d 820 (1992)).

Appellant argues that the facts herein parallel those in *Jones Rigging*. Here, the jury was given interrogatories, and appellees' only objections were to request a general-verdict form and an objection to including Rowlett in the interrogatories. No alternative interrogatories were offered by appellees. Appellant contends that when the jury returned a verdict that made them unhappy, appellees moved for a judgment notwithstanding the verdict. The trial court denied this motion, but granted the motion for a new trial on the basis of the irregularities in signing the interrogatories. Appellant argues that the trial court herein, just as in *Jones Rigging*, granted a new trial on the basis of an event for which there was not a proper objection. We agree.

Objections to jury interrogatories

Appellees argue that they did make an objection to the interrogatories being submitted to the jury, and referenced the trial court to their motion in limine and brief in support, which sought the trial court's exclusion of testimony or evidence that would support any contention that a non-party, Elizabeth Rowlett, was liable in any way for appellees' damages. Further, appellees maintain that they were not required to proffer an alternate jury instruction, citing *Tandy Corporation v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984) (where our supreme court held that all that is required to preserve an objection for appeal regarding an erroneous instruction of law is to make a timely objection and state valid reasons for the objection).

We agree that appellees were not required to proffer an alternative jury instruction in order to preserve the objection for appeal. However, the objection made by appellees was different than and irrelevant to the reasons proffered for a new trial. An objection must be specific enough to tell the trial court exactly

why the interrogatory is wrong. *See* Ark. R. Civ. P. 51 (2006). Appellees' objection was "with regard to a percentage at fault being available to Elizabeth Rowlett, as the empty chair or non-party here. . . ." The trial court had previously determined that the inclusion of the "empty chair" was correct as a matter of law.[1] However, a new trial was granted on the basis of the irregularities in signing the interrogatories. Therefore, the new trial was not granted due to the sole issue on which appellees objected. Further, appellees acknowledge that the trial court "went beyond the objection raised against the interrogatories" in granting a new trial.

Fair trial

Also pursuant to *Jones Rigging*, appellees were required to establish that their right to a fair trial was materially affected in order to obtain a new trial. *See Jones Rigging*, 347 Ark. at 635, 66 S.W.3d at 603. Appellees failed in this regard in two ways. First, the jury heard facts to support the three-way division of fault, and thus the record supports the jury's answer to Interrogatories Nos. 1 and 2.

Second, appellees are not entitled to recovery, even though Mr. Hindes was found to be only twenty-five percent at fault, because appellees failed to properly preserve this issue. Arkansas Rule of Civil Procedure 51 states in pertinent part as follows:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue. . . . A mere general objection shall not be sufficient to obtain appellate review of the court's action relating to instructions to the jury except as to an instruction directing a verdict or the court's action in declining to do so.

The interrogatories as written only allowed for recovery if appellant had been found by the jury to be more than fifty-percent at fault.

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[1] The Civil Justice Reform Act, codified at Ark. Code Ann. § 16-55-202 (Repl. 2005) which became effective on March 25, 2003, requires the fact-finder to consider the fault of all persons or entities who contributed to the alleged injury or damage regardless of whether the person or entity was or could have been named as a party to the suit.

Appellees should have objected to the interrogatory as written, but they did not. Therefore, the resultant verdict of "no damages" cannot be the basis for ordering a new trial.

Appellees contend that they did not receive a fair trial and maintain that they raised the issue with their oral motion for judgment notwithstanding the verdict, and it was further argued by them in their written motion and established again in oral argument on that motion. They argue that the following issues were raised in the post-trial hearing: 1) the verdict was not supported by the evidence presented at trial; 2) the interrogatories submitted to the jury should not have included the non-party; 3) the jury failed to understand and follow the instructions as they were given; 4) finding Mr. Hindes to be twenty-five percent at fault should not have excluded him from an award of damages; 5) damages were not assessed for Mrs. Hindes, who was an innocent passenger. Appellees argue that these issues relate to the fact that they were not awarded damages by the jury. They contend that this failure to award damages was determined by the trial court as being the result of irregularities in the proceedings.

Appellees maintain that the irregularities justify an award of a new trial, making appellant's argument, whether objections were made to the interrogatories, moot. Rule 59(a)(1) (2006) of the Arkansas Rules of Civil Procedure allows for a new trial based upon irregularities in the proceedings. Appellees argue that one of the most telling irregularities in the proceedings was the failure of the jury to follow the instructions as given by the trial court, as discussed in the facts above. Had the jurors complied with the instructions, appellees surmise that there would not have been the requisite number of jurors signing the interrogatory assigning the distribution of fault, and the effect would have been a hung jury, warranting a new trial. Further, they contend that because there was no finding of negligence against Mrs. Hindes, she should have been awarded one hundred percent of her damages against appellant.

■ There is a long-standing rule in Arkansas that "the time to object to an irregularity or inconsistency in a verdict is prior to the discharge of the jury." *Spears v. Mills*, 347 Ark. 932, 937, 69 S.W.3d 407, 411 (2002). That did not happen here and, in fact, the issue only came to light during oral argument in the hearing on appellees' motion for judgment notwithstanding the verdict, or alternatively, motion for new trial. Appellees lost their opportunity to object when they failed to recognize the irregular-

ity when the jury was polled. Therefore, the argument that the jury's failure to award Mrs. Hindes any damages was an irregularity has been waived because appellees failed to object when the verdict was rendered.

[redacted] Appellees argue that the trial court did not abuse its discretion in awarding a new trial. They contend that under Rule 59(a)(1) and (e), the trial court had the authority to grant a new trial. The rule states in pertinent part as follows:

> (a) A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: (1) any irregularity in the proceedings or any order of court or abuse of discretion by which the party was prevented from having a fair trial.
>
> . . . .
>
> (e) Not later than 10 days after entry of judgment, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely filed, for a reason not stated in the motion. In either case, the court shall specify in the order the ground therefor.

However, a party may not enjoy the benefits of a Rule 59(e) order for new trial when the errors justifying a new trial were caused by that party. The rule provides that the trial court can grant a new trial on its own when that party could have properly brought such a motion. Appellant argues that appellees could not have properly brought a new trial motion because they failed to object when the verdict was rendered, effectively waiving their opportunity to seek a new trial based upon the irregularities found in the interrogatory responses. *See Jones Rigging, supra.*

We agree. We further hold that the trial court's order did not have the requisite specificity as required under Rule 59(e), which states that the trial court must specify in its order the reason for ordering a new trial. Accordingly, we hold that the trial court abused its discretion in granting a new trial based upon irregularities to which there were not proper objections.

Reversed and remanded in order that the jury's verdict be reinstated.

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

HART and BIRD, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. Because the Arkansas Constitution guarantees a citizen the right to appeal, the Arkansas Court of Appeals handles a high volume of appeals. We are able to handle this high volume of appeals because we adhere to certain conventions and practices. With few very limited exceptions, we do not have a plain error rule in Arkansas appellate practice. Accordingly, we routinely affirm cases where the *appellant* has failed to make an argument to the trial court. *See, e.g.*, *Parker v. BancorpSouth Bank,* 369 Ark. 300, 253 S.W.3d 918 (2007). However, it is beyond dispute that the same rules do not apply to the *appellee.*

One of our most important conventions in appellate jurisprudence is that we will affirm a trial court if it reaches the right result; indeed, our supreme court has held that it is "axiomatic" that we affirm if we can determine that the trial court reached the right result even if it is for a different reason. *Stromwall v. Van Hoose,* 371 Ark. 267, 265 S.W.3d 93 (2007); *Thomas v. Avant,* 370 Ark. 377, 260 S.W.3d 266 (2007); *see also Davis v. State,* 367 Ark. 330, 240 S.W.3d 115 (2006); *Alphin v. Alphin,* 364 Ark. 332, 219 S.W.3d 160 (2005); *Regions Bank v. Griffin,* 364 Ark. 193, 217 S.W.3d 829 (2005); *State Farm Fire and Casualty Co. v. Andrews,* 363 Ark. 67, 210 S.W.3d 896 (2005); *Warr v. Williamson,* 359 Ark. 234, 195 S.W.3d 903 (2004); *Bright v. Zega,* 358 Ark. 82, 186 S.W.3d 201 (2004); *Ouachita Trek & Dev. Co. v. Rowe,* 341 Ark. 456, 17 S.W.3d 491 (2000); *Malone v. Malone,* 338 Ark. 20, 991 S.W.2d 546 (1999); *State v. Hatchie Coon Hunting & Fishing Club,* 98 Ark. App. 206, 254 S.W.3d 11 (2007); *McKenzie v. State,* 69 Ark. App. 186, 12 S.W.3d 250 (2000). Given that our practice of affirming a trial court if it reaches the right result is so well settled, it is untenable that the majority has decided this case on the *appellees'* failure to raise certain arguments.

The *appellees* were not even required to raise *any* issue for the trial judge to grant a new trial. Rule 59(e) of the Arkansas Rules of Civil Procedure invests the trial court with the power "on its own initiative [to] order a new trial for *any reason* for which it might have granted a new trial on a motion of a party." The specifically enumerated grounds stated in Rule 59(a) include: "(5) error in the assessment of the amount of recovery, whether too large or too small;" and "(6) the verdict or decision is clearly contrary to the preponderance of the evidence or is contrary to law." I think our

analysis need go no further than to note that Pamela M. Cornwell-Hindes, a non-negligent passenger, recovered nothing in this lawsuit, which is a patently erroneous assessment of damages and a result that is clearly contrary to the preponderance of the evidence. On the inadequacy of the verdict alone, the trial court was correct in granting a new trial and should be affirmed. *See Tirado v. O'Hara*, 70 Ark. App. 152, 15 S.W.3d 715 (2000).

I note further that there was an irregularity in the proceeding that would have justified a new trial. That irregularity came through the submission of the case on special interrogatories that the appellant essentially concedes "should have been written differently." The majority, however, accepts the appellant's obviously fallacious argument that the deficiencies in the interrogatories are of no consequence because the objection that the *appellees* made to the trial court was not adequate under Rule 51 of the Arkansas Rules of Civil Procedure. In fact, the appellees were not required to make any objection at all. Our review focuses on the trial court's ruling, not what the *appellees* said to the trial court before the trial court made that ruling.

Furthermore, it must be noted that the majority has confused "instructions" with "interrogatories." Black's Law Dictionary defines a jury *instruction* as "A direction or guideline that a judge gives a jury concerning the law of the case." It defines a special *interrogatory* as "A written jury question whose answer is required to supplement a general verdict." Through *instructions*, a jury receives information from the court, whereas through *interrogatories*, the court receives information from the jury. Remarkably, the majority purports to support its holding that the appellees' objection to the appellant's *interrogatories* was inadequate under Arkansas Civil Procedure Rule 51, which only concerns jury *instructions*. While Arkansas Civil Procedure Rule 51 expressly requires a specific contemporaneous objection and proffer of the party's proposed jury *instruction* to preserve the issue for appellate review,[1] Arkansas Civil Procedure Rule 49, the rule concerning

[1] In pertinent part, Arkansas Civil Procedure Rule 51 states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection, and no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on the issue.

special *interrogatories*, imposes no equivalent requirement of a contemporaneous objection and proffer. I have never seen a more obvious mistake of law. As a consequence, the majority's holding is completely unsupported by any relevant authority.

I believe that this case must be affirmed, therefore, I respectfully dissent.

BIRD, J., joins.

Todd HALL *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 07-911 278 S.W.3d 609

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

Lisa Lundeen-Gaddy, for appellant.

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

Chrestman Group, PLLC, by: *Keith L. Chrestman*, attorney *ad litem* for the minor children.

ROBERT J. GLADWIN, Judge. Todd Hall brings this appeal from an order of the Benton County Circuit Court terminating his parental rights to his daughter, R.H., born February 20, 1999, and to his son, M.H., born February 25, 2000. He raises three points for reversal.[1] We affirm the circuit court's termination order.

Appellee Arkansas Department of Human Services (DHS) filed a petition for emergency custody of R.H. and M.H. on February 13, 2006, alleging that the children were dependent-neglected. An affidavit in support of the petition states that the children were removed because of physical and sexual abuse by Hall. The affidavit also contains statements reflecting that Hall had told a DHS worker to put the children in foster care to prove that M.H. was constantly lying when making allegations of abuse. The circuit court entered an order for emergency custody the same day.

A probable-cause hearing was held on February 21, 2006. The parents stipulated to the existence of probable cause for entry

[1] Hall's wife, Virginia Hall, was a party to the proceedings below. Her parental rights were not terminated, and she is not a party to this appeal.

of the emergency order. The children remained in DHS's custody, and Hall was not allowed any contact with R.H.

After a continuance, the adjudication hearing was held on April 18, 2006. The parents stipulated to facts that would meet the statutory definition of "dependent-neglected." The circuit court continued the children in DHS's custody, with the case goal to be reunification with the parents. Hall was permitted supervised visitation with M.H. Hall was ordered to attend counseling or a sexual-offender program, attend parenting classes focusing on appropriate disciplinary techniques, obtain and maintain stable housing and employment, and pay child support of $20 per week.

A review hearing was held on July 17, 2006. In its order, the circuit court noted that Hall did not appear to be taking the matter seriously or trying to change the behavior that caused the removal of the children. Hall was found to have failed to attend counseling or parenting classes or to have paid child support.

A permanency-planning hearing was held on January 2, 2007. The court entered an order finding that Hall had attended counseling but failed to address the allegations of sexual abuse. Hall was also found not to have attended visitation with M.H. on a regular basis or to have paid child support as ordered. The goal of the case plan was changed to the termination of Hall's parental rights with a guardianship to be obtained for the children.

On February 5, 2007, DHS filed its petition seeking to terminate parental rights. As grounds, the petition alleged that the children had been adjudicated dependent-neglected and continued out of the parents' custody for more than twelve months without the conditions being remedied.

The termination hearing was held on April 24, 2007. M.H. testified that, when he was five years old, his father spanked his feet with a spoon, beat him on his legs and ankles, and bit him.

Todd Hall testified that he was convicted of battery in 2000 for leaving bruises and bite marks on R.H. because he was angry and frustrated with the control his in-laws had over his life. He acknowledged that he had bitten both children since that time and admitted to striking his wife in the arm. Hall acknowledged that M.H. got into trouble for blinking his eyes during nap time because he observed M.H. over a video monitor. He said there was also a camera in R.H.'s room. Hall also acknowledged that he viewed pornography on his computer.

Evelyn Weigel, the children's counselor, testified that she had been treating the children since June 2006. She described the children as having anxiety, post-traumatic stress disorder, and adjustment disorder. She said that there had been intermittent improvement with the children until they had contact with the parents. She was reluctant to recommend continued contact with the parents because the children often associated seeing the parents with a belief that they were returning home.

The children's maternal grandmother, Betty Sue Knapp, testified that the children were living with her and that she had noticed a change in their behavior since the permanency-planning hearing. She described M.H. as violent, using foul language, throwing things, and threatening to kill her. She described R.H. as screaming, beating her head against the bedroom wall, and threatening to kill her. She said the children were unmanageable after visits with their father. She recommended that the children not visit with either parent because they often were confused and agitated after the visits. She said that the children were not as violent as they were when they first came to her home. Knapp indicated that she was willing to adopt the children.

Detective Mark Jordan of the Bentonville Police Department testified that he investigated a hotline report that Hall had been touching R.H. inappropriately. He said Hall was arrested on rape charges in February 2006 but that the charges were dismissed a few weeks prior to the termination hearing. He also testified as to pornography found on Hall's computer.

Kathleen Housley, the counselor seeing Hall and his wife, testified that Hall denied sexually abusing his children and that the subject was not addressed. She said that, if it were determined that R.H. had been sexually abused, Hall should have no contact with her until he completed sex-offender treatment. Housley noted that the mother did not believe that R.H. had been sexually abused. She noted that Hall interacted appropriately during visits with M.H. She also testified that she requested a psychological evaluation be conducted. Housley described Hall as dominating the mother.

DHS caseworker Amber Strickland testified that the children had been in DHS custody for fourteen months at the time of trial. She also said that Hall was not consistent in his visits with M.H. She acknowledged that there had been discussions about having a psychological evaluation for Hall, but she did not know

whether a referral had been made. She also expressed her concerns that Virginia Hall would put the children at risk by choosing Hall over the children. According to Strickland, there were no factors to prevent the children from being adopted by their grandmother.

The circuit court ruled from the bench and found clear and convincing evidence that Todd Hall's parental rights should be terminated. The court found it difficult to assess Hall's credibility, noting that he was manipulative and controlling, trying to have all of the information come out favorable to him, and that he was easily distracted. The court did not find clear and convincing evidence to terminate the mother's parental rights. An order memorializing these findings was entered on June 12, 2007.

On June 21, 2007, the court entered an order appointing Betty Sue Knapp as the children's guardian. The order required Todd Hall to pay child support of $50 per week, even though his parental rights had been terminated. Hall filed a notice of appeal on June 25, 2007, designating the termination order as the order being appealed from.

This court reviews termination of parental rights cases de novo. *Yarborough v. Ark. Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). The grounds for termination of parental rights must be proven by clear and convincing evidence. *Id.* When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the circuit court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, giving due regard to the opportunity of the circuit court to judge the credibility of the witnesses. *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.* Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Kight v. Ark. Dep't of Human Servs.*, 94 Ark. App. 400, 231 S.W.3d 103 (2006). Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.*

Hall first argues that the termination of his parental rights was not necessary to achieve permanency for the children. We disagree.

Arkansas Code Annotated section 9-27-338(c) (Repl. 2007) gives preference, after the return of the children to their parents, to the termination of parental rights, unless the children

are being cared for by a relative and the termination is not in the children's best interest. Hall's argument focuses only on the preference prong, not the best-interest prong. Here, although the children are being cared for by their grandmother, it cannot seriously be argued that the termination of the parental rights of a person who physically or sexually abused his children is not in the children's best interests. Therefore, we cannot say that the circuit court erred in following the statutory preference for the termination of parental rights in this case.

Hall's second point is that several provisions of the circuit court's order were not supported by clear and convincing evidence. There is no requirement that every factor must be established by clear and convincing evidence; rather, after consideration of all the factors, the evidence must be clear and convincing that the termination is in the best interest of the children. *McFarland v. Ark. Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005). The question this court must answer is whether the circuit court clearly erred in finding that there was clear and convincing evidence of facts warranting termination of parental rights. *See Trout v. Ark. Dep't of Human Servs.*, 359 Ark. 283, 197 S.W.3d 486 (2004).

In its written order, the circuit court found two grounds for termination: that the children had been adjudicated dependent-neglected and remained out of the parents' custody for more than twelve months and, despite meaningful efforts from DHS, the conditions had not been remedied by the parent, *see* Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a) (Repl. 2007), and that the parent was found by a court of competent jurisdiction to have subjected any juvenile to aggravated circumstances, *see* Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(3). Most of Hall's argument appears directed to the finding of aggravated circumstances because, according to Hall, the court did not make a finding that he sexually abused R.H.[2] It is unnecessary to address this argument because there is sufficient evidence to support the circuit court's finding that the children had been adjudicated dependent-neglected and remained out of the parent's custody for more than twelve months.

[2] We note that a finding that Hall had sexually abused R.H. is not the only element present that supports a finding of aggravated circumstances. *See* Ark. Code Ann. § 9-27-303(b) (Repl. 2007).

Hall does not argue that DHS did not provide any services, only that there were services that DHS could have provided but did not, specifically pointing to a psychological evaluation. The circuit court found that Hall has failed to address the issues of sexual abuse with his counselor. The failure to consistently attend counseling sessions to address the issues resulting in the children's removal is a factor that shows indifference and will support termination of a parent's rights. *See Jefferson v. Ark. Dep't of Human Servs.*, 356 Ark. 647, 158 S.W.3d 129 (2004).

In his third point, Hall challenges the circuit court's order requiring him to pay child support for his children. After the circuit court terminated Hall's parental rights, the court granted guardianship of the children to their maternal grandmother, Betty Sue Knapp. The court also ordered Hall to pay child support of $50 per week. That order was entered on June 21, 2007. Hall filed his notice of appeal on June 25, 2007. However, he did not designate the guardianship/support order as one of the orders being appealed. Rule 3(e) of the Arkansas Rules of Appellate Procedure--Civil requires that the notice of appeal designate the judgment or order from which the appeal is taken. Orders not mentioned in a notice of appeal are not properly before the appellate court. *See Conlee v. Conlee*, 366 Ark. 398, 235 S.W.3d 899 (2006); *Ark. Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988). The guardianship/support order is independent from the termination order and cannot be considered as relating back to the termination order so that an appeal from the termination order brings up intermediate orders involving the merits and affecting the judgment. *See* Ark. R. App. P.–Civil 3(a). Therefore, we cannot address this point.[3]

Affirmed.

ROBBINS and HEFFLEY, JJ., agree.

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[3] We note that, insofar as any actual parental relationship was concerned, Hall was, after the entry of the termination order and at the time of the guardianship/support order, substantially the same as a stepparent to his children because he remained married to their mother. A stepparent, by reason of this relationship alone, has no duty to support the stepchild. *Kempson v. Goss*, 69 Ark. 451, 64 S.W. 224 (1901). Neither the circuit court nor the parties cite to any statutory authority providing otherwise.

Wanda SCOTT, Administratrix of the Estate of Ethel Mince, Deceased *v.* CENTRAL ARKANSAS NURSING CENTERS, INC., Nursing Consultants, Inc., and Michael Morton

CA 06-1252 278 S.W.3d 587

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

Wilkes & McHugh, P.A., by: *Susan Nichols Estes*, *Melody H. Piazza* and *Deborah Truby Riordan*; and *Brian G. Brooks Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Lyn P. Pruitt* and *Jeffrey W. Hatfield*, for appellees Robinson Nursing and Rehabilitation Center, LLC, Central Arkansas Nursing Centers, Inc., Nursing Consultants, Inc.

Hardin, Jesson & Terry, PLC, by: *Kirkman T. Dougherty*, for appellee Michael S. Morton.

WENDELL L. GRIFFEN, Judge. This appeal is brought from the grant of appellees' motions for a directed verdict and the denial of appellant's motion for a new trial. We affirm in part and reverse and remand in part.

I. Factual and Procedural Background

Appellant is the daughter of the late Ethel Mince, who died on September 18, 2002, while residing at Robinson Nursing & Rehabilitation Center. Appellee Central Arkansas Nursing Centers, Inc. (CANC), provided administrative services to Robinson under a written agreement, for which it received three and one-half percent of Robinson's gross revenues. Appellee Nursing Consultants, Inc. (NCI), provided consulting services to Robinson and other long-term-care facilities in exchange for a fee paid by the facilities. Appellee Michael Morton was the sole shareholder of CANC and NCI and a fifty-percent shareholder in Robinson. He acquired his interest in Robinson in late 2001.

In May 2001, Ethel Mince entered Robinson Nursing & Rehabilitation Center. She had a history of heart disease, dementia, and other illnesses, but she was able to walk, feed herself, and attend to her bathroom needs. Her condition remained fairly sound through February 2002, when she developed shaking, chills, cough, and a high fever. A nurse practitioner prescribed an antibiotic, but, by February 16, Mrs. Mince was lethargic and unresponsive. She was transported to the hospital and arrived in critical condition with bilateral pneumonia.

Mrs. Mince recovered enough to return to Robinson on February 25, 2002. Her prognosis was poor, and hospice care was recommended. Nevertheless, she improved somewhat and gained a few pounds, although she could no longer feed herself. But, within several weeks, she began losing weight and developing pressure sores. Thereafter, she steadily deteriorated — her sores got worse, her food intake decreased, and she became incontinent. She died on September 18, 2002. According to Coroner Mark Malcom, Mrs. Mince was in an emaciated condition at her death, which indicated a lack of proper nutrition. Malcom also observed multiple decubitus ulcers (pressure sores) that were decayed and emitting a foul odor. Two of the sores were so severe that the bone was exposed. The death certificate listed congestive heart failure as

the immediate cause of death and listed pressure sores and inanition (wasting away due to lack of food and water) as significant conditions contributing to death.

On August 15, 2003, and by an amended complaint dated May 23, 2005, appellant sued Robinson and appellees for wrongful death, negligence, breach of contract, and violation of the Arkansas Long Term Care Residents' Rights statute, Ark. Code Ann. § 20-10-1204 (Repl. 2005). She alleged that inadequate staffing and various acts of malfeasance, including improper hygiene, skin care, and nutritional care, proximately caused Mrs. Mince's injuries and death. The case went to trial in early 2006 against all four defendants. At the close of appellant's case, the trial court directed verdicts in favor of appellees on the ground that appellant's evidence against them was so insubstantial that it failed to move beyond speculation and conjecture. The trial proceeded against Robinson, and the jury returned a verdict in Robinson's favor. Appellant then moved for a new trial on the ground that, during voir dire, a prospective juror failed to disclose "potentially relevant and disqualifying information." The trial court did not rule on the new-trial motion, and it was deemed denied on the thirtieth day after it was filed. Ark. R. Civ. P. 59(b). Appellant filed a timely notice of appeal, and she now argues that: 1) the trial court erred in directing verdicts in favor of appellees; and 2) the trial court abused its discretion in denying her motion for a new trial.

II. Directed Verdicts

We first address appellant's argument that the trial court erred in granting directed verdicts in favor of appellees. Appellant contends that she presented substantial evidence from which a jury could find all three appellees liable for negligence or wrongful death.[1] Appellant does not challenge the sufficiency of the evidence to support the jury verdict in favor of Robinson.

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[1] Appellant does not argue that the directed verdicts were incorrect as to her claims for breach of contract and violation of residents' rights. It appears undisputed that appellees had no contract with Mrs. Mince. Further, a violation-of-residents'-rights count may be enforced only against a licensee, which in this case was Robinson. Ark. Code Ann. § 20-10-1209(a)(1) (Repl. 2005); *Health Fac. Mgmt. Group v. Hughes*, 365 Ark. 237, 227 S.W.3d 910 (2006).

A. Standard of Review

In determining whether a directed verdict should have been granted, we review the evidence in the light most favorable to the party against whom the verdict is sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003). A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Id.* Stated another way, a motion for a directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *Id.* Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Id.* Substantial evidence is evidence of sufficient force and character to induce the mind of the fact finder past speculation and conjecture. *Sparks Reg'l Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998).

B. Trial Testimony

The following summary of pertinent evidence is taken from appellant's abstract and is recounted in the light most favorable to appellant.

Appellant Wanda Scott and her sister, Marilyn Borecky, testified that, when their mother returned to Robinson in February 2002 after being hospitalized for pneumonia, she was given a poor prognosis. But she improved somewhat and began eating and drinking more. However, both women later became concerned about whether their mother was receiving adequate food and water at Robinson when she began losing weight in May or June 2002. On occasion, they saw their mother's food and water on a tray across the room, out of her reach. They also said that the family requested that Ensure be added to their mother's diet when she began losing weight but that it was a long time before it was provided. Additionally, they observed that their mother appeared thirsty and that she drank two or three glasses of water when they offered it to her. Mrs. Borecky testified that, on several occasions, she found her mother in a dirty diaper with feces under her nails and on the bed rails. She said that staff was sometimes available to change her mother but, at other times, she had to find someone. Both ladies were aware that their mother had bed sores but testified that they were not informed of the extent of them. They com-

plained to the Robinson staff and expressed concern about these situations. It was appellant's opinion that Robinson was not always fully staffed.

Several Certified Nursing Assistants (CNAs) who formerly worked at Robinson testified that they sometimes had difficulty completing their tasks due to lack of staff. Sylvia Molden said that when the facility was short of staff, her resident load increased from ten to seventeen. Among the things that were difficult to accomplish under those circumstances, she said, were turning the residents, feeding them breakfast in a timely manner, taking residents to the bathroom, encouraging fluid intake, and changing the residents. She also said that, if the facility was short of staff, the CNAs would, on the advice of the nurses, leave their documentation blank and fill it in later. Molden testified that she complained to the charge nurse about the staffing and it got better at times. Additionally, she said, during a state survey the floor would be fully staffed but, after the State left, the staffing level would be short again. Molden recalled Mrs. Mince being a resident at Robinson, and she said that she tried to reposition Mrs. Mince every two hours but was not always able to do so. She said that she often found Mrs. Mince and other residents soiled or wet when she began her shift. Molden also said that Robinson did not always have enough linens when she worked there, although she had all the other supplies she needed.

CNA Pamela Holland testified that she would sometimes notice at the beginning of her shift that Mrs. Mince was lying in urine and that she noticed that Mrs. Mince was always lying on her back. Holland further testified that she sometimes found a can of Ensure on Mrs. Mince's bedside table or on the heater, open and full with a straw in it. According to Holland, the number of residents she was required to care for during a shift depended on "who didn't show up for work." She said that Robinson's Director of Nursing "didn't want to hear any complaints." Holland agreed that, when the facility was appropriately staffed, she could get her job done, and she said that there were enough CNAs to properly care for the residents. Holland also said that Robinson lacked enough sheets, pads, and towels.

CNA Dennise Dockery testified that Robinson did not have enough CNAs at times because people quit or got fired or did not show up. She said she was not able to spend the time she needed with people like Mrs. Mince when the facility was short-staffed. She complained to the Director of Nursing or the floor nurses,

who said they would try to hire more people. Short-staffing prevented water from being passed out sometimes, she said, and she sometimes did not have the supplies she needed. Dockery worked with Mrs. Mince "about twice" and saw her wet and needing to be changed. She also saw other residents who had been left in their own waste for a long period of time. Dockery testified that staffing levels would change when "the State came in the building."

Dr. David Liu testified that he provided medical services to Robinson and was the treating physician for Mrs. Mince. He visited Robinson once a month and depended on the nurses to keep him informed. He said that no one at Robinson discussed staffing levels with him. He agreed that, to provide adequate care to residents, "you have to have sufficient staff." However, he had no opinion about whether staffing had anything to do with the care and treatment given to Mrs. Mince. He agreed that Robinson should follow federal regulations regarding staffing and that residents should be kept clean, comfortable, properly hydrated, and repositioned. He observed that, when Mrs. Mince began developing pneumonia symptoms in February 2002, her chart showed no entries for a thirty-six hour period between February 14 and February 16, when she was hospitalized. Further, her chart at Robinson *did* show activity for Mrs. Mince on days when she was actually in the hospital. Dr. Liu said that these charting errors concerned him and were inappropriate. But, he testified that he could not say whether he saw any evidence of neglect of Mrs. Mince while he was caring for her.

LPN Deborah Vasquez was the skin-treatment nurse at Robinson and was familiar with Robinson's procedures and protocols for pressure sore management. She was not sure who asked her to take that position but believed it was the facility's Director of Nursing and probably a nurse consultant who was employed by a predecessor to CANC. Vasquez was responsible for skin assessments on all ninety of Robinson's residents. She said she was a little overwhelmed on some days and complained about the situation to other nurses and to the assistant Director of Nursing. She recalled being in Mrs. Mince's room and said that she did assessments on Mrs. Mince weekly toward the end of Mrs. Mince's life. She said that an updated care plan might have helped Mrs. Mince. She also observed that flow sheets from June 2002 and afterward indicated that Mrs. Mince might not have been repositioned like she should have been nor was she eating like she should have.

According to Vasquez, the only training she received before taking the position of skin-treatment nurse was on-the-job training and a few seminars; no one at Robinson, including a nurse consultant, had trained her. But, she said, "after CANC took over," she went to Fort Smith for training. She also testified that she had training "with different wound care whenever I started nursing." Vasquez explained that she did not order a pressure-alternating mattress for Mrs. Mince when her skin first began to break down in June 2002 because Mrs. Mince did not yet have open areas and that her "skin issues" were not at the stage where the mattress was needed. She said that the decision to provide the mattress in August 2002 belonged to hospice and the doctors. However, she referenced an earlier deposition, in which she said that she was not trained enough to know that she could get a pressure-alternating mattress.

Appellant's expert, Dr. Loren Lipson, testified that Mrs. Mince's care and treatment was sub-standard in several respects: the failure to monitor her for a thirty-six-hour period when her pneumonia began in February 2002; chart errors and gaps in nursing notes; the failure to add nutritional supplements, encourage fluids, or timely intervene in Mrs. Mince's weight loss; and the improper and delayed care of pressure sores. Dr. Lipson said that the situation at Robinson may not just have been the people who were there, such as CNAs and nurses, but "may have been failure to have enough people there" and could be "a systemic problem from, basically, what is the budget to be spent on these individuals and who decides how much. . . ." He said that he was critical of Robinson's CNAs, nurses, and employees "in addition to, potentially, the administration who governs how the nursing care is given. . . ." Dr. Lipson also referenced his earlier deposition, where he mentioned "what maybe had been a situation of lack of training of staff," though he said that he had no documentation of that.

RN Betty Bennett was employed by NCI during the time that Mrs. Mince was a resident at Robinson. She said that NCI provided consulting services to nursing homes "affiliated with CANC." Upon request, she would assist the homes with "assuring that they had systems and processes in place to provide good quality of care." Robinson was one of the primary homes for which Bennett had consulted. In fact, for two days in March 2002, she served as Director of Nursing at Robinson. Bennett was familiar with state guidelines concerning residents' rights and

federal regulations regarding staff training, resident assessment, pressure sores, and development of policies and procedures. As an example of her work, she said that, when going into a facility to address a problem with pressure sores, she would meet with the DON to discuss protocol within the facility. And, she said, "if I identify an area that I thought could be enhanced upon in a different way, then we would have that discussion." This would entail checking to see if preventative mattresses were in place; looking at a resident's care plan; possibly meeting with the treatment nurse "to make certain that she knows that if a [sore] does not improve within two to four weeks, that they change the treatment"; and discussing other factors such as nutrition, bathing, and repositioning. Bennett also said that the question of whether lack of staffing might be responsible for services not being delivered to a resident was a question she would ask a DON. However, she said, her supervisor, Julie Harrod, would be the one who worked with the nursing homes to improve staffing. Bennett said that she did not do hands-on nursing or make rounds to check residents as part of her consulting work.

According to Bennett, when she first began working with Robinson, it was a "focus facility," meaning that it was the subject of heightened scrutiny by the State. She reviewed Robinson's surveys with its DON, and one survey reflected inadequate staffing over four shifts during a two-week period in June 2002. Bennett said that, as part of her job when she started consulting at Robinson, she looked at the facility's records on occasion and made suggestions as to residents' care. She agreed that it would be fair to say that some of the residents' issues she looked at were problematic. She said that, if she went into a facility and "saw something," she would make a recommendation about how to resolve or improve a problem. She said that, during her visits to Robinson in 2001 and 2002, the facility was not without the resources it needed to implement her suggestions. Bennett also said that she had attended meetings regarding clinical care and training in Fort Smith and that CANC representatives and Michael Morton were present on some occasions. She testified that CANC provided administrative services to some of the same facilities for which she consulted but that she never communicated with anyone at CANC, other than through presentations at meetings. Her supervisor Julie Harrod spoke with CANC, she said, but Bennett did not know who Harrod spoke with and did not relate the subject of their conversations.

Michael Morton testified that he owned stock in twenty-five nursing homes, including Robinson. According to him, Robinson was considered one of the worst nursing homes in Arkansas when he purchased a fifty percent interest in it in 2001. Morton had developed NCI, in which he was the sole stockholder, to help his nursing homes that might be having problems with a survey or certification and to help administrators hire proper personnel. Near the time he purchased an interest in Robinson, he hired Julie Harrod at NCI to "head up the administrative area" and supervise various NCI employees. In particular, Harrod was to direct the nurse-consultants to where they were needed most and to facilities that were having the most problems. Harrod hired Betty Bennett and was Bennett's supervisor.

Morton said that he used NCI to get Robinson "back on its feet." According to Morton, Betty Bennett was helpful in "dealing with the survey process and plans of correction." And, he said, if there were "patient-care issues," Bennett could work with the DONs. He further said that Bennett would normally have talked to Julie Harrod about any care issues at Robinson and that, if any intervention was taken as the result of a survey, it would be by the in-house administrator or DON, or by NCI. He further said that it would have been NCI's responsibility to go over facility manuals and look at policies and procedures. Morton said that he did not have contact with Bennett on a day-to-day basis, look at facility surveys, or manage the day-to-day operations of any nursing home. He was generally contacted regarding such things as replacement of appliances or heating and cooling systems or how much to pay management personnel. He also remembered Julie Harrod asking "on the very first day we took over" to give everybody a one-dollar-per-hour raise. He acknowledged that he and his partner, Rick Griffin, were the "governing body" of Robinson.

Morton testified that he was also the sole stockholder in CANC, which provided financial services to nursing homes in which he held an interest. CANC's administrative services agreement with Robinson stated that CANC would provide such things as Medicare billing support, payroll processing, administration of employee-benefit plans, and accounts payable and receivable. The agreement also stated that CANC would "cooperate and assist [NCI] as requested to schedule quarterly risk management training for facility staff." Morton said that seminars were held at CANC offices in Fort Smith and that it was usually NCI who decided what

topics to cover at educational meetings, although CANC might develop financial-related topics. Morton also testified that he did not have budgets but that he had never denied the people running Robinson anything. This testimony was basically confirmed by Morton's partner in Robinson, Richard Griffin.

At the close of the above evidence, appellees moved for directed verdicts on the basis that appellant had not proven that they owed a duty to Mrs. Mince or, if a duty existed, that they breached the duty and proximately caused Mrs. Mince's injuries or death. The trial court granted the motions, from which appellant now appeals.

C. Discussion of Appellant's Arguments

Appellant argues that appellees were responsible for the under-staffing and lack of training and supervision at Robinson, which ultimately led to Mrs. Mince's injuries and death. The essential elements of a cause of action for negligence are that the plaintiff show a duty owed and a duty breached, and that the defendant's negligence was a proximate cause of the plaintiff's damages. *See Wagner v. Gen. Motors Corp.*, 370 Ark. 268, 258 S.W.3d 749 (2007). In a wrongful-death case, the plaintiff must show that the defendant's negligence was the proximate cause of the decedent's death. *See generally Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209 S.W.3d 393 (2005); AMI Civ. 2216 (2007). Proximate cause is defined, for negligence purposes, as 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. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004). With these authorities in mind, we review the directed verdicts as to each appellee.

1. CANC

CANC was under contract to provide billing and accounting services to Robinson. Appellant's proof shows no substantial evidence that CANC supervised Robinson employees or had any responsibility for the number of staff on duty at Robinson during Mrs. Mince's time there. It is true that CANC was contractually bound to cooperate with and assist NCI in scheduling quarterly risk-management training. But only sheer conjecture could equate that logistical obligation with a duty to provide clinical training to the Robinson staff in matters such as

skin care, nutrition, and hydration. Appellant's reliance on the deposition testimony of skin care nurse Deborah Vasquez that she was not well-trained enough to order a pressure-alternating mattress for Mrs. Mince is unavailing because appellant fails to connect this alleged lack of training to any error or omission on CANC's part beyond speculation. In fact, Vasquez testified that she received training "after CANC took over." Appellant additionally mentions that some employees of "the entities owned by Mr. Morton, like NCI, have CANC email addresses." While this fact establishes an affiliation among the entities in this case, it does not constitute substantial evidence that CANC was negligent or that CANC contributed to Mrs. Mince's injuries or death. We therefore affirm the directed verdict as to CANC.

2. Michael Morton

Shareholders are not ordinarily liable for the acts of their corporation or LLC. Ark. Code Ann. § 4-27-622(b) (Repl. 2001). But shareholders and employees may be liable for their own acts or conduct. *See id. See also McGraw v. Weeks*, 326 Ark. 285, 294, 930 S.W.2d 365, 370 (1996) (holding that a corporate employee may be sued if he is "personally involved in the events surrounding an injury"). Appellant argues that she presented substantial evidence in this case to hold Morton directly liable for his own conduct. We disagree.

Appellant succeeded in establishing a link between Morton and the other appellees, and she established that Morton undertook any number of executive responsibilities to ensure Robinson's continuity. What is missing is any evidence beyond conjecture that Morton was charged with staffing, training, or supervision at Robinson or that his actions proximately caused Mrs. Mince's injuries or death. Appellant points to Morton's testimony that he considered himself and his co-shareholder the "governing body" of Robinson. According to appellant, this status made Morton "responsible for management of the facility." *See* 42 CFR 483.75(d) (providing that a facility's "governing body" is responsible for establishing and implementing policies regarding management and operation of the facility and for appointing an administrator who is responsible for management). We differ with appellant's interpretation of this regulation. It requires the governing body to establish and implement *policies* regarding management but recognizes that management is the function of the facility

administrator. Appellant offered no evidence at trial, and makes no argument on appeal, that Morton failed to implement proper policies or that he hired an ineffective administrator.

Appellant also tries to characterize Morton's use of NCI to assist in hiring proper personnel, and Morton's testimony that he was responsible for hiring "professional" people, as evidence that Morton was responsible for ensuring that enough staff was present at Robinson. It cannot be reasonably inferred from these statements that Morton was responsible for the number of staff on the floor at Robinson during Mrs. Mince's tenure. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Mangrum v. Pigue*, 359 Ark. 373, 198 S.W.3d 496 (2004).

Appellant makes the implied argument that Morton engaged in a corporate philosophy that put profits ahead of resident care. Whatever deficiencies in staffing or training that might have existed at Robinson (and the jury apparently was not persuaded that there were any that accounted for the death of Mrs. Mince), we see no evidence beyond speculation that they were attributable to Morton's corporate philosophy. No witnesses testified that they were denied anything for reasons of budget cuts or lack of funds, nor did any witness testify that Morton employed a profits-before-care philosophy. *Compare Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), where a former vice-president of the company testified to a change in philosophy that placed profits over patient care.

Finally, the cases relied upon by appellant in support of her case against Morton are distinguishable; they involve situations in which the defendant's liability was undisputedly based on his own conduct that led directly to the plaintiff's damages. *See McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007) (holding that the owner of a tractor could be held liable as the tractor-driver's employer or for his own negligent provision of the tractor and supervision of the driver); *McGraw, supra* (holding a corporate employee personally liable for the plaintiff's damages where he unquestionably made the very decision that caused the plaintiff's injury); *Canavan v. Nat'l Heathcare Corp.*, 889 So. 2d 825 (Fla. Ct. App. 2004) (reversing a directed verdict for a shareholder who ignored complaints of inadequate staffing while cutting operating expenses, where the evidence indicated that the plaintiff's injuries were the direct result of under-staffing); *Forsythe v. Clark USA, Inc.*, 836 N.E.2d 850 (Ill. Ct. App. 2005) (reversing a summary

judgment for a parent company whose budget cuts affected the ability of a subsidiary to hire trained personnel, where the lack of training led directly to the plaintiffs' deaths). Appellant produced no substantial evidence that Morton cut expenses or that his monetary decisions adversely affected the level of care at Robinson.

We therefore affirm the directed verdict in Morton's favor.

3. NCI

We reverse and remand the directed verdict in favor of NCI because appellant presented substantial evidence from which a jury could reasonably conclude that this entity was negligent and that its negligence was a proximate cause of Mrs. Mince's injuries and death. It is plain from the proof that NCI was directly involved in the provision of care at Robinson during the time that Mrs. Mince's condition began to deteriorate. Nurse Betty Bennett reviewed Robinson's surveys, including one in June 2002 that showed inadequate staffing, and there were occasions when Bennett looked at Robinson's records and made recommendations concerning residents' care. Additionally, Bennett served as DON at Robinson for a two-day period in June 2002, which could be viewed as evidence of her familiarity with and responsibility for the conditions at Robinson. It is further evident that NCI possessed an expertise in the provision of care in nursing homes. A jury might consider Bennett's detailed testimony of the actions she would take if confronted with a facility that experienced trouble in treating pressure sores as the actions that NCI should have taken in this case, had NCI exercised its expertise and followed its mandate of assisting problematic facilities. This is especially true here, where Robinson had been deemed one of the worst facilities in the state in the not too distant past. There was also testimony from Bennett that her supervisor, who was hired by NCI, worked with the nursing homes to improve staffing. We conclude that these facts rise to the level of substantial evidence, and we hold that the directed verdict in favor of NCI was improperly granted.

III. Motion for New Trial

Appellant argues that a new trial should have been granted because a potential juror gave a false answer during voir dire, causing her to expend a peremptory challenge to remove him.

A. Standard of Review

Our standard of review for denial of a new trial on grounds of juror misconduct was explained in *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993):

> When a new trial is requested because of juror misconduct under the rubric of Ark. R. Civ. P. 59(a), the moving party must show that the party's rights have been materially affected by demonstrating that a reasonable possibility of prejudice has resulted from the misconduct. We have held that prejudice, in such instances, is not presumed. Trial courts are vested with great discretion in acting on motions for a new trial, and, in a case in which a new trial is requested on the ground of juror misconduct, we will not reverse the trial court's denial unless there is a manifest abuse of that discretion.

Id. at 160, 852 S.W.2d at 796 (citations omitted).

B. Events During Voir Dire

The venireman at issue was William Watson. Mr. Watson was asked by appellant's counsel both personally and as part of the venire if he "had ever been involved in any litigation," "had been sued for personal injury," or "had a civil judgment against" him. Watson answered, "No," or gave no response. After questioning of the venire was concluded, appellant's counsel approached the bench and told the court that she had proof Mr. Watson had "civil judgments pending against him. So clearly he lied." The court said, "I'm sorry, at this point, I'm not going to do anything." Appellant used a peremptory strike on Watson, and the jury was seated.

Thereafter, appellant's counsel reiterated to the court that she had reason to believe that Watson had civil judgments pending against him, though he did not admit it during voir dire. Counsel then said, "we asked that he be struck for cause and were denied." Counsel further said that, if Watson had been struck for cause, she would have used her remaining peremptory strike on juror Vancura, who sat on the case. The court said, "If you had brought this up before it had been closed I would have allowed you to examine him on it more. I'm not convinced he lied. I think he may have been mistaken, and that's the reason I didn't do it for cause." After trial, appellant moved for a new trial on the ground of juror

misconduct. She attached a public-records report showing that a William Watson had a bankruptcy, several state tax liens, and some civil judgments against him. The motion was deemed denied, and appellant now appeals from that denial.

C. Discussion of Appellant's Arguments

Appellant argues that the trial court erred in not excusing Watson for cause and in not inquiring into the reasons behind his response. We find no abuse of discretion.

Watson was never seated on the jury. In *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998), the supreme court explained:

> It is well settled that the loss of peremptory challenges cannot be reviewed on appeal. The focus should not be on a venireperson who was peremptorily challenged, *but on the persons who actually sat on the jury*. Because Ms. Howard and Ms. Wooley were not seated on the jury, we need not consider whether they should have been struck for cause.
>
> Appellant then argues that because he was forced to exercise two peremptory challenges on Ms. Howard and Ms. Wooley and exhausted his challenges, he had no challenges available to use to strike juror Nancy Beene, who had stated that she would have a problem with affording appellant the presumption of innocence. We have said that in order to challenge a juror's presence on appeal, the appellant must have exhausted his peremptory challenges *and must show that he was forced to accept a juror who should have been excused for cause. Appellant must have asked the court to remove the juror for cause, and the court must have improperly denied the request.*

Id. at 420-21, 977 S.W.2d at 894-95 (citations omitted) (emphasis added).

Appellant does not argue that she was forced to accept a juror who should have been excused for cause. Therefore, under the rule stated in *Willis*, her argument on this point must fail. As for appellant's contention that the trial court should have conducted an inquiry into Watson's answers on voir dire, she did not ask the court to do so, nor did she ask the court to allow her to probe further into Mr. Watson's responses or lack thereof. We decline to address this issue for the first time on appeal. *See generally Lewis v. Robertson*, 96 Ark. App. 114, 239 S.W.3d 30 (2006).

III. Conclusion

We affirm the directed verdicts in favor of appellees Morton and CANC, and we affirm the denial of appellant's motion for a new trial. We reverse and remand the directed verdict in favor of NCI.

Affirmed in part; reversed and remanded in part.

VAUGHT and BAKER, JJ., agree.

GLENN MECHANICAL, INC. *v.*
SOUTH ARKANSAS REGIONAL HEALTH CENTER, INC.,
and Southeast Building Concepts, Inc.

CA 06-1473 278 S.W.3d 583

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

Compton, Prewett, Thomas & Hickey, LLP, by: *F. Mattison Thomas, III*, for appellant.

Smith Akins, P.A., by: *James E. Smith, Jr.*, for appellee.

D.P. MARSHALL JR., Judge. Dirt work led to a dispute that became this case. Southeast Building Concepts was the general contractor for building South Arkansas Regional Health Center a new hospital in El Dorado. Glenn Mechanical was the second subcontractor to take on the dirt work. The circuit court held that the Southeast/Glenn contract, which Glenn drafted, governed the disputed work of undercutting for the hospital parking lot. Based on the existence of that contract, Judge Guthrie also rejected Glenn's quasi-contract theories of recovery. Glenn's appeal brings the case here.

I.

We affirm the circuit court's decision that Southeast and Glenn made a contract that covered the disputed dirt work. Glenn bid on two subcontracts for this project: the heating, ventilation, and air conditioning work and the dirt work. It got the HVAC contract, and in due course completed all this mechanical work without any snags. Glenn did not get the dirt work subcontract initially. But when the company who did filed for bankruptcy after starting the job, Southeast asked Glenn to bid to finish it. Glenn did so. Southeast accepted the bid, which was $62,000.00 for specified tasks and a per-load price for undercutting — hauling dirt out of and into — the parking lot site. The specific number of loads was to be determined by written change order. The parties

reduced their agreement to a contract, which Glenn wanted to write and did write. The contract was signed the day that Glenn began work. Because the dirt work needed to be done immediately, Southeast wanted Glenn on site as soon as possible, and their contract provided that time was of the essence.

The parties' dispute turns on Article 4 of their contract. This provision is entitled "CHANGES IN THE WORK." It states:

I. The Contractor and Subcontractor agree that the Contractor may add to or deduct from the amount of work covered by this Agreement, and any changes so made in the amount of Work involved, or any other parts of this agreement, shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof which shall be mutually agreed upon between the Contractor and Subcontractor. The Subcontractor agrees to proceed with the Work as changed when so ordered in writing by the Contractor so as not to delay the progress of the Work, and pending any determination of the value thereof unless Contractor first requests a proposal of cost before the change is effected. If the Contractor requests a proposal of costs for a change, the Subcontractor shall promptly comply with such request. Change Order Items Specifically include:

   i. Demo of Wet Sandy Soil and Haul Offper cubic yard $6.50

   ii. Haul in, Spread and Compact Select Fill per cubic yard $11.50

   iii. Haul in, Spread and Compact "B" Stone per cubic yard $32.00

   iv. Haul In, Spread and Compact SB-2 Stone per cubic yard $32.00

   v. Lay Geo Textile Fabric (eq. Mirafi 140N) per 12' x 360' roll $825.00

II. The Subcontractor will make all claims for extra compensation and for extension of time to the Contractor promptly in accordance with this Article and consistent with the Contract Documents.

III. Not withstanding any other provision, if the Work for which the Subcontractor claims extra compensation is determined by

> the Owner not to entitle the Contractor to a Change Order or extra compensation, then the Contractor shall not be liable for any extra compensation for such Work, unless Contractor agreed in writing to such extra compensation.

The original subcontractor had left a big hole containing wet, sandy soil and standing water. At the request of Southeast's job superintendent, Glenn therefore began undercutting the parking lot. Glenn's witnesses testified at trial that the superintendent told them that a change order was in the works for the many loads of dirt that Glenn began hauling out and hauling in. Glenn worked for about a week and faxed an interim bill to Southeast for approximately $27,000.00 for undercutting. Meanwhile, Glenn requested and Southeast approved two change orders about unrelated dirt work on a driveway and a French drain. These change orders increased the fixed-price part of the contract to approximately $94,000.00.

Southeast did not respond immediately to Glenn's interim bill for the undercutting. Glenn continued to haul dirt out and in, preparing the ground for the parking lot. After another week of work, Southeast rejected the first bill, and Glenn submitted a bill for its second week of undercutting. The total for all of Glenn's undercutting work was approximately $64,000.00. Because Southeast refused to pay the bills, the dirt work stopped. Southeast and Glenn were unable to resolve their dispute; Glenn left the job; and Southeast contracted with a third company to finish the dirt work. Southeast also paid approximately $38,000.00 to a dozer company with whom Glenn had contracted to help on the undercutting.

The hub of the case is whether Glenn and Southeast had a contract about the undercutting. The circuit court's conclusion that they did is not clearly against the preponderance of the evidence. *Taylor v. Hinkle*, 360 Ark. 121, 129, 200 S.W.3d 387, 392 (2004). Glenn contends otherwise, arguing that the contract is indefinite about the undercutting and that the parties' conflicting testimony about whether the $62,000.00 base price covered the undercutting shows that no mutual agreement existed. *E.g.*, *Williamson v. Sanofi Winthrop Pharm., Inc.*, 347 Ark. 89, 98, 60 S.W.3d 428, 433-34 (2001) (contractual elements).

Glenn's contract is definite enough and reflects mutual agreement. Southeast agreed to Glenn's proposal about how to decide the amount of undercutting to be done at Glenn's per-load

price. The nature of this work necessarily contained some uncertainty. Exactly how much unstable soil needed to be removed and replaced with more solid material to provide an adequate base for the parking lot was a matter of judgment. Glenn's project engineer testified that all of Glenn's work was necessary to stabilize the ground. Other witnesses, however, testified that less undercutting would have been sufficient for this parking lot, which would not carry heavy loads. And one Southeast witness testified that he did not think that, if it had been given the choice, the Health Center would have agreed to pay for all the undercutting that Glenn eventually did.

The parties dealt with the uncertainty by subjecting the undercutting work to the change-order provision of their agreement with fixed load-in/load-out prices. Southeast was not on the hook for the undercutting until it approved the work in writing. Their contract stated that any changes from the base price "shall be by a written amendment hereto setting forth in detail the changes involved and the value thereof which shall be mutually agreed upon between [Southeast] and [Glenn]." This is a definite agreement about how the parties would decide exactly how much undercutting to do. No such writing about this work was ever executed.

This contract — which Glenn drafted — put Southeast in control: the general contractor had to approve the amount of undercutting in writing; if it did, then the parties' contract gave Glenn the right to insist on payment from Southeast even if the Health Center ultimately refused to pay Southeast. Whether this allocation of authority and risk was wise is not the issue. This is the contract that Glenn proposed and Southeast accepted. They followed it when changing other tasks and substantially increasing the price of the other dirt work. And their contract governs their dispute about the undercutting.

Testimony from one of Southeast's principals and its superintendent that they thought the base contract price covered all the undercutting was evidence of confusion or a unilateral mistake, but it is not a sufficient reason to hold that the parties' express contract failed for lack of mutual agreement. *Frazier v. State Bank of Decatur*, 101 Ark. 135, 140-41, 141 S.W. 941, 943-44 (1911). As the circuit court found, Glenn knew that it needed Southeast's written approval of the amount of undercutting. It expected that approval. But under the parties' contract, Glenn must bear the consequences of not getting it.

II.

We also reject Glenn's argument for a quasi-contractual recovery based on promissory estoppel or unjust enrichment. The basis of this argument is testimony that Southeast's superintendent urged Glenn to do all the undercutting immediately and promised a change order. At trial, the superintendent denied this promise and his credibility was for the circuit court sitting as the fact-finder. *Taylor*, 360 Ark. at 129, 200 S.W.3d at 392. On the other side of the evidentiary scale, Glenn's witnesses were experienced subcontractors who acknowledged that change orders are commonplace and that a company does extra work without one at its own risk. In any event, these disputed facts do not answer the contract question.

As the circuit court held, the parties had an enforceable written contract about the undercutting, and that contract prevents recovery on a quantum meruit basis. With exceptions not applicable here, "the law never accommodates a party with an implied contract when he has made a specific one on the same subject matter." *Lowell Perkins Agency, Inc. v. Jacobs*, 250 Ark. 952, 959, 469 S.W.2d 89, 92-93 (1971). Glenn's quasi-contract theories therefore fail as a matter of law. *Taylor v. George*, 92 Ark. App. 264, 274, 212 S.W.3d 17, 24-25 (2005) (promissory estoppel); *Coleman's Service Center, Inc. v. FDIC*, 55 Ark. App. 275, 299, 935 S.W.2d 289, 302 (1996) (unjust enrichment).

The record supports the circuit court's finding that both parties prevailed in some degree and presented cases of merit in good faith. Southeast's refusal to come to final terms with Glenn about the amount of undercutting, the court held, was unreasonable and discharged Glenn from further performance. This breach barred Southeast from recovering the approximately $75,000.00 that it had to pay the third subcontractor to finish the dirt work. Southeast has not cross-appealed this ruling. The circuit court likewise noted that, although Southeast paid Glenn's dozer subcontractor approximately $38,000.00, thereby relieving Glenn of this obligation, Southeast did not try to recover this expense from Glenn. Finally, the court declined to award attorney's fees and costs to either party. In sum, Glenn's assignments of error present no basis for reversing the circuit court's careful resolution of all the issues.

Affirmed.

HART and BIRD, JJ., agree.

Donald L. NORMAN *v.* Jaunita COOPER

CA 07-247 278 S.W.3d 569

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

Lynn Frank Plemmons, for appellant.

Tom Allen, for appellee.

LARRY D. VAUGHT, Judge. The genesis of this appeal was a divorce complaint filed by appellee Juanita Cooper on August 9, 1994. On September 27, 1994, Cooper was granted an uncontested divorce and awarded custody of the parties' minor children, and appellant Donald Norman was awarded visitation. Although the divorce was granted and an agreement regarding visitation and support was accepted by the court, the parties continued to live together for approximately one year thereafter, at which point they finally and permanently separated. The parties engaged in sporadic litigation in the ensuing years, with Norman claiming to have been denied visitation and Cooper claiming not to have been paid child support. Following an agreement to resolve their issues, Norman exercised visitation twice in 1996. However, Norman has had no visitation with his children since 1996.

In September 2004, the Office of Child Support Enforcement sought to collect child support arrears on behalf of Cooper in Prairie County Circuit Court. However, Child Support Enforcement dismissed the case and closed its file at the request of Cooper. Norman continued the action in Prairie County seeking a finding of contempt against Cooper and an order to enforce visitation. Due to the fact that Cooper and her children had moved to Independence County, she objected to the case being set for a hearing in Prairie County. Consequently, Norman requested that the case be transferred to the Circuit Court of Independence County.

Following Norman's transfer request, a hearing was scheduled in Independence County for January 6, 2006, and notice was sent to Cooper via her attorney, Jill Blankenship. After Cooper's counsel received notice, by order entered on December 21, 2005, Blankenship was permitted to withdraw as counsel. (The record does not explain why Blankenship was allowed to withdraw so close to the date of the hearing.) Neither Cooper nor her counsel attended the hearing. Norman, accompanied by his counsel, was present at the hearing.

As the hearing began, the trial judge, the Honorable Tim Weaver, recalled that he had previously been consulted, in his capacity as a private attorney, about the parties' dispute in relation to a step-parent adoption question. As such, he decided to recuse from the matter and requested that Judge John Norman Harkey accept the case and continue the hearing.

Judge Harkey accepted the case and summoned Cooper's former counselor, Jill Blankenship, who acknowledged receipt of the notice of the hearing and gave the court Cooper's telephone number. The trial court permitted the hearing, but informed the parties that it would be treated as an ex parte hearing. At the conclusion of the hearing, the court ordered that visitation with Norman commence immediately. On January 6, 2006, the order was filed and served on Cooper. In response to the ordered visitation, as noted by Judge Harkey, there was "correspondence from one of the children, a petition for contempt, a counter-petition for contempt, a medical report, interrogatories, and lots of paper work; . . . the children are now, respectively, 15 years old and 14 years old; and . . . these matters are now [set] for what the Court hopes is a final hearing."

A full hearing was held on July 28, 2006. Following this hearing, the trial court found both parties to be in contempt of court and took the other issues under advisement. In a judgment entered on November 14, 2006, the trial court found that Norman owed a child-support arrearage in the amount of $25,000, and was in contempt for willfully and intentionally disobeying the court's order by failing to provide child support for his minor children. Norman was ordered to jail for sixty days, and thereafter "an automatic pickup order" would be issued if he missed any support payments.[1] Norman was also ordered to pay Cooper $2,000 in attorney's fees. Finally, the trial court found Cooper to be in contempt (for violating the visitation order) and ordered her to serve a term of seventy-two hours in jail. Only Norman appealed.

Norman first argues that the trial court erred in its display of bias against him and by "acting upon said bias in its rulings." Although the great majority of Norman's brief is dedicated to this allegation of error, we are unable to reach the merits of his claim because he makes this argument for the first time on appeal. Our supreme court has repeatedly held that appellants are precluded from raising arguments on appeal that were not first brought to the attention of the trial court. *See, e.g.*, *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006). Issues raised for the first time on appeal will not be considered because the trial court never had an opportunity to rule on them. *Id.* A party cannot change the

[1] He was ordered to pay $52.00 per week for his current obligation and $10 per week toward his past obligation, with his first payments due August 4, 2006.

grounds for an objection or motion on appeal but is bound by the scope and nature of the arguments made at trial. *Lewis v. Robertson*, 96 Ark. App. 114, 239 S.W.3d 30 (2006). Because Norman's allegation of trial-court bias was not raised and decided below, we are precluded from reaching its merits now. *Id.*

Next, Norman argues that the trial court erred by allowing appellee to solicit testimony on cross-examination relating to his prior incarceration for failure to pay child support in an unrelated case. At trial, Cooper's counsel asked Norman "How many times did you go to jail because of support problems with Ms. Francis?" Norman's counsel objected, claiming the evidence was "not relevant." The objection was overruled, and Norman answered that he "went to jail one time because of support problems with Ms. Francis." Norman also noted that he "stayed in jail for 40 days . . . for nonpayment of support." Cooper's counsel followed up by asking when the incarceration occurred. Norman's counsel responded that he would like to "[r]enew the objection." Once again, the objection was overruled and Norman answered "1989, I believe."

On appeal Norman concedes that the "question is plainly relevant as defined in Rule 404 of the Rules of Evidence," but argues that it was not "admissible pursuant to Rule 402, and not allowable pursuant to Rule 404(b)." Specifically, he argues that 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." However, Norman's only objection below was to the relevance of the inquiry — a point that he now concedes. Because we cannot reach the merits of newly crafted appeal arguments where the trial court was neither put on notice of the alleged error nor given the opportunity to right the wrong, we affirm on this point without considering the merit — or lack thereof — of Norman's prior-bad acts argument. *See Burford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006).

Norman also claims that the trial court erred in its decision to treat the January 6, 2006, proceeding as an ex parte hearing. This hearing was held at the request of Norman. He attended, as did his counsel. The trial court explained at the outset of the hearing that because neither Cooper nor her counsel were present, it would be considered an ex parte proceeding. Norman made no objection to the trial court's ex parte designation at the time. The trial court then entered an order granting Norman

immediate visitation with his children — the precise relief that he had requested. Although, as previously discussed, we are prohibited from addressing Norman's claim of error because it is made for the first time on appeal, we are confounded by what possible wrong Norman might have suffered by being granted the immediate relief that he requested following a hearing where he was the only party in attendance.

For his fourth point on appeal, Norman claims that the trial court failed to apply the doctrine of unclean hands or alternatively the principle of equitable estoppel. Because this argument is made for the first time on appeal and Norman is precluded from raising arguments on appeal that were not first brought to the attention of the trial court, we do not consider this argument on its merits. *Green, supra.*

Next we consider Norman's claim of error surrounding the trial court's decision to grant Cooper's petition to change the surname of the minor children from Norman to Cooper. In cases involving a name-change order, where there has been a full inquiry into the factors supporting the proposed change and the trial court has determined it is in the child's best interest to grant the change, we will not reverse unless the decision is clearly erroneous. *See Boudreaux v. Mauterstock*, 88 Ark. App. 389, 199 S.W.3d 120 (2004). These relevant factors include, but are not limited to, the child's preference; the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the degree of community respect associated with the present and proposed surnames; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and the existence of any parental misconduct or neglect. *Id.* The trial court may consider other relevant factors when determining which surname would be in the child's best interest. *Id.*

Here, the evidence established that although the children's step-father had at one point expressed an interest in adopting them, an adoption had not occurred. The record also showed that 1) the children manifested a strong desire to change their name to Cooper; 2) they had two siblings with the surname Cooper; 3) they had a close familial relationship with both their stepfather and his parents (who also bear the name Cooper); and 4) their natural father had failed to contact them or pay child support for a ten-year

period. Based on these facts, particularly their strong desire to have the name Cooper and the extraordinary misconduct and neglect of their natural father, it cannot be said that the trial court was clearly erroneous in its decision that the name change was in the children's best interest. As such, we affirm on this point.

Norman also claims that the trial court erred in its decision to not reduce or abate Norman's child-support obligation following its conclusion that Norman had failed to prove by a preponderance of the evidence that he was disabled (he claimed to suffer from lyme disease) and was therefore unable to seek employment. At the hearing Norman anchored his disability claim on two letters that he introduced into evidence, one that outlined the symptoms of lyme disease and another that stated he could not safely climb a ladder or perform work as a pipe fitter. However, neither letter indicated that Norman was disabled. As such, we see no error in the trial court's conclusion that Norman failed to prove that he was disabled. Norman's child-support-reduction/abatement argument further alleges that the trial court misapplied Administrative Order No. 10 (imputing to him an income based on minimum wage) after finding that Norman was unemployed. He argues that the court should have followed Order 10(c), which is reserved for those who are self-employed. However, the proof at trial showed that Norman was not self-employed; rather, he was unemployed. As such, the court made no error in its income calculations, and we affirm on this point.

Norman next argues that the trial court erred in sentencing him to sixty days in jail for contempt because a thirty-day sentence is the maximum allowed by law. Indeed, Arkansas Code Annotated section 5-4-201(b)(3) (Supp. 2005), describes contempt as a class C misdemeanor with punishment limited to a maximum of thirty-days incarceration and a fine of $100. Therefore, Norman is correct in his claim the trial court had no *statutory* authority to impose a sixty-day sentence for criminal contempt. However, Article 7, Section 26 of the Arkansas Constitution provides, "The General Assembly shall have power to regulate by law the punishments of contempts; not committed in the presence or hearing of the courts, or in disobedience of process." The last word of this article — "process" — has been construed so broadly that it encompasses virtually anything a court does. *See Osborne v. Power*, 322 Ark. 229, 908 S.W.2d 340 (1995) (finding that process is a comprehensive term that includes all writs, rules, executions,

warrants or mandates issued during the progress of an action); *Ark. Dep't of Human Servs. v. Clark*, 305 Ark. 561, 810 S.W.2d 331 (1991)(concluding that willful disobedience of an order is no different than willful disobedience of process and the statute does not apply); *Smith v. Smith,* 28 Ark. App. 56, 770 S.W.2d 205 (1989) (stating that an order of the court is process). Thus, there is little or nothing left of the specifically reserved power to regulate contempt of court granted to the General Assembly by the Arkansas Constitution.

Norman violated an order of the court when he failed to make child-support payments. Although his violation was an indirect contempt, committed outside of the court's presence, it was by definition a violation of process. The court has the inherent authority to punish Norman, and the will of our General Assembly is not a limitation on the power of the court to inflict reasonable punishment for disobedience of process. Such power cannot be removed by laws to the contrary. *See Ark. Dep't. of Human Servs. v. Clark*, 305 Ark. 561, 810 S.W.2d 331 (1991). Therefore, because Norman was sentenced pursuant to the court's inherent authority to punish violations of court processes, we affirm the sentence.

Finally, Norman contends that the trial court erroneously failed to enforce visitation. However, because Norman agreed to the arrangement at trial, noting that he did not want to force his children to enter into a relationship with him, but he also did not want them prevented from contacting him if they so desired, he cannot claim error on appeal. Not only did Norman fail to object to the visitation arrangement set out by the trial court — he suggested it in the first place. As such, we see absolutely no merit in this argument, and affirm the trial court's decision.

Affirmed in all respects.

GRIFFEN and BAKER, JJ., agree.

Larry Dean YOUNG *v.* Debra Loraine YOUNG

CA 07-540 278 S.W.3d 603

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

Brenda Austin Ltd., by: *Brenda Austin*, for appellant.

Judith Rebecca Pratt Hass, for appellee.

SARAH J. HEFFLEY, Judge. This appeal arises out of the divorce between appellant Larry Dean Young and appellee Debra Loraine Young. In distributing the parties' property, the trial court found that appellant occupied a position of trust and dominance over appellee and that he exercised undue influence over her when she executed a deed creating a tenancy by the entirety in property she received from her father. Based on these findings, the trial court set aside the deed and declared the land to be appellee's sole and separate property. The trial court also made an unequal division of marital property by awarding appellee the marital home that was built on the land. Appellant challenges both of these decisions on appeal, but finding no error, we affirm.

The Deed

The parties in this case had been married for seventeen years until April 2006 when they separated and appellee filed for divorce. They both had been married once before, and they each had two children from their previous marriages. The four children resided with them until reaching adulthood.

In the summer of 2003, appellee's father was suffering from Alzheimer's disease and required around-the-clock care. Although employed full-time, appellee tended to her father on a daily basis, sometimes before work or during lunch, and she prepared his dinner almost every night. Her father's property had been in trust, and in June 2003 appellee received a conveyance of sixty acres of land from the trust, titled solely in her name.

In July 2003, appellee's son Cody died quite unexpectedly. Initially, the cause of death was a mystery, and because of his young age, either suicide or foul play was suspected. It was several months before the autopsy results were received, which revealed that he had died of an undiagnosed heart condition.

In August 2003, the month after her son died, appellee executed a quitclaim deed adding appellant's name to the deed. Appellee's father passed away the following November.

At the trial, appellee's first witness was her personal physician, Dr. Jennifer Bingham, who specialized in internal medicine. Dr. Bingham had treated appellee since 2000 for the chronic conditions of hypertension and Crohn's disease. Dr. Bingham explained that Crohn's disease involves the inflammation of the colon, and she said that this condition was exacerbated by stress.

Normally, Dr. Bingham saw appellee every three months, but in the summer of 2003 she had appellee come into the office every two weeks because she was worried about her. Dr. Bingham was aware of Cody's death and the illness of appellee's father. She also knew that appellee had marital problems stemming from a previous affair appellant had with another woman. Dr. Bingham stated that appellee was experiencing multiple flare-ups of her Crohn's disease and episodes of infections such as sinusitis and bronchitis, which Dr. Bingham attributed to decreased resistance from stress. Dr. Bingham also treated appellant for depression that summer.

Dr. Bingham testified that appellee was "devastated," "distraught," and "overwhelmed" with grief over the death of her son. Dr. Bingham added that appellee was "not thinking right" and that her ability to conduct the affairs of daily life was "extremely compromised." Appellee was not able to participate in making sound health-care decisions, as shown by her declining to fill prescriptions that Dr. Bingham had prescribed. Dr. Bingham said this was uncharacteristic of appellee, who usually complied with her medical recommendations.

Appellee spoke to Dr. Bingham about the land transaction. Dr. Bingham testified that appellee was feeling very much alone in the aftermath of Cody's death and in the midst of her father's illness. Appellee told her that appellant had threatened to leave her unless his name was added to the deed, and she said that appellee felt "completely forced" into doing it, and that appellee felt "awful" for having done so. Dr. Bingham testified as to her belief that appellee would not have given appellant an interest in the property had she not been so ill and "swimming in grief." She said that appellee's resistance was at a low ebb because every bit of her strength and endurance had been drained from dealing with Cody's death, her father's sickness, and her own illnesses. Dr. Bingham also testified that, based on her numerous conversations with appellee, appellant was the dominant figure in the marriage.

The trial court also heard the testimony of appellee's friend and coworker, Nora Hall. She had known appellee for nineteen years since appellee began working at the company. Ms. Hall said that the summer of 2003 was a difficult time for appellee because of Cody's death and her father's declining health. She testified that appellee was worried about her father and that caring for him took up a lot of her time and energy. Ms. Hall said that Cody's death "wiped her out" and that appellee was so depressed that she "was just like a zombie." Appellee missed a lot of work, and her work

decreased in quality. Ms. Hall explained that appellee and Cody had been very close and that they had spoken to one another on the phone every day. She stated that Cody was appellee's "support system," and whereas appellee was estranged from her daughter, Cody had always been there for appellee and loved her unconditionally.

Ms. Hall was of the opinion that appellant dominated appellee. She testified that appellant was very jealous and that he called appellee at work five or six times a day and checked the parking lot to see if appellee's car had been moved at lunch. She said that appellee was always aware of where she stood in a room in relation to male coworkers and that appellee was afraid to be seen in a car with a male coworker when they went to lunch as a group. Appellant would not allow appellee to go to a bar that he frequented that was across the street from their work. Ms. Hall also testified that appellee had to ask appellant for permission to go on trips with the girls and that before any trip appellee would be nervous and agitated to the point of physical illness because of appellant's warnings about what appellee could and could not do during the outing.

During Ms. Hall's testimony several photographs she had taken of appellee were introduced into evidence. These photographs showed extensive bruising on appellee's arms, which appellee said had been inflicted by appellant.

Gene George, part owner of the company where appellee worked, echoed the previous witnesses' testimony that appellee was despondent and not herself in the summer of 2003. He said that appellee was not functioning at her usual level and that he had been worried about her.

Appellee testified that she was devastated by Cody's death. She referred to him as her "rock" and said that they were very close. After his death, she said she "functioned like in a fog." She had trouble remembering her activities at the end of the day. She said that she was exhausted both mentally and physically.

Appellee further testified that appellant had caused the bruises shown in the photographs that Ms. Hall had taken and that there were other times he had been physically abusive. She said that on occasion she would be angry when appellant came home late and that she would try to get out of bed, but that appellant would hold her down and not let her get up. She said that appellant drank alcohol and that the more he drank the more verbally

abusive he would be. She feared him on these occasions. She said there were nights when he did not come home and other nights when someone had to drive him home. Appellee also testified that when appellant moved out of the house he took and pawned a rifle that had belonged to Cody, in her mind, just to be mean.

Appellee stated that appellant initiated all of the conversations about placing his name on the deed. She said that he called her about it at work and at night and that he would bring it up if he were at home. He threatened to leave her "just like Cody" and said that "his family was his" and that she would be deprived of them, too. She said that appellant would cuss and get extremely angry and that he called her a "greedy bitch" for not putting his name on the deed. She said that he made her "life a living hell" and that finally he "wore me down." She testified that she did not take the deed to be filed in hopes that appellant would back off. She said she did not tell her friends about it because she knew it was something she had not wanted to do. Appellee testified that there was not a day that she did not regret doing it. She said that no one at the bank told her that having appellant's name on the deed was a condition for obtaining a loan at the bank to build a home.

Sandra Thomas, appellant's sister, testified that she had never noticed any hostility between appellant and appellee and that she had not noticed appellant dominating appellee. She said that appellee was devastated by Cody's death "like any mother would be."

Appellant testified that he had not been physically or verbally abusive to appellee. He admitted that he had caused the bruises shown in the photographs, but he said that it happened one night when appellee was applying a TENS unit to his neck and he had grabbed her when she, as a joke, was going to place the unit on his genitals. Appellant also testified that he had taken and pawned Cody's rifle, but he claimed that appellee had given the rifle to his son. He did purchase and return the rifle.

Appellant did not recall any of the conversations about having his name placed on the deed. He also did not know whose idea it was to have his name placed on the deed. He said that it was not a big deal and that appellee never refused to put the land in his name. Appellant stated that they had been "married for seventeen years and it's just ours." He believed that she had placed his name on the deed because he was her husband and she loved him. He also said that a bank officer had told him that it was necessary for his

name to be on the title so that they could get a construction loan to build the home on the land. Appellant said that he had taken the deed to be filed.

Appellant's daughter, Alisha Fogley, testified that she had never witnessed any physical abuse. She said that her father had treated all of the children the same and that appellant was upset when Cody died. Ms. Fogley also testified that appellee told her that she had gotten the bruises when they were playing around with an electrolysis machine and appellee attempted to place the machine on his "male area."

In rebuttal, appellee testified that she and appellant did tussle over the TENS unit. She said, however, that the TENS unit incident occurred months before appellant inflicted the bruises depicted in the photographs.

After the trial judge heard the testimony, he took a brief recess before announcing his decision. When he returned to the courtroom, the trial judge made extensive findings from the bench. The judge found credible and placed great weight on the testimony of appellee and her witnesses. The trial judge found that appellant was the dominating force in the marriage, both physically and mentally, and that he overcame her free will at a time when she was vulnerable and in a substantially impaired state. Based on these essential findings, the trial court set aside the quitclaim deed. Appellant contends that the trial court's findings are clearly erroneous. We disagree.

When property is placed in the names of a husband and wife, a presumption arises that they own the property as tenants by the entirety. *Dunavent v. Dunavent,* 66 Ark. App. 1, 986 S.W.2d 880 (1999). This presumption can be overcome only by clear and convincing evidence that a spouse did not intend a gift. *Id.*

It is also well settled that, once a spouse has shown that a confidential relationship existed with the other, and that the other was the dominant party in the relationship, it is presumed that a transfer of property from the former to the latter was invalid due to coercion and undue influence. *Myrick v. Myrick,* 339 Ark. 1, 2 S.W.3d 60 (1999). *See also, e.g., Marshall v. Marshall,* 271 Ark. 116, 607 S.W.2d 90 (1980); *Dunn v. Dunn,* 255 Ark. 764, 503 S.W.2d 168 (1973); *Lyons v. Lyons,* 13 Ark. App. 63, 679 S.W.2d 811 (1984); *Perrin v. Perrin,* 9 Ark. App. 170, 656 S.W.2d 245 (1983); *Crestman v. Crestman,* 4 Ark. App. 281, 630 S.W.2d 60 (1982). In such a case, the spouse to whom the property was transferred bears

the burden of rebutting the presumption by producing evidence showing that the transfer of property was freely and voluntarily executed. *Myrick, supra.* The invocation of the presumption of invalidity is in truth the product of a two-pronged test. *Id.* Before the presumption of invalidity can be invoked, the transferring party must not only claim that the receiving party was the dominant one, but must also establish that this party occupied such a superior position of dominance or advantage as would imply a dominating influence. *Id.* Once this has been established, the presumption of involuntariness on the part of the transferring spouse is invoked, and the burden shifts to the donee to prove that the transfer was voluntary. *Id.*

Although we review traditional equity cases de novo on the record, we do not reverse unless we determine that the trial court's findings were clearly erroneous. *Hill v. Hill*, 84 Ark. App. 132, 134 S.W.3d 6 (2003). A trial court's findings of fact are clearly erroneous when, although there is evidence to support them, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.* In reviewing a trial court's findings, we defer to the trial court's superior position to determine the credibility of witnesses and the weight to be accorded their testimony. *Id.*

In this case, appellee ostensibly made a gift of this property to appellant, but there was evidence credited by the trial court that it was one that was not bestowed upon him voluntarily. The record contains testimony that appellant commanded a dominating influence over appellee. There was also evidence that he badgered, belittled, and threatened appellee to accede to his demand for an interest in the property at a time when she was in a substantially weakened and diminished condition, both physically and emotionally. We are simply unable to say that the trial court's findings or its decision was clearly erroneous.[1]

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[1] Appellant has raised no claim of laches occasioned by the three-year lapse of time between the transfer and the request to set it aside made in the divorce action. Nor does he argue that this time interval detracts from appellee's claim of undue influence. Our review of the case law does not reveal any time restraints for seeking to set aside a transaction that was not freely made. *See, e.g., Myrick, infra* (fourteen-year lapse); *Marshall v. Marshall, infra* (two-year lapse); *Dunn v. Dunn, infra* (one-year lapse); *Perrin v. Perrin, infra* (two-year lapse).

Unequal Division of Marital Property

The trial court evenly divided the parties' marital property except for the marital home. The court awarded appellee the home and also made her responsible for paying the construction loan. Arkansas Code Annotated section 9-12-315(a)(1)(A) (Repl. 2008) contains a non-exclusive list of factors for a trial court to take into account when deciding whether to make an unequal division of marital property. When an unequal division is made, the statute requires that the trial court "must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order entered in the matter." Ark. Code Ann. § 9-12-315(a)(1)(B). The trial court's order stated, "That the Court, taking into account all the factors of section 9-12-315(a)(1)(A) of the Arkansas Code, finds that an unequal distribution of marital assets to be equitable in this matter." Appellant contends that this statement falls short of the statutory requirement for the court to explain its decision.

Appellant is correct that simply reciting the statutory factors does not satisfy the requirement of the statute. *See Baxley v. Baxley,* 86 Ark. App. 200, 167 S.W.3d 158 (2004). However, the trial court covered this issue in detail in its oral ruling from the bench. We have held that a trial court's explanation set out in an oral ruling meets the requirement of the statute. *Jones v. Jones,* 17 Ark. App. 144, 705 S.W.2d 447 (1986). Accordingly, we find no merit in appellant's argument.

Affirmed.

GLADWIN, J., agrees.

ROBBINS, J., concurs.

JOHN B. ROBBINS, Judge, concurring. I disagree with the majority's holding with regard to the trial court's decision to set aside the deed. The proof showed that virtually everything each party had acquired was commingled throughout their seventeen-year marriage, which included $97,000 of appellant's Wal-Mart Stock, appellant's inheritance of $18,000, and monthly social security benefits he received after the death of his children's mother. The real property acquired by the appellee was also among the property placed into the joint ownership of the parties, and in my view the trial court clearly erred in finding that the appellant occupied such a superior position of dominance or advantage as would imply a dominating influence and raise the presumption of an invalid transfer.

While I believe the belt is broken, the suspenders hold and save the trial court's decision. I agree to affirm this case on the alternate basis recited in the trial court's order. The trial court's order stated, "That the court, taking into account all the factors of section 9-12-315(a)(1)(A) of the Arkansas Code, finds that an unequal division of marital assets to be equitable in this matter." The majority correctly points out that while simply reciting the statutory factors is not sufficient to support an unequal distribution, the trial court in this case extensively covered the proof as it related to the factors in its oral ruling from the bench. Under our holding in *Jones v. Jones*, 17 Ark. App. 144, 705 S.W.2d 447 (1986), this was sufficient. In its oral ruling, the trial court adequately explained its reasons for awarding Ms. Scott the property, and in particular noted that the real estate was acquired relatively recently by Ms. Scott through her father's trust, and that Ms. Scott would be solely responsible for the debt incurred to build the house. The trial court provided specific reasons to support an unequal distribution, and because that decision was not clearly erroneous, I concur in the majority's affirmance of this case.

Michael BIBBS, L.D. Mason, and MJ Construction Co., Inc. *v.* COMMUNITY BANK

CA 07-808 278 S.W.3d 564

Court of Appeals of Arkansas
Opinion delivered March 5, 2008

[Rehearing denied April 9, 2008.]

Eichenbaum, Liles & Heister, P.A., by: *James H. Penick, III*, for appellants.

Watts, Donovan & Tilley, P.A., by: *David M. Donovan*; and *Stuart Law Firm, P.A.*, by: *J. Michael Stuart* and *Ginger Stuart Schafer*, for appellee.

BRIAN S. MILLER, Judge. Appellants Michael Bibbs, L.D. Mason, and M J Construction Co, Inc., appeal from a summary judgment in favor of appellee Community Bank. The circuit court ruled that appellants lacked standing to sue the Bank and that their amended complaint, naming additional plaintiffs who purportedly had standing, was time-barred and did not relate back to the original filing. We affirm.

In 2000, Bibbs, Mason, and M J Construction purchased 120 acres in Lonoke County for subdivision development. They financed the purchase with a three-year, $375,000 loan from the Bank, and the Bank took a mortgage on the property as security. The loan document provided that a final balloon payment for the unpaid balance was due on April 25, 2003. But, according to Bibbs, he did not expect to pay in accordance with the loan's written terms because his prior dealings with the Bank would have permitted him to roll the balance over into a new loan.

By early 2003, the Bank showed every intention of enforcing the terms of the loan and was concerned about appellants' ability to make the upcoming balloon payment. When appellants failed to pay, the Bank sued for foreclosure on August 1, 2003. During this same period, the Bank filed several replevin and foreclosure actions against appellants and a related company,

Solomon Investments, Inc., on other loans totaling about $700,000. On August 25, 2003, Bibbs filed Chapter 7 bankruptcy. Mason filed Chapter 7 bankruptcy on February 8, 2005, and filed Chapter 13 bankruptcy some months later.

On August 8, 2005, appellants, through attorney James H. Penick III, sued the Bank for breach of the covenant of good faith, breach of fiduciary duty, fraud, conversion, unjust enrichment, and intentional infliction of emotional distress. They alleged that the Bank engaged in numerous acts of misconduct and forced them into bankruptcy. The Bank answered that appellants lacked standing to file suit.

On February 13, 2007, the Bank moved for summary judgment on the standing issue, arguing that Bibbs's and Mason's bankruptcy trustees had the exclusive right to prosecute the lawsuit. Appellants amended their complaint on March 22, 2007, to include their bankruptcy trustees as plaintiffs. They maintained in their response to the motion for summary judgment that they (appellants) were the appropriate parties before the court but that "the claims have been, and continue to be pursued on behalf of the estate." They attached an affidavit from Bibbs's trustee, James Dowden, which stated: 1) during Dowden's tenure as trustee he "became aware of the Debtors' assertion that they had a cause of action against Community Bank"; 2) that this led to the hiring of attorney James Penick to pursue the claim, for which Dowden obtained the bankruptcy court's permission in September 2005 (after appellants' suit was filed); 3) that Dowden recorded the lawsuit as a potential asset of the bankruptcy estate in December 2005; 4) that the claim was "being pursued on behalf of the Chapter 7 bankruptcy estate by Mr. Penick as special counsel to the Trustee"; 5) that "this is the proper way of handling such litigation"; 6) that, if the claim were settled and approved by the bankruptcy court, the funds would be payable to the bankruptcy estate. Appellants also argued that the Bank waited too long to assert its standing argument and that, in any event, M J Construction remained as a proper party.

The Bank moved to dismiss the amended complaint on the ground that it was filed outside the three-year statute of limitations. The Bank also filed a certificate from the Secretary of State reflecting that M J Construction's corporate charter was revoked on December 31, 2003, and not reinstated to good standing until April 9, 2007.

On June 4, 2007, the circuit court granted the Bank's motion for summary judgment. The court ruled that 1) Bibbs's and Mason's claims were the property of the bankruptcy estate and could only be filed by the bankruptcy trustees; 2) therefore, neither Bibbs nor Mason had standing to file the original complaint; 3) by the time the amended complaint was filed adding the trustees as plaintiffs, the statute of limitations had run; 4) the amended complaint did not relate back to the original filing because the original complaint was void *ab initio*; 5) M J Construction lacked standing because it was not a corporation in good standing on the date the complaint was filed. Appellants appeal from this order.

Standing

Appellants argue that the trial court erred in ruling that Bibbs and Mason lacked standing to file the original complaint on August 8, 2005.[1] Standing is a matter of law and is reviewed de novo on appeal. *See Pulaski County v. Ark. Democrat-Gazette*, 371 Ark. 217, 264 S.W.3d 465 (2007).

When a debtor commences a Chapter 7 bankruptcy, an estate is created comprised of all the debtor's legal and equitable interest in property. 11 U.S.C. § 541(a)(1) (2007). Bankruptcy estate property is broadly defined to encompass conditional, future, speculative, and equitable interests, and includes all causes of action the debtor could have brought at the time of the bankruptcy petition. *U.S. v. Transp. Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001). *See also Fields v. Byrd*, 96 Ark. App. 174, 239 S.W.3d 543 (2006); *Vickers v. Freyer*, 41 Ark. App. 122, 850 S.W.2d 10 (1993). When a trustee is appointed to administer the property of the estate in bankruptcy, he has the exclusive right to prosecute causes of action that are the property of the bankruptcy estate. 11 U.S.C. §§ 323, 704(a)(1) (2007); *Fields v. Byrd*, *supra*.

Bibbs argues first that his causes of action accrued after he filed bankruptcy. If he were correct, the lawsuit would belong to him rather than the bankruptcy estate. Our reading of the complaint and Bibbs's deposition, however, convinces us that Bibbs's causes of action accrued prior to his filing bankruptcy.

[1] Appellants do not argue on appeal that M J had standing to file suit. We therefore consider that argument abandoned. *See Robbins v. Johnson*, 367 Ark. 506, 241 S.W.3d 747 (2006).

First, the core of Bibbs's complaint is that the Bank forced him into bankruptcy, which necessarily entails pre-bankruptcy misconduct. Secondly, the numerous incidents of wrongdoing on which Bibbs's causes of action were based generally occurred before Bibbs filed bankruptcy on August 25, 2003. Bibbs's causes of action were viable at that point. *See Courtney v. First Nat'l Bank*, 300 Ark. 498, 780 S.W.2d 536 (1989) (holding that a cause of action accrues the moment the right to commence the action comes into existence). The fact that some of the Bank's alleged misconduct pertaining to these causes of action streamed into latter 2003 and early 2004 does not change our decision. The causes of action themselves accrued prior to the bankruptcy filing and, therefore, were the property of the bankruptcy estate. *Fields v. Byrd, supra.*

We further note that Bibbs's argument on this point is directly contrary to his contention below that "the claims have been, and continue to be pursued on behalf of the estate." It is also contrary to the affidavit of Bibbs's trustee, which stated that the lawsuit was being pursued on behalf of the Chapter 7 bankruptcy estate and that, if the lawsuit were settled, the funds would be payable to the bankruptcy estate. If these matters are taken at face value, the claim belongs to the bankruptcy estate, in which case the trustee had the exclusive right to prosecute it. *Fields v. Byrd, supra.*

Bibbs also argues that he had standing to sue because Trustee Dowden ratified his filing of the complaint. He cites *Bratton v. Mitchell, Williams, Selig, Jackson & Tucker*, 302 Ark. 308, 788 S.W.2d 955 (1990), where the debtor, Bratton, filed a claim that should have been filed by his bankruptcy trustee. Our supreme court stated:

> In this case, there is no evidence that the bankruptcy trustee abandoned this claim or that the trustee joined in *or ratified* Bratton's filing of this complaint in circuit court. In fact, the evidence in the record indicates the contrary.

Id. at 309, 788 S.W.2d at 956 (emphasis added). Bibbs interprets this passage to mean that a trustee may ratify the debtor's filing of a claim belonging to the bankruptcy estate. We decline to assign such import to *Bratton*'s singular mention of ratification. The Bankruptcy Code and case law are uniform in providing that the bankruptcy trustee has the exclusive right to prosecute lawsuits belonging to the estate. *See* 11 U.S.C. §§ 323, 704(a)(1) (2007); *Fields v. Byrd, supra.* The only

notable exception is where the trustee abandons the claim. *See* 11 U.S.C. § 554(a) (2007); *Vreugdenhil v. Hoekstra*, 773 F.2d 213 (8th Cir. 1985). Clearly, Trustee Dowden has not abandoned this lawsuit. His affidavit states that the suit is being pursued on behalf of the estate.

We turn now to Mason's argument that the laws regarding a trustee's exclusive right to administer estate property do not apply to him because he filed Chapter 13 bankruptcy on August 15, 2005, and October 16, 2005. Mason is correct that, under a Chapter 13 filing, the debtor makes a plan of repayment rather than liquidates his assets, and the debtor's property remains in his hands instead of passing to the trustee. David Epstein, BANKRUPTCY § 1-8 (1993). *See also* 11 U.S.C. § 1302(b)(1) (2007); 11 U.S.C. § 704 (2007); Historical Notes to 11 U.S.C. § 323 (2007). However, Mason's first bankruptcy filing was under Chapter 7 on February 8, 2005, which was undisputedly after his causes of action accrued. Therefore, at the moment of his Chapter 7 filing, the lawsuit became an asset of his bankruptcy estate to be administered by the trustee. 11 U.S.C. § 541(a)(1) (2007).

Mason contends, however, that, because he scheduled the lawsuit as an asset in his Chapter 7 bankruptcy, and the bankruptcy was later closed without the suit having been administered, the suit was "abandoned" to him. *See* 11 U.S.C. § 554(c) (2007) (providing that, when a Chapter 7 estate is closed and scheduled property has not been administered, the property is abandoned to the debtor). We decline to consider this argument. First, Mason makes the argument for the first time in his reply brief. *See Abdin v. Abdin*, 94 Ark. App. 12, 223 S.W.3d 60 (2006) (holding that we do not consider arguments raised for the first time in a reply brief). Secondly, Mason did not raise his section 554(c) argument below, and we do not consider arguments raised for the first time on appeal. *Laird v. Weigh Syst.*, 98 Ark. App. 393, 255 S.W.3d 900 (2007).

Finally on the standing issue, appellants attempt to distinguish *Fields v. Byrd*, *supra*, on which the trial court relied. There, the debtor's tort claim accrued in 1999. In 2000, she filed bankruptcy without listing the potential lawsuit as an asset. She filed her suit in 2001. We held that the debtor had no standing to sue because the cause of action belonged to the bankruptcy estate. Appellants argue that, unlike the debtor in *Fields*, they did not conceal their lawsuit from their bankruptcy trustees. But that factor was not crucial to our holding in *Fields*. A debtor's accrued

cause of action becomes the property of the bankruptcy estate at the time the bankruptcy is commenced, regardless of whether it was scheduled.

For the above reasons, we affirm the trial court's ruling that Bibbs and Mason lacked standing to file the original complaint.[2]

Relation Back

Because Bibbs and Mason lacked standing to sue in 2005, their complaint was void *ab initio*. *See Fields, supra*. Therefore, the 2007 amended complaint that added the trustees as plaintiffs did not relate back to the original filing. *See id. See also St. Paul Mercury Ins. Co. v. Circuit Ct. of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002); *Andrews v. Air Evac EMS*, 86 Ark. App. 161, 170 S.W.3d 303 (2004). In light of these authorities, we affirm the trial court's ruling that the amended complaint did not relate back and that, as a result, the statute of limitations ran on the causes of action.[3]

Summary Judgment Hearing

Due to conflicting correspondence from the court and opposing counsel, and some understandable confusion, appellants' counsel did not appear at the summary-judgment hearing. Appellants argue that this constituted reversible error. However, we cannot see that appellants were prejudiced under the circumstances here. *See Simmons v. Dixon*, 96 Ark. App. 260, 240 S.W.3d 608 (2006) (holding that we will not reverse in the absence of prejudice).

In deference to the non-appearance of appellants' counsel, the trial court did not hear arguments from the Bank's counsel at the hearing. Instead, the court relied on the detailed and voluminous documents that the parties presented in support of their respective positions. Appellants argue that the judge "admitted he had not read all the documents submitted." In fact, the judge said that he "reviewed the pending motions, the briefs in support

[2] As for appellants' argument that the Bank waited too long to argue the standing issue, the issue was raised as a defense in the Bank's original answer. The Bank asserted that the claim was "assertable only by the applicable Bankruptcy trustees."

[3] Appellants do not challenge the court's ruling that the statute of limitations had run at the time the amended complaint was filed.

thereof, has taken the opportunity to review some of the documents, although I cannot conclusively say that I have exhaustively gone though each one." Our review of the hearing transcript indicates to us that the judge was eminently familiar with the facts and issues in the case.

Appellants also argue that the Bank was allowed to "submit evidence" at the hearing in the form of a document concerning M J Construction. However, we cannot see that the trial court considered any new evidence. Appellants appear to be referring to the certificate from the Secretary of State's office demonstrating that M J's charter had been revoked. But, that document was submitted to the trial court before the hearing.

Affirmed.

PITTMAN, C.J., and GLOVER, J., agree.